SECTION REPORT
FAMILY LAW

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IN THIS MONTH'S REPORT

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

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

MESSAGE FROM THE CHAIR

Are you ready for cooler weather, football, and changing colors? I know I am! Let me catch you up on what your Section has been doing.

Advanced Family Law

I hope most of you made it to the incredible Advanced Family Law CLE this year. Course directors Jonathan Bates and Kimberly Naylor, the planning committee, and the State Bar staff deserve kudos for an excellent program.

Honors and Awards

The Section's awards were presented during the Advanced Family Law seminar. The deserving recipients this year were:

Larry H. Schwartz was inducted into the Hall of Legends. This honor is bestowed upon an attorney who has practiced in family law for at least 40 years and who has had a significant impact on the practice.

Heather King won the Dan Price Award. This award is for a person who has had a significant impact/betterment of the Family Law Section for the past year.

B.F. "Biff" Pennypacker was honored posthumously for his dedication to pro bono by being awarded the Ken Fuller Pro Bono Award. Since this award includes a scholarship to the Advanced Family Law course, Jami Kayla Nance was awarded the scholarship for her pro bono work.

Jessica Janicek, Heather King, and Paul Leopold won the Best Family Law CLE Article for their "New Evidence Handbook" published and presented at the Advanced Family Law seminar in August 2016.

Kevin Fuller won the Gay G. Cox Collaborative Law award.

Congratulations to all the recipients this year, and thank you for all your work to make the practice of family law better for everyone.

Publications

We rolled out some new publications at Advanced this year. The Client Notebook is now on a flash drive that enables attorneys to print information that is helpful to your client. You can print the applicable portions of the Notebook, place it in a binder, and give to your clients. The Family Law at Your Fingertips was rolled out with a new chapter, and the Fast Guide to Family Law—Checklists for Everyday Practice was also updated. The Texas Family Code Annotated is a great resource for the family law practitioner with annotations to cases and articles. The Family Lawyer's Essential Toolkit is the "must-have" item to take to court. The DVDs are a great source of information for clients regarding depositions, trials, mediation and social media presence. And last, but certainly not least, you receive this Section Report. Thank you to everyone for the countless hours in creating and updating these publications. If you are interested in purchasing one of these publications, please visit the Section's website at www.sbotfam.org.

Legislation

The legislative committee is already gearing up for the next legislative session. There is no rest for the weary! Along with the hard-working legislative committee, the members of the Family Law Foundation always have an eye on the next session. If you are not already a member of the Texas Family Law Foundation, I encourage you to join. The Foundation and numerous volunteers dedicate countless hours to review bills, testify before committees, and generally be the first line of defense for bills that affect family law.

Pro Bono

I am proud to announce that the Family Law Section won the Pro Bono Service Award this year from the Texas Access to Justice Commission. Lisa Hoppes and Leigh de la Reza, along with their committee members and numerous volunteers, coordinated outstanding live and webcast CLE programs last year to win this award. The Family Law Section's commitment to providing indigent Texans with an attorney for their family law case drives the Pro Bono Committee. This year, the com-

mittee is planning seminars in Conroe, Sherman, Amarillo, Corpus Christi, Midland, and one other possible location. If you are interested in volunteering to help with a seminar in one of these locations, please contact Lisa Hoppes.

The seminar is free with the commitment that the attendee will take two pro bono cases in a 12-month period. The volunteers who speak at these seminars travel on their own time and their own dime with no reimbursement. Thank you to the Pro Bono Committee for their hard work and the Section Members who volunteered.

Upcoming CLE

Mastering Your Practice: Family Law and Estate Planning
September 14-15, 2017 (Horseshoe Bay, Marble Falls, TX)
Course Directors: Gary L. Nickelson and Tina R. Green

New Frontiers in Marital Property Law
October 19-20, 2017 (Westin Las Vegas Hotel, Las Vegas, NV)
Course Directors: Kathy Kinser and Hon. Emily Miskel

Advanced Family Law Drafting
December 7-8, 2017 (Omni Hotel, Fort Worth, TX)
Course Director: Charles Hardy

Innovations in Child Custody Litigation
January 11-12, 2018 (New Orleans, LA)
Course Directors: Angela Pence England and Charlotte Rainwater

Texas Academy of Family Law Specialist's Annual Trial Institute
February 15-16, 2018 (New York New York Hotel, Las Vegas)
Course Directors: Leigh de la Reza and Chris Nickelson

Collaborative Law Seminar
March 22, 2018 (ATT Conference Center, Austin, TX)

Marriage Dissolution
April 12-13, 2018 (Westin Galleria Hotel, Dallas, TX)
Course Director: Chris Wramplemeier
101 Course Director: Jacqueline Smith

Advanced Family Law
August 13-16, 2018 (Marriott Rivercenter, San Antonio, TX)
Course Directors: Anna McKim and Rick Robertson
101 Course Director: Lisa Hoppes

I look forward to seeing everyone in Vegas!

Cindy Tisdale
Chair, Family Law Section

GO TO TABLE OF CONTENTS

TABLE OF CASES

GO TO TABLE OF CONTENTS

IN THE LAW REVIEWS AND LEGAL PUBLICATIONS

TEXAS ARTICLES

Give Me the Ring Back!: When Written Promises Are Binding in Failed Engagements, Drew **York**, 80 Tex. B.J. 406 (June 2017).

NON-TEXAS ARTICLES

A Case Against Collaboration, Rachel **Rebouché**, 76 Md. L. Rev. 547 (2017).

Collaboration and Intention: Making the Collaborative Family Law Process Safe(r), Margaret **Drew**, 32 Ohio St. J. on Disp. Resol. 373 (2017).

In -Kind Child Support, Margaret **Ryznar**, 29 J. Am. Acad. Matrim. Law. 351 (2017).

Divorce and Disability: Identifying and Resolving the Unique Issues of a Spouse with Disabilities, Michelle P. **Fuller-Urbatsch** & Kevin **Urbatsch**, 96-Jul Mich. B.J. 28 (July 2017).

Parents, Babies, and More Parents, June **Carbone** & Naomi **Cahn**, 92 Chi.-Kent L. Rev. 9 (2017).

Entrenched Postseparation Parenting Disputes: The Role of Interparental Hatred?, Bruce M. **Smyth** & Lawrence J. **Moloney**, 55 Fam. Ct. Rev. 404 (July 2017).

Parental Abduction and the State Intervention Paradox, Jane K. **Stoever**, 92 Wash. L. Rev. 861 (June 2017).

Formulating a Winning Strategy While Simply Surviving or Surviving Simply, Michel Kane **Cummings**, 40-Sum Fam. Advoc. 20 (Summer 2017).

Married with Kids: Court Rules on Birth Certificate Designations for Same-Sex Parents, Mark **Walsh**, 103-Sep A.B.A. J. 20 (September 2017).

Collaborative Divorce: What Louis Brandeis Might Say About the Promise and Problems?, Susan Saab **Fortney**, 33 Touro L. Rev. 371 (2017).

A Bone to Pick: Applying a "Best Interest of the Family" Standard in Pet Custody Disputes, L. Morgan **Eason**, 62 S.D. L. Rev. 79 (2017).

Your Money or Your Life: Indian Parents and Child Support Modifications, Marcia **Zug**, 29 J. Am. Acad. Matrim. Law. 409 (2017).

Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse, Fernanda S. **Rossi**, Amy **Holtzworth-Munroe**, Amy G. **Applegate**, Connie J. **Beck**, Jeannie M. **Adams**, & Darrell F. **Hale**, 55 Fam. Ct. Rev. 390 (July 2017).

GO TO TABLE OF CONTENTS

Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children, Timothy **Sandefur**, 37 Child. Legal Rts. J. 1 (2017).

Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents, Katharine K. **Baker**, 92 Chi.-Kent L. Rev. 135 (2017).

Young Children in Divorce and Separation: Pilot Study of a Mediation-Based Co-Parenting Intervention, Jennifer E. **McIntosh** & Evelyn S. **Tan**, 55 Fam. Ct. Rev. 329 (July 2017).

Duel or Dual: An Interdisciplinary Approach to Parenting Coordination for Uber-Conflicted Parenting Relationships, William RJP **Brown**, Lauren **Behrman**, & Jeffrey **Zimmerman**, 55 Fam. Ct. Rev. 345 (July 2017).

Evaluation of the University of Denver's Center for Separating and Divorcing Families: The First Out-of-Court Divorce Option, Marsha Kline **Pruett** & Logan **Cornett**, 55 Fam. Ct. Rev. 375 (July 2017).

Direct-to-Consumer Genetic Testing, Gamete Donation, and the Law, Abigail **Hoglund-Shen**, 55 Fam. Ct. Rev. 472 (July 2017).

Child Support for Post-Secondary Education: Empirical and Historical Perspectives, Leslie Joan **Harris**, 29 J. Am. Acad. Matrim. Law. 229 (2017).

Documentary Evidence in Child Support Litigation, John E.B. **Meyers**, 29 J. Am. Acad. Matrim. Law. 331 (2017).

Differences in State Child Support Guidelines Models, Economic Basis, and Other Issues, Jane C. **Venohr**, 29 J. Am. Acad. Matrim. Law. 377 (2017).

A Survey of Post-Majority Child Support for Adults with Impairments, Erica **Fumagalli**, 29 J. Am. Acad. Matrim. Law. 433 (2017).

IN BRIEF

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

Alimony: The Massachusetts Supreme Judicial Court held that durational limitations for alimony enacted in 2011 were not unconstitutionally retroactive when applied to alimony agreements signed prior to the effective date of the act. *Van Arsdale v. Van Arsdale,* 75 N.E.3d 1123 (Mass. May 31, 2017). The West Virginia Supreme Court reversed an alimony award of $4,000 per month as too low because the trial court imputed income to a 62-year-old spouse who never had worked outside the home. *Mulugeta v. Misailidis,* 801 S.E.2d 282 (W. Va. June 13, 2017). The New Hampshire Supreme Court reversed an alimony award of $750 per month for the opposite reason—the trial court failed to impute income to the other spouse, who earned $21 per hour when she last worked. *In the Matter of Dow,* ___ A.3d ___, 2017 WL 3482935 (N.H. Aug. 15, 2017). A New Jersey appellate court affirmed the trial court's denial of the obligor's request to lower his alimony payments of $800 per week based upon loss of his job because, over a 15-month period, the obligor's attempts to find employment were limited to "posting his résumé on line, attending a job fair, and applying for seven positions." *Beden v. Beden,* 2017 WL 3081776 (N.J. App. July 20, 2017).

Attorney's fees: In *White v. White,* 296 Neb. 772, 896 N.W.2d 600 (2017), the Nebraska Supreme Court reiterated its rule that unless a parent ordered to pay attorney's fees is indigent, a district court may not order the county to pay attorney's fees for counsel appointed to represent the children in a divorce case. The North Dakota Supreme Court affirmed a trial court's decision to award attorney's fees upon a contempt finding despite the contemnor's argument that "there was no showing of a willful and

inexcusable intent to violate a court order." *Peterson v. Schulz,* 2017 ND 155, 896 N.W.2d 916 (2017). The Maine Supreme Judicial Court rejected an appellant's argument that the trial court abused its discretion by awarding a lesser amount of attorney's fees than requested. *Neri v. Heilig,* 2017 ME 146, ___ A.3d ___, 2017 WL 2871665 (2017).

Evidence: The Mississippi Supreme Court reversed a chancellor's custody decision because it was based upon a guardian ad litem's testimony, which itself was based entirely on hearsay from third-party interviews. *Ballard v. Ballard,* ___ So.3d ___, 2017 WL 2290495 (Miss. May 25, 2017). A Virginia trial court did not abuse its discretion when, in a divorce case, it enforced a scheduling order requiring identification of witnesses and exhibits by prohibiting a wife who failed to comply with it from calling anyone but herself as a witness and by limiting other testimony and any exhibits to rebutting or impeaching the husband's evidence. *Reaves v. Tucker,* 67 Va.App. 719, 800 S.E.2d 188 (Va. June 13, 2017). The Nebraska Supreme Court reiterated that the uncorroborated testimony of a husband or wife is not competent to overcome the presumption of paternity for a child born during marriage, agreeing with the trial court that photos purporting to show that the child looked like the other man's son did not constitute sufficient corroboration. *Erin W. v. Charissa W.,* 297 Neb. 143, 897 N.W.2d 858 (2017).

Marital property: Although a husband's post-retirement medical benefits are marital property to the extent accrued during marriage, they must be valued for equitable distribution purposes rather than addressed by ordering the husband "to pay for comparable medical benefits for the wife for the rest of her life." *Grove v. Grove,* ___ P.3d ___, 2017 WL 3443680 (Alas. Aug. 11, 2017). A Georgia trial court erred when it concluded that a Vanguard account was wholly a wife's non-marital asset, even though she contributed marital assets to it during marriage, because she "owned" it prior to marriage. *Flesch v. Flesch,* ___ S.E.2d ___, 2017 WL 3468517 (Ga. Aug. 14, 2017). A California trial court erred when it denied a deceased husband's pension benefits to his widow as his "surviving spouse" because the husband died after a judgment of legal separation but before any divorce judgment, such that the parties were still married when he died. *Irvin v. Contra Costa County Employees' Retirement Ass'n,* No. 13 Cal.App.5th 162 (Cal. App. June 30, 2017). An Arizona court erred when it relied upon a retired veteran's testimony that his wife was not entitled to benefits under an Armed Services Survivor Benefit Plan because she would no longer be his survivor, federal law providing that a former spouse may receive benefits under such a plan. *Downham v. Downham,* 2017 WL 3138185 (Ariz. App. July 25, 2017).

Parenting: The New Hampshire Supreme Court reversed a trial court that modified a parenting plan because the parties did not agree to modify it, as required by statute. *In the Matter of Kelly,* ___ A.3d ___, 2017 WL 2323091 (N.H. May 26, 2017). In *Mills v. Fleming,* 2017 ME 144, ___ A.3d ___, 2017 WL 2871597 (2017), the Maine Supreme Judicial Court found itself embroiled in a dispute over soccer when it rejected the mother's contention that a decree requiring her to take the kids to soccer or allow the father to take them violated "her constitutionally-protected liberty interest in the care, custody, and control of her children." An Alaska trial court did not abuse its discretion by granting physical custody of a child to the mother, but it did abuse its discretion by modifying legal custody because neither party sought that relief. *Judd v. Burns,* 397 P.3d 331 (Alas. July 7, 2017).

Termination: The Idaho Supreme Court upheld a trial court's decision to terminate a father's parental rights when the father was serving time for murder, would not be eligible for parole until the child turned 18, and had had no recent contact with the child. *In the Matter of Jane Doe III,* 162 Idaho 194, 395 P.3d 814 (Idaho May 31, 2017). The Nevada Supreme Court reversed a termination case, stating: "We take this opportunity to clarify that poverty is not, and has never been, a valid basis for terminating one's parental rights." *In re Parental Rights as to R.T.,* 396 P.3d 802 (Nev. June 29, 2017). The Maine Supreme Judicial Court affirmed termination of a father's parental rights, focusing on the damage to the children caused by the father's current incarceration, his significant criminal history, his history of drug abuse and his inconsistent communication with his children. *In re: Mathew H.,* 2017 ME 151, ___ A.3d ___, 2017 WL 2951686 (2017).

GO TO TABLE OF CONTENTS

Were recusal that easy: The Alaska Supreme Court rejected an appellant's argument that he had the right to represent himself in a Child in Need of Aid proceeding, agreeing with the trial court that an attorney must represent him because he repeatedly "presented pleadings and courtroom objections that were neither rational nor coherent" and engaged in "obstreperous courtroom conduct," at one point exclaiming, "You're all fired!" *Barry H. v. Alaska Dept. of Health & Social Services,* ___ P.3d ___, 2017 WL 3443670 (Alas. Aug. 11, 2017).

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

Like you, I've been thinking about faith lately. Faith comes in many varieties, although most of the time when people tout their faith, they mean a religious faith. At the moment, though, I'm thinking of more mundane faith.

For example, I'm writing this as I stand in line to board a flight. Boarding was proceeding smoothly, and then it stopped because, it was announced, the plane lost power. I'm still standing here because I have faith in the maintenance experts that they will fix the problem, the plane will still depart, and power won't go out again for the entire flight. It goes without saying that it takes great faith to assume that any plane will take off at all, stay in the air, and land safely. You and I both know that airplanes are a physical impossibility, and yet there they are.

Other people in this line have less faith. For example, one man approached the ticket agent and said, "Look, it's just the jetway. How bout you just load the damn plane and take off!" This man had little faith in the intelligence and abilities of the airline decision makers, although he had an abundance of faith in his mechanical diagnostic skills and executive decision-making abilities. Unknowingly, perhaps, he was placing his faith in the restraint of the ticket agent and of a vengeful God.

I also have faith that the Egg McMuffin I'm eating while I wait won't kill me. Immediately, I mean. That faith does not, at this time, extend to Chipotle.

Hey! My faith has been rewarded. We're boarding. Now, my faith is that the combination of Texas heat and a full airplane won't kill me before this plane can start up its engines and cool off. My faith on this point is wavering presently, but I will try to stay strong.

It takes faith to believe that there will be a city waiting for me at the other end of this flight. Like you, I was an excellent little French philosopher when I was a child. I was skeptical that anything existed beyond what I could see, touch, hear, taste, or smell with my own senses at that moment. Paris? The far side of the moon? Waco? Nothing but rumors. Now, I have faith. (And I've been to Waco!)

Why did I get out of bed this morning? Because I had faith that there was not an alligator in my kitchen, lurking near the coffee machine, that had not been fed in months, and that had been trained by my enemies to hate me. But I still looked before walking towards the coffee machine.

After all, we should keep the faith. But verify.

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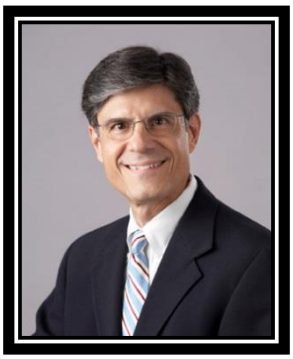
[1] Mr. Geilich is a writer, family lawyer, and full-time mediator in the DFW Metroplex. He's doing what he can with what he's got and can be reached at cngeilich@gmail.com. His two books, *Domestic Relations* and *Running for the Bench*, may be purchased on Amazon.

GO TO TABLE OF CONTENTS

IS THE EXPERT A GOOD FIT?

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



Science lies in the rigor of the inference. Use this assertion by risk analyst Nassim Taleb to pierce the story that ties an expert's data to her opinions and recommendations.

Experts must do more than show that they used reliable evaluation methods. Of course, methods are critical. The *Daubert/Robinson* cases stress that if an expert's methods are unreliable, the data from those methods will also be unreliable—*methods reliability*.

But those cases also emphasize *reasoning reliability*, the inference process by which experts develop their conclusions (e.g., personality descriptions of litigants; opinions about the quality of parent-child relationships; recommendations about parenting arrangements). *Havner* notes, "A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). The more rigorous the inferences, the more reliable the testimony.

Too often, though, experts gloss over the weaknesses of their inferences and reasoning: They cherry-pick the research or misstate findings; they misapply test results while touting the "objectivity" of testing; they invoke abstract, emotion-laden terms (trauma, bonding, borderline personality disorder) to camouflage sloppy thinking. Then they highlight these deflections to bolster their opinions.

Mathematician Jordan Ellenberg writes that in various life endeavors, "we are presented with observations and asked to build theories." *Recast*: Evaluators develop their data (methods reliability) and then are asked to build their stories of the case (reasoning reliability). Your challenge? Figure out how an expert's story of the case holds up. How rigorous are the expert's inferences or reasoning that tie her data to the story she builds? Consider three steps to meet this challenge:

1) *Know the science or subject matter of the testimony*. This time-honored advice for cross examination is critical: If you don't know the subject matter of the testimony and the underlying issues that support the testimony, you'll fail to control the examination. Retain a consulting expert to advise you if you can't learn the basics on your own.
2) *Identify specific data from the evaluation methods that the expert used to develop her inferences that support her "story."*
   - Interviews: Did the expert conduct a sufficient number of interviews to inform her story (opinions)? What interview statements did the expert either use or disregard to support her story?
   - Testing: Did the expert administer psychological testing? If so, did the expert properly apply test results to support her story?
   - Collateral information: What collateral information—review of records; consults with relevant persons (e.g., counselors, doctors, family members)—did the expert review? What information did the expert either use or disregard to support her story?
3) *Ask the expert to articulate the reasoning that she used to tie the data from Step 2 to her story*.

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[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.*

GO TO TABLE OF CONTENTS

Don't settle for a fable. Test the rigor of an expert's inferences, and you'll quickly expose the reliability of her story of the case.

NAVIGATING THROUGH THE FINANICAL ASPECTS OF DIVORCE. . . DURING AND AFTER

By Christy Adamcik Gammill, CDFA[1]

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

The role of the financial professional in this process is often times a bit vague. To add some clarity to the overarching mystery, listed below are the 5 steps that financial professionals typically address with clients who are going through the divorce process.

I. The Introduction Meeting

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

II. Identifying the Estate and/or Budgeting and Expenses Meeting

- Now that we have groundwork, what is the client currently spending? Do they imagine maintaining a similar or different lifestyle moving forward?
- It is the financial professional's job to get an accurate depiction of all expenses, not just for temporary orders during divorce proceedings but also to create a uniquely tailored financial plan for the client's future.
- As documents are transmitted by the client or attorney's office to the financial professional, who then reviews the financial documents in detail. This includes anything from basic checking accounts to retirement plan assets (these can be 401(k)'s or more complicated defined benefit plans or annuity contracts) to executive compensation plans such as restricted stock,

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GO TO TABLE OF CONTENTS

stock options and deferred compensation plans. The financial professional may need more information from the financial institution or company depending on the complexity of the asset. Once a suitable amount of information is gathered, the financial professional prepares a Family Coded Asset & Liability Worksheet as a framework to work and build from.

III. Preparing the Settlement Strategies

a. The process of understanding exactly what is in the estate may take some time, sometimes months. In more complex cases a forensic CPA or an accredited business valuation "ABV" expert may be retained if tracing or understanding the value of a business is a part of the marital estate equation.
b. Depending on whether the process is litigation or collaborative, parties will work with their professional team of advisors to articulate financial needs, interests and relevance of particular assets within the investment pie to be divided.
c. After meeting with the client and their attorney, forensic or ABV expert, the financial professional can fully analyze all external factors.
d. Through the use of the financial professional's extensive knowledge of the various asset types and their after-tax or liquidation values, he or she will take a look at all available resources of the parties. These may be derived from the estate in the form of asset liquidation, investment income, earned income, mineral interests, partnership interests, social security or a myriad of other income sources. Backing into the overall financial resources and goals of the parties, the financial professional will assess liquidity needs of the client, now and later, and work with the client and his/her tax, legal and other advisors to ultimately design a settlement package that benefits both the parties financially.
e. A professional financial analysis or plan is done on behalf of the divorcing party to work through realistic assumptions of income and expense flows, assigning particular assets to the client with investment rates of return and inflation adjustments. These rates based on the backward and forward looking asset class rates of returns to match the client's time horizon and tolerance for risk.
f. These reports may serve as a tool used to propose a settlement package to the opposing party based on the needs of the client, tying in the introduction meeting needs analysis as to whether the client may need income now versus later, retirement planning, and tax concerns.

IV. The Post-Divorce Settlement Meeting(s)

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

V. The Client Account Review Meetings

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

ARTICLES

Marital Property Liability: Post *Tedder*
by Tom Featherston[1]

In its first significant case addressing marital property liability after the passage of the Matrimonial Act of 1967 (and the original version of the Texas Family Code of 1969), the majority of the Texas Supreme Court in *Cockerham v. Cockerham,* 527 S.W.2d 162 (Tex. 1975), in the author's opinion, got it wrong, but, in his dissent, Justice Reavley got it right. That decision helped perpetuate the Texas "urban myth" of "community debt." It then took the Texas Supreme Court almost forty years to get it right in *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013). In *Tedder*, Justice Hecht explained:

> Much of the judicial discussion of "community debt" is based on the erroneous supposition that all "community debts" are equally shared by the spouses whether they are both makers of the debt or not. That supposition is not warranted by the basic principles of Texas law. Apart from the context of acquiring necessaries, debt incurred by only one spouse does not affect the other spouse at all except that it makes the nonobligated spouse's share of community property liable for payment if the property sought for payment is subject to the sole or joint management of the spouse who incurs the debt.

No Community Debt

The Texas Family Code's liability rules do not support the notion of a "community debt." That term suggests that (i) both spouses have personal liability for the debt and (ii) all nonexempt community property can be reached to satisfy the debt. Neither statement is necessarily true. For a more complete discussion, see *Marital Property Liabilities: Dispelling the Myth of Community Debt*, Featherston and Dickson, *Texas Bar Journal*, January 2010.

In *Tedder*, the court effectively confirmed the Legislature's basic rules of marital property liability found in Sections 3.201, 3.202 and 3.203 of the Texas Family Code. Those rules depend in part on the definitions of sole management community property and joint management community property found in Section 3.102 of the Texas Family Code. The *Tedder* approach recognizes that neither "community property" nor the "community estate" is an entity that can own property or incur debt. Community property is simply a form of co-ownership. Only the spouses themselves can incur debt. A debt is the debt of one spouse, the debt of the other spouse, or the debt of both spouses. For a more complete discussion of Texas marital property liability since *Tedder*, see the author's discussion in *Texas Practice Guide – Probate*, Chapter 2. When the Decedent Was Married, §§ 2:21 – 2:34 (Thomson Reuters 2016).

Statutory Rules

1. Separate Property Exemption

As a general rule, a spouse's separate property is not subject to the debts of the other spouse. Tex. Fam. Code § 3.202(a).

2. Sole Management Community Exemption

As a general rule, a spouse's sole management community property is not subject to any debts incurred by the other spouse prior to the marriage or any nontortious debts of the other spouse incurred during the marriage. Tex. Fam. Code § 3.202(b).

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[1] Tom Featherston is the Mills Cox Professor of Law at the Baylor Law School.

3. Other Rules of Law

These two exemptions exist unless both spouses are personally liable under "other rules of law." Tex. Fam. Code § 3.201.

4. Generally Exempt Property

Of course, the family homestead and certain items of personal property are generally exempt from the debts of both spouses, regardless of the marital character of the property. Tex. Prop. Code §§ 41.001 and 42.001. The Texas Property Code and Texas Insurance Code also create exemptions for retirement benefits, certain savings plans and life insurance. Tex. Property Code §§ 42.0021 and 42.0022. Tex. Insurance Code § 1108.051.

5. Creditors' Rights

Accordingly, a spouse's nonexempt separate property and sole management community property are subject to any liabilities of that spouse incurred before or during the marriage. Nonexempt joint management community is liable for the debts of either spouse incurred before or during marriage. In addition, the nonexempt sole management community properties of both spouses are subject to the tort liabilities of either spouse incurred during marriage. Tex. Fam. Code § 3.202 (c) and (d).

6. Order of Execution

A court may determine, as deemed just and equitable, the order in which particular separate or community property is subject to execution and sale to satisfy a judgment. In determining the order, the court is to consider the facts and circumstances surrounding the transaction or occurrence on which the debt is based. Tex. Fam. Code § 3.203.

Other Factors

The general rules described above apply unless both spouses are personally liable under "other rules of law."

1. Joint Obligations

Of course, both spouses may sign a contract or commit a tort which would make them jointly and severally liable and thereby subjecting the entire nonexempt marital estate to liability.

2. Principal-Agent

The law also defines other situations where any person can be held personally liable for debts of another. These situations include the following relationships: respondeat superior, principal/agency, partnership and joint enterprise. These special relationships can exist between spouses and can impose vicarious liability on an otherwise innocent spouse. *See Lawrence v. Hardy*, 583 S.W.2d 795 (Tex. App.—San Antonio 1979, writ ref'd n.r.e.). The Texas Family Code has codified this concept. Tex. Fam. Code § 3.201(a)(1). However, the marriage relationship, in and to itself, is not sufficient to generate vicarious liability. Tex. Fam. Code § 3.201(c). *See also Wilkinson v. Stevision*, 514 S.W.2d 895 (Tex. 1974).

3. "Necessaries"

Each spouse has a duty to support the other spouse and a duty to support a child generally for so long as the child is a minor and thereafter until the child graduates from high school. Tex. Fam. Code §§ 2.501 and 154.001. Accordingly, all nonexempt marital assets (separate and community) are liable for such "necessaries."

The Necessaries Doctrine

A spouse's duty of support extends beyond the marital relationship itself. For example, a spouse who fails to discharge this duty is generally liable to third parties who provide necessaries to the other spouse. Tex. Fam. Code § 2.501(b). Accordingly, when third parties provide services deemed reasonably necessary for one spouse's support, both spouses are personally liable for the costs of such ser-

vices.[2] While the spouse who actually incurs the debt may be deemed to be primarily liable, both spouses are liable to the third party under the necessaries doctrine. Tex. Fam. Code § 3.201(a)(2). Accordingly, debt incurred for necessaries by either spouse exposes the entire nonexempt marital estate (separate and community) to liability.

Key Questions

The Texas Legislature has actually enacted a logical liability process that utilizes a multiple-step process to determine which nonexempt marital assets of the spouses are liable for which debts during the marriage. The process is dependent upon the answers to four questions:

1. When was the debt incurred? *It was incurred either prior to or during the marriage.*
2. Whose debt is it? *It is either the debt of one spouse, the debt of the other spouse or both spouses' debt*.
3. What type of debt is it? *Was it tortious or contractual in nature or was it incurred for a "necessity"?*
4. If not a "necessity," was the spouse who incurred the debt acting as the other spouse's agent? *Thereby creating vicarious liability.*

The ultimate answer depends on the relevant facts and circumstances and the specific answers to these four questions.[3]

Summary

Accordingly, excluding generally exempt assets, a spouse's separate property and sole management community property, as well as the couple's joint community property, are liable for that spouse's debts whether incurred prior to or during the marriage. If the liability is a tort debt incurred during the marriage, the other spouse's sole management community property is also liable for the debt (the other spouse's separate property may be exempt depending upon the circumstances).

If the debt is not a tort debt incurred during the marriage, the other spouse's separate property and sole management community property are exempt during the marriage from the debt unless the other spouse is personally liable under "other rules of law." In which event, the other spouse's property (i.e., that spouse's sole management community and separate) is liable as well.

However, if the debt was incurred as a reasonable expense for the support of either spouse, each spouse has personal liability, and the entire nonexempt marital estate (each spouse's separate property and their community property) is liable.

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[2] The author's research discovered statements from various sources suggesting that once one spouse has qualified for Medicaid nursing care the other spouse no longer has any personal liability for the nursing care. The author appreciates notes elder law attorney, Clyde Farrell, confirming this general understanding of this complex set of Medicaid rules. Clyde also explained that, while the community spouse is still generally liable for other "necessaries," when the other spouse is in the nursing home, Medicaid covers most of the needs of the other spouse. If the other spouse is receiving Medicaid home care, Medicaid does not pay for "necessaries" other than medical care (including personal attendant care). However, for the purpose of this paper, it will be assumed that neither spouse has qualified for Medicaid nursing care.

[3] Professor Paulsen, in his excellent article on post-divorce liability, challenges what most have assumed to be established Texas law; divorce cannot prejudice the rights of preexisting creditors. He argues that such a rule ". . . lacks any modern legal justification and subverts the intent of the Texas Constitution and Family Code." He encourages the Texas Supreme Court to declare that ". . . an unsecured creditor . . . has no special rights against a former spouse or that spouse's property once the marriage ends." *See* James W. Paulsen, *The Unsecured Texas Creditor's Post-Divorce Claim to Former Community Property*," 63 Baylor Law Review 781 (2011).

Enforcement Delayed is Often Justice Denied: the Changes to TFC § 9.007(c)

By Chris Nickelson[1]

The 85th Regular Session of the Texas Legislature concluded in May. This year, the Family Law Section, with help of the Texas Family Law Foundation, pushed Senate Bill 1237 through the legislature. S.B. 1237 contains several changes to the Texas Family Code ("TFC") relating to family law appeals. This article focuses on the changes made to TFC § 9.007(c) of the code, which is the code section that addresses enforcement of property divisions while a divorce decree is being appealed. The amendment is intended to overturn a line of cases interpreting TFC § 9.007(c) which had held that the property division in a divorce decree cannot be enforced, by any means, while the property division is being appealed, unless the enforcement activity involved a ministerial act, such as issuing a writ of execution or directing a receiver, already appointed by the decree, to perform a ministerial act.

A. The changes.

TFC § 9.007(c) has been amended to read as follows:

> (c) The trial court may not [~~power of the court to~~] render an order [~~further orders~~] to assist in the implementation of or to clarify the property division made or approved in the decree before the 30th day after the date the final judgment is signed. If a timely motion for new trial or to vacate, modify, correct, or reform the decree is filed, the trial court may not render an order to assist in the implementation of or to clarify the property division made or approved in the decree before the 30th day after the date the order overruling the motion is signed or the motion is overruled by operation of law [~~is abated while an appellate proceeding is pending~~].

TFC § 9.007(c) was amended to allow the trial court to clarify and enforce a property division beginning 30 days after the decree is signed, or if a motion for new trial or motion to modify correct or reform is filed, then 30 days after all timely filed motions for new trial or motions to modify, correct, or reform the decree are overruled. This change in law moves the practice of family law away from the trial court having no power whatsoever to deter the party in possession of property from disposing of or damaging the property while an appeal is pending, to a new regime where the trial court will be able to take reasonable steps to protect the party awarded property in a property division from the other party's bad acts while an appeal is pending. To understand the full effect of the change in law made by the revision of TFC § 9.007(c), the reader will have to check out the changes made to TFC § 6.709, which is the code section addressing temporary orders during appeal. The changes made to TFC § 6.709 are lengthy and beyond the scope of today's article since the space for this article is limited.

B. Why the changes were needed.

The former version of TFC § 9.007(c) states: "The power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending." TFC § 9.007(c) was added to the family code in 1983 pursuant to a request by Judge Sam Emisson. No one is quite sure why Judge Emisson wanted this provision added to the code or how this provision was supposed to operate in relation to other law that already existed regarding enforcement of property divisions. To understand why changes were needed to TFC § 9.007(c), you need to know a little about judgment enforcement outside the family code, a little history, a little bit about statutory in-

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[1] Mr. Nickelson currently serves as Vice-Chair of the Family Law Section and is board certified in civil appellate law. He can be reached at jcn@nickfamlaw.com

terpretation, a little bit about how Section 9.007(c) has been interpreted by the courts of appeals, and a little bit about appellate traps and gamesmanship that had grown up around Section 9.007(c).

1. A primer on judgment enforcement outside the family code.

Here are the basics of judgment enforcement outside the family code. When a judgment has not been superseded, the trial court has the power to enforce its judgment even though the judgment has been appealed. *See In re Sheshtawy*, 154 S.W.3d 114, 124-25 (Tex. 2004).

Several rules and statutes give trial courts specific grants of power to enforce its orders and decrees. *Greiner v. Jameson*, 865 S.W.2d 493, 498 (Tex. App.—Dallas 1993, writ denied). The court may enforce a judgment by using various rules and statutes. The court may order execution. *See* Tex. R. Civ. P. 622; Tex. Civ. Prac. & Rem. Code § 34.001 (West 2017). The court may order attachment. *See* Tex. R. Civ .P. 592; Tex. Civ. Prac. & Rem. Code § 61.021 (West 2017). The court may order garnishment. *See* Tex. R. Civ. P. 658; Tex. Civ. Prac. & Rem. Code § 63.001 (West 2017). The court may order postjudgment turnover of a judgment debtor's property. *See* Tex. R. Civ. P. 621a; Tex. Civ. Prac. & Rem. Code § 31.002 (West 2017). The court may appoint a receiver to take possession of a judgment debtor's property, sell it, and distribute the proceeds to the judgment creditor. *See* Tex. R. Civ. P. 695-695a; Tex. Civ. Prac. & Rem. Code § 31.002, 64.001 (West 2017). The court may appoint commissioners to partition real estate or personal property. *See* Tex.R.Civ.P. 756-778. The trial court also may enforce its judgments through orders of contempt, Tex. Gov't Code Ann. § 21.002 (West 2017); *see Ex parte Pryor*, 800 S.W.2d 511, 512 (Tex. 1990); and by issuing orders that are necessary or proper in aid of its jurisdiction. *See* Tex. Gov't Code Ann. § 21.001(a) (West 2017).

In addition to the express grants of judicial power to each court, there are other powers which courts may exercise though not expressly authorized or described by constitution or statute. The Texas Supreme Court categorizes these additional powers as "implied" and "inherent" powers. See *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex.1979). A court does not derive its inherent judicial power from legislative grant or specific constitutional provision but from the very fact that the state constitution has created and charged the court with certain duties and responsibilities. The inherent powers of a court are those that it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity. *Eichelberger*, 582 S.W.2d at 398; *Cook v. Stallcup*, 170 S.W.3d 916, 920 (Tex. App.—Dallas 2005, no pet.).

2. Property division enforcement before the adoption of TFC § 9.007(c).

Prior to the enactment of the TFC § 9.007(c), it was clear that any property adjudications in a divorce decree became final in the same manner as in other judgments relating to title and possession of property. *Schwartz v. Jefferson*, 520 S.W.2d 881, 887 (Tex. 1975).

After a divorce decree became final, case law made clear that the trial court had no authority to change its provisions relating to the property division; however, the trial court did have the authority "to make orders necessary to carry the judgment into execution in a manner which is consistent with the provisions and finality of the judgment." *Schwartz*, 520 S.W.2d at 887.

The trial court's enforcement powers included the power to issue any "further order" needed "to clarify" its judgment. *Id.*; *Bush v. Bush*, 265 S.W.2d 676 (Tex. Civ. App.—El Paso 1954, no writ)(trial court properly clarified legal description of property).

After the Texas Family Code was enacted in 1973, but before Chapter 3, Subchapter D was enacted (the original subchapter on enforcement of property divisions), Texas law had recognized that the trial court's power to make "further orders" included the power "to issue [any] order in aid and clarification of its prior decree and for the purpose of effectuating the terms of the decree." *Ex parte McKinley*, 578 S.W.2d 437, 438 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

In *Ex parte McKinley*, the trial court awarded the parties' homestead to the ex-wife, and ordered her to execute a promissory note to her former husband and a deed of trust securing the note. 578 S.W.2d 437. In return, the ex-husband had been ordered to execute a special warranty deed conveying his interest in the property to her. When ex-wife failed to execute the promissory note and deed of trust following ex-husband's execution of the special warranty deed, he filed a motion for contempt. Although the trial court denied the contempt motion, it ordered the ex-wife to execute and deliver to her former

husband by a date certain a real estate lien note and deed of trust in the form attached to the order. When she failed to comply, she was held in contempt and incarcerated until she complied with the order of the court. In its opinion on her application for writ of habeas corpus, the court of appeals noted that the divorce decree sufficiently set forth the material terms of the note and deed of trust to be executed, and that the subsequent order entered by the trial court in aid of its decree merely set forth with particularity the form of the note and deed of trust to be executed by the ex-wife, and the date and time on which the documents were to be delivered. The court then held that the trial court was authorized to issue this order "in aid and clarification of its prior decree and for the purpose of effectuating the terms of the decree."

3. The enactment of Chapter 3, Subchapter D.

TFC § 9.007(c) is currently found in Chapter 9, Subchapter A, of the family code. However, when this provision was first added to the code, it appeared in what was then Chapter 3, Subchapter D.

Chapter 3, Subchapter D, became effective September 1, 1983, and provided a statutory procedure for clarification and enforcement of final decrees of divorce in much the same manner as that established in *Schwartz*, *McKinley*, and *Bush*. Acts 1983, 68th Leg., R.S., ch. 424, effective Sept. 1983; *Dechon v. Dechon*, 909 S.W.2d 950, 957 (Tex. App.—El Paso 1995, no writ).

Section 3.70 of Subchapter D provided that a court that rendered a property division in a divorce decree retained jurisdiction to enforce the property division and stated that any party affected by the property division **"may"** file a motion seeking to enforce the property division "as provided by this subchapter" in the court that rendered the decree. Acts 1983, 68th Leg., R.S., ch. 424, § 2, effective Sept. 1983, Section 3.70.

Section 3.71 provided, in relevant, part as follows:

> (a) Except as provided by this subchapter or the Texas Rules of Civil Procedure, a court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. Further orders may be entered to enforce the division, but these orders shall be limited to orders in aid of or in clarification of the prior order. The court may specify more precisely the manner of effecting the property division previously made if the substantive division of property is not altered or changed.
>
> (b) An order under this section that amends, modifies, alters, or changes the actual, substantive division of property made or approved in a final decree of divorce or annulment is beyond the power of the divorce court to enter and is unenforceable.
>
> (c) The power of the court to enter further orders to aid or clarify the property division is abated during the pendency of any appellate proceeding.
>
> Acts 1983, 68th Leg., R.S., ch. 424, § 2, effective Sept. 1983, Section 3.71.

The plain language of Section 3.71(a) shows that the legislature simply codified existing common law authority by granting trial courts general power to make "further orders . . . in aid of or in clarification of the prior order" so that it could be enforced while adhering to the well-established rule that no "further order" could substantively amend, modify, alter, or change the property division made in the prior order.

Following the general grant of power made in Section 3.71, Subchapter D, then included several additional sections that identify the types of "further orders" the trial court was authorized to make in a Subchapter D enforcement proceeding. These Sections authorized the trial court: (1) to make clarifying orders so that its clarification order could then be enforced by contempt; (2) to make orders for the delivery of specific existing property awarded in a property division (so that if the property was not delivered by a date certain it could be enforced by contempt); (3) to render a money judgment where delivery of specific existing property was no longer an adequate remedy; and (4) to enforce its "further orders" by contempt if a party failed to comply with the court's "further orders." Acts 1983, 68th Leg., R.S., ch. 424, § 2, effective Sept. 1983; former Sections 3.72-3.76.

Importantly, the last substantive section of Subchapter D, that being Section 3.76 which addressed the courts' power to enforce its "further orders" by contempt, expressly stated that "[t]his subchapter does not detract from or limit the general power of a court to enforce its orders by appropriate means." Acts 1983, 68th Leg., R.S., ch. 424, § 2, effective Sept. 1983, former Section 3.76. This Section when read with the other provisions of Subchapter D, seems to make clear that the specific remedies provided in the subchapter were intended to be additional remedies and not exclusive remedies for enforcing property divisions. *See* Acts 1983, 68th Leg., R.S., ch. 424, § 2, effective Sept. 1983, Section 3.70. (any party affected by the property division **"may"** file a motion seeking to enforce the property division); Acts 1983, 68th Leg., R.S., ch. 424, § 2, effective Sept. 1983, former Section 3.76 ("[t]his subchapter does not detract from or limit the general power of a court to enforce its orders by appropriate means").

In *Dechon v. Dechon*, Chief Justice McClure explained well that Subchapter D was added to the code to assist in implementing property divisions that could not be enforced due to ***an ambiguity*** in the decree that needed to be resolved before it could be enforced such as a failure to state where and when property was to be delivered, or when an award of property, such as the award of retirement benefits in *Dechon* had to be clarified before it could be enforced. *Dechon*, 909 S.W.2d at 955-58 (clarifying whether award of retirement benefits was award of "gross" or "net" benefit).

The general context surrounding the enactment of Chapter 3, Subchapter D, was that courts were issuing inconsistent opinions as to whether clarification orders were substantive modifications of property divisions or not. During the 60s through the 80s Texas courts and the courts of many other states were struggling to develop standards for dividing retirement benefits and other unique forms of property (stock options, etc.) and there was a lack of uniformity in how a court should divide these forms of property and what magic language needed to be used to create a clear and unambiguous award of property. As a result, there were many disputes over whether a decree was clear or ambiguous, and whether a "further order" assisting in enforcement was a substantive modification of the decree or an authorized clarifying order.

4. The initial reaction—meh.

Following the enactment of Subchapter D, Chapter 3, courts and litigants did not treat the remedy provided by Subchapter D as exclusive of common law or statutory remedies for enforcing a property division.

In *Caulley v. Caulley*, ex-wife applied for a writ of execution and then filed an application for turnover order, which the trial court granted to enforce a money judgment that had been based upon an award of property in divorce decree. *Caulley v. Caulley*, 806 S.W.2d 795, 796 (Tex. 1991)(affirming portion of turnover order used appoint receiver to sell real property). No one argued or claimed that this was improper or that Chapter 3, Subchapter D, was the exclusive remedy for enforcement of the property division.

In *Roosth v. Roosth*, ex-wife filed an application for turnover order while the underlying divorce was on appeal. The trial court granted the turnover order and appointed a receiver to sell property to pay ex-wife's award of attorney's fees. *Roosth v. Roosth*, 889 S.W.2d 445, 457 (Tex. App.—Houston [14th Dist.] 1994, writ denied). No one argued or claimed that this was improper or that Chapter 3, Subchapter D, was the exclusive remedy for enforcement of the property division.

In *Cain v. Cain*, the court of appeals held that using the turnover statute to collect a money judgment derived from a divorce decree did not violate Section 3.71 of the Texas Family Code. *Cain v. Cain*, 746 S.W.2d 861, 863 (Tex. App.—El Paso 1988, writ denied). No one argued or claimed that this was improper or that Chapter 3, Subchapter D, was the exclusive remedy for enforcement of the property division.

5. The 1997 re-codification.

In 1997, Title 1 of the Texas Family Code was re-numbered and re-codified. Acts 1997, 75th Leg., R.S., ch. 7, § 1, effective Apr. 17 1997. Chapter 3, Subchapter D, was re-numbered and re-codified as Chapter 9, Subchapter A. *Id*.; Tex. Fam. Code §§ 9.001-9.014.

Most of the language used in former Chapter 3, Subchapter D, remained the same in Chapter 9, Subchapter A, including the language stating that a party affected by a property division **"may"** request enforcement of that division in a suit brought under Chapter 9, and the language stating that **"[t]his subchapter does not detract from or limit the general power of a court to enforce an order of the court by appropriate means."** *Compare* former Sections 3.70 and 3.76 *with* Sections 9.001 and 9.014.

The language used in former Section 3.71 was broken into two new sections, 9.006 and 9.007, and some of the language used in the former section was modified to read as follows:

> § 9.006. Enforcement of Division of Property
>
> (a) Except as provided by this subchapter and by the Texas Rules of Civil Procedure, the court may render further orders to enforce the division of property made or approved in the decree of divorce or annulment to assist in the implementation of or to clarify the prior order.
>
> (b) The court may specify more precisely the manner of effecting the property division previously made or approved if the substantive division of property is not altered or changed.
>
> (c) An order of enforcement does not alter or affect the finality of the decree of divorce or annulment being enforced.
>
> Tex. Fam. Code Ann. § 9.006 (West 2016).
>
> § 9.007. Limitation on Power of Court to Enforce
>
> (a) A court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. An order to enforce the division is limited to an order to assist in the implementation of or to clarify the prior order and may not alter or change the substantive division of property.
>
> (b) An order under this section that amends, modifies, alters, or changes the actual, substantive division of property made or approved in a final decree of divorce or annulment is beyond the power of the divorce court and is unenforceable.
>
> (c) The power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending.
>
> Tex. Fam. Code Ann. § 9.007 (West 2016).

Nothing in Chapter 9, Subchapter A, appears to have changed its purpose—to provide additional remedies for enforcing a property division that is too vague or ambiguous to be enforced as written.

6. TFC § 9.007(c) finally gets interpreted.

By the 2000s, litigants began taking notice of TFC § 9.007(c) and relying upon it to argue that a trial court's *jurisdiction* to clarify or enforce the property division in a divorce decree was entirely abated while an appeal was pending. Litigants generally ignored the other provisions in Chapter 9, Subchapter D, which indicated that TFC § 9.007(c)'s language was directed at the trial court's power to render "further orders" to implement or clarify the property division, as set out in that subchapter, and was not directed at all of its powers under other bodies of law to enforce a clearly worded property division. By 2001, the first interpretation of TFC § 9.007(c) by a court of appeals arrived. The important cases from the courts of appeals you need to know to understand the changes made to Section 9.007(c) are set forth below:

In *English v. English*, 44 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2001, no pet.), the parties, Eula and Manous, were divorced in January 1998. The original decree gave each party an option to purchase the other's interest in the homestead. If neither spouse exercised the option, the home would be sold and the proceeds divided. The decree required that the option be exercised on or before 180 days after the decree was signed. The option period could be extended by agreement. Manous filed a notice of appeal, but he did not file a supersedeas bond. The Fourteenth Court of Appeals dismissed the appeal for want of prosecution on January 7, 1999. Thereafter, Eula's attorney notified his counterpart that Eula exercised her option, had already obtained a loan, ordered the title work, and set a closing date. Manous did not appear at the closing and Eula filed a motion for enforcement. The trial court ruled that Eula's 180–day option period did not begin to run until Manous' appeal was dismissed. Manous appealed the enforcement order, contending that Eula could have exercised her option during the pendency of the appeal and that the 180–day window opened on the date the trial court signed the judgment.

The court of appeals concluded that a trial court is legislatively restrained by Section 9.007(c) from rendering further orders to assist in the implementation or clarification of the property division pending appeal. *English*, 44 S.W.3d at 106. The plain statutory language does not stay, supersede, or otherwise inhibit the finality of the decree absent a supersedeas bond. *Id*. Similarly, the plain language is directed at the power of the court, not to the obligations and responsibilities of the parties. *Id*. Under the statute, the trial court is prohibited from implementing and clarifying the property division by way of further order. *Id*. But the ministerial act of execution upon the judgment is not proscribed. *Id.*; *State v. Blair*, 629 S.W.2d 148, 150 (Tex. App.—Dallas 1982)(execution in a judgment is merely a direction to a ministerial officer to permit enforcement of the judgment), *affirmed by Blair v. State*, 640 S.W.2d 867 (Tex.1982). Thus, the judgment granted each party an option beginning on the date the decree was signed, and neither a supersedeas bond nor Section 9.007(c) prohibited the free exercise of the option. *English*, 44 S.W.3d at 106. Eula's option expired 180 days after the decree was signed. *Id*.

There is nothing particularly wrong with the result of the court of appeals opinion in *English*; however, its conclusion that “the trial court is prohibited from implementing and clarifying the property division by way of further order” except for “the ministerial act of execution” is an overbroad statement of law and has proven to be confusing and misleading to the courts of appeals that have relied upon *English* since the *English* Court made no distinction between unambiguous and ambiguous property divisions and impliedly limited the enforcement of both unambiguous and ambiguous property divisions to a writ of execution and nothing else while an appeal is pending.

An unambiguous property division, which is not in need of Chapter 9, Subchapter A’s “further orders” before it can be enforced, should be enforceable independent of Chapter 9, under the rules of civil procedure, any statute for judgment enforcement, or the court’s inherent power. However, an ambiguous property division, which needs a “further order” pursuant to Chapter 9 Subchapter A’s provisions before it can be enforced, clearly falls within Section 9.007(c)’s abatement provision.

The Houston First Court of Appeals, was the next court to misinterpret Chapter 9, Subchapter A.

The First Court of Appeals addressed the applicability of Section 9.007(c) to a motion to enforce the terms of a property division by criminal contempt pending appeal. *See In re Fischer–Stoker*, 174 S.W.3d 268 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). After a bench trial, the trial court ordered both parties to deliver an accounting of their bank accounts as of December 12, 2003, along with a check made payable to the other party for 50% of the sums in those accounts as of that date. Fisher–Stoker failed to comply and filed a notice of appeal. Stoker responded with a motion for contempt and Fisher–Stoker filed a motion to dismiss. The court construed the relief sought as a request for an order to assist in the implementation of the property division. *Id*. The Court said this was “precisely the type of order that a trial court is prohibited from issuing during the pendency of the appeal.” *Id.*, *citing English*, 44 S.W.3d at 106. The court of appeals held that the power of the trial court to issue an order of contempt is abated during the pendency of the appeal. *Id*. at 272.

The result in *Fischer-Stoker* is wrong. The property division was clear and in no need of a “further order” under Subchapter A to make it enforceable. Yet the court of appeals impliedly concluded that Subchapter A applied to unambiguous property divisions, not just ambiguous property divisions, and Section 9.007(c) prohibited any order that seeks “to assist in the implementation” of a property division

while an appeal is pending regardless of whether the motion seeks relief under Chapter 9, Subchapter A, or relief under a separate rule, statute, or the court's inherent power.

There are several cases worth reading that demonstrate the wide array of approaches taken to interpreting and applying Chapter 9, Subchapter A, and Section 9.007(c). These cases include:

Gainous v. Gainous, 219 S.W.3d 97, 107–08 (Tex. App.—Houston [1st Dist.] 2006, pet. filed) (this case is factually distinguishable since it does not involve an attempt to enforce a property division while an appeal is pending, but it is nonetheless noteworthy because it repeats much of the language from *Fischer-Stoker* and seems to interpret Chapter 9, Subchapter A as an exclusive remedy for enforcing property divisions).

Sheikh v. Sheikh, 248 S.W.3d 381, 391-92 (Tex. App.—Houston [1st Dist.] 2007, no pet.)(holding that trial court had jurisdiction to enforce an unsuperseded monetary judgment against H, but lacked subject-matter jurisdiction under Section 9.007(c) to enter a turnover-and-receivership order as to property awarded to W in the decree's property division while an appeal was pending).

In re Phillips, 296 S.W.3d 682, 687 (Tex. App.—El Paso 2009, pet. denied)(distinguishing *Fisher-Stoker* and holding that the trial court's order, issued while an appeal was pending, which directed a receiver to distribute sale proceeds from sale of house was not a prohibited "further order" under Section 9.007(c) but was an order to a ministerial officer to enforce an unambiguous property division).

In re Lovell, No. 14-11-00197-CV, 2011 WL 1744211, at *3 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding)(applying 9.007(c) to prohibit clarifying order regarding sale of house while appeal was pending).

In re Edwards, No. 06-12-00037-CV, 2012 WL 1430896, at *1 (Tex. App.—Texarkana 2012, no pet.)(holding that power of the trial court to issue post-decree order directing an officer from the Sheriff's Office to stand by as W retrieved items of personal property from H's possession was abated under Section 9.007(c) while an appeal was pending).

7. Why the courts of appeals got it wrong.

It is presumed that a statute is enacted by the legislature with complete knowledge of existing law and with reference to it. *Acker v. Texas Water Com'n*, 790 S.W.2d 299, 301 (1990). Whether a statutory remedy is cumulative or exclusive depends on the intention of the legislature. *Bishop v. Houston Indep. Sch. Dist.*, 119 Tex. 403, 407, 29 S.W.2d 312, 313-14 (Comm'n App. 1930)(holding that statute addressing truancy and unruly children which established legal procedures in juvenile court to deal with truancy and unruly was not exclusive remedy for dealing with disobedient children, and holding that school district had discretion to address disciple problems outside of the juvenile court system). Generally a statutory remedy is regarded as cumulative of common law remedies unless it contains an express or implied negation of common law remedies. *Indem. Ins. Co. of N. Am. v. S. Texas Lumber Co.*, 29 S.W.2d 1009, 1010-11 (Tex. Comm'n App. 1930)(holding that statutory remedy for disputes over construction bonds involving municipal projects was exclusive because the statutory scheme would be defeated if the statutory remedy was cumulative and allowed independent common law suits on the bond); *Navistar Int'l Transp. Corp. v. Crim Truck & Tractor Co.*, 791 S.W.2d 241, 245 (Tex. App.--Texarkana 1990)(holding that a prior version of the Texas Motor Vehicle Commission Code which created an administrative procedure for addressing dealer/manufacturer disagreements was not exclusive) *aff'd*, 823 S.W.2d 591 (Tex. 1992).

Chapter 9, Subchapter A, of the Texas Family Code provides enforcement remedies to a party affected by a property division in a decree of divorce. *See* Tex. Fam. Code §§ 9.001-9.014. The remedies include having the court issue "further orders" to assist in the implementation of or to clarify the prior order. The "further orders" a court is authorized to make include orders that: (1) clarify any award of property so that the award can be enforced by contempt if not complied with; (2) ordering the delivery of specific existing property awarded in a decree so the order of delivery may be enforced by contempt if not complied with; (3) reducing to a money judgment any award of specific existing property where delivery of the property is no longer an adequate remedy; and (4) enforcing by contempt any of the foregoing "further orders" of the court when a party fails to comply with the "further orders." *See* Tex. Fam. Code § 9.006-9.012

Section 9.007(c) abated a trial court's power to render the specific "further orders" described in Chapter 9, Subchapter A, while an appeal was pending. However, this section should not have been interpreted to extend beyond the specific "further orders" authorized by Chapter 9, Subchapter A. This is so because the plain language of Chapter 9, Subchapter A, shows that the remedies provided in that subchapter are not exclusive, but are cumulative of all other remedies provided under Texas law for enforcing and executing judgments.

Section 9.001 states "[a] party affected by a decree of divorce . . . providing for a property division . . . **may** request enforcement of that decree by filing a suit to enforce as provided by this chapter . . . ". *See* Tex. Fam. Code § 9.001(a) (emphasis added). Thus, the very first provision of Subchapter A makes clear that a suit to enforce, filed under Subchapter A, is an optional remedy provided to a party affected by a property division. *See* Tex. Gov't Code Ann § 311.016 (stating that the term "may" creates discretionary authority or grants permission or power).

Next, the plain language of several sections, when read together as a whole, show that the remedies provided in Subchapter A are cumulative of all other remedies provided by Texas law for enforcing judgments.

Sections 9.008 authorizes the court to issue a "further order" that clarifies the property division so that the clarification order can then be enforced by contempt under Section 9.012 if a party fails to comply with the clarification order. *See* Tex. Fam. Code §§ 9.008 and 9.012.

Section 9.009 authorizes the court to issue a "further order" that orders the delivery of specific existing property awarded in a property division so that the delivery order can then be enforced by contempt under Section 9.012 if a party fails to comply with the delivery order. *See* Tex. Fam. Code §§ 9.009 and 9.012.

Section 9.010 authorizes the court to issue a "further order" that reduces an award of specific existing property to a money judgment where delivery of the property is no longer an adequate remedy. *See* Tex. Fam. Code § 9.010. Section 9.010 provides that a "further order" for a money judgment may be enforced by any means available for enforcing a debt, but it also states that the remedy of reduction to a money judgment "is in addition to the other remedies provided by law" which clearly recognizes that the remedy provided is not exclusive. *Id*.

Sections 9.010-9.012 make it clear that a right to future property that was awarded in a property division may be enforced by any remedy provided in Subchapter A, including a money judgment or contempt. *See* Tex. Fam. Code §§ 9.010-9.012.

Moreover, the section addressing the Court's contempt power, Section 9.012, expressly states that the Court's contempt power includes holding someone in contempt for failing to comply with any of the "further orders" issued under Sections 9.008, 9.009, and 9.011, but Section 9.012 then expressly states **"This subchapter does not detract from or limit the general power of a court to enforce an order of the court by appropriate means."** *Compare* Tex. Fam. Code § 9.012(a), (b), *with* Tex. Fam. Code § 9.012(c)(emphasis added).

You simply cannot get any more explicit that the general power of the court to enforce its own orders was not supposed to be abrogated by Chapter 9, Subchapter A!

In summary, the plain language of Chapter 9, Subchapter A, shows that the remedies provided by Subchapter A are not exclusive but are cumulative of all other remedies provided under Texas law for enforcing and executing judgments. Stated bluntly, if a property division in a decree of divorce is clear and can be enforced as written, then a party does not need to file a Chapter 9, Subchapter A, suit, but can proceed directly with any remedy provided by Texas law for the execution of judgments. *See* Tex. Fam. Code §§ 9.001(a) and 9.012(c).

This interpretation is confirmed by case law. *See e.g., Caulley v. Caulley*, 806 S.W.2d 795, 796 (Tex. 1991)(affirming portion of turnover order used to appoint receiver to sell real property in satisfaction of ex-wife's judgment); *Roosth v. Roosth*, 889 S.W.2d 445, 457 (Tex. App.—Houston [14th Dist.] 1994, writ denied)(affirming portion of turnover order trial court granted, while the case was on appeal, which appointed a receiver to sell property to pay an award of attorney's fees to ex-wife); *Roosth v. Daggett*, 869 S.W.2d 634, 635 fn. 1 (Tex. App.—Houston [14th Dist.] 1994, no writ) (judgment creditor in divorce case has right to execution pending appeal where no supersedeas bond filed.); *Dechon*, 909 S.W.2d at 955-58 (explaining that Chapter 3, Subchapter D was added to the code to assist in imple-

menting property divisions that could not be enforced due to an ambiguity in the decree that needed to be resolved before it could be enforced); *cf., English*, 44 S.W.3d at 106 (stating "The plain statutory language [of Section 9.007(c)] does not stay, supersede or otherwise inhibit the finality of the decree, absent a supersedeas bond. Similarly, the plain language is directed at the power of the court, not the obligations and responsibilities of the parties. Under the statute, the trial court is prohibited from implementing and clarifying the property division by way of further order. However, neither the parties nor the ministerial act of execution of the judgment are proscribed.").

Further, the context surrounding the enactment of what has become Chapter 9, Subchapter A, seems to make clear that this portion of the code was added to address ambiguous property divisions—not unambiguous property divisions that could be enforced by traditional judgment enforcement remedies.

The correctness of the foregoing interpretation becomes even clearer when you consider the effect that a contrary interpretation would have on Chapter 9, Subchapter A. If former Section 9.007(c) truly had abated the Court's power to issue any additional order enforcing its property division while the property division was on appeal, regardless of whether the additional order is one of the "further orders" described in Subchapter A, then Section 9.007(c) was unconstitutional. *See Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex.1982)(Every court having jurisdiction to render a judgment has the inherent power to enforce its judgments); *Ex parte Ortega*, 759 S.W.2d 191, 192 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding)("The legislature may not, consistent with separation of powers, turn the courts of this State into toothless tigers" by stripping the courts of their inherent power to enforce their judgment).

Moreover, any argument that the legislature has the right to alter well established common law remedies fails because while the legislature does have this power, it ordinarily must replace that remedy with something adequate to protect a party's vested rights. *See e.g., Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955)(holding that the Texas Constitution prohibits legislative bodies from arbitrarily withdrawing all legal remedies from one having a cause of action well established and well defined in the common law); *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex.1983)(same); *City of Terrell v. Howard*, 130 Tex. 459, 111 S.W.2d 692, 693-95 (Comm'n App. 1938)(holding that a provision of city charter amendment that no suit to recover damages for personal injury shall be brought against city without first obtaining consent of majority of city commissioners is void as violating injured person's constitutional guaranty of remedy by due course of law). That has not been done if Section 9.007(c) is interpreted broadly so as to abate all judgment enforcement remedies except a writ of execution for an un-superseded property division since that remedy may not be effective to protect a judgment winner from action by the judgment loser to dispose of property awarded to the winner while the case is on appeal.

It is a basic rule of statutory construction that when presented with two interpretations--one which validates a statute and one which renders it unreasonable or unconstitutional, the Court should choose the interpretation that validates the statute. *See* Tex. Gov't Code § 311.021(1), (3)(it is presumed the legislature intended to comply with the constitution and intended a reasonable result when enacting a statute); *City of Fort Worth v. Howerton*, 149 Tex. 614, 619, 236 S.W.2d 615, 618 (1951)("It is also the general rule that the Legislature does not have power to enact any law contrary to a provision of the Constitution, and if any law, or part thereof, undertakes to nullify the protection furnished by the Constitution, such law, or part thereof, that conflicts with the Constitution is void").

In light of the foregoing, the correct interpretation of Chapter 9, Subchapter A, is that it authorizes an optional remedy for a party affected by a property division to seek the "further orders" authorized by Subchapter A, if the party needs the "further orders" identified in Subchapter A in order to make the property division enforceable by contempt or by reduction to a money judgment. If a party does not need any of the remedies contained in Subchapter A, because the property division in the divorce decree is clear enough to be executed upon by ordinary judgment enforcement procedures, then a party is not required to file a Chapter 9 suit.

Section 9.007(c) should have been interpreted by the courts of appeals to apply only to the "further orders" authorized by Chapter 9, Subchapter A, and should not have been interpreted so as to abate a trial court's power to enforce its property division by any remedy provided by law outside of Chapter 9, Subchapter A. *See* Tex. Fam. Code § 9.012(c). This includes, the inherent power to enforce by con-

tempt outside of Chapter 9, Subchapter A, issuing a turnover order, appointing a receiver, issuing attachment, etc.

8. Summary: why 9.007(c) had to be amended.

Section 9.007(c), and Chapter 9, Subchapter A, were misinterpreted by litigants and the courts of appeals as abating all the trial court's power to enforce its own property division once an appeal was filed, unless the action the court took was considered ministerial by the reviewing court. *See English v. English*, 44 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *In re Fischer–Stoker*, 174 S.W.3d 268 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *Gainous v. Gainous*, 219 S.W.3d 97, 107–08 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Sheikh v. Sheikh*, 248 S.W.3d 381, 391-92 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *In re Phillips*, 296 S.W.3d 682, 687 (Tex. App.—El Paso 2009, pet. denied); *In re Lovell*, No. 14-11-00197-CV, 2011 WL 1744211, at *3 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding); *In re Edwards*, No. 06-12-00037-CV, 2012 WL 1430896, at *1 (Tex. App.—Texarkana 2012, no pet.).

The courts of appeals' interpretation left the spouse who was awarded property, in the possession of the other spouse, unable to enforce the property division and get what was awarded to him or her while an appeal is pending. In addition, it gave the losing spouse in possession of the property free supersedeas and a bargaining chip for forcing a settlement in their favor while the case was on appeal, regardless of the merits of their appellate arguments, because they held the property and could force the winning spouse to accept less than what they were awarded simply because the winning spouse needed property or the winning spouse was simply ready to move on and willing to accept less than what was awarded to them to get away from their ex-spouse. Under the courts of appeals' interpretation, the spouse who was not awarded the property could literally set the property on fire in front of the spouse who was awarded the property, but the trial court was powerless to do anything while an appeal was pending. After the appeal was over, all the trial court could do was render a paper money judgment to the spouse who was awarded the property that the other spouse had burned. This state of the law, of course, made the entire divorce process look horribly ineffective and gave the spouse in the possession of property an unfair advantage not seen in other areas of Texas law.

In addition, there was one other glaring problem with Section 9.007(c) and the courts of appeals' interpretation of it. Appeals can take 1-4 years or longer to wind up depending upon whether they go all the way to the Texas Supreme Court or beyond. Imagine a client who cannot get cash, a deed, an assignment of interest to transfer title to a motor vehicle, personal property, or any other property for 3-4 years. How would they feel about the job you did for them in the trial court if they cannot force the losing spouse to turn over the property so long as an appeal is pending? Further, imagine how a client would feel if their trial lawyer failed to get them temporary spousal support pending appeal because their lawyer missed the window for obtaining temporary orders during appeal, pursuant to TFC § 6.709, after an appeal is filed?

The foregoing problems necessitated that something be done to alter the effect of Section 9.007(c).

Yours, Mine, or Ours?
Dealing with a Jointly-Owned Separate Property House during Divorce

Jodi Bender[1]

Introduction

I had a recent consultation with a man, who we'll call Brian, to discuss an issue that I've discussed with other various clients recently. Brian and his now husband, who we'll call Joe, have been together for 15 years but did not get married until 2015. As is more and more common in today's relationships, especially with gay couples who were not able to marry in the state of Texas until recently, Brian and Joe purchased a home together in both of their names before the marriage. Brian used his savings to make a 20% down payment on the house, and both parties took out a mortgage together for the remainder of the purchase price. Since purchasing the home, Brian has paid 100% of the mortgage, interest, and taxes for the home and used his savings for the maintenance and repairs.[2] After two years of marriage, Brian and Joe have decided to divorce. Brian wants to remain in the house, but Joe wants it sold. It is well-settled that characterization of property in Texas is governed by the inception-of-title rule. Given that the home was purchased prior to marriage by two people, makes the character of the home the separate property of both Brian and Joe.[3] The problem is that real property that can't be divvied up like a financial account, and what happens to it after divorce, is a little trickier. Given these facts, what should happen with Brian and Joe's house?

If the home is separate property, does the divorce court have the authority to order a sale of the house?

A court may order the sale of jointly-owned real property as part of a partition suit, even though courts are prohibited from divesting a spouse of his or her separate property during a divorce. The partition of separate property is not a part of a divorce proceeding.[4] Texas Family Code Section 3.63 authorizes a division "of the estate of the parties," or the community estate.[5] But a trial court can divide jointly-owned separate property in a partition proceeding under the general laws pertaining to partition suits between cotenants, not under the law applicable to a divorce action.[6]

In a divorce action, a trial court is not authorized to divest a spouse of his or her separate property.[7] In fact, it is reversible error for a court to award ownership of a house which is all or partly the separate property of one spouse to the other spouse or to order the house sold, and to award one spouse's separate property share of the proceeds to the other spouse.[8]

In *Motley v. Motley,* the trial court ordered the sale of the parties' residence in a divorce action.[9] Noting that the property was the separate property of both parties, the trial court found "the only remedy available to the court was to order its sale 'thereby converting the property from undivided separate real property to cash to be divided as the separate property of the parties pursuant to the formula set forth in the decree.'"[10] Wife argued on appeal that the trial court violated the prohibition of divesting a spouse of his or her separate property.[11] The court distinguished the holdings in *Cameron, Eggemeyer,* and *Gerami* noting that the courts in those cases had divested one spouse of his or her separate property and transferred title to the other spouse who had not previously owned any interest in the property.[12]

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[1] Jodi Bender is a Partner at Duffee + Eitzen, L.L.P. located in Dallas, Texas. She can be reached at jbender@duffee-eitzen.com.

[2] Reimbursement claims Brian may have under Texas Family Code Section 3.402 for community funds expended during the time of marriage are beyond the scope of this article.

[3] *Carter v. Carter,* 736 S.W.2d 775, 779 (Tex. App.—Houston [14th Dist.] 1987, no writ).

[4] *Halamka v. Halamka,* 799 S.W.2d 351, 354 (Tex. App.—Texarkana 1990, no writ).

[5] *Id. at 354, citing Duke v. Duke,* 605 S.W.2d 408, 411 (Tex. Civ. App.—El Paso 1980, writ dism'd).

[6] *Id.*

[7] Tex. Fam. Code §7.00; Tex. Const. art. I, § 19; *Eggemeyer v. Eggemeyer,* 554 S.W.2d 137, 139 (Tex. 1977); *Cameron v. Cameron,* 641 S.W.2d 210 (Tex. 1982).

[8] *See Gerami v. Gerami,* 666 S.W.2d 241 (Tex. App.—Houston [14th Dist.] 1984, no writ).

[9] *Motley v. Motley,* 390 S.W.3d 689 (Tex. App—Dallas 2012, no pet.),

[10] *Id.*

[11] *Id.*

[12] *Id.*

The *Motley* court determined that, although the partitioning of separate property is not part of a divorce proceeding, it can be done concurrently with the divorce proceeding.[13]

How does a partition suit work under general property law?

Any joint owner of real property or an interest in real property may compel a partition.[14] When a party seeks partition, the trial court "shall determine the share or interest of each of the joint owners or claimants in the real estate sought to be divided, and all questions of law or equity affecting the title to such land which may arise."[15] The trial court shall order partition if it "determines that the whole, or any part of such property is susceptible of partition."[16] "Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition."[17]

Once the court has determined the interests of the co-owners as they correspond to a percentage of the total value of the jointly-owned property, a court will determine whether the property is susceptible to a fair division by metes and bounds in accordance with those interests.[18] If such a physical division is impossible, the court is empowered to order the sale of all jointly-owned property that is incapable of partition, in which case the proceeds of such sale will be distributed to the co-owners in accordance with their percentage interests.[19]

In choosing between partition in-kind (physically dividing the property) or partition by sale, the former is the preferred procedure, because it is not the policy of the courts to compel property owners to sell property against their will.[20] Given this policy, clients like Brian can argue that rather than order a sale of the home, a court should permit him to buy out Joe's interest in the home after adjustment of any common-law reimbursement claims he has for payment of the mortgage and other expenditures.

In at least one case, the court concluded that a valid partition of the property could be accomplished by ordering the wife to buy out the husband's interest in the property after adjusting the reimbursement claims and offsets between the parties rather than by ordering a sale of the property to be conducted by a receiver.[21]

Is a co-tenant entitled to reimbursement in a partition suit?

A trial court applies the rules of equity in determining the broad question of how property is to be partitioned.[22]

As an equitable consideration, it is the general rule that since the care, maintenance, upkeep, and preservation of property rests upon joint owners collectively, a joint owner who expends funds for necessary or proper upkeep is entitled to have such expenditures charged to co-owners in accordance with their pro rata ownership.[23] In Brian and Joe's case, because Brian paid 60% of the consideration for the

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[13] *Id. Citing Halamka v. Halamka,* 799 S.W.2d 351, 354 (Tex. App.—Texarkana 1990, no writ) (in divorce action where parties held property as joint owners, it was appropriate for trial court to apply partition principles and ultimately order the sale of the property and a division of the proceeds).

[14] TEX. PROP. CODE. ANN. § 23.001 (Vernon 2000).

[15] TEX. R. CIV. P. 760.

[16] TEX. R. CIV. P. 761.

[17] TEX. R. CIV. P. 770.

[18] TEX. R. CIV P. 770.

[19] *Id.*

[20] *Daven Corp. v. TARH E&P Holdings, L.P.,* 441 S.W.3d 770, 776 (Tex. App.—San Antonio 2014, pet. filed); *Cecola v. Ruley,* 12 S.W.3d 848 (Tex. App.—Texarkana 2000, no pet.); *Irons v. Fort Worth Sand & Gravel Co.,* 284 S.W.2d 215, 219 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); *Henderson v. Chesley,* 273 S.W. 299, 303 (Tex. Civ. App.—Austin 1925), aff'd on other grounds, 116 Tex. 355, 292 S.W. 156 (1927).

[21] *See Jacobs v. Plummer,* No. 03-07-00097-CV, 2008 Tex. App. Lexis 9596 (Tex. App.—Austin December 23, 2008, no pet.). *Please note in the *Jacobs* case, the parties had stipulated to the value of the property, so the court found that a receiver would be unnecessary.

[22] *See Thomas v. Sw. Settlement & Dev. Co*., 132 Tex. 413, 123 S.W.2d 290, 296 (Tex. 1939) ("In this state partition by suit, whether brought under the statute or without the aid of the statute, does not proceed independently of the rules of equity."); *Yturria v. Kimbro*, 921 S.W.2d 338, 342 (Tex. App.--Corpus Christi 1996, no writ).

[23] *Gonzalez v. Gonzalez*, 552 S.W.2d 175, 181 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Minus v. Doyle*, 141 Tex. 67, 170 S.W.2d 220, 222–223 (1943); *see* § 284.102.

purchase of the home and Joe paid 40%, their duty to maintain the property would be charged in the same percentages.

The right of a co-owner to contribution or reimbursement by his co-owners arises when an advancement is made.[24] Interest may be recovered on such advancements from the date they are made.[25]

What expenses can be made part of a reimbursement/contribution claim in a partition suit?

A co-owner is entitled to reimbursement from other co-owners for sums expended to discharge the other co-owner's share of an encumbrance, such as mortgage payments, against the jointly-owned property.[26] Expenses entitled to contribution also include those incurred for taxes, repairs, maintenance, and insurance premiums.[27] But there is no claim for reimbursement for taxes when one cotenant is possessing the property under a court order.[28] For example, if Brian has the right to exclusive possession of the real property under a temporary order, he would have the obligation to pay the taxes on the property unless the order provides otherwise.[29] Courts have also held that a party cannot recover on a reimbursement claim for improvements to property without consent or for personal services rendered in managing or maintaining the jointly-owned property.[30]

Rental value can be claimed as an offset to a claim for reimbursement. When a cotenant who has used the property asks for a contribution of funds from other cotenants as a reimbursement claim, the other cotenants are entitled to an offset for the reasonable rental value of the claimant's use.[31] But offset for rental value is not available when one party is in possession of the property by virtue of a court order.[32]

Finally, it should be noted that this common-law reimbursement claim that is made through a partition suit is different than a claim for reimbursement found in marital property law. A common-law reimbursement or contribution claim is for items directly related to the house and would not extend to other reimbursement claims permitted under the Family Code.

How do you ask the court in a partition suit to decide reimbursement claims?

At any time, a cotenant may bring an action for an accounting.[33] In an accounting, each cotenant will have to account for any rents and profits received, waste committed, improvements, taxes, and other expenditures made for the home.[34] A suit for accounting may be brought without seeking partition of the property.[35] In an accounting, reimbursement claims between cotenants are calculated, rents received are calculated, and any allowable offsets are adjusted.

Once the court has determined the ownership shares of the parties and the applicable reimbursement claims, can the court award the reimbursement claim by awarding one party a larger share of the property?

The good news for Brian is – yes! A reimbursement obligation can be enforced in a partition action.[36] As stated by the Texas Supreme Court:

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[24] *Schluter v. Sell*, 194 S.W.2d 125, 133 (Tex. Civ. App.—Austin 1946, no writ).
[25] *Id.*
[26] *Doss v. Roberts,* 487 S.W.2d 839, 842 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.)
[27] *Schluter*, 194 S.W.2d at 133; *Gilleland v. Meadows*, 351 S.W.2d 656, 659 (Tex. Civ. App.—Dallas 1961, no writ).
[28] *Miller v. Two Investors, Inc.,* 475 S.W.2d 610 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).
[29] *See id.*
[30] *Burton v. Williams*, 195 S.W.2d 245, 247 (Tex. Civ. App. — Waco 1946, writ ref'd n.r.e.).
[31] *Webb v. Mitchell*, 371 S.W.2d 754, 760 (Tex. Civ. App. — Houston 1963, no writ); *Rucker v. Butcher*, 300 S.W.2d 183,185 (Tex. Civ. App. — Fort Worth 1957, no writ); *see*, e.g., *Scott v. Scruggs*, 836 S.W.2d 278, 280-281 (Tex. App. — Texarkana 1992, writ denied) (equity may justify offset).
[32] *Gilleland v. Meadows,* 351 S.W.2d 656 (Tex. Civ. App.—Dallas 1961, no writ).
[33] *Sayers v. Pyland,* 161 S.W.2d 769 (Tex. 1942).
[34] *Id*. at 771.
[35] *Manning v. Benham,* 359 S.W.2d 927, 932 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.)
[36] *See generally, Hanrick v. Gurley,* 54 S.W. 347 (Tex. 1899); *Duke v. Reed,* 64 Tex. 705, 1885 Tex. Lexis 301, (Tex. December 18, 1885).

> The district court has the power to determine and adjust the rights of the parties in this suit, and may justly treat this as an equitable partition proceeding. In making such partition, all of the property in which the parties are jointly interested should be dealt with as a whole, and partition made, as far as possible, in kind, giving due recognition to the homestead rights. In case a complete partition in kind cannot be had, so as to award each party his or her equitable portion, the court can, if necessary, award certain property to one or more of the interested parties, impressing it with a money charge in favor of another, which charge may be ordered enforced by sale, if not satisfied by payment of the money within a fixed period of time. It may be found that [wife] can be awarded specific property in fee, such, for instance, as the homestead property; and her claim to reimbursement for advancements may in this way be adjusted without sale.[37]

For example, in *McGehee v. Campbell*, the trial court "debited or credited the parties [their respective reimbursement claims and offsets for rental value] and determined their respective shares of ownership of the home" based on equitable principles.[38]

What if the property has homestead protection?

The homestead is an interest in land which, by operation of state constitution and statute, is not subject to forced sale under legal process.[39] The homestead right is akin to a life estate.[40] A homestead right arises upon the intention of a person to use the premises for homestead purposes, coupled with occupancy or some overt act of preparing to occupy the premises for that purpose.[41] Although a homestead can be lost through abandonment, once the homestead character of property is established, it continues through a divorce for so long as some of the family continues to reside on the property.[42] A party must assert and prove the existence of homestead exemption.[43]

The Texas Constitution provides special protections for the homestead separate and distinct from protections afforded other types of property.[44] Because constitutional homestead rights protect citizens from losing their homes, statutes relating to homestead rights are liberally construed to protect the homestead.[45] But partition rights also are well established.[46] The right to partition has been characterized as "absolute."[47]

Thus, a homestead right must accommodate the right to partition in some circumstances.[48] For example, upon divorce, the trial court has broad power to order a "just and right" division of a divorcing couple's estate, including the power to order the sale of the homestead and partition of the proceeds.[49] Under these circumstances, the homestead right attaches to the proceeds of the partition sale; a spouse generally enjoys continued homestead protection for the proceeds of the partition sale against creditors.[50]

Further, although not applicable in Brian and Joe's case, it is important for a practitioner to remember that a court has the authority to give the right to use property as a residence to the custodial parent

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[37] *Dakan v. Dakan*, 83 S.W.24 620, 629 (1935).
[38] *McGehee v. Campbell*, No. 01-08-1023-CV, 2010 Tex. App. LEXIS 2306, at *6-8 (App.—Houston [1st Dist.] 2010).
[39] Tex. Const. art. VII, § 22 (1845).
[40] *Sparks v. Robertson,* 203 S.W.2d 622 (Tex. Civ. App.—Austin 1947, writ ref'd).
[41] *Kostelnik v. Roberts,* 680 S.W.2d 532, 536 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).
[42] *See Sakowitz Bros. v. McCord,* 162 S.W.2d 437 (Tex. Civ. App.—Galveston 1942, no writ).
[43] *McIntyre v. McIntyre*, 722 S.W.2d 533, 694 (Tex. App.— San Antonio 1986, no writ).
[44] *See Grant v. Clouser*, 287 S.W.3d 914, 919 (Tex. App.—Houston [14th Dist.] 2009, no pet.; Tex. Const. art. XVI, § 50.
[45] *Grant,* 287 S.W.3d at 919 ,*citing Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 807 (Tex.App.-Austin 2004, pet. denied).
[46] *See id.*
[47] *Id, citing Mayes v. Stewart*, 11 S.W.3d 440, 457 (Tex.App.-Houston [14th Dist.] 2000, pet. denied); *Carter v. Charles*, 853 S.W.2d 667, 671 (Tex.App.-Houston [14th Dist.] 1993, no writ).
[48] *Id.*
[49] *Id., citing Laster v. First Huntsville Props. Co.*, 826 S.W.2d 125, 131 (Tex.1991).
[50] *See id.,citing Delaney v. Delaney*, 562 S.W.2d 494, 495–96 (Tex.Civ.App.-Houston [14th Dist.] 1978, writ dism'd).

for the duration of the minority of the parties' children, even if the property is the separate property of the non-possessing spouse.[51]

Conclusion

After a review of the law pertaining to partition proceedings and homestead rights in a divorce case, what should the Court do with Brian and Joe's house? Based on the foregoing, either Brian or Joe could request an accounting from the Court to determine their respective reimbursement claims during the divorce proceeding. Generally, this would be advantageous for either party to request so that each party would know what additional equity in the home the party might have. In Brian and Joe's situation, it is likely Brian would be the person to request an accounting because he paid for all maintenance and repairs to the house while the parties lived in it. Given that Brian wants to stay in the home after divorce and Joe wants it sold, Brian could either choose to buy Joe out of his portion of the house after determination of his reimbursement claims, or the Court could order the house sold, awarding the parties proceeds of sale based on their respective percentage ownership. The good news for Brian is that, because he spent more money on the house than Joe, a trial court will consider his requests considering the equity between the parties and would hopefully allow him to stay in the house and pay Joe a significantly smaller sum for the buy-out once the reimbursement claims have been considered.

[51] *Hedtke v. Hedtke,* 248 S.W.21, 22 (Tex. 1923).

Constitutional Concerns Created by the Indian Child Welfare Act

By Elicia Grilley Green[1]

I. Introduction

Twin sisters, Laurynn and Michaela, were removed from their parent's home and placed in foster care at nine months of age. The girls were extremely lucky; they had been placed with a loving couple that wanted very much to adopt them and raise them as their own. When the girls were three years old they were officially placed for adoption, and their foster parents jumped at the chance to make the girls legally theirs. However, things changed dramatically in only a few short weeks due to the Indian Child Welfare Act ("ICWA" or "the Act").[2] No matter how small a percentage of Indian blood flows through a child's veins, under ICWA, the tribe has the legal right to make all decisions in regard to that child's custody.[3] Although neither Laurynn nor Michaela had ever lived on the reservation, the girls had distant Native American ancestry; therefore, the tribe took control of their adoption and ordered both girls to be "reunified" with their Indian grandfather. Due to this decision, and in less than two months, Laurynn was dead, murdered by her grandfather's overwhelmed, poverty-stricken, and mentally unstable wife.

Every child, but especially those made most vulnerable by being placed for adoption or by living in foster care, deserves to be treated equally by the law and given an equal chance to be raised by individuals who want them and can provide a safe and nurturing environment. At its inception in 1978, the Act was intended to prevent state entities from removing "an inordinately large number of Native American children from their homes without a full appreciation of traditional Native American child-rearing practices."[4] However, over time, ICWA has become a source of constant confusion to courts and has therefore produced many arbitrary, negative, and unfair results. ICWA has outlived its purpose at best, and miserably failed its purpose at worst. Over the almost four decades since the Act was passed, society's view of race and the interracial family has changed dramatically. Also, parents have been empowered by the Court; therefore, Indian parents should have more discretion in where their children are placed, especially in light of the fact that conditions for Native American youth within the Indian community have grown increasingly strained. Because the racial quantum of a child's blood does not have a place in any type of custody decision, and because parents have a right to look to the best interests of their children in matters related to control over their family, the unconstitutional portions of ICWA need to be reinterpreted by the Supreme Court or abolished completely by Congress.

II. The History Behind the Indian Child Welfare Act

As stated in the very first paragraph of the Act's legislative history, ICWA was intended for good; it was developed to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[5] Throughout American history injustices of various forms have been committed against Indians. One specific form of injustice was the systematic removal of Indian children from their homes.[6] Throughout the late nineteenth and early twentieth centuries tens of thousands of Indian children were placed into federally run off-reservation boarding schools.[7] The belief at the time was that Indians needed to be assimilated into the culture of the white man.[8] Richard Pratt, an army officer who worked to develop the first of these schools in 1892, said that not all Indians should be dead

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[1] Ms. Green is due to graduate from SMU Deadman School of Law in May 2018. She can be reached at eggreen@smu.edu.
[2] 25 U.S.C. § 1915 (2012); George F. Will, *The Blood-Stained Indian Child Welfare Act*, THE WASHINGTON POST (Sept. 2, 2015), https://www.washingtonpost.com/opinions/the-blood-stained-indian-child-welfare-act/2015/09/02/d3aea62e-50cb-11e5-933e-7d06c647a395_story.html?utm_term=.afaa6105127b.
[3] 25 U.S.C. § 1911 (2012).
[4] B.J. JONES, MARK TILDEN, & KELLY GAINES-STONER, THE INDIAN CHILD WELFARE ACT HANDBOOK 1 (2nd ed. 2008).
[5] H.R. REP. 95-1386, 8, 1978 U.S.C.C.A.N. 7530, 7530.
[6] JONES, TILDEN & GAINES-STONER, *supra* note 3, at 2-5.
[7] *Id.* at 2; Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR: MORNING EDITION (May 12, 2008, 12:01 AM), http://www.npr.org/templates/story/story.php?storyId=16516865.
[8] *See* National Conference on Social Welfare, *Official Proceedings of the Nineteenth Annual Conference of Charities*, GRADUATE LIBRARY UNIVERSITY OF MICHIGAN PRESERVATION OFFICE (1892), https://quod.lib.umich.edu/n/ncosw/ACH8650.1892.001/69?rgn=full+text;view=image.

but instead "all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."[9] Tsianina Lomawaima, the head of American Indian Studies at the University of Arizona, stated that "the intent was to complete ly transform people, inside and out . . . . from the start the government's objective was to 'erase and replace' Indian culture, part of a larger strategy to conquer Indians,"[10] and what better way to erase Indian culture than through their children, the next generation itself.

It is estimated that by 1971 almost 35,000 Indian children were living away from their families in federally run boarding schools and dormitories.[11] However, Indian children were not only being attacked through these types of educational avenues, they were also being taken by social services and placed in foster care or up for adoption at alarming rates.[12] The Indian Adoption Project, which lasted from 1958 through 1967, worked to place nearly 400 Native American children into white families from states generally far away from any roots the children had to their extended Indian family or to the reservation itself.[13] By 1974 it was estimated that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. . . . The adoption rate of Indian children was eight times that of non-Indian children, [and] approximately 90% of the Indian placements were in non-Indian homes."[14] These staggering statistics led Congress to find that there was an "Indian child welfare crisis of massive proportions and that Indian families face[d] vastly greater risks of involuntary separation than are typical of our society as a whole."[15] Therefore, in 1978, after denouncing "the wholesale separation of Indian children from their families . . . [as] the most tragic and destructive aspect of American Indian life," Congress passed the Indian Child Welfare Act.[16] The Act was designed to protect the Native American culture and value system through federal regulations that placed restrictions on the removal and placement of Indian children.[17]

III. Child Custody Under ICWA

The Indian Child Welfare Act begins by drawing on the Commerce Clause of the U.S. Constitution, which grants Congress the power to regulate commerce with several entities including Indian tribes, to find that the Federal government has the authority to assume the "protection and preservation" of Indian children as a "resource" of the tribes themselves.[18] The Act works to protect Indian children as a form of "commerce" through several channels. First, the Act's definition of "Indian child" works to give the tribe broad discretion to pick and choose which children it will consider as members of the tribe, and therefore, which children will be protected under the Act. There are two categories of Indian children under ICWA: the child, who in either case must be under eighteen years of age and unmarried, is (1) a member who has been registered with the tribe; or (2) is eligible for membership because one of their biological parents is a member of the tribe.[19] This broad definition means that a child will be considered a member of the tribe, and under their jurisdictional authority, even if they are only "eligible" because one of their genetic parents is a member, even if the parents themselves do not want their child to be a member and do not want their child's case controlled by the tribe or ICWA.[20] Moreover, even if the child was removed from his or her Indian parents shortly after birth and has been under the care of non-Indian parents, never having been a true member of the tribe, or perhaps even exposed to the tribe at all, the tribe can still choose to adjudicate that child's future because of the "eligible member" provision.[21] The tribe can almost always choose to control a child's case, regardless of the strength of that

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[9] *Id.* at 46.
[10] Charla Bear, *supra* note 6.
[11] H.R. REP. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7531.
[12] *Id.*
[13] *The Adoption History Project: Indian Adoption Project*, THE UNIVERSITY OF OREGON (Feb. 24, 2012), http://pages.uoregon.edu/adoption/topics/IAP.html.
[14] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989); Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3.
[15] H.R. REP. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7531.
[16] *Id.*
[17] *Id.*
[18] 25 U.S.C. § 1901 (2012).
[19] 25 U.S.C. § 1903 (2012).
[20] *See generally* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
[21] 25 U.S.C. § 1903 (2012); H.R. REP. 95-1386, 39, 1978 U.S.C.C.A.N. 7530, 7562.

child's blood Indian ancestry, or the strength of any bond the child or the child's parents have with Indian culture. "Each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria. Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership."[22] However, even in cases where the tribe does not take control over an Indian child's case, the state or federal courts involved will apply the provisions of ICWA.[23]

Second, the Act grants exclusive jurisdiction to the tribe in most child custody proceedings,[24] which the Act defines as including foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements.[25] Where a child is a ward of the tribe or is domiciled on the reservation, the tribe automatically has exclusive jurisdiction; in cases where the child is not domiciled on the reservation there must be "good cause to the contrary" to not transfer the proceeding to the tribal courts, and in any state court Indian child custody proceeding the tribe may intervene at any point.[26] Additionally, the decisions of the tribe in child custody proceedings are given full faith and credit and therefore must be upheld in every state or territory of the United States.[27] The Act states that these jurisdictional rights apply to foster care placements and hearings for termination of parental rights; however, in order to place a child up for any type of adoptive placement the parent's rights must first be terminated, so the exclusive jurisdiction granted to the tribe really circumvents any type of child custody proceeding.[28]

Third, ICWA works to enforce higher standards than those utilized in non-Indian child custody proceedings. First, anytime a foster care placement or termination of parental rights proceeding is heard under the Act, the court must ensure that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[29] Most states have a similar requirement that remedial and rehabilitative measures be taken with the family before a child is removed from the home; however, these procedures are almost never provided.[30] ICWA places a federal requirement absolutely mandating these remedial efforts take place in every case dealing with an Indian child.[31] Next, in the case of a foster care placement, there must be expert testimony and proof by clear and convincing evidence that the child would be likely to suffer "serious emotional or physical damage" if left in the care of the parent or Indian family in custody.[32] Most states only require clear and convincing evidence that it is in the child's best interests, due to a multitude of possible causes, to be placed in foster care; however, ICWA raises this bar for Indian children by requiring testimony by a "qualified expert witness [with] expertise beyond the normal social worker qualifications."[33] Moreover, in the case of a termination of parental rights proceeding, the determination can only be made with expert testimony and evidence that proves beyond a reasonable doubt that the continued custody of the child by either the parent or Indian custodian will result in "serious emotional or physical damage."[34] The standard applied to non-Indian children in a termina-

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[22] *In re* Santos Y., 112 Cal. Rptr. 2d 692, 713 (Cal. App. 2d Dist. 2001).
[23] Petition for Writ of Certiorari at i, *In re* Alexandria P., 204 Cal. Rptr. 3d 617, 621 (Cal. App. 2d Dist. 2016), *review denied* (Sept. 14, 2016), *cert. denied sub nom*. R. P. v. Los Angeles County Dept. of Children and Fam. Services, 137 S. Ct. 713 (2017) (No. 16-500), 2016 WL5957550.
[24] 25 U.S.C. § 1911 (2012).
[25] 25 U.S.C. § 1903 (2012).
[26] 25 U.S.C. § 1911 (2012).
[27] *Id.*
[28] Tex. Fam. Code Ann. § 162.001 (Vernon); National Adoption Center, *Adoption Laws* (2017), http://www.adopt.org/adoption-laws.
[29] 25 U.S.C. § 1912 (2012).
[30] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2579 (2013); H.R. REP. 95-1386, 22, 1978 U.S.C.C.A.N. 7530, 7545; Child Welfare Information Gateway, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, WASHINGTON DC: U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU (2016), https://www.childwelfare.gov/pubPDFs/reunify.pdf.
[31] 25 U.S.C. § 1912 (2012); H.R. REP. 95-1386, 22, 1978 U.S.C.C.A.N. 7530, 7545.
[32] 25 U.S.C. § 1912 (2012).
[33] *Id.*; H.R. REP. 95-1386, 22, 1978 U.S.C.C.A.N. 7530, 7545; Tex. Fam. Code Ann. § 161.001 (Vernon); Child Welfare Information Gateway, *Determining the Best Interests of the Child*, WASHINGTON DC: U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.
[34] 25 U.S.C. § 1912 (2012).

tion of parental rights proceeding is the lower standard of clear and convincing evidence that is used in any type of non-Indian child custody proceeding.[35] In fact, the "beyond a reasonable doubt" evidentiary standard is the absolute highest legal standard and is the same as that applied in criminal cases.[36] This standard raises the burden of proof to an almost unattainable level when attempting to terminate the parental rights of an Indian child's parent or parents.[37] The Act also works to further ensure that the absolute highest bar is attained in any type Indian child custody proceeding by stating that in the rare case that the state standard is higher than the standard stated in ICWA, no matter what type of child custody proceeding is involved, the higher standard between the state standard and the ICWA standard must always be applied.[38]

Fourth, if an Indian child is removed and placed in foster care or placed for adoption special preferences come into play. If the child is to be placed up for adoption "preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[39] In the case of a child's being placed into foster care or in a pre-adoptive placement there is a different set of preferences that also work to greatly favor the tribe and those of Indian ancestry. In these cases a "preference shall be given, in the absence of good cause to the contrary, to a placement with (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs."[40] While states are required to give some preference to relatives in the placement of a non-Indian child, those preferences, unlike the placement provisions of ICWA, are secondary to the best interests of the child.[41] Also, under The Multiethnic Placement Act ("MEPA"), which was passed by Congress in 1994, states can never place children based on the race of the child or the foster or adoptive family.[42] The Act gets around this racial qualification by calling the Indian status of a child a political affiliation due to their political status as a member or eligible member of the tribe.[43] However, "it is racial heritage, and racial heritage alone, that determines eligibility for such membership," so really race is the qualifier that works as a proxy for the political affiliation.[44]

Lastly, under ICWA the customary test of looking to the best interests of the child is diluted at best and completely eliminated at worst. Since very early on in the U.S. judicial system, child custody decisions have turned on the "best interests of the child."[45] Justice Cardozo famously articulated this standard stating that the judge "acts as parents patriae to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' (citation omitted), and make provision for the child accordingly . . . concern is for the child."[46] This test is not designed as a single factor, but instead takes in the totality of the circumstances of each specific case and then individualizes accordingly.[47] Alternately, under ICWA, the test "imposes a single, blanket presumption . . . that it's in a child's best interest to be placed with Indian families."[48] This presumption can be overcome in two situa-

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[35] Mark Flatten, *Death on a Reservation: Federal Law Forces Native American Children to Remain in Dangerous, Abusive Homes*, GOLDWATER INSTITUTE (July 7, 2015), http://www.goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/death-on-a-reservation/.
[36] *Id.*
[37] H.R. REP. 95-1386, 32, 1978 U.S.C.C.A.N. 7530, 7555.
[38] 25 U.S.C. § 1921 (2012).
[39] 25 U.S.C. § 1915 (2012).
[40] *Id.*
[41] 42 U.S.C. § 1996b (2012); *Placement of Children with Relatives*, CHILD WELFARE INFORMATION GATEWAY (July 2013), https://www.childwelfare.gov/pubPDFs/placement.pdf; Flatten, *supra* note 34.
[42] *Placement and Permanency*, UNITED STATES COMMISSION ON CIVIL RIGHTS (Sept. 21, 2007), http://www.cwla.org/briefing-the-multiethnic-placement-act-minority-children-in-state-foster-care-and-adoption/.
[43] Morton v. Mancari, 417 U.S. 535, 553 (1974).
[44] Reply Brief for Guardian ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 17, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2558 (2013) (No. 12-399), 2013 WL 1411848.
[45] Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925).
[46] *Id.*
[47] Timothy Sandefur, *The Best Interests of Individual Children*, CATO UNBOUND (Aug. 25, 2016), https://www.cato-unbound.org/2016/08/25/timothy-sandefur/best-interests-individual-children.
[48] *Id.*

tions, by the showing of "good cause" not to grant tribal jurisdiction, and the showing of "good cause" not to follow the Act's placement preferences; however, "good cause" is never defined in the Act, and this has led to a plethora of disagreements on exactly how or even if to apply the best interests standard. Some courts flatly refuse to apply the best interest analysis because "use of the best interest standard when determining whether good cause exists defeats the very purpose for which the ICWA was enacted, for it allows Anglo cultural biases into the picture. Second, the best interest test is relevant to issues of placement, not jurisdiction."[49] The Montana Supreme Court even went so far as to state that while the court would apply the best interests of the child as a factor in child custody cases governed by state law, "it is improper to apply a best interests standard when determining whether good cause exists to avoid the ICWA placement preferences, because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences."[50] The difference is determining what is in the best interest of an entire class of children versus the best interests of an individual child. Other courts take the opposite approach and use the "best interests of the child" standard in defining good cause, or as a factor to be used in the analysis of good cause, in both jurisdictional and placement cases.[51] And to even further complicate matters, the most recent guidelines issued by the Bureau of Indian Affairs, which are not binding on courts but are often considered by courts in ruling on cases concerning Indian children,[52] state that "courts should not consider the best interests of the child in determining foster care or adoptive placements."[53]

IV. The Courts Stumble to Apply ICWA

a. The Court Sets a Precedent: The Tribe Controls

Cases can be used to pointedly illustrate the confusing and many times heartbreaking results that have ensued when courts try to interpret and apply the maze that is created by ICWA when considering child placement proceedings. In *Mississippi Band of Choctaw Indians v. Holyfield*, the Supreme Court was asked for the first time to decide issues of child custody under the Act. In this case both the biological mother and father of the children involved were members of the Mississippi Band of Choctaw Indians, and they both lived on the Indian reservation at the time of the babies' birth. Jennie Bell, the biological mother, was an unemployed single mother of two existing children and was pregnant with twins from a man who was married to someone else with whom he also had to two existing children.[54] Jennie, knowing she would be unable to raise the twin babies, tried to find extended family and other members of the Choctaw tribe who would be willing to adopt the twins.[55] After no one came forward who was willing to adopt both of the babies, as she wanted keep them together, Jennie looked outside of the reservation where she found the Holyfields.[56]

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[49] Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 170 (Tex. App.--Hous. [14th Dist.] 1995); *see also* In re J.L.P., 870 P.2d 1252, 1258 (Colo.Ct.App.1994) (refusing to apply the best interest standard because it would "defeat the purpose of the ICWA"); In Interest of Armell, 550 N.E.2d 1060, 1066 (Ill. App. 1st Dist. 1990) (refusing to use the best interests of the child test in determining good cause to deny transfer of jurisdiction to the tribe "regardless of any psychological impact upon the child"); *In re C.E.H.,* 837 S.W.2d 947, 954 (Mo.Ct.App.1992) (refusing to apply the best interest test and instead using BIA guidelines, which do not include the analysis); Matter of Guardianship of Ashley Elizabeth R., 863 P.2d 451, 456 (N.M. App. 1993) (refusing to apply best interest standard when determining jurisdiction, only to be used when ascertaining placement).

[50] *In re* C.H., 997 P.2d 776, 782 (Mont. 2000).

[51] Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 169 (Tex. App.--Hous. [14th Dist.] 1995); *see also* Matter of Maricopa County Juv. Action No. JS-8287, 828 P.2d 1245, 1251 (Ariz. App. 1st Div. 1991) (finding it is appropriate to "consider an Indian child's best interest when deciding whether to transfer a custody proceeding to tribal court"); *In re* Robert T., Cal.Rptr. 168, 175 (Cal.Ct.App.1988) (using the best interests test in determining not to transfer jurisdiction to the tribe); Matter of Adoption of T.R.M., 525 N.E.2d 298, 308 (Ind. 1988) (finding "that the best interests of the child are a valid consideration in determining the issue of good cause"); *In re* C.W., 479 N.W.2d at 114; *In re* Interest of Bird Head, 331 N.W.2d 785, 791 (Neb. 1983) (finding that "the Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount"); *In re* J.J., 454 N.W.2d 317, 331 (S.D.1990) (using the best interest standard as a factor in determining good cause).

[52] Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 169 (Tex. App.--Hous. [14th Dist.] 1995).

[53] DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS: GUIDELINES FOR STATE COURTS AND AGENCIES IN INDIAN CHILD CUSTODY PROCEEDINGS (Feb. 25, 2015), https://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf.

[54] Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1 (2008).

[55] *Id.*

[56] *Id.* at 1-2.

The Holyfields were not of Indian decent and were not members of the tribe, but they jumped at the chance to adopt both children after years of failed adoption attempts.[57] Jennie was absolutely certain that this was the family for her babies, and in fact, moved into their home some 200 miles from the reservation in an attempt to circumvent the tribe taking exclusive jurisdiction of their adoption because she was "domiciled or residing on the reservation."[58] Jennie did not want the tribe to be able to dictate to her who could and could not adopt her children; therefore, she chose to give birth at a hospital off of the reservation and did not return to the reservation for several weeks after their birth.[59] After their birth both Jennie and the babies' father signed paperwork relinquishing their parental rights to the children and the state court formalized their adoption by the Holyfields.[60]

Nevertheless, two months later the Tribe, having found out about the case, "filed a motion to vacate the adoption on the grounds that it violated ICWA."[61] The lower court overruled this motion holding that the Tribe had "never obtained exclusive jurisdiction over the children involved herein" because of two distinct facts.[62] First, "the twins' mother 'went to some efforts to see that they were born outside the confines of the Choctaw Indian Reservation' and that the parents had promptly arranged for the adoption by the Holyfields," and second "[a]t no time from the birth of these children to the present date have either of them resided on or physically been on the Choctaw Indian Reservation."[63] The Tribe fought this ruling all the way up to the Supreme Court of Mississippi, but it affirmed the lower court's ruling holding that "[a]t no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation."[64] The Tribe even tried to make the unique argument that living in their mother's womb while she was on the reservation counted as their being domiciled on the reservation and therefore granted the tribe jurisdiction, but the court did not find this at all compelling stating that this argument should be "lauded for its creativity; however, . . . is unsupported by any law within this state, and will not be addressed . . . due to the far-reaching legal ramifications that would occur were we to follow such a complicated tangential course."[65]

However, the Tribe appealed and the Supreme Court reversed the lower court's holding finding that the children's domicile was that of their mother regardless of whether the children had ever been there.[66] The Court concluded that although ICWA did not define "domicile" specifically the intent of Congress was for a uniform law to apply.[67] By the time the Court reached this decision and the Tribe took over jurisdiction of the adoption, the children had been living with the Holyfield's for over four years.[68] Thankfully, the Tribe decided it was in the best interests of the children to remain with the Holyfields.[69] Although, the Tribe's decision was in part based on the fact that there was no acceptable tribal family at that time who was willing or able to adopt them, and therefore, they would have gone directly into foster care rather than staying in their secure and loving home.[70] Unfortunately, in cases where the specific facts such as those found in *Holyfield* did not exist many children under the constraints of ICWA, including Laurynn and Michaela spoken about in the introduction, have been removed from loving homes to live in foster care for unknown periods of time or have been placed with Indian families that were unable to properly or safely care for them.

b. Blood Quantum and the Existing Indian Family

The most recent ICWA case that has been considered by the Supreme Court is *Adoptive Couple v. Baby Girl*. This case centered around a little girl named Veronica who is only 1.2% or 3/256ths Chero-

[57] *Id.* at 2.
[58] *Id.* at 3, 8; 25 U.S.C. § 1911 (2012).
[59] Maldonado, *supra* note 53, at 6–7.
[60] *Id.* at 7.
[61] *Id.*
[62] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 38–39 (1989).
[63] *Id.* at 39.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 48-49.
[67] *Id.* at 47-49.
[68] Maldonado, *supra* note 53, at 17.
[69] *Id.*
[70] *Id.* at 18.

kee Indian.[71] Her mother, who is primarily Hispanic, dated and was briefly engaged to her father, who is a member of the Cherokee Indian Tribe.[72] After Veronica's mother became pregnant the relationship fell apart, and her father stated that he would rather give up his parental rights than have to pay child support, so Veronica's mother made the decision to give her unborn baby up for adoption.[73] Veronica's mother worked to find a perfect family for her child and eventually settled on a non-Indian couple from South Carolina.[74] For the duration of her pregnancy Veronica's mother was financially and emotionally supported by the adoptive couple, while Veronica's father displayed no interest in the child and offered no support whatsoever.[75] However, four months after Veronica was born and handed over to the adoptive couple, even though he had already signed paperwork relinquishing his parental rights to the child, Veronica's biological father utilized ICWA to request a stay of the adoption proceedings.[76]

Veronica continued to live with the adoptive couple, the only parents she had ever known, for two years before the case was heard by the South Carolina Family Court that then "denied Adoptive Couple's petition for adoption and awarded custody to Biological Father. . . . [Therefore,] at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met."[77] The adoptive couple fought this decision up to the South Carolina Supreme Court, which affirmed the lower court's ruling finding that ICWA applied because Veronica was an Indian child under the Act. The court based their decision on several factors including that "remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" had not been provided, that it had not been shown that granting custody to Veronica's biological father "would result in serious emotional or physical harm to her beyond a reasonable doubt," and that it was irrelevant to the adoptive couple anyway because if the father's rights were terminated then the preferences of ICWA would be enforced and they would not get custody.[78]

Then, after Veronica had been removed from her adoptive parent's home and had been living with her biological father for almost two years, she was taken from his home and returned to the home of the adoptive parents after the U. S. Supreme Court reversed the lower court's ruling.[79] The Court found that the section of ICWA that states that to terminate parental rights it must be shown that the "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" did not apply because the word "continued" as applied meant custody "that a parent already has (or at least had at some point in the past)," and that this particular section of ICWA did not apply "in cases where the Indian parent never had custody of the Indian child."[80] It is important to note that, in deciding *Adoptive Couple v. Baby Girl*, the Supreme Court got very near to utilizing an exception that state courts have carved out as a tool to get around some of the Constitutional issues ICWA creates, yet the Court did not specifically comment on or endorse that exception.[81] This exception, known as the Existing Indian Family Exception ("EIFE"), has been a major point of contention in courts nationwide and many were hoping the Supreme Court would settle the issue with this case.[82] EIFE "is an entirely judge-made doctrine that precludes application of the ICWA when neither the child nor the child's parents have maintained a significant social, cultural, or political relationship with his or her

[71] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2558 (2013).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2558–59 (2013).
[77] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2559 (2013).
[78] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2559 (2013).
[79] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2565 (2013).
[80] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2560 (2013).
[81] Brief of Amicus Curiae American Academy of Adoptive Attorneys in Support of Petitioners at 3, *In re* Alexandria P., 204 Cal. Rptr. 3d 617 (Cal. App. 2d Dist. 2016), *review denied* (Sept. 14, 2016), *cert. denied sub nom*. R. P. v. Los Angeles County Dept. of Children and Fam. Services, 137 S. Ct. 713 (2017) (No. 16-500), 2016 WL 6803676.
[82] Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward A New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 625 (2002).

tribe."[83] The courts have used this exception in many cases involving Indian children to avoid the provisions of ICWA in regard to "children who never lived with an Indian family or in an Indian community."[84]

The Court further held that there was no need "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" when one parent had abandoned the child before birth and had never had physical or legal custody of the child because there was therefore no risk of breaking up an Indian family that in fact had never existed as a family in the first place.[85] The Court also found that the placement preferences of ICWA did not apply in this specific case because no alternative party who was eligible under ICWA had tried to adopt Veronica and therefore no particular family or individual was available to be "preferred" under the Act.[86] In the opinion Justice Alito expressly noted that "had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law," because Veronica's biological father's consent would not have been needed for her adoption under applicable state law and, due to Veronica's parents having never legally married, sole custody would have been granted to her biological mother who then could have placed her for adoption on her own.[87] This personifies the stark difference between adoptions of Indian children that fall under ICWA and those of all other children that are governed by state law. Because the quantum of Veronica's blood is a miniscule percentage Cherokee, she spent the first five years of her life, which are considered by many as the most formative years in a child's development, being traded back and forth as a pawn under ICWA.

c. A Mess in the California Court System

The most recent ICWA case, *In re Alexandria P.*, also clearly demonstrates how the confusing standards of ICWA are still being inconsistently interpreted and applied, leading to tragic results. At the center of this case is a little girl named Alexandria but known to the world as Lexi. Lexi's biological mother had six other children who were all removed by the state due to her substance abuse issues.[88] Her father, who is a member of an Indian tribe, has a lengthy criminal record and had also lost custody of his previous biological child.[89] At seventeen months of age, Lexi was removed from her biological mother's home due to accusations of neglect.[90] By the time she was two, she had been placed with three foster families.[91] Under the care of the first family, she suffered physical injuries that caused her to be removed and placed with another family that gave her up a few weeks later due to what they called her "extreme neediness." By this time Lexi had no idea which adults she could actually trust and in fact "called every adult . . . 'Mommy' or 'Daddy'. . . . [and] . . . was weepy, . . . clingy, . . . [and] volatile."[92] However, after being placed with the third family, the Pages, Lexi's behavior began to improve dramatically; she bonded with her new "parents" and their other siblings who became like brothers and sisters to her.[93] The tribe allowed her to stay in her non-Indian placement with the Pages so long as efforts were being made to "reunify" her with her Indian father; however, two and a half years later when Lexi was almost five years old those efforts failed, and she was removed from the Pages home and, due to the preferences of the ICWA, sent to live with her father's non-Indian extended family in Utah.[94] However, the Pages defied the court order to release Lexi to social workers for her transfer and hysteria ensued "when protesters and media surrounded the house in an effort to prevent Lexi from leaving

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[83] *Id.*
[84] Brief of Amicus Curiae American Academy of Adoptive Attorneys in Support of Petitioners at 3, *In re* Alexandria P., 204 Cal. Rptr. 3d 617 (Cal. App. 2d Dist. 2016), *review denied* (Sept. 14, 2016), *cert. denied sub nom*. R. P. v. Los Angeles County Dept. of Children and Fam. Services, 137 S. Ct. 713 (2017) No. 16-500 WL 6803676.
[85] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2562 (2013).
[86] *Id.* at 2564.
[87] *Id.* at 2562.
[88] *In re* Alexandria P., 204 Cal. Rptr. 3d 617, 622 (Cal. App. 2d Dist. 2016), *review denied* (Sept. 14, 2016), *cert. denied sub nom*; R. P. v. Los Angeles County Dept. of Children and Fam. Services, 137 S. Ct. 713 (2017).
[89] *In re* Alexandria P., 204 Cal. Rptr. 3d at 625; *R. P.* 137 S. Ct. at 713.
[90] Lorelei Laird, *Children of the Tribe Lawsuits Claim the Indian Child Welfare Act Is Not Always in the Best Interests of Those It's Meant to Protect*, 102 ABA J. 40 (October 2016).
[91] *Id.* at 40-42.
[92] *Id.* at 42.
[93] *In re* Alexandria P., 204 Cal. Rptr. 3d at 625; *R. P.* 137 S. Ct. at 713.
[94] *In re* Alexandria P., 204 Cal. Rptr. 3d at 625; *R. P.* 137 S. Ct. at 713.

the premises, [and] [a]s the car carrying Lexi pulled away . . . protesters followed the vehicle, with some beating on the windows and screaming as the terrified child cried in the back seat."[95]

The Pages fought for Lexi all the way up to the Supreme Court, which denied certiorari in 2017,[96] arguing that looking to the best interests of the child "good cause" had been shown to depart from the placement preferences of the ICWA.[97] As previously discussed, courts have struggled with how or even if to apply the best interests of the child standard in child custody proceedings under the Act, and in fact, an entire article could be written on the back and forth decisions of the courts involved in this particular case as they tried to decipher exactly how the best interest standard worked with the analysis of "good cause" in the placement of an Indian child. Through the appeals of this case the courts stated several different and conflicting viewpoints alternating back and forth between holding that "a good cause determination should not devolve into a standardless, free-ranging best interests inquiry,"[98] to finding that the best interests should be "a" factor but not an "independent consideration"[99] in the analysis, to then saying that the child's best interests should not be controlling as weight should not be given "to any one factor over others."[100] In the end Lexi was left in the custody of her father's extended family in Utah and the Pages have had little if any contact with the child they considered their daughter and sister for several years.

d. Constitutional Concerns

Being protected by the provisions of the U.S. Constitution is considered by many as "the greatest political privilege that was ever accorded to the human race."[101] Certainly, all United States citizens including American Indians come under the basic protections afforded by the Constitution. However, time and time again, as U.S. Courts consider cases under ICWA, the Act's constitutionality becomes more and more debatable.

1. ICWA Violates Equal Protection

Arguably, ICWA violates the Fourteenth Amendment of the U.S. Constitution. The Equal Protection Clause of the Fourteenth Amendment states that no citizen of the United States shall be denied "equal protection of the laws."[102] As stated by the Supreme Court, "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."[103] Under the Equal Protection Clause, laws based on race will be found unconstitutional unless they can survive strict scrutiny analysis, which is the highest or "most rigid" level of scrutiny that is ever to be applied.[104] As previously noted, Courts have sidestepped applying strict scrutiny to ICWA by defining "Indian" as a political affiliation rather than a racial group.[105] However, membership in a Tribe is not created through belonging to or signing up to be a member of a particular political entity; rather, the deciding factor is solely the person's blood lineage or ancestry. For example, the Cherokee Nation, which is the largest existing Indian Tribe in the U.S with over 315,000 members, dictates that "[t]o be eligible for a federal Certificate Degree of Indian Blood and Cherokee Nation tribal citizenship, you must be able to provide documents that connect you to a direct ancestor listed on the Dawes Final Rolls of Citizens of the Cherokee Nation with a blood degree."[106] The Supreme Court itself has defined race as protected by antidiscrimination statutes as "identifiable classes of persons who are subjected to intentional discrimi-

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[95] Suzette Brewer, *ICWA: Supreme Court Denies Hearing in Lexi Case*, INDIAN COUNTRY MEDIA NETWORK (Jan. 11, 2017), https://indiancountrymedianetwork.com/culture/social-issues/icwa-supreme-court-denies-hearing-lexi-case/.
[96] R. P. v. Los Angeles County Dept. of Children and Fam. Services, 137 S. Ct. 713 (2017).
[97] *In re* Alexandria P., 204 Cal. Rptr. 3d 617, 622 (Cal. App. 2d Dist. 2016), *review denied* (Sept. 14, 2016), *cert. denied sub nom*; R. P. v. Los Angeles County Dept. of Children and Fam. Services, 137 S. Ct. 713 (2017).
[98] *In re* Alexandria P., Cal. Rptr. 3d at 633; *R. P.* 137 S. Ct. at 713.
[99] *In re* Alexandria P., Cal. Rptr. 3d at 633; *R. P.* 137 S. Ct. at 713.
[100] *In re* Alexandria P., Cal. Rptr. 3d at 633; *R. P.* 137 S. Ct. at 713.
[101] Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POLICY 543 (1996).
[102] U.S. Const. amend. XIV.
[103] Palmore v. Sidoti, 466 U.S. 429, 432 (1984).
[104] Toyosaburo Korematsu v. U.S., 323 U.S. 214, 216 (1944).
[105] Morton v. Mancari, 417 U.S. 535, 554 (1974).
[106] *Tribal Citizen: Citizenship*, CHEROKEE NATION, http://www.cherokee.org/Services/TribalCitizenship/Citizenship.

nation solely because of their ancestry or ethnic characteristics,"[107] and even the U.S. Census lists American Indian as a race.[108]

Moreover, the Court has found that race cannot play a part in child custody proceedings not controlled by the ICWA. In concluding that the equal protection clause prohibited racial bias dictating a child's removal from her mother's home the Court stated "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[109] Then Congress took granting equal protection to children of all races a step further when it passed the Multiethnic Placement Act, which, as previously mentioned, prohibits considering the race or ethnic profile of the adoptive family in determining placements of children who belonged to a different race.[110] MEPA was in part passed because minority children, especially African American children, were stagnating in foster care with little, if any hope of adoption due to a lack of same race families who were willing or able to adopt.[111] Opening up the possibility of interracial adoption created a whole new supply of ready and loving homes for these children.[112] Harvard Law Professor Elizabeth Bartholet openly criticized ICWA when compared to the provisions granted to children of all other races by MEPA stating "that children's interests are served by placement in the earliest available nurturing permanent homes, regardless of color. Other laws, including the Indian Child Welfare Act, conflict with these principles; American Indian children are treated as resources belonging to Indian tribes."[113]

Several of the guidelines of ICWA clearly mandate the unequal treatment of Indian children as compared to all other children in similar situations. The higher standard of beyond a reasonable doubt, which is required to terminate parental rights related to an Indian child, sometimes works to leave Indian children in abusive homes where they continue to suffer from injury or even death.[114] Even if they are removed, the Act's placement preferences make it very unlikely that they will ever be adopted because of the lack of Indian families who are willing or able to do so.[115] This leaves many Indian children moving from foster home to foster home for their entire childhood and adolescence rather than being permanently placed or adopted. Also, many families looking to foster or adopt are weary or even completely unwilling to take on Indian children out of fear of the legal repercussions of becoming attached to an Indian child, making the availability of families for the placement of Indian children even more scarce.[116]

Plus, the extra efforts that must be made to attempt to reunify the Indian family mean longer and longer waiting times spent in foster care and in court before an Indian child can even be placed within

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[107] Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987).
[108] *Anna Brown, The Changing Categories the U.S. Has Used to Measure Race*, PEW RESEARCH CENTER (June 12, 2015), http://www.pewresearch.org/fact-tank/2015/06/12/the-changing-categories-the-u-s-has-used-to-measure-race/.
[109] Palmore v. Sidoti, 466 U.S. 429, 433 (1984).
[110] *Placement and Permanency*, UNITED STATES COMMISSION ON CIVIL RIGHTS (Sept. 21, 2007), http://www.cwla.org/briefing-the-multiethnic-placement-act-minority-children-in-state-foster-care-and-adoption/.
[111] *Id.*
[112] *Id.*
[113] Elizabeth Bartholet, *In Adoptions, Take Race Out of the Equation*, THE NEW YORK TIMES (Feb. 3, 2014), http://www.nytimes.com/roomfordebate/2014/02/02/in-adoption-does-race-matter/in-adoptions-take-race-out-of-the-equation.
[114] *See* Clancy v. Addison, No. CIV-12-434-R, 2015 WL 5692165, at *1 (W.D. Okla. Apr. 30, 2015), report and recommendation adopted, No. CIV-12-434-R, 2015 WL 5692172 (W.D. Okla. Sept. 28, 2015) (child killed by mother's boyfriend after the tribe refused to terminate mother's custody); George F. Will, *The Blood-Stained Indian Child Welfare Act*, THE WASHINGTON POST (Sept. 2, 2015), https://www.washingtonpost.com/opinions/the-blood-stainedindianchildwelfareact/2015/09/02/d3aea62e50cb11e5933e7d06c647a395_story.html?utm_term=.afaa6105127b; Randy Ellis, *Lawsuit Challenges Indian Child Welfare Act*, THE OKAHOMAN (July 8, 2015, 12:00 AM), http://newsok.com/article/5432362; Clint Bolick, *The Wrongs We Are Doing Native American Children*, NEWSWEEK (Nov. 12, 2015, 3:48 PM), http://www.newsweek.com/wrongs-we-are-doing-native-american-children-389771.
[115] ELIZABETH BARTHOLET, FAMILY BONDS 99-101 (1993) (noting that there is no doubt that "racial matching policies result in delays and denial of permanent placement for minority children"); Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, PHOENIX NEW TIMES (Sept. 7, 2016, 7:32 AM), http://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832.
[116] Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, PHOENIX NEW TIMES (Sept. 7, 2016, 7:32 AM), http://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832.

the ICWA's preferences or with a permanent family at all.[117] Social workers have gone back and forth on exactly how intensive these reunification efforts have to be, but in a move that further exaggerates the extremes children under ICWA face, the Bureau of Indian Affairs in its 2015 guidelines "stipulated that reunification efforts should continue even in the face of aggravated circumstances, such as 'abandonment, torture, chronic abuse, and sexual abuse.'"[118] It is truly a sad comparison that the federal Adoption and Safe Families Act provides for a much higher standard for all children except those considered Indian by a Tribe's determination of ancestry.[119] Like Adolph Plessy, Indian children in the U.S. are segregated to a slower and dysfunctional train car on their road to foster placement or adoption for no reason other than their race.[120]

Under the Equal Protection Clause, a law that distinguishes based on race can only survive the strict scrutiny analysis if it is proven to be "narrowly tailored to further a compelling government interest."[121] This begs the question, is ICWA actually furthering a compelling government interest? Although Congress relied heavily on the notion that removing Indian children from their families and culture was akin to genocide of the Indian race there is "surprisingly little empirical data addressing the impact of the removal of Indian children from their culture and their placement in the non-Indian, predominantly Anglo-Saxon culture."[122] It appears that "much of what Congress relied on was anecdotal and statistical information and the inferences drawn from that." Ironically, since race can no longer be considered in adoption and child custody proceedings not falling under ICWA, most if not all of the studies that do exist on the subject "pertain to transracial adoptions and the effect on minority children."[123] Because Native American is perfectly analogous to any of a long list of races defined by blood ancestry, it makes sense to look at studies on transracial adoptions in general when considering the consequences on Indian children adopted by non-Indian parents. Professor Elizabeth Bartholet studied "how well transracial adoptions work from the adoptee's viewpoint" by looking to "the adoptees' adjustment, self-esteem, racial identity, and integration into the adoptive family as well as the community."[124] Her research uniformly shows that "transracial adoption [is] working well from the viewpoint of the children and the adoptive families involved. The children are doing well in terms of such factors as achievement, adjustment, and self-esteem. They seem fully integrated in their families and communities, yet have developed strong senses of racial identity." Moreover, the research of psychiatrist Dr. Joseph Westermeyer on the adoption of Indian children by non-Indian families concluded that when Indian children are exposed to some Indian culture, through friends for example, they are able to maintain "secure Indian cultural identities" even when they have been adopted into non-Indian families.[125] Indeed many judges have recognized that children can be placed in non-Indian homes while still maintaining links to their culture by requiring their caregivers "to maintain ties with members of the child's tribe and extended family."[126] Like people and children of all races, Indian children have many avenues available to them that they can use to stay connected to their Indian heritage and culture. However, those needs should not take precedence over the equally important and complex array of other emotional and physical needs that a healthy child gets fulfilled by being a part of a loving and permanent family. Children of all races can have the best of both worlds by staying in touch with their cultural heritage while being an integral part of a family that may not be of their same ethnicity. Clearly, Congress's concerns of cultural genocide

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[117] Matter of Custody of S.E.G., 521 N.W.2d 357, 358, 364 (Minn. 1994) (finding that, although the three children involved had a non-Indian family willing to adopt them, their "need for permanence" could be better met in foster care, so as to adhere to ICWA's placement preferences).
[118] *Id.*
[119] *See* ADOPTION OF CHILDREN—FOSTER CARE, PL 105–89, November 19, 1997, 111 Stat 2115; Matter of Custody of S.E.G., 521 N.W.2d at 364; NASWDC, *Adoptions and Safe Families Act of 1997* (2017), http://www.naswdc.org/archives/advocacy/updates/1997/safeadop.htm.
[120] Plessy v. Ferguson, 163 U.S. 537, 538 (1896), overruled by Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954).
[121] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
[122] JONES, TILDEN & GAINES-STONER, *supra* note 3, at 18 n.36.
[123] *Id.*
[124] Bakeis, *supra* note 100, at 548.
[125] Joseph Westermeyer, *The Apple Syndrome in Minnesota: A Complication of Racial-Ethnic Discontinuity*, 10 J. OPERATIONAL PSYCHOL. 134, 137-39 (1979).
[126] Atwood, *supra* note 81, at 665.

are not supported by enough evidence to prove that they are even valid much less to ensure that they represent a compelling government interest so as to survive strict scrutiny.

Additionally, ICWA is not working to reduce the numbers of Indian children being removed from their homes and families. Almost thirty years after the enactment of ICWA statistics show that "Indian children are still disproportionately removed from their families by states, basic compliance with the ICWA remains problematic, and cultural bias still influences the decision making process."[127] For example, in Alaska, which is the only state that has actually studied the effects of ICWA on adoption and "out of home" placements, removal of Indian children from their Indian families has significantly increased since the Act began being applied.[128] This finding was based on statistics from a survey done by the Association of American Indian Affairs which estimated that between 1976 and 1986 the number of Indian children in "out-of-home" placements in Alaska grew from 393 to 1,010 while the total number of Native American children in that state only increased by 18 percent over the same time period.[129] More recently a report by the National Indian Child Welfare Association found that Native American children are "overrepresented in the nation's foster care system at more than 1.6 times the expected level and are overrepresented among children in foster care who are awaiting adoption at two to four times the expected level."[130] In Minnesota, which has a very small Indian population compared to other states with less than 2 percent of the state's children being Indian, yet Indian children make up almost one fourth of the foster care population there.[131] Findings by the U.S. Department of Health and Human Services list neglect or maltreatment as the largest causes of Indian children being removed by social services and their studies have shown that Indian children are at a greater risk of suffering from these types of abuse than children of other races.[132] However, in the almost four decades since ICWA was passed these numbers have not decreased, and the fact that child abuse continues to be a serious problem in the American Indian population signifies deeper systemic issues, which the Act does not even address, much less repair or correct. As the rate of Indian children being removed from their homes continues to grow it appears less and less likely that ICWA is serving any sort of government interest compellingly enough to pass strict scrutiny.

Since ICWA was passed, society and the world has changed in many important ways. One of the ways that the world is changing is in how people view race, and it is questionable whether current perceptions and ideals of race will survive as people continue to genetically and ancestrally blend. According to sociological studies "the racial and ethnic makeup of the American people is in flux, . . . [and] the boundaries between racial and ethnic groups are becoming blurred by high rates of intermarriage and the growing number of persons with mixed ancestry."[133] This ever-changing and blending of race has led many scientists to conclude that a person's ethnicity or racial composition will become of less and less significance in American society.[134] The Act uses a child's biology to define that child as an "eligible" member of the tribe; however, how will this analysis play out as the racial profiles of children in America continue to expand? How are courts to factor in the race or races of multiethnic parents and extended family? Should Indian ancestry and the preservation of the Indian tribe be the only heritage that matters, and therefore, dictate who can parent that child and what family that child can be a part of? As people become more multiethnic the "Act's definition of 'Indian child' may run against the understanding that identity is a fluid, contingent construct. When a state court judge is faced with feuding parties advancing disparate characterizations of a child's identity, the judge may well resist cloaking the

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[127] Maylinn Smith, *Where Have All the Children Gone? When Will They Ever Learn?*, in FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 251 (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort eds., 2009).
[128] Bakeis, *supra* note 100, at 557.
[129] *Id.*
[130] NICWA, *Time For Reform: A Matter of Justice for American Indian and Alaska Native Children* at 5 (Nov. 19, 2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/nicwareportpdf.pdf.
[131] Brandon Stahl & Mary Jo Webster, *Indian Kids in Foster Crisis*, THE STAR TRIBUNE (Aug. 21, 2016), http://www.startribune.com/part-1-why-does-minnesota-have-so-many-american-indian-kids-in-foster-care/389309792/#1.
[132] NICWA, *supra* note 128, at 5.
[133] Anthony Daniel Perez & Charles Hirschman, *The Changing Racial and Ethnic Composition of the US Population: Emerging American Identities*, POPULATION AND DEVELOPMENT REVIEW (Mar. 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2882688/.
[134] *Id.*

child of mixed heritage with one monolithic classification."[135] It is no wonder that many state court judges are frustrated by the Act's requirement that they rule in absolutes created by blood lineage. In *Lawrence v. Texas* the Supreme Court recognized that although the "history and tradition" of a social or moral construct may play a part in the analysis of that issue's relevance in society today, those factors "are the starting point but not in all cases the ending point" to the inquiry.[136] As the racial identity of America continues to blur, the law must be fluid enough to move with those currents of change, and statutes that take race into account, such as ICWA, must be reevaluated or completely repealed so as to provide equal protection to all.

2. ICWA Violates Due Process

It is likely that ICWA also violates the Fourteenth Amendment of the United States Constitution by its noncompliance with the Due Process Clause. The Due Process Clause of the Fourteenth Amendment says that no State shall "deprive any person of life, liberty, or property, without due process of law."[137] When evaluating a law's potential denial of due process rights, the court will perform an analysis that begins by identifying "the precise nature of interest being threatened by the State."[138] The Supreme Court has "firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'"[139] The Court found that it is "self-evident" that in certain cases the rights of parents to their children "are sufficiently vital to merit constitutional protection."[140] Family rights are granted both substantive and procedural protection under the Due Process Clause.[141] Similar to the equal protection analysis, under due process, strict scrutiny is applied to a law that conflicts with a fundamental right, and "[l]egislation which interferes with the enjoyment of a fundamental right is unreasonable under the Due Process Clause and must be set aside or limited unless such legislation serves a compelling public purpose and is necessary to the accomplishment of that purpose."[142]

It is well established that the Constitution protects the rights of parents to their children as fundamental. In *Stanley v. Illinois* the Court found a father's right to his biological children to be one that "undeniably warrant[ed] deference and, absent a powerful countervailing interest, protection."[143] However, ICWA works to elevate the rights of the tribe above those of the parents by granting the tribe the ultimate say in all adoption and child custody proceedings involving Indian children. This violation of parental rights has played out in several cases. In *Mississippi Band of Choctaw Indians v. Holyfield*, the parents went to great lengths to try and avoid surrendering jurisdiction over their twin's adoption to the tribe.[144] Both parents in this case were sure that they wanted their children raised by non-Indian parents, off of the reservation; however, the Court found that the tribe ultimately controlled who could adopt their children.[145] In *In re Baby Girl A*, the mother was so clear in her desire to keep the tribe out of decisions related to her child's adoption, and so sure that she wanted her child raised by non-Indian parents, that she went all the way to Canada to find the adoptive family.[146] The California court presiding over this case made an interesting distinction by stating that this was a voluntary adoption on the mother's part, and she could always choose to keep the child herself, but if she chose to move forward with the adoption, the tribe and the preferences of ICWA would control who was able to adopt her child.[147] The court stipulated that "[b]y enacting the ICWA, Congress has placed further conditions on the choice of prospective parents when placing an Indian child for adoption."[148] In *In re M.K.T.*, a father relinquished his tribal membership in an effort to try and keep his daughter with the non-Indian foster

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[135] Atwood, *supra* note 81, at 593.
[136] Lawrence v. Texas, 539 U.S. 558, 572 (2003).
[137] U.S. Const. amend. XIV.
[138] Lehr v. Robertson, 463 U.S. 248, 256 (1983).
[139] *Lehr*, 463 U.S. at 256 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974)).
[140] *Id.*
[141] *Id.*
[142] *In re* Bridget R., 49 Cal. Rptr. 2d 507, 523 (Cal. App. 2d Dist. 1996), as modified on denial of reh'g (Feb. 14, 1996).
[143] Stanley v. Illinois, 405 U.S. 645, 651 (1972).
[144] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37–40 (1989).
[145] *Id.*
[146] *In re* Baby Girl A., 282 Cal. Rptr. 105, 107 (Cal. App. 4th Dist. 1991).
[147] *Id.* at 110.
[148] *Id.*

mother who had been caring for her.[149] He felt this was in the best interests of his daughter, and he wanted to "take the matter out of the Tribe's hands."[150] The child's mother agreed with him and also expressed her intense desire that her daughter stay in the care of the foster mother with whom the child had bonded.[151] The court here allowed the child to remain in the foster home, but clearly stated that this decision was just temporary and that the "child was subject to the Indian Child Welfare Act."[152]

These parents, and many other Indian parents like them, are unselfishly looking at all of the circumstances involved and what is ultimately in their child's best interests; a factor that is unfortunately completely left out of the analysis by many state and tribal courts.[153] These parents might look at modern conditions on Indian reservations, and within the Native American community, and question what environment is best for their child. Today, there are roughly 5.2 million American Indians in the United States. Of this number, 31.6 percent are under the age of 18.[154] This represents a more condensed youth population than the overall child and adolescent population in the United States, which was around 24 percent in 2010.[155] According to statistics from the National Indian Child Welfare Association ("NICWA"), Indian children are more at risk of living in poverty than children of other races.[156] In 2009, the poverty rate in the American Indian community was 27.3 percent, which was "almost twice the national poverty rate of 14.2" percent across the rest of the U.S.[157] The Native American school system is also in total disarray with "native youth post[ing] the worst achievement scores and the lowest graduation rates of any student subgroup."[158] In 2014, only 67 percent of American Indian students managed to graduate from high school, compared to the national average of 80 percent and "many of their school facilities have been equally neglected, lacking . . . heat and running water."[159]

Additionally, American Indian "youth have higher rates of anxiety, substance abuse, and depression."[160] These mental health issues are reflected by high suicide rates. In 2010, of the total number of deaths of Indian children and young adults ages 15 to 24, one-fifth was caused by suicide.[161] Alcohol abuse has long been a problem in the Native American population, and this issue has been inherited by their youth; "[i]n 2007, 8.5% of all [American Indian] youth were struggling with an alcohol use disorder compared to 5.8% of the general use population."[162] Gang activities have also become a real concern on and around Indian reservations with "15% of [American Indian] youth. . . involved with gangs compared to 8% of Latino youth and 6% of African American youth nationally."[163] Many times when a parent is faced with a child that they are unwilling or unable to properly care for, they may have to perform an emotional and mental balancing of what future they can give their child. Children, regardless of race, deserve to live in the most positive environment available to them, and parents have a fundamental right to "freedom of personal choice in matters of . . . family life."[164] Therefore, it is easy to see why Indian parents may want the option of selecting from a diverse array of families when choosing what environment is best for their child.

In *Troxel v. Granville* the Count recognized a parent's fundamental right to control who their child visits. In this case, the Court overruled a Statute that "effectively permit[ed] a court to disregard and

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[149] *In re* M.K.T., 368 P.3d 771, 776–77 (Okla. 2016), *as corrected* (Feb. 1, 2016).
[150] *Id.* at 776.
[151] *Id.* at 779.
[152] *Id.* at 801.
[153] *See* cases cited *supra* note 48 and accompanying text.
[154] *American Indian Children and Families: Problems Facing American Indian Children and Families*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION (2017), http://www.nicwa.org/children_families/.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Lauren Camera, *Native American Students Left Behind*, U.S. NEWS (Nov. 6, 2015, 11:28 AM), https://www.usnews.com/news/articles/2015/11/06/native-american-students-left-behind.
[159] *Id.*
[160] *American Indian Children and Families: Problems Facing American Indian Children and Families*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION (2017), http://www.nicwa.org/children_families/.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] Lehr v. Robertson, 463 U.S. 248, 256 (1983) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974)).

overturn any decision by a fit custodial parent concerning visitation whenever a third party (here the grandparents) affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest."[165] The Court found that parents have a fundamental right regarding the "care, custody, and control of their children."[166] Then the Court held that the statute in question violated the mother's due process rights in regard to her children, and that the visitation order "clearly violated the Constitution."[167] It seems completely paradoxical that the Court recognizes a parent's right to control who their child visits, but in cases that fall under the ICWA, it allows the tribe to supersede the rights and wants of parents in regard to permanent placements of their children. ICWA even goes so far as to dictate that if an Indian family cannot be located within the child's immediate tribe then that child should be placed with an Indian family of any tribe in the United States, no matter how far or attenuated that may be from the child's home.[168] The Act openly violates due process by placing "the purpose of ICWA and tribal courts, . . . to maintain the survival of the tribe through retention of its members,"[169] above the fundamental right of parents to "control" their children.[170]

V. Conclusion

Over the many years since ICWA's enactment social views and judicial interpretations have changed dramatically in the United States. The Act was meant to be a remedy to societal conditions and biases in regard to race and culture that were affecting Native American children and families almost forty years ago; however, the Act has been unable to fix those problems. Moreover, ICWA has potentially forced courts to violate the Equal Protection Clause of the U.S. Constitution, by considering race in child custody proceedings, and has possibly stripped Indian parents of their Constitutional due process rights pertaining to their own children and families. Clearly, the time has come for ICWA to be completely reinterpreted by the Supreme Court or have its unconstitutional provisions repealed by Congress.

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[165] Troxel v. Granville, 530 U.S. 57, 57 (2000).
[166] *Id.*
[167] *Id.* at 57-59.
[168] 25 U.S.C. § 1915 (2012).
[169] Lorinda Mall, *Keeping It in the Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence*, in FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 165 (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort eds., 2009).
[170] Troxel, 530 U.S. at 57.

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

DIVORCE
JURISDICTION AND PROCEDURE

WIFE BORE RESPONSIBILITY TO ENSURE HUSBAND RECEIVED PROPER SERVICE TO SUPPORT DEFAULT JUDGMENT.

¶17-5-01. *Nelson v. Nelson*, No. 14-16-00602-CV, 2017 WL 2484378 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (mem. op.) (06-08-17).

Facts: Wife obtained a no-answer default judgment in her suit to enforce a contract incident to her and Husband's divorce. Subsequently, Husband filed a restricted appeal, asserting inadequate service.

Holding: Reversed and Remanded

Opinion: In a restricted appeal, there is no presumption in favor of valid issuance, service, and return of citation. If the record fails to affirmatively show strict compliance with service rules, attempted service is invalid. Actual notice, without proper service, is insufficient to invoke a trial court's jurisdiction to grant a default judgment.

Here, Husband was served an amended petition without a citation. Despite Wife's assertion that she properly requested service and that the error was that of the clerk's office, Wife bore the responsibility to see that service was properly accomplished and properly reflected in the record.

DEATH-PENALTY SANCTIONS IMPROPER WITHOUT REASONED EXPLANATION AS TO THE APPROPRIATENESS OF THE SANCTIONS OR CONSIDERATION OF LESSER SANCTIONS.

¶17-5-02. *Mullins v. Mullins*, No. 02-16-00449-CV, 2017 WL 3184676 (Tex. App.—Fort Worth 2017, no pet. h.) (mem. op.) (07-27-17).

Facts: Wife filed a petition for divorce. Husband answered and filed a counter-petition that included claims of forgery, breach of fiduciary duty, fraud, and misapplication of community property. Over the next several months, Wife failed to cooperate with discovery and refused to answer questions during a deposition. Husband filed two separate motions for sanctions and to compel discovery. After each, the trial court ordered Wife to comply with discovery requests but opted to consider the motions for sanctions at a later date.

Eventually, the parties reached an agreed discovery order, but Wife still failed to fully respond to interrogatories, and the documents produced were not identified or categorized to any particular discovery request. Husband asked the trial court to impose all available sanctions against Wife. After a hearing, at which Wife did not appear, Husband argued that a third discovery order was not going to get Wife to comply. The trial court sanctioned Wife by striking her pleadings, ordering her to pay Husband's expenses and attorney's fees, preventing her from conducting discovery, foreclosing her ability to present evidence, prohibiting her from refuting any of Husband's claims or defenses, and granting Husband a default judgment. About a week later, Husband offered evidence to support a default judgment, which the trial court signed. Wife appealed.

Holding: Reversed and Remanded

Opinion: A trial court must consider the availability of lesser sanctions and offer a reasoned explanation as to the appropriateness of the sanction before imposing death penalty sanctions. A threatened sanction does not constitute the imposition of a sanction. Here, the order listed instances where Wife failed to comply with discovery orders, but it did not indicate why death-penalty sanctions were warranted. Additionally, no other sanctions were imposed before the court ordered death-penalty sanctions.

Editor's comment: *So among other things, a trial court must bite, not merely bark, before imposing death penalty sanctions. J.V.*

Editor's comment: *Just by reading this case, you can see how important it is to make sure not only that you have the proper findings in any discovery sanctions order, but also that the court makes a finding of lesser sanctions before it issues death penalty sanctions. Here, it appears that the husband requested discovery sanctions but they were put off until a later date. How many of us do that with sanctions and attorney's fees, and ask for the court to consider it at final trial? I know I do that all the time, but this case shows that if you have a litigant who is not going to participate, you best get sanctions and fees and the appropriate findings while the case is going on if you believe death penalty sanctions may be necessary. J.H.J.*

DIVORCE
VALIDITY OF MARRIAGE

THE MOST RECENT MARRIAGE IS PRESUMED VALID AGAINST ANY PRIOR MARRIAGE.

¶17-5-03. ***Zewde v. Abadi*****,** ___ S.W.3d ___, No. 14-16-00536-CV, 2017 WL 3441392 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (08-10-17).

Facts: Zewde and Abadi were married on January 2, 2014, and their son was born on June 17, 2014. On February 13, 2015, Zewde filed an Original Petition to Declare Marriage Void, asserting that Abadi's prior marriage in Eritrea to Italian citizen to Carbonetti was never properly dissolved; thus, according to Zewde, his and Abadi's subsequent marriage was void. Abadi subsequently filed a counter-petition for divorce.

The trial court bifurcated the trial to hear the validity of the marriage issue first and during that trial, Abadi testified that she married Carbonetti in Eritrea in March 2002, they have 2 children together, and they were legally separated in an Italian court proceeding in 2009. The Italian court also ordered Carbonetti to pay child support to Abadi. Abadi subsequently initiated pro se divorce proceedings in Eritrea in 2013. The record contains what purports to be an Eritrean divorce decree, and its English translation, showing a date of divorce of November 12, 2013. The decree further notes that Abadi was ordered to announce the proceedings in a local newspaper and that such notice appeared in a certain newspaper on October 22, 2013. Carbonetti, however, failed to appear in court, and the decree was issued in his absence. Abadi testified that she believed herself to be properly divorced.

Zewde's counsel introduced an Italian court decree indicating that proceedings in Italy were ongoing in 2013. Abadi testified that the Italian proceedings were for legal separation, not divorce, and that she sought a divorce in Eritrea because that is where they were married and she wanted the divorce decree to be in her own language. Zewde's counsel also submitted a copy and a translation of the notice of the Eritrean proceedings published in an Eritrean newspaper. The notice advises that Carbonetti should appear at the court at 8 a.m. on November 13, 2013. The Eritrean divorce decree was granted on November 12, 2013. Neither side presented the trial court with any Italian or Eritrean marital law. At the conclusion of the first phase of the trial, the trial court denied Zewde's request that his marriage to Abadi be declared void.

At the conclusion of the second phase of the bench trial, the trial judge named Abadi as the sole managing conservator of the child and Zewde as possessory conservator.

Holding: Affirmed

Opinion: Every marriage entered into in the State of Texas, including Zewde and Abadi's, is presumed to be valid. When a person is alleged to be married to more than one person, the most recent marriage is presumed valid against any prior marriage. Accordingly, Zewde had the burden of proof to establish that his marriage to Abadi was invalid. Although it was not her burden to prove the validity of the marriage, Abadi introduced into evidence a purported copy of her Eritrean divorce decree and testified how and why she obtained the divorce. She further testified that she believed herself to be validly married to Zewde. Zewde did not plead or attempt to prove any Eritrean law; however, he did present certain evidence that he contends established that Abadi's divorce was fraudulently obtained. Zewde's evidence attempted to establish three things: (1) Italian court proceedings were ongoing when Abadi filed for divorce in Eritrea, (2) Abadi made false statements in her affidavit, and (3) the notice published in the Eritrean newspaper requested Carbonetti's appearance in court the day after the decree was granted. Zewde failed to introduce sufficient evidence to establish that Abadi's divorce was fraudulently obtained.

There was sufficient evidence to support Abadi's appointment as sole managing conservator. There was significant evidence in this case of conflict and animosity between Abadi and Zewde. For example, Abadi testified that Zewde had acted cruelly toward her, including calling her names, at times preventing her from leaving a room or their home, threatening to kill her, and threatening to harm her other children. She also presented her brother's testimony, wherein he described an incident in which Zewde threatened to kill them. The trial court could have found from this evidence that it would be difficult for Abadi and Zewde to reach shared decisions in the child's best interest and encourage and accept a positive relationship between the child and the other parent and that the psychological or emotional needs and development of the child would not benefit from the appointment of them as joint managing conservators.

DIVORCE
COMMON LAW MARRIAGE

WIFE NOT REQUIRED TO SHOW A REPUTATION IN THE COMMUNITY THAT SHE AND HUSBAND WERE MARRIED BECAUSE EVIDENCE ESTABLISHED THAT HUSBAND AND WIFE HELD OUT AS MARRIED TO INSURANCE COMPANY, MEDICAL PROVIDERS, AND BANK.

¶17-5-04. *In re B.H.W.*, No. 05-15-00841-CV, 2017 WL 2492612 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (06-09-17).

Facts: During their divorce proceedings, Husband and Wife disputed the date of marriage. Wife asserted that they entered into a common-law marriage a month before their wedding ceremony.

Before they married, Wife discovered she was pregnant, and she and Husband happily announced the news to Husband's family. Shortly before attending her first prenatal appointment, Husband provided Wife with a health insurance card that listed her as his spouse. Wife's medical records listed Wife with Husband's surname and marked her legal status as married. Wife asserted that she and Husband provided that information to the intake nurse together. That evening, Husband for the first time asked Wife to sign a prenuptial agreement to put some of his employees at ease. Two days later, they went to Husband's lawyer's office to sign the agreement. Wife signed it without being given the opportunity to read it. The signed agreement had a blank for the date of marriage, which was not added in until after the subsequent ceremony. Immediately after signing the agreement, Husband took Wife to his bank to

add her to his checking account. He represented to the bank that Wife was his spouse, and they executed right of survivorship agreements for the account. About a week later, the couple had a wedding ceremony, and that was the date celebrated as their wedding anniversary. During the trial, Wife introduced her health insurance information which listed the date of coverage—as Husband's spouse—beginning one month before the formal ceremony. A jury found that Husband and Wife entered into a common law marriage one month before the ceremony. Husband appealed, arguing in part that there was no evidence that the couple had a reputation in the community as being married.

Holding: Affirmed

Opinion: After the couple agreed to be married, Wife began using Husband's surname and wearing a wedding band. Husband and Wife jointly told healthcare providers and Husband's bank that they were married. With these facts, Wife was not required to prove they had a "reputation in the community" for being married. While a reputation in the community is a significant factor in determining whether a couple held themselves out as married, it is not itself an element of a common-law marriage.

Editor's comment: *This is a case that interprets the proof requirements for informal marriage. Note that the jury found that the parties entered into an informal marriage before their ceremonial marriage. Although not the square-on point of the opinion, many believe that a later ceremonial marriage negates the possibility of a prior informal marriage. Such is not the case. Also, the court pointed to the representations as married contained in bank and medical records. As such, no one needed to prove that there was some consensus among their friends that they held out. The documents were sufficient. M.M.O.*

Editor's comment: *Every common law marriage case is worth a read, because each one is so fact-specific and the application is always interesting. Here, the focus was on the "holding out" element, and the court says, maybe for the first time, "[n]evertheless, the family code does not require multiple representations or multiple instances of "holding out."" I can foresee this language being quoted heavily in future briefs and motions. R.T.R.*

Editor's comment: *I have only a brief comment about this case. I've seen a lot of common law marriage claims with people trying to assert that it is necessary that the community believes the parties are married. That's not the rule, and this case has a good explanation of the common law marriage elements and that while having a reputation in the community as married is a factor, it is not one of the elements you must prove for common law marriage. Instead, it only goes towards the factfinder's notion of whether the parties are common-law married. J.H.J.*

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT HAD NO AUTHORITY TO SIGN AGREED FINAL DECREE BASED ON MSA THAT INCLUDED SWEEPING ARBITRATION PROVISION WHEN ISSUES REMAINED UNRESOLVED.

¶17-5-05. *S.P. v. N.P.*, No. 02-16-00278-CV, 2017 WL 3821887 (Tex. App.—Fort Worth 2017, no pet. h.) (mem. op.) (08-31-17).

Facts: In the course of their divorce proceedings, Husband and Wife signed an MSA. Part of the MSA required that Husband turn over a Lexus to Wife, while he continued to make payments on the car until paid in full. Subsequently, Husband refused to turn over the car because the MSA did not indicate which party was required to maintain insurance and other car-related expenses. Additionally, there

were other disputed issues relating to the drafting of a final decree. Wife filed a proposed final decree and motion to enter. Husband sent a letter to Wife and the arbitrator detailing issues that were unresolved. Husband asked the trial court to deny entry of the final decree and to compel arbitration. However, after a hearing, the trial court signed an "Agreed Final Decree" that was not signed by either party. Husband appealed.

Holding: Reversed and Remanded

Opinion: Arbitration is a contractual commitment, and a strong presumption favors arbitration. When an arbitration provision states that "any dispute" is subject to arbitration, the provision "is considered to be broad and capable of expansive reach. Further, a presumption exists against waiving a contractual right to arbitration. Merely delaying one's demand is not a waiver of the right to make the demand.

Here, the arbitration was sweeping in scope. Husband properly notified, pursuant to the MSA, the arbitrator and Wife of issues he believed required arbitration. The trial court was required to stay its proceedings until the arbitration had been completed.

Editor's comment: *Family law practioners often skim over mediator's arbitration provisions in MSAs, but they can make a huge difference depending on how they are worded. If you are in doubt, take it out, or limit its scope! R.T.R.*

Editor's comment: *I am seeing more and more of these broad arbitration provisions in MSA's, and many of them are getting overlooked. This case is a good reminder that you need to look at the form-language of every MSA and make sure that it is very specific as to how disputes are to be handled. You may want the trial court to make certain determinations, and the mediator to make others as arbitrator. Or, you may just want to require that disputes be mediated and not arbitrated. Every mediator that I have ever used has different language. Just as a practice tip, put together your own proposed language that you can bring to mediation. Then, if you want to change something about the standard form language of the mediator, you already have that language put together that you can insert. J.H.J.*

DIVORCE
PROPERTY DIVISION

HUSBAND'S EARNEST-MONEY CONTRACT INSUFFICIENT TO OVERCOME COMMUNITY PRESUMPTION.

¶17-5-06. *In re Willett*, No. 03-16-00084-CV, 2017 WL 2417831 (Tex. App.—Austin 2017, no pet. h.) (mem. op.) (06-02-17).

Facts: Husband and Wife entered into a common law marriage. Upon divorce, they disputed the date of marriage and the characterization of two pieces of real property. Husband purchased one piece of property purportedly as "a single person," and two days later, an adjacent piece of property was acquired by both parties as "a married couple." Husband asserted that both properties were his separate property and that he was entitled to reimbursement. Husband argued that the second property was his separate because an earnest-money contract for the property predated the marriage. Alternatively, Husband argued that if either property was characterized as community, he was entitled to reimbursement. Wife contended that any right to reimbursement was offset by benefits his separate property received from community contributions or from her separate property. The trial court characterized the first property as Husband's separate and the second as community and did not award Husband any reimbursement. Husband appealed.

Holding: Affirmed

Opinion: While the date on an earnest money contract may be sufficient to establish the inception of title of land, here the contract in evidence was undated and only referred to one of the two contested properties. Thus, Husband failed to overcome the community property presumption.

Benefits for use and enjoyment of property may be offset against a claim of reimbursement. Here, both parties' testimony tended to show that Husband's separate estate and the marital estate benefited from Wife's contributions.

Editor's comment: *This is a case regarding the community property presumption. An undated contract cannot support a contention that title incepted prior to the marriage and the community property presumption prevails. The party claiming separate has the burden of proof. Here, he failed to meet it. M.M.O.*

MARITAL HOME NOT COMMUNITY PROPERTY BECAUSE QUIT CLAIM DEED TRANSFERRED INTEREST TO THE HUSBAND'S SON FROM PRIOR RELATIONSHIP, AND NO VALID DEED EVER TRANSFERRED PROPERTY TO HUSBAND OR WIFE.

¶17-5-07. *In re Marriage of Kennedy and Clark*, No. 14-15-01038-CV, 2017 WL 2882190 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (mem. op.) (07-06-17).

Facts: Before marriage, Husband lived in his father's home, for which he paid his father on a seven-year lease. When Husband and Wife married, she moved into the home. Three years into the marriage, the seven-year lease ended, and Husband's father signed a quit-claim deed in favor of Husband's sixteen-year-old Son from a prior relationship.

During the marriage, Husband and Wife executed a general warrant deed on the home, in which Husband was purported to be the executrix [sic] of Son's estate, although Son had not died. Husband asserted that the deed was executed to obtain a loan, but he acknowledged that the deed was fraudulent because Son was not dead. Wife asserted that the deed was executed to correct title and did not believe the deed was fraudulent. A few years later, Husband and Wife obtained a home equity loan, using the home as security. A few years after that, Husband, Wife, and Son executed a tax lien deed of trust on the home to pay delinquent taxes.

During Husband and Wife's subsequent divorce, they disputed the characterization of the home. Wife asserted that it was community property, and Husband denied that characterization. Son filed special exceptions and a counter-claim for trespass to title. The trial court held a hearing on characterization of the house and ruled that the home was community property and that Son would take nothing on his claim. The court further ordered that the home be sold and the proceeds be divided as community property. Husband and Son appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Texas law does not restrict the ability of minors to own property, so the quit-claim deed effectively granted Son the property. Any subsequent deeds executed by Husband or Wife were ineffective because Husband and Wife had no ownership interest in the property. Further, even if an age-restriction on property ownership existed, the quit-claim deed would have then been ineffective, and ownership would have remained in Husband's father's name, not Husband's or Wife's.

Editor's comment: *How did the spouses get any of this past the title company? J.V.*

NO EVIDENCE HUSBAND AND WIFE'S MOTHER ENTERED INTO PARTNERSHIP.

¶17-5-08. *In re Marriage of Armstrong*, No. 12-15-00300-CV, 2017 WL 3225053 (Tex. App.—Tyler 2017, no pet. h.) (mem. op.) (07-31-17).

Facts: During the marriage, Wife's mother gave Husband money to purchase property on which he subsequently ran a warehouse business. During the divorce proceedings, in their inventories, both Husband and Wife asserted they each owned a one-half interest in the real property. In the divorce decree, the trial court awarded Husband the business and awarded Wife the real property. Husband appealed, arguing that the real property was not subject to division because it was owned by a partnership and not part of the community estate. Husband asserted that the property was held as a partnership between himself and Wife's mother. Wife asserted that Husband and her mother owned the property as tenants in common.

Holding: Affirmed as Modified

Opinion: There was no evidence that Husband and Wife's mother ever entered into a partnership. They never agreed to share in the profits and never expressed an intent to be partners. Wife's mother never participated in the operation of the business.

Because the evidence established that the community estate had only a one-half interest in the property, the trial court erred in awarding the entire property to Wife as her sole and separate property. Finding that the error did not materially affect the just and right division, the appellate court modified the property division to award Wife only a half-interest in the property and affirmed the decree as modified.

Editor's comment: *It's always interesting to see what a reversing appellate court thinks "materially affects the court's just and right division of the property." In this case, the trial court awarded Wife all the business's real property, purchased for $30,000 in 2010. The court reformed the divorce decree to award Wife the community's half of the property. Therefore, taking $15,000 from Wife did not materially affect the trial court's division. We don't know the value of the rest of the community estate, but $15,000 seems like a lot of money to me. J.V.*

WIFE FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE THAT DEED PURPORTING TO GIFT HER REAL PROPERTY WAS NOT PROCURED THROUGH FRAUD.

¶17-5-09. *In re Marriage of Green and McDaniel*, No. 12-17-00034-CV, 2017 WL 3224866 (Tex. App.—Tyler 2017, no pet. h.) (mem. op.) (07-31-17).

Facts: Husband and Wife were married for over 15 years, during which time, they established an RV park. Husband had heart problems and saw many doctors for his condition. After his doctors' visits, Wife would meet privately with the doctors and later tell Husband that "the doctor said it really wasn't good[,] you may not be with us very long." Wife arranged for an attorney to draft a quickclaim deed to transfer Husband's interest in the RV park to Wife. Husband did not have independent counsel. Husband signed the deed but stated that he only intended to transfer his interest if something happened to him. During the subsequent divorce proceeding, Wife asserted that the RV park had been gifted to her by Husband and, thus, was her separate property. The trial court found that the quitclaim deed had been procured through fraud and that the RV park was community property. Wife appealed.

Holding: Affirmed

Opinion: A deed from one spouse to another creates a rebuttable presumption that the grantee spouse received the property as a gift. The presumption can be rebutted by proof that the deed was procured by fraud, accident, or mistake. The intent of the donor is the principle issue. Therefore, the court must

look to the facts and circumstances surrounding the execution, in addition to the recitations in the deed itself.

All transactions between a fiduciary and her principal are presumptively fraudulent. Thus, it was Wife's burden to establish that she acted fairly and informed Husband of all material facts relating to the alleged transaction.

Here, the deed purported to transfer property in exchange for consideration, but Wife testified the property was gifted to her. After the deed was signed, Husband continued to use community funds for the upkeep of the property. Husband did not have the benefit of independent advice, only that of Wife's attorney, whom Husband had never previously met. Wife regularly spoke to Husband's doctors outside of Husband's presence and told Husband that he would not be with her long. Husband testified that he signed the deed for the sole purpose of transferring the property if something were to happen to him.

Editor's comment: *It is remarkable that in upholding a trial court judgment based on Wife's fraud, the court of appeals did not say that Wife's statements to Husband about his medical condition were untrue. J.V.*

Editor's comment: *Just reading these case facts, I had a feeling where this case was going. Obviously, these issues of fraud are on a very fact by fact basis. Here, it looks like wife basically became the vehicle for all communication to husband. She told him what the doctor said, what the lawyer said, what to do, etc. The only question I have about this though is what duty husband really had as a reasonable adult? While the facts are just icky to me, it seems like husband could have reasonably spoken to his own doctors, or called a lawyer, or even could have just done a Google search. While I certainly think that spouses have a duty not to mess (the PG version of what I really want to say) each other over, I still think husband had a reasonable duty and obligation to find out some of this information on his own. J.H.J.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

ORDER PREMATURELY ENFORCING DIVORCE DECREE VOIDABLE AND NOT SUBJECT TO MANDAMUS RELIEF.

¶17-5-10. *In re Marriage of Tyson*, No. 05-17-00371-CV, 2017 WL 3015731 (Tex. App.—Dallas 2017, orig. proceeding) (mem. op.) (07-17-17).

Facts: The trial court signed an order requiring Wife to sign a warranty deed and convey her interest in the marital residence to Husband within 24-hours of entry of the judgment. Wife filed a petition for writ of mandamus and requested an emergency stay of the order, which the appellate court granted.

Holding: Writ of Mandamus Denied

Opinion: Tex. R. Civ. P. 627 provides that absent the posting of a supersedeas bond, execution of a final judgment from a district court may not issue until thirty days have elapsed since the rendition of the final judgment, or thirty days after the overruling of any motion for new trial, either by written order or by operation of law. A prematurely issued execution of judgment is not void, only voidable, and is not subject to mandamus relief. In comparison, Tex. Fam. Code § 9.007(c) prohibits a court from implementing or clarifying the property division while an appeal is pending. Because this Section is jurisdictional, an order violating § 9.007(c) is void and may be challenged by petition for writ of mandamus.

Here, no appeal had been filed, so Tex. Fam. Code § 9.007(c) did not yet apply. Thus, the order prematurely enforcing the judgment was only voidable and not subject to mandamus relief.

Editor's comment: *See the article by Chris Nickelson on page 15, wherein he explains that § 9.007(c) didn't mean what we always thought it did and how the revisions to § 9.007(c) clarifies this issue.*

Editor's comment: *So what happens now? The deadline to sign the deed has passed and in any event, the court of appeals stayed the order to sign it. Wife could appeal, after which Tex. Fam. Code Â§ 9.007(c) would prohibit the trial court from ordering Wife to sign the deed. J.V.*

SAPCR
PROCEDURE AND JURISDICTION

TO DETERMINE WHETHER UNCLE HAD STANDING TO SEEK CONSERVATORSHIP, TRIAL COURT SHOULD HAVE CONSIDERED FATHER'S PAST AND CURRENT BEHAVIOR AND MAKE REASONABLE INFERENCES ABOUT THE CHILDREN'S NEEDS GOING FORWARD.

¶17-5-11. ***Rolle v. Hardy*****,** ___ S.W.3d ___, No. 01-16-00402-CV, 2017 WL 2376826 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (06-01-17).

Facts: The Children's Mother past away due to cancer. Prior to her death, she and Father had been appointed joint managing conservators of the Children. Upon Mother's death, Father took possession of the Children, who had been staying with Mother's extended family. Mother's brother ("Uncle") filed a SAPCR, seeking sole managing conservatorship. Uncle asserted that he and his wife had been very involved in the Children's lives and that Mother wanted him to care for the Children after her death. Uncle further alleged that Father had never been involved in the Children's lives prior to Mother's death and was not an appropriate caregiver for the Children. After a long hearing on Uncle's standing to maintain the SAPCR, the trial court found that Uncle failed to present satisfactory proof that an order appointing him as the sole managing conservator was necessary because the Children's present circumstances in Father's care would significantly impair their physical or emotional development. Further, the trial court found that the satisfactory proof must have existed on the date the suit was filed and that the court was prohibited from considering what may happen in the future.

Holding: Reversed and Remanded

Opinion: Uncle was required to present "satisfactory proof" that "the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development. "Satisfactory proof" is proof established by a preponderance of the evidence as the facts existed at the time the suit or intervention was filed.

Thus, for Uncle to have standing to pursue his petition seeking a modification of the children's conservatorship, the trial court had to find it necessary to reassess the children's conservatorship order because their present circumstances in the sole managing conservatorship—not merely "care"—of Father would significantly impair their physical health or emotional development. Uncle was not required to establish that he should be appointed as sole managing conservator of the children in order to have standing to seek a modification of the conservatorship order. Whether Uncle should be appointed a sole or joint managing conservator, a possessory conservator, or whether he should be granted any visitation or possession rights at all, was relevant to the merits underlying his petition. That question was not properly before the trial court in making its standing determination.

The trial court erred in looking only at the Children's circumstances on the day Uncle filed his petition. The court's determination necessarily entailed drawing reasonable inferences from the evidence of both past and current behavior that Father exhibited towards the Children and their needs going forward.

Editor's comment: *The holding of this case is pretty scary. Basically, just by reading this case, you would have to pinpoint that harm was already occurring to children at the time of filing or on the day it's filed. That makes no sense. The point of those statutes is to protect children, and if the court cannot look at past, present, and possible future behavior, how can the courts effectively protect children? I think the Court of Appeals definitely got it right here--habit evidence, for standing purposes, is absolutely relevant in determining a potential future harm that could occur to children. J.H.J.*

TEX. FAM. CODE § 156.102 DOES NOT REQUIRE DISMISSAL OF SAPCR IF SUPPORTING AFFIDAVIT INSUFFICIENT TO SUPPORT ALLEGATION THAT THE CHILD'S PRESENT ENVIRONMENT MAY ENDANGER THE CHILD'S PHYSICAL HEALTH OR SIGNIFICANTLY IMPAIR THE CHILD'S EMOTIONAL DEVELOPMENT.

¶17-5-12. ***In re J.R.P.***, ___ S.W.3d ___, No. 14-15-00912-CV, 2017 WL 2959828 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (07-11-17).

Facts: About five months after the parties' divorce, Father filed a petition to modify, asking the court to grant him, instead of Mother, the exclusive right to designate the Child's primary residence. In his affidavit, he alleged that Mother had been taking drugs while in possession of the Child. The trial court held that Father's affidavit was insufficient to support setting a hearing but declined to dismiss the case. The parties agreed that Mother would submit to drug testing, and she tested positive for drugs the next day. Father filed an amended petition with an amended affidavit, to which he attached the positive drug-test results. After a hearing, the court appointed the parents joint managing conservators and awarded Father the exclusive right to designate the Child's primary residence. On appeal, Mother raised a number of issues, including a complaint that the trial court erred in failing to dismiss the proceedings when Father's first affidavit was deemed insufficient.

Holding: Affirmed

Opinion: If a Tex. Fam. Code § 156.102 affidavit is insufficient, the trial court is required to deny the motion to modify and refuse to schedule a hearing. The trial court is not required to dismiss the case. Here, after the trial court found the affidavit insufficient, Father filed an amended petition with an amended affidavit.

Editor's comment: *Ummm….. okay….. the code says that if the affidavit is insufficient, the court should "deny the motion to modify" and "refuse to set a hearing". Somehow the 14th Court decides that "deny" is not equivalent to a final ruling and distinguishes that against "dismissal" of the case. Semantical? I think so. When a motion (sic, petition?) to modify is "denied", isn't that a final ruling on the merits? M.M.O.*

Editor's comment: *This is another one I see all the time, and admittedly, I file motions to dismiss on these grounds frequently. I have even seen some dismissed with prejudice (which is scary). Basically, in reality, if your affidavit is insufficient, this is almost treated like special exceptions. You can't have a hearing and any request for temporary orders may be denied, but the case is not just dismissed. You can amend your pleadings and fix the affidavit. J.H.J.*

GRANDMOTHER ESTABLISHED STANDING PURUSUANT TO TEX. FAM. CODE § 102.004 TO SEEK CONSERVATORSHIP.

¶17-5-13. *In re J.R.W.*, No. 05-15-01479-CV, 2017 WL 3083930 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (07-20-17) (on reh'g).

Facts: Mother and Father had one Child. Father initiated a SAPCR, seeking joint managing conservatorship with Mother. Mother filed a general denial. Paternal Grandmother intervened seeking possession. Mother challenged Grandmother's standing, but the trial court overruled Mother's objections. Mother and Grandmother both asserted that Father had committed family violence and suffered from drug addiction and mental illness. After a final trial, the court appointed Mother and Grandmother as joint managing conservators. Mother appealed, challenging Grandmother's standing.

Holding: Affirmed

Opinion: Although at the hearing on Mother's motion to strike, Grandmother's attorney represented that Grandmother only sought possession of and access to the Child, in her amended pleadings, she sought joint managing conservatorship, and by the time the case went to trial, all parties understood that Grandmother sought conservatorship of the Child. Thus, although Mother based her complaints on both Tex. Fam. Code §§ 153.433 and 102.004, the appellate court addressed only whether Grandmother had standing to seek conservatorship pursuant to § 102.004.

Grandmother attached supporting affidavits to her pleadings, which included, inter alia, assertions that Mother relied heavily on Grandmother to care for the Child, Father struggled with substance abuse and depression, and Mother had anger problems and extreme mood swings. Overall, the evidence readily supported the trial court's implied findings that Grandmother had substantial past contact with the Child and that there was satisfactory proof to the trial court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the Child's physical health or emotional development.

SAPCR
TEMPORARY ORDERS

TEMPORARY ORDER CHANGING THE PERSON WITH THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILDREN'S PRIMARY RESIDENCE WAS VOID BECAUSE NO EVIDENCE THAT CHILDREN'S PRESENT CIRCUMSTANCES WOULD SIGNIFICANTLY IMPAIR THEIR PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.

¶17-5-14. *In re Eddins*, No. 05-16-01451-CV, 2017 WL 2443138 (Tex. App.—Dallas 2017, orig. proceeding) (mem. op.) (06-05-17).

Facts: Mother and Father's agreed divorce decree awarded Father a standard possession schedule their two Children and granted Mother the exclusive right to designate the Children's primary residence. A bit over four months later, Father filed a petition for enforcement, to modify possession, and for orders regarding communication between Mother and Father. Father alleged Mother violated the decree by failing to surrender the Children on a few occasions, sending vulgar text messages, cursing in the presence of the Children during an exchange, surveilling Father at a baseball game, and making three remarks about Father's girlfriend. Mother testified that the Children did not like Father's girlfriend and did not want to go with Father when the girlfriend would be present and that Mother was worried about the girlfriend drinking around the Children. Mother was also concerned that Father had stopped being supportive of the Children's rodeo competitions. At the hearing, the Children's counselor testified that

the Children viewed Father as all bad and Mother as very good and had adopted many of Mother's thoughts and opinions. The therapist further testified that both parents shared too much information about the divorce with the Children. The therapist did not mention alienation.

At the hearing's conclusion, the trial court entered temporary orders making Father the Children's sole managing conservator with the exclusive right to designate the Children's primary residence. The court found that Mother's alienating behavior was detrimental to the short and long term emotional health of the Children. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Despite the fact Father's initial petition to modify was filed within a year of the prior final order, because Father filed an amended motion to modify more than a year after the prior final order, the provisions relating to a modification within a year were inapplicable.

Without an affidavit including facts that the Children's present circumstances would significantly impair their physical health or emotional development, and without a pleading by Father requesting temporary conservatorship, the court's order changing the person with the exclusive right to designate the Children's primary residence was void because Mother was not afforded adequate notice that conservatorship was an issue before the court.

Finally, although the evidence established a dysfunctional relationship between the parents, violations of the divorce decree, inappropriate conduct during exchanges, and possible alienation by Mother of the Children against Father, the evidence was insufficient to support a wholesale change in custody in temporary orders.

Editor's comment: *I find that the terminology used here is difficult. A trial court entered temporary orders, apparently without pleadings or affidavit per the Code, which changed custody. The Dallas court (what is going on in our Dallas COA???!!!) decided that the temp orders were void. And besides, they say, the evidence was insufficient too. That's just a weird use of terminology to achieve this outcome. M.M.O.*

Editor's comment: *The court of appeals denied a subsequent motion to remove the conditional nature of the mandamus when the trial court had complied by vacating the temporary orders and reinstating the agreed final divorce decree, even though the trial court thereafter issued a TRO restraining Mother from having unsupervised contact with the children and ordering that the children "remain in the exclusive and immediate possession" of Father. J.V.*

Editor's comment: *The first thing I noticed about this case is that the commentary states that even though father filed within one year of the decree being entered, he amended his pleading after one year so the one year requirements were inapplicable. While I'm not sure I completely agree with that, I will say that an amended pleading supersedes any other pleading before it, so even if the court had dismissed on those grounds, father could have just immediately re-filed. Additionally, although the court made comments about the insufficient evidence, it seems like the major issue here was that father's requested relief was not proper. He did not attach an affidavit and he did not plead the children's present circumstances would significantly impair the children's physical health or emotional development. That means the relief father got was VOID. We have wonderful forms in the TFLPM that include all of these specific requests, and I can't emphasize how important it is to make sure the proper relief is in the pleadings. If you don't ask for it, you can't get it. J.H.J.*

TEMPORARY ORDERS SIGNED BEFORE MANDATORY TRANSFER NOT VOID, BUT EVIDENCE DID NOT SUPPORT A CHANGE OF THE PERSON WITH THE RIGHT TO DESIGNATE THE PRIMARY RESIDENCE OF THE CHILD IN TEMPORARY ORDERS.

¶17-5-15. *In re Estes*, No. 07-17-00225-CV, 2017 WL 3122359 (Tex. App.—Amarillo 2017, orig. proceeding) (mem. op.) (07-19-17).

Facts: A court order appointed Mother and Father joint managing conservators of their Child and gave Mother the exclusive right to designate the Child's primary residence. Father filed a SAPCR to modify conservatorship and be granted the right to designate the Child's primary residence. Mother filed a motion to transfer because she and the Child had lived in another county for more than six months before Father's suit. Father did not file a controverting affidavit. The trial court held a temporary-orders hearing and entered temporary orders granting Father's requested relief—changing the designation of the person with the right to designate the primary residence of the child. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Because Father failed to timely file a controverting affidavit, the trial court had a ministerial duty to grant Mother's motion to transfer. However, until the transfer was completed, the transferring court retained jurisdiction to render temporary orders.

However, although Father attached to his petition unauthenticated drug results, Father failed to submit any test result complying with the trial court's subsequent order for drug testing. Thus, no admissible evidence supported a finding of significant impairment that would have justified changing the person with the exclusive right to designate the Child's primary residence in temporary orders.

Editor's comment: *I just have to preach a little evidence here. Attaching a document to a pleading does not make it evidence and it does not make it admissible. Even if the proper authentication documents were attached to that pleading, unless they fall under another exception (like the BRA statutes), they are still not admissible without the proper predicates. Pleadings are not evidence. J.H.J.*

SAPCR
CONSERVATORSHIP

EVIDENCE SUPPORTED LIFTING GEOGRAPHICAL RESTRICTION ON CHILD'S RESIDENCE TO ALLOW MOTHER AND THE CHILD TO MOVE WITH MOTHER'S FIANCÉ.

¶17-5-16. *Mitchell v. Wright*, No. 03-16-00496-CV, 2017 WL 2927063 (Tex. App.—Austin 2017, no pet. h.) (mem. op.) (07-07-17).

Facts: Mother and Father never married and had one Child. Father had not consistently followed the prior court-ordered possession schedule for the Child and did not attend the Child's activities or stay involved with the Child's school. Father was behind on child support payments, but he did maintain a relationship with the Child. Father was currently unemployed but was looking for work in the "tech industry" and described himself as "very hirable." Father was married to another woman, with whom he had another child.

Mother filed a petition to lift the geographic restriction on her right to determine the Child's primary residence because she was engaged and planned to move with the Child to Washington to live with her fiancé. After a hearing, the trial court lifted the geographic restriction and terminated Father's child support obligation to offset travel expenses. Father appealed.

Holding: Affirmed

Opinion: While Father focused on evidence that disfavored a move, evidence was also presented that weighed in favor of a move. Mother, who was the Child's primary caregiver, testified about her plans if the geographic restriction was removed, including her employment opportunities, the house in which they would live, the Child's relationship with Mother's fiancé, and the Child's anticipated school and other activities. The trial court as the sole judge of the witnesses' credibility had authority to resolve conflicting evidence and exercise its discretion in making a best interest determination.

Further, the ad litem believed Mother would support a relationship between Father and the Child after the move. Additionally, Father had not consistently exercised his rights to possession and access, and the standard possession order for parents living more than 100 miles apart would give Father longer possession periods than that which he had exercised previously. Moreover, evidence showed that Father could seek employment that would enable him to move and live near the Child, if desired. Finally, the trial court facilitated Father's visitation by terminating his child support obligation to offset the costs associated with long-distance visitation.

Editor's comment: *This case demonstrates that in moveaway cases, the parent who wants to move should present a well-thought-out plan to the court and support it by as many bits and pieces of evidence as possible. J.V.*

THE RECORD EVIDENCE SUPPORTED AN IMPLIED FINDING THAT MOTHER'S APPOINTMENT AS SMC WOULD RESULT IN SIGNIFICANT IMPAIRMENT OF CHILD'S EMOTIONAL DEVELOPMENT OR PHYSICAL HEALTH.

¶17-5-17. *In re L.E.M.*, No. 05-16-00209-CV, 2017 WL 3474012 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (08-14-17).

Facts: L.E.M. was born in February 2009. Her parents engaged in a romantic relationship before and after L.E.M.'s birth. Mother, Father, and Grandmother were involved in raising L.E.M., who has lived in Grandmother's home since she was 10 months old. On June 22, 2013, Father was murdered during a robbery, and on July 1, 2013, Mother went to Louisiana and stayed with relatives for several months, leaving 4r-year-old L.E.M. in Grandmother's care. Soon after Mother left, Grandmother filed a petition seeking to be appointed sole managing conservator of L.E.M. On October 22, 2015, the case proceeded to a bench trial at which Grandmother, Mother, and Mother's father testified. On January 26, 2016, the trial court signed an order appointing Grandmother and Mother as joint managing conservators of L.E.M. and awarding Grandmother the exclusive right to designate L.E.M.'s primary residence. Mother appealed.

Holding: Affirmed

Opinion: The family code presumes that a parent will be appointed managing conservator. For a non-parent to be appointed as managing conservator in lieu of one or both parents, the non-parent must overcome the parental presumption by proving by a preponderance of the evidence that appointment of the parent as managing conservator would significantly impair the child's physical health or emotional development. Here, the record evidence supported an implied finding that Mother's appointment as sole managing conservator would result in significant impairment of L.E.M.'s emotional development or physical health.

The evidence at trial establishes that (1) shortly after her four-year-old child's father was murdered, Mother left L.E.M. in Grandmother's care for several months without providing any financial support; (2) Mother sought to instill L.E.M. with resentment and prejudice; (3) Mother fought and exchanged insults with her boyfriend in front of L.E.M.; (4) Mother demonstrated an inability or unwillingness to recognize the possible harmful effects of her cigarette smoking on

L.E.M.'s physical health; (5) Mother indicated she intended to cut L.E.M. off from a family member who had played a significant role in L.E.M.'s life; and (6) despite having the custody of L.E.M. at stake, Mother refused to cooperate with the Dallas County Domestic Relations Office's attempts to conduct a home visit, creating a reasonable inference that Mother's home environment was not conducive to L.E.M.'s emotional development or physical health. This is sufficient evidence to support an implied finding that Mother's appointment as sole managing conservator would result in significant impairment of L.E.M.'s emotional development or physical health. While each factor discussed above standing in isolation might not demonstrate significant impairment, when viewed in the aggregate, we are not convinced the trial court abused its discretion in appointing Grandmother and Mother as joint managing conservators.

TRIAL COURT ABUSED DISCRETION APPOINTING PARENTS JOINT MANAGING CONSERVATORS WHEN CREDIBLE EVIDENCE THAT BOTH HAD COMMITTED FAMILY VIOLENCE WITHIN THE PRIOR TWO YEARS.

¶17-5-18. *In re J.M.*, No. 02-16-00428-CV, 2017 WL 3821863 (Tex. App.—Fort Worth 2017, no pet. h.) (mem. op.) (08-31-17).

Facts: During a TDFPS investigation into Mother, she had Father take possession of their older child, and she voluntarily placed the younger Child—the Child the subject of this suit—with the Child's daycare Teacher. After having possession of the Child for about 9 months, Teacher filed suit seeking sole managing conservatorship of the Child. After hearing evidence, the trial court affirmatively stated that there was a history of family violence but also stated that he was a "big believer that parents should raise children." Thus, the trial court appointed Mother and Father as joint managing conservators and removed Teacher as temporary sole managing conservator. Teacher appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code § 153.004 requires the trial court to consider evidence of intentional force against the parents or a minor within 2 years of the suit and prohibits appointing a managing conservator when credible evidence is presented of a history or pattern of past or present child neglect or abuse by one parent against the other parent, a spouse, or a child. Here, both Mother and Father conceded that Father had choked and hit Mother within 2 years of the proceeding and that Mother caused bodily injury to her other child within 2 years of the suit. Accordingly, with this conceded and uncontroverted evidence, neither parent could have been appointed as a joint managing conservator of the Child.

Editor's comment: *Reaffirmation that there's no JMC when history of family violence. There's consequences to making those allegations. M.M.O.*

Editor's comment: *Tex. Fam. Code § 153.004(b) forbids the parents being appointed joint managing conservators, but it does not forbid either one from being appointed sole managing conservator. The court of appeals noted that for Teacher to be appointed sole managing conservator, the trial court would have to find that appointing either parent sole managing conservator would not be in the child's best interest and that Teacher's appointment as sole managing conservator would be. J.V.*

SAPCR
CHILD SUPPORT

GRANDFATHER HAD NO DUTY TO SUPPORT GRANDCHILD.

¶17-5-19. *In re J.J.R.*, No. 05-16-00220-CV, 2017 WL 3275895 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (07-31-17).

Facts: The trial court ordered Grandfather to pay child support to Father for the support of THE Child. Grandfather appealed. The OAG filed a brief in the appellate court conceding error.

Holding: Affirmed as Modified

Opinion: While a grandparent may have standing to intervene in a SAPCR, a grandparent has no duty of support.

SAPCR
MODIFICATION

TRIAL COURT HAD JURISDICTION TO HEAR MOTHER'S PETITION FOR MODIFICATION OF SAPCR WHILE APPEAL OF PRIOR ORDER WAS PENDING.

¶17-5-20. ***In re Reardon*,** 514 S.W.3d 919 (Tex. App.—Fort Worth 2017, orig. proceeding) (03-23-17).

Facts: The trial court issued a final order in a SAPCR. A few days later, Father filed a new petition to modify the final order. Mother filed a counter-petition, a motion for new trial, and a notice of appeal. While Mother's appeal was pending, the trial court signed temporary orders in the new SAPCR. Father filed a petition for writ of prohibition, arguing that the trial court did not have jurisdiction to hear pending motions to modify in a SAPCR while an appeal was pending from the last final order. Father argued that the Fort Worth Court of Appeals was bound by a 2015 decision from the El Paso Court of Appeals because that case had been transferred from the Fort Worth Court and was, thus, binding precedent until overruled by an en banc decision from the Fort Worth Court.

Holding: Writ of Prohibition Denied

Opinion: When a case is transferred from one appellate court to another pursuant to a docket control order, the Texas Rules of Appellate Procedure require a transferee court to follow the precedent of the transferor court. However, when the transferee court is faced with a question of first impression, the transferor court is not subsequently bound by the transferee court's decision. Thus, here, the question of whether a party may file a new SAPCR while an appeal of a prior SAPCR order is pending was still a question of first impression for the Fort Worth Court of Appeals, and that court was not bound by the El Paso Court of Appeals' 2015 decision.

Only three provisions in Title 5 of the Tex. Fam. Code address appellate procedure. One addresses the trial court's authority to issue temporary orders pending appeal, another provides that appeals shall be as in civil cases generally, and the third applies to indigent appellants. Subtitle B of Title 5 provides various substantive parameters under which a trial court may modify a SAPCR and delineate particular circumstances under which modification is permitted. A petition seeking a modification is a sepa-

rate lawsuit and seeks a separate judgment to replace an existing SAPCR order. None of the provisions in Subtitle B include the pendency of an appeal as a limitation or barrier to modification.

During the pendency of an appeal, a party may seek temporary relief from the SAPCR order pursuant to the Tex. Fam. Code. At the same time, a party may seek to *permanently* modify the SAPCR order in a new suit. Thus, the statutes can be read in harmony without rendering any parts meaningless.

Additionally, a civil complaint regarding a final judgment can become moot prior to its resolution on appeal. Nothing peculiar to SAPCR orders or the law that governs them requires that courts carve out an exception to the general rule that changed circumstances may moot an appellate issue or an entire appeal.

Further, while Father was correct that, in theory, allowing modification orders during the appellate process could allow a party or a trial court to evade judicial review, the Tex. Fam. Code contains sufficient safeguards to ensure the unlikelihood and undesirability of such an endeavor.

Finally, the law provides adequate remedies for those who must face litigation costs in defense of groundless or frivolous claims, but a party should not be barred from asserting a valid claim simply because additional resources must be expended to litigate them.

Editor's comment: *The Fort Worth Court of Appeals joins the Dallas Court of Appeals and the Houston First Court of Appeals in holding that a party may file a modification suit while an appeal is pending. Hudson v. Markum, 931 S.W.2d 336 (Tex. App.—Dallas 1996, no writ); Blank v. Nuszen, No. 01-13-01061-CV, 2015 WL 4747022 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.). However, as the Reardon court notes, the El Paso Court of appeals holds to the contrary without reference to or analysis of either Blank or Hudson. In re E.W.N., 482 S.W.3d 150 (Tex. App.—El Paso 2015, no pet.). G.L.S.*

SAPCR
CHILD SUPPORT ENFORCEMENT

BECAUSE DOMESTIC RELATIONS OFFICE NOT OFFICIAL COURT FUNCTIONARY, ITS MISTAKE IN CALCULATING FATHER'S ARREARAGES DID NOT ENTITLE MOTHER TO BILL OF REVIEW.

¶17-5-21. ***Bialaszewski v. Bialaszewski***, ___ S.W.3d ___, No. 03-17-00046-CV, 2017 WL 3379109 (Tex. App.—Austin 2017, no pet. h.) (08-03-17).

Facts: Father was ordered to pay support. Over the next many years, several additional orders were entered ordering Father to pay increasing arrearages. The latest order was based on a motion by the Travis County Domestic Relations Office (DRO) and ordered Father to pay about $10,000 in arrearages. About a year later, Mother filed a petition for bill of review because the prior order was allegedly made in reliance on erroneous information. A subsequent audit found that Father was actually in arrearages of about $25,000. After a bench trial, the trial court granted Mother's petition for bill of review, set aside and vacated the challenged order to the extent necessary to remove the arrearage finding and found Father in arrears of a new amount. Father appealed.

Holding: Reversed and Rendered

Opinion: A bill of review may be granted on the grounds of an "official mistake," but the "official" must be under the direct supervision of the court. Here, there was no evidence that the DRO was under the direct control or supervision of the district courts. Further, Mother did not allege that fraud or accident

on Father's part prevented her from making a meritorious claim about the outstanding arrearage amount, and the record did not support such a claim.

SAPCR
REMOVAL OF CHILD AND TERMINATION OF PARENTAL RIGHTS

TDFPS REQUIRED TO RETURN CHILD TO PARENTS AFTER EMERGENCY REMOVAL BECAUSE NO EVIDENCE OF AN URGENT NEED FOR PROTECTION REQUIRED IMMEDIATE REMOVAL.

¶17-5-22. ***In re M.N.M.***, ___ S.W.3d ___, No. 14-17-00328-CV, 2017 WL 2819349 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (06-29-17).

Facts: TDFPS received a report that Mother left the Child unattended in her car for 40 minutes while Mother received medical treatment. Subsequently, Mother submitted to a drug test, which came back positive for amphetamines and methamphetamines.

An affidavit supporting emergency removal of the Child without a court order stated that removal was appropriate because Mother's drug test was positive, and Father had refused to submit to a drug test.

It was later determined that the Child had not been left unattended but was in the car with her adult sister watching a movie.

After an adversary hearing, the trial court refused to return the Child to her parents and appointed TDFPS as the Child's temporary managing conservator. The parents filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The Texas Family Code Ch. 262 permits TDFPS to take possession of a child without a court order, but only on facts that would lead a person of ordinary prudence and caution to believe there is an immediate danger to the physical health or safety of the child. After an emergency removal, a full adversary hearing must be held within 14 days, after which the child *must* be returned unless evidence establishes:

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

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

(emphasis added).

Here, the only basis for the Child's emergency removal was Mother's positive drug test, which was based on hair follicle test, indicating the drug use could have occurred months earlier. Further, the caseworker observed an injury-free two-year-old who was appropriately dressed, groomed, fed, housed, and behaved; appropriate interactions between the Child and Father; a clean and hazard-free house; and a kitchen stocked with food. Even if the positive drug test satisfied subsection (1) of the above, nothing indicated an "urgent" need for an "immediate" removal. Nothing in the record supported the extreme measure of an emergency removal without a court order.

NO EVIDENCE PRESENTED AT TRIAL PROVIDED BASIS FOR TERMINATING FATHER'S PARENTAL RIGHTS.

¶17-5-23. ***In re B.D.A***, ___ S.W.3d ___, No. 01-17-00065-CV, 2017 WL 3141321 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (07-27-17).

Facts: TDFPS sought to terminate both parents' parental rights. Before trial, Mother signed an affidavit voluntarily relinquishing her parental rights. At the time of trial, Father had been in prison for a few years and was not expected to be released before 2027.

A caseworker testified that Father had never reached out to her. However, the documentation sent from TDFPS to Father was signed by different TDFPS employees, and no evidence was presented that Father did not reach out to someone else at TDFPS.

Another witness, who may have been from "Child Advocates," testified that one of the three Children was doing better in foster care and that Father had not sent the Children any cards or letters. There was no evidence regarding the placement of the other two Children other than that they were not placed together. Also, there was no evidence whether Father had made any efforts at communication by means other than cards or letters.

At the trial's conclusion, Father's parental rights were terminated on the grounds of endangerment, abandonment, failure to comply with a court order, and having been convicted for an offense resulting in imprisonment and inability to care for his Children for more than two years. The court additionally found that termination was in the Children's best interest. Father's appointed trial counsel filed a notice of appeal, withdrew from the case, and appellate counsel was appointed. At oral argument, after learning that the appellate attorney had not met with Father, the appellate court abated the proceedings and ordered the trial court to hold a hearing to determine whether Father wished to appeal. He did, and the appeal was reinstated.

Holding: Reversed and Remanded

Opinion: There may have been additional facts and circumstances in this case that, if proved at trial, could have justified the termination of Father's parental rights. However, on the face of the appellate record, there was no meaningful evidence that TDFPS, the guardian ad litem, the trial court, or even Father's own attorneys ad litem ensured that services which might have been available were actually offered to Father. There was no meaningful evidence that other services and programs intended to help the plight of the three Children involved in this case were utilized. TDFPS did not prove that it investigated potential kinship placements.

Termination was not shown to improve the outlook for the current and future emotional and physical needs of the Children. The Children had been separated from one another, but TDFPS had not shown why that was necessary or if it planned to keep the siblings together to the extent possible. No evidence was presented to support any of the *Holley* factors. There was no evidence Father's criminal behavior directly endangered any Child. TDFPS bore the burden at trial by clear and convincing evidence, and the termination decree could not be justified merely by blaming Father for his past failures.

Editor's comment: *I wanted to make a quick practice tip comment about this case. There was commentary by the court that none of the Holley factors were actually proven or met to prove best interest for the termination. In essence, because best interest is a factor in every child-related case, copy down the Holley factors before trial and provide evidence and testimony to support each factor. Although those factors are not exhaustive, at least providing this testimony will support the record and argument that evidence was provided to sufficiently support the ruling being in the best interest of the child. J.H.J.*

GO TO TABLE OF CONTENTS

UNCLEAN AND UNSAFE HOME SUPPORTED TERMINATION OF MOTHER'S PARENTAL RIGHTS.

¶17-5-24. ***In re A.L.*****,** ___ S.W.3d ___, No. 08-17-00048-CV, 2017 WL 3225030 (Tex. App.—El Paso 2017, no pet. h.) (07-31-17).

Facts: After a second referral to TDFPS, the Child was removed due to her home's unsanitary and unsafe conditions. After a trial, Mother's parental rights were terminated. Mother appealed.

Holding: Affirmed
Opinion: The Child was living in extremely unsafe conditions upon removal. Dog feces and urine was throughout the home. Insects were crawling on dirty dishes. Knives were left out on the kitchen table. Brown smears were on the mattresses. While there were some improvements in the cleanliness and safety during the course of litigation, the improvements were minimal. Additionally, Mother either denied the unsafe conditions existed or made excuses for not addressing them. Mother suffered from bipolar disorder and other mental health conditions but chose not to take her medications because they made her sleepy.

EVIDENCE OF ABUSE OR NEGLECT REPLACED THE PARENTAL PRESUMPTION; PARENTS FAILED TO ESTABLISH APPOINTING THEM AS CONSERVATORS WOULD BE IN THE CHILDREN'S BEST INTEREST.

¶17-5-25. ***In re J.J.G.*****,** ___ S.W.3d ___, No. 01-16-00104-CV, 2017 WL 3492308 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (en banc) (08-15-17).

Facts: TDFPS removed the parents' four Children after Mother took the youngest Child, who had been vomiting, to the hospital, where he was found to have multiple injuries. Mother said that the child may have been injured when he fell off the bed a few days before, when the Child's car seat became dislodged while she turned a corner, or perhaps the Child had tangled himself in his crib bars. Mother stated that after each of these incidents, she consoled the Child, he appeared fine, and he ate and drank normally afterwards. By the time of trial, it was unclear who had caused the injuries, but the medical expert testified that the injuries appeared to be intentional and to have been caused by an adult.

After a bench trial before a master, the master found that TDFPS failed to establish that the parents' parental rights should be terminated, appointed the parents joint managing conservators of the Children, and ordered that the Children be immediately returned to the parents.

TDFPS filed a motion for rehearing. The trial court declined to terminate the parents' parental rights but appointed TDFPS the Children's permanent managing conservator and did not appoint the parents as possessory conservators.

The parents appealed. A three-judge panel reversed the trial court's ruling. TDFPS filed a motion for rehearing en banc, which was granted.

Holding: Affirmed

Majority Opinion: (J. Keyes, C.J. Radack, J. Bland, J. Massengale, J. Brown)

Pursuant to Tex. Fam. Code § 153.131, "[i]t is a rebuttable presumption that the appointment of a parent as…managing conservator…is not in the best interest of the child if credible evidence is presented of…neglect, or physical or sexual abuse…" "Under the plain language of [the Tex. Fam. Code], the parental presumption is replaced by the opposite presumption…upon a showing of credible evidence…of...neglect or…abuse." "To rebut that presumption, such a parent must produce evidence that her appointment will be in the child's best interest."

Mother argued that the evidence demonstrated that she did not harm the Child and could not have anticipated that someone else would. However, Mother was still a suspect in the ongoing investigation of who had injured the Child.

Mother and Father also argued that there were no indications of injury or neglect to the older Children, that the parents had substantially complied with their family service plans, that they were gainfully employed, and that they did not have a history of drug or alcohol abuse, domestic violence, or mental illness.

These arguments rely on a misapplication of the appropriate standard of review and standard of proof in conservatorship proceedings. The appointment of a conservator imposes a "more general standard" that that which is applied in a termination proceeding.

Dissenting without opinion: (J. Lloyd)

Dissenting Opinion: (J. Jennings, J. Higley)

"[T]he en banc majority merely disagree[d] with the panel majority's original holding, mischaracterize[d] the record evidence, improperly [held] that the presumption in favor of the children's parents [was] negated in this case, and deprive[d] two parents, without any evidence that they will impair their children's physical health or emotional development, of the right to care for and raise their children…."

The Tex. Fam. Code creates a strong presumption that it is in a child's best interest for his parents to be named joint managing conservators. The Code allows a trial court to appoint TDFPS as a child's managing conservator only if it makes a significant impairment finding. To appoint TDFPS without terminating parental rights, TDFPS must offer "specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child."

The en banc majority found that Tex. Fam. Code § 153.004, which removes the parental presumption when there is a history or pattern of child neglect or abuse, operated to replace the parental presumption in this case with the opposite presumption. However, for Section 153.004 to apply, the trial court must make a specific finding of abuse or neglect, which it did not do. "Thus, the en banc majority's reliance on section 153.004…is serious error."

MOTHER'S CONDUCT ALONE—NOT FATHER'S—BORE ON THE ISSUE OF TERMINATION OF MOTHER'S PARENTAL RIGHTS.

¶17-5-26. ***In re C.V.***, ___ S.W.3d ___, No. 07-17-00072-CV, 2017 WL 3723507 (Tex. App.—Amarillo 2017, no pet. h.) (08-25-17).

Facts: Mother had three Children. TDFPS initiated proceedings to terminate her parental rights to the first two Children before the third was born. Mother made efforts to seek the return of the two older Children. However, after apparent efforts to comply with her service plan and after the third Child was born, Mother tested positive for drugs and all three Children were removed. After the removal, the youngest Child—the Child the subject of this suit—tested positive for drugs. Mother's rights to the older two Children were terminated in a separate proceeding, and the Father of those two Children voluntarily relinquished his parental rights. The youngest Child's Father testified that he and Mother intended to marry one day.

After a bench trial, the court terminated Mother's parental rights to the Child and appointed TDFPS as permanent managing conservator and Father as possessory conservator.

Holding: Affirmed

Opinion: Mother's efforts to comply with the service plan were laudable. Mother contested her positive drug test result, but she did not have an explanation for the Child's subsequent positive drug test result. Mother completed a plan of services only to relapse to drug usage. The trial court could have determined that Mother remained in denial of the impact of her conduct on her Children.

Father's rights had not been terminated, and Mother and Father intended to continue living together. The Child had been placed with Mother's half-sister and was doing well in that placement. Mother argued that these facts weighed against a finding that termination was in the Child's best interest. The trial court made no finding that Father endangered the Child, and the court could have considered Mother's conduct, not Father, to bear most heavily on the issue of best interest of her termination. Further, reviewing the record as a whole, the appellate court did not believe that termination of Mother parental rights would necessarily postpone the Child's permanent placement.

MISCELLANOUS

FATHER AND EX-GIRLFRIEND COULD NOT RECEIVE MENTAL-ANGUISH DAMAGES FOR "WRONGFUL PREGNANCY," BUT FATHER MAY HAVE BEEN ENTITLED TO MENTAL ANGUISH DAMAGES FOR MOTHER'S BAD ACTS NOT DIRECTLY RELATED TO BIRTH OF CHILD.

¶17-5-27. ***Hardin v. Obstetrical and Gynecological Assoc. P.A.***, ___ S.W.3d ___, No. 01-15-01004-CV, 2017 WL 2438641 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (06-06-17).

Facts: Father and Ex-Girlfriend were in an intimate relationship. Father had children from a prior relationship, and the couple had a child from their current relationship. Father decided to have a vasectomy, but they did not want to preclude the possibility of giving their child a younger sibling. Father stored 8 vials of sperm and signed an agreement with the fertility clinic to keep the sperm frozen. The agreement provided that if the couple split up, Ex-Girlfriend would have dispositional authority over the use and storage of the sperm.

Father had an affair with Mother (a 19-year-old woman), which led to Father and Ex-Girlfriend breaking up. After an on-again-off-again relationship with Mother, she and Father also broke up. During their brief relationship, Mother learned of the frozen sperm. She convinced the fertility clinic to give her two vials, with which she impregnated herself and gave birth to the Child.

Throughout her pregnancy, Mother treated Father poorly. At some points, she told Father the Child was not his. Other times, she said the Child was his, that he could be at the birth, but he would otherwise not be allowed to see the Child. When she gave birth, she did not permit Father to be present, which Father later testified was devastating.

Mother, Father, and Ex-Girlfriend lived in a small town. Mother told everyone in town that Father agreed to allow her to impregnate herself, and showed people a photo of a forged HIPAA release giving her authority to use the sperm. Ex-Girlfriend, a police officer, was embarrassed to have her personal life exposed to the town. People in the town made negative statements about Father and accused him of dishonesty. They said evil things about him and confronted him about the pregnancy. Father described the situation as a painful nightmare.

Father isolated himself to avoid Mother and the Child he was not allowed to see. Later, Mother began a new relationship with a man who wanted to adopt the Child. Because Father had isolated himself and not made an effort to be involved in the Child's life, a court agreed to terminate his parental rights against his wishes.

Father and Ex-Girlfriend sued the fertility clinic for breach of contract and conversion, and they sued Mother for conversion and IIED. After a jury trial, the jury found the fertility clinic breached the contract, both Mother and the fertility clinic converted the sperm, and Mother engaged in outrageous conduct and inflicted severe emotional distress on Father and Ex-Girlfriend and awarded Father and Ex-Girlfriend damages for mental anguish from both defendants. Subsequently, the trial court granted Mother's and the fertility clinics motions for JNOV, holding that mental anguish damages were simply not available for a "wrongful pregnancy" claim.

Father and Ex-Girlfriend appealed.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: After thoroughly reviewing and balancing the conflicting public policies interests supporting (1) permitting recovery for mental-anguish damages and (2) prohibiting recovery for mental anguish based solely upon the birth of healthy children, the court determined the latter outweighs the former. The court recognized strong reasons for permitting recovery of mental-anguish damages in certain contexts. Yet, the court also recognized that Father undisputedly suffered severe mental anguish. However, the reasons for precluding recovery for mental anguish based solely upon the birth of healthy children was more fundamental.

To the extent Father presented evidence of IIED that was not directly tied to the Child's existence, he may have been able to recover. The court expressed no opinion on whether Father, on remand, would be able to establish his claim, only that the possibility existed that mental-anguish damages were not entirely foreclosed as a matter of law.

None of Ex-Girlfriend's claims for mental anguish were not directly related to the birth of a health Child. Further, Ex-Girlfriend's distress was speculative and difficult to predict, and this state does not permit recovery for negligent infliction of emotional distress.

Finally, the only claims for mental anguish damages by Father or Ex-Girlfriend against the fertility clinic were tied to the existence of a healthy child. Further, Ex-Girlfriend still had access to 6 vials of Father's sperm if she chose to impregnate herself in the future.

HUSBAND'S SON FAILED TO INTRODUCE EVIDENCE THAT WIFE ABANDONED HOMESTEAD BEFORE HUSBAND'S DEATH.

¶17-5-28. *In re Navarro*, No. 04-16-00351-CV, 2017 WL 2457080 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (06-07-17).

Facts: Before Husband died, Wife moved out of the homestead. The couple had been married for over twenty years. During the marriage, Wife left and returned more than once. She asserted that Husband was abusive and that she left when he ran her out and returned when they reconciled. On this occasion, she left all her belongings in the home and intended to return. She and Husband still met for meals and helped each other with errands.

After Husband died, his son filed an application to probate Husband's will. Wife filed an application to set aside certain personal property and the homestead as exempt for her use and benefit. The probate court granted both applications. The son appealed, arguing that Wife had abandoned the homestead and had moved on with her life.

Holding: Affirmed

Opinion: Abandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead and the intent to permanently abandon the homestead. Merely changing residence is not, alone, an abandonment of the homestead.

Here, Wife left the homestead almost two years before Husband died. She left her belongings in the homestead and stated that she intended to eventually return. The couple remained in contact, did not divorce, and Wife hoped they would reconcile. While Husband's son controverted Wife's testimony, the trial court was entitled to believe Wife.

FATHER REQUIRED TO PRESENT EVIDENCE OF REASONABLENESS FOR FEES AWARDED PURSUANT TO FEE PROVISION OF THE PARTIES' DIVORCE DECREE IN SUBSEQUENT CHILD-SUPPORT MODIFICATION.

¶17-5-29. *In re A.N.Z.*, No. 05-15-01443-CV, 2017 WL 2464677 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (06-07-17).

Facts: Mother and Father's divorce decree ordered Father to pay child support and included a provision that if either party subsequently sought to modify child support, the responding party would be entitled to fees, regardless of the case's outcome. Mother subsequently filed a motion to modify child support. Father responded with a counter-petition to eliminate his child-support obligation. After a hearing, the trial court terminated child-support, denied Mother's request for fees, and awarded Father attorney's fees. Mother appealed the orders regarding attorney's fees.

Holding: Reversed and Remanded

Opinion: An agreement for an unspecified amount of attorney's fees implies payment of a reasonable fee. Thus, Father was required to present evidence that his attorney's fees were reasonable and necessary. Additionally, Father did not seek fees pursuant to the Civ. Prac. & Rem. Code. He sought them pursuant to the fee provision of the parties' divorce decree. Thus, the trial court could not take judicial notice of reasonableness pursuant to the Civ. Prac. & Rem. Code.

Further, the fee provision of the parties' divorce decree unambiguously provided that the parties were entitled to attorney's fees if the other party sought to modify child support. There was nothing in the fee provision that limited the fee award to the first party to file. Both Mother and Father sought to modify child support. Thus, both Mother and Father were entitled to fees.

Editor's comment: *If one of the parties had argued it, I wonder if the attorney's fees section in their agreed order would have been upheld, or thrown out on public policy grounds? R.T.R.*

Editor's comment: *This is a good reminder that unless a document states otherwise, attorney's fees are considered under a reasonable standard. And, what is reasonable is left up to the discretion of the court. If your intent in a document is that attorney's fees be awarded no matter how high or low they are, then that needs to be specified that they should be awarded dollar for dollar. Otherwise, it's going to be a reasonable fee standard and that is at the discretion of the particular judge. J.H.J.*

★★★SUPREME COURT OF THE UNITED STATES ★★★

ARKANSAS MAY NOT, CONSISTENT WITH *OBERGEFELL*, DENY MARRIED SAME-SEX COUPLES THE RIGHT TO BE LISTED ON THE CHILD-OF-THE-MARRIAGE'S BIRTH CERTIFICATE, WHEN THAT RIGHT IS GRANTED TO OPPOSITE-SEX MARRIED COUPLES.

¶17-5-30. ***Pavan v. Smith*,** 582 U.S. ___, No. 16-992, 2017 WL 2722472 (2017) (06-26-17).

Facts: Two married same-sex couples had children during their marriages. In both cases, the couples filled out paperwork to have both partners names listed on their respective child's birth certificate. In both cases, Arkansas denied the request and listed only the biological mother's name on the certificate. The state asserted that, pursuant to its statutes, only a "husband" could be listed as a "father" on the birth certificate. The couples sued, seeking a declaratory judgment that the state's statute violated the Constitution. The trial court agreed with the couples, but the Arkansas Supreme Court reversed, concluding that the statute "pass[es] constitutional muster" and that "the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband

and wife," and so it "does not run afoul of *Obergefell*." The couples petitioned the U.S. Supreme Court for review.

Holding: Reversed and Remanded

Majority Opinion: (Per Curiam)

Pursuant to the state's statutes, when a married woman in Arkansas is impregnated by means of artificial insemination, Arkansas must list the woman's husband on the child's birth certificate. Thus, despite Arkansas's assertions, its statutes regarding parents' names on birth certificates do not center on the biology. Arkansas has chosen to make its birth certificates more than a mere marker of biological relationships: The state uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Thus, the Arkansas Supreme Court's decision denied married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage."

Dissenting Opinion: (J. Gorsuch, J. Thomas, J. Alito)

Summary reversal is usually reserved for cases where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Nothing in *Obergefell* spoke to the question of the constitutionality of the challenged Arkansas statute. Further, to the extent the majority relies on Arkansas's treatment of parental names on a birth certificate after artificial insemination, that particular statute was not challenged by the plaintiffs.

★★★TEXAS SUPREME COURT ★★★

FIFTH CIRCUIT'S DECISION IN *DE LEON* IS NON-BINDING AUTHORITY; PARTIES ENTITLED TO PRESENT IN FULL THEIR CASES REGARDING EMPLOYMENT BENEFITS FOR SAME-SEX SPOUSES.

¶17-5-31. ***Pidgeon v. Turner*, ___ S.W.3d ___, No. 15-0688, 2017 WL 2829350 (Tex. 2017)** (06-30-17).

Facts: After *Windsor*, the city of Houston began offering employee benefits to same-sex spouses. Two taxpayers sued the city and its Mayor, alleging the practice violated Texas's and the city's DOMA statutes. The city and Mayor filed pleas to the jurisdiction. The trial court denied the please and granted the taxpayers' requested injunction. The city and Mayor filed an interlocutory appeal.

While the appeal was pending, *Obergefell* was decided. In a separate suit, *De Leon*, the Fifth Circuit dismissed an appeal, in light of *Obergefell* and found that Texas's DOMA statutes were unconstitutional. Subsequently, in this suit, the court of appeals reversed the trial court's injunction and remanded the case for further proceedings consistent with *Obergefell* and *De Leon*.

The taxpayers sought review from the Texas Supreme Court, arguing that the appellate court erred in remanding the case for further proceedings "consistent with" *De Leon*, by reversing rather than vacating the injunction, and by refusing to affirm the injunction with respect to dates prior to *Obergefell* thereby allowing the City to "claw-back" benefits paid. Additionally, the taxpayers urged the Texas Supreme Court to direct the trial court to "narrowly construe" *Obergefell* because that case did not recognize a fundamental right to spousal employee benefits. The City argued that to narrowly construe the case would ignore its natural meaning and applications.

Holding: Appellate Judgment Reversed; Trial Court Order Vacated; Remanded

Opinion: While the Fifth Circuit's opinion in *De Leon* is persuasive authority, it is not binding on Texas Courts. Thus, the appellate court erred in remanding the case to the trial court for further proceedings "consistent with" rather than "in light of" *De Leon*.

Dissolution of a temporary injunction bars a second application for such injunctive relief, unless the second request is based on changed circumstances not known by the applicant at the time of the first application. *Obergefell* constitutes a change in the law, which means that Plaintiffs are not precluded from seeking the same or similar relief on remand, regardless of whether their prior injunction was vacated or reversed. Thus, the appellate court's reversal would not bar the taxpayers from seeking the same or similar relief on remand.

Because the taxpayers never sought a claw-back injunction, the Texas Supreme Court declined to express an opinion on whether they had standing to seek one or were entitled to one.

While the Fifth Circuit found that Texas's DOMA statutes were unconstitutional, the U.S. Supreme Court made no such finding in *Obergefell*. Further, the parties had not yet presented their cases as to whether the City was entitled to immunity or the Mayor had acted *ultra vires*. The case before the Texas Supreme Court was only an interlocutory appeal of a temporary injunction. The parties in this case should be entitled to fully present their cases as to whether Texas's DOMA statutes are constitutional and whether the City may constitutionally deny benefits to its employees' same-sex spouses. The Texas Supreme Court declined to render a final ruling on the merits before the parties have had a full opportunity to make their cases.

DECLARATORY JUDGMENT ACTION COULD NOT BE BROUGHT TO INTERPRET PRIOR DIVORCE DECREE.

¶17-5-32. *Lancashire v. Lancashire*, No. 05-16-00890-CV, 2017 WL 2952995 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (07-11-17).

Facts: A final decree provided that Husband would be a constructive trustee for the benefit of Wife with regard to Husband's shares in a certain business. The decree further ordered Husband to pay Wife within five days of receipt one-half of the sum of any and all monies he received for any sale or transfer of those shares.

Seeking "some assurance," Wife filed suit and moved for the appointment of an auditor. Wife sought an accounting of the business's financial affairs and sought tax returns, related K-1 forms, and other business records. Husband filed a general denial, affirmative defenses, and a counter-claim for a declaratory judgment that Wife was not entitled to any additional rights other than what was clearly stated in the final decree. A year later, Husband filed for traditional and no-evidence summary judgments asserting he was entitled to summary judgment on his affirmative defenses and that there was no evidence Wife was entitled to the relief sought. After a hearing, the trial court rendered a declaratory judgment requiring Husband to provide an annual written summary of the status of the shares and granted Husband a summary judgment without stating its basis for doing so. Wife appealed.

Holding: Vacated in Part; Affirmed in Part

Opinion: A declaratory judgment action may not be brought to interpret a prior judgment. Such an action constitutes an impermissible attack on the previous judgment. Even though this issue was not raised by the parties, the appellate court had a duty to consider it sua sponte because it was determinative of the trial court's power to decide the merits, as well as the appellate court's power to consider the appeal. Because the trial court lacked jurisdiction to render a declaratory judgment, the appellate court vacated that judgment.

The final decree appointed Husband as "a constructive trustee…to the extent of his payment obligations[.]" That language, interpreted literally, imposed only an obligation on Husband to pay Wife pursuant to the decree and imposed no other obligations. Thus, Husband was entitled to summary judgment.

Editor's comment: *This case demonstrates the importance of drafting decrees with precise language that imposes only those obligations as are necessary to accomplish the specific intent of the matters at*

issue. Using over-generalized language in this decree regarding H's appointment as a constructive trustee could have obligated him to provide W with unnecessary propriety information regarding the LLC, which would have been wholly unwarranted to insure that W received her share in any stock sales. S.S.S.

Editor's comment: *The Dallas COA sua sponte decides that the trial court cannot consider a declaratory judgment action to sort out the rights of parties under a prior judgment, as that is a collateral attack on the judgment. No one pleaded for this. No one briefed it. No one argued it. No one complained about it. The Dallas Court on their own vacated the order on that. M.M.O.*

Editor's comment: *These declaratory actions come up frequently with premarital agreements. And, while I still support doing declaratory judgments if everyone agrees, I also agree that they are impermissible attacks on judgments. In fact, if there was a clarification issue, it seems like asking for clarification on how to enforce the property rights would have been an alternative measure. Clarifications are pretty broad, and the court always has the ability to clarify an order. By asking for a declaratory judgment, you are basically telling the judge what the clarification should be, and I think that may have been the problem here. J.H.J.*

TO SUPPORT STATEMENT OF INABILITY TO PAY COSTS, MOTHER HAD NO BURDEN TO SHOW HER FAMILY OR FRIENDS WERE UNABLE TO PAY.

¶17-5-33. *In re A.R.M.*, No. 05-17-00651-CV, 2017 WL 2962830 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (07-12-17).

Facts: After Mother's parental rights were terminated, she sought to appeal the termination. She filed a statement of inability to pay for the reporter's record, and the court reporter challenged the statement. The court reporter testified that the reporter's record would cost $4800 for a "normal turnaround" and $9600 "if expedited." Mother testified that she had no income because she was a student and that her boyfriend paid her living expenses. Her father had paid some, but not all, of her trial attorney's fees, but he stated that he would not give her any more money for this case. Her boyfriend earned $76,000 the prior year, but money was "tight." Mother still owed $225,000 in legal fees, and she had few assets to her name. She did not own a car but drove one owned by her father. The trial court sustained the court reporter's challenge, finding Mother not to be credible and that portions of her affidavit were "inaccurate, false, and/or misleading." The court further found that "the household earns $76,000 per year" and "[b]ased upon the information provided for the Court's consideration, the…household has approximately $3,200.00 in disposable income." Mother appealed.

Holding: Reversed

Opinion: To establish one's inability to pay costs pursuant to Tex. R. Civ. P. 145, a party is not required to show that friends or family are unable to pay costs, and she is not expected to secure the necessary funds by depriving herself and her family of the necessities of life or borrowing money she cannot repay.

Here, while the trial court found Mother's testimony not to be credible, the court abused its discretion in disregarding Mother's uncontroverted testimony that she had no income and could not afford the reporter's fee. The only basis for challenging Mother's affidavit was that her father had paid for trial counsel and her boyfriend paid her living expenses.

FATHER'S FAILURE TO PAY INTERIM ATTORNEY'S FEES FOR AMICUS ATTORNEY DID NOT PERMIT TRIAL COURT TO STRIKE FATHER'S JURY DEMAND AS A SANCTION.

¶17-5-34. *Wheeler v. Wheeler*, No. 01-16-00642-CV, 2017 WL 3140027 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (mem. op.) (07-25-17).

Facts: A divorce decree provided orders for the conservatorship of the Children. Subsequently, Mother filed a petition to modify seeking increased child support and an order appointing her sole managing conservator. Father filed a counter-petition seeking joint managing conservatorship and the exclusive right to designate the Children's primary residence. Father filed a notice of jury demand and paid the requisite fee.

During the proceedings, the trial court appointed an amicus attorney and ordered that the parties pay interim fees for the amicus attorney. Mother paid her share in full, but Father only partially paid his share. Mother moved to strike Father's jury demand as a sanction for his failure to pay in full his share of the amicus attorney's fees, and the trial court granted Mother's request.

At trial, Father presented evidence in support of his claim that he should have been appointed as the conservator with the exclusive right to designate the Children's primary residence. The trial court granted Mother's requested modifications and denied Father's. He appealed.

Holding: Reversed and Remanded

Opinion: The Texas Constitution guarantees a right to trial by jury. The Tex. Fam. Code provides that a party is entitled to a jury verdict on the determination of which joint managing conservator will have the exclusive right to designate the child's primary residence.

The trial court was not authorized to strike Father's jury demand as a sanction for failure to comply with an order to pay interim attorney's fees. Moreover, here, because Father introduced some evidence in support of his request that he be appointed the joint managing conservator with the exclusive right to designate the Child's primary residence, the trial court's error in striking Father's jury demand was harmful.

Editor's comment: *This is interesting. This case says that a failure to pay amicus fees doesn't justify striking jury demand. But, failure to pay court costs, and amicus fees are a court costs and a necessity, may be punished by striking the party's affirmative claims for relief. Now an amicus attorney has even fewer remedies for nonpayment. M.M.O.*

COLLEGE TUITION PROVISION NOT ENFORCEABLE THROUGH PETITION FOR ENFORCEMENT; MOTHER SHOULD HAVE FILED BREACH OF CONTRACT ACTION.

¶17-5-35. *In re B.M.Y.*, No. 05-16-00475-CV, 2017 WL 3275505 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (07-26-17).

Facts: In their agreed divorce decree, Father agreed to pay 60% of the Children's college tuition and expenses. These provisions were not included in either the child support section or in the property division section. Many years later, the oldest Child attended her first year of college, but Father did not contribute any money for tuition or any related costs. Mother filed a petition to enforce the college tuition provisions of the divorce decree. In an answer, Father asserted that Mother was not entitled to relief because she failed to file a breach of contract action. Mother countered that the trial court had authority to enforce its own decree and a breach of contract action was unnecessary. At trial, Father repeatedly asserted that Mother had presented no viable cause of action, but Mother denied that a breach of contract action was necessary to enforce an agreed decree signed by the court. At the trial's conclusion, the court awarded Mother 60% of the college tuition and expenses for their oldest Child. Father appealed.

Holding: Reversed and Rendered

Opinion: Tex. Fam. Code § 9.001 allows a party to file a petition to enforce a property division. Here, the college tuition provision was not included in the property division provisions of the decree. Further, a trial court has no authority to impose or enforce post-majority child support. Thus, Mother could not rely on the Tex. Fam. Code to seek an enforcement of Father's failure to comply with the college tuition provision.

The college tuition provision was a contractual agreement between the parties. Mother's only vehicle by which she could obtain relief was a breach of contract action, which she explicitly did not seek.

Editor's comment: *Anything over and above the court's authority to order child-support is contractual, and is considered "post-majority child support." It is vital that you file a breach of contract action on these, and not a Texas Family Code enforcement. And when in doubt, make alternative pleadings. You don't want to have a situation where your claim is denied and then you are estopped from bringing an alternative claim because you could have brought it in the first lawsuit (and you didn't). J.H.J.*

A TRIAL COURT'S JURISDICTION TO ENTER ORDERS PENDING APPEAL UNDER TFC 6.709(c) IS LIMITED TO THE 30-DAY PERIOD FOLLOWING THE FILING OF THE NOTICE OF APPEAL.

¶17-5-36. ***Fuentes v. Zarogoza*****,** ___ S.W.3d ___, No. 01-17-00122-CV, 2017 WL 3184957 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (07-27-17).

Facts: In December 2015, the trial court signed a Final Decree of Divorce between Husband and Wife. Husband filed his notice of appeal on March 18, 2016. The trial court set a supersedeas bond at $278.3 million, which Husband challenged and this Court reduced to $25 million, which Husband posted on June 13, 2016.

Ten days after Husband filed his notice of appeal, while the amount of the supersedeas bond was being litigated, Wife moved for temporary orders under Family Code § 6.709. On April 1, 2016, the trial court issued temporary orders pursuant to section 6.709 requiring Husband to pay Wife $300,000 in monthly support and $50,000 in monthly attorney's fees during the pendency of the appeal. Husband sought and was granted a writ of mandamus because there was no supporting evidence and, after a rehearing, ordered the trial court to modify its order of temporary support and attorney's fees. After a hearing, the trial court ordered $250,000 in monthly spousal support and $100,000 and appointed a receiver. Husband filed an interlocutory appeal challenging the trial court's jurisdiction to appoint a receiver.

Holding: Appointment of receiver void for lack of jurisdiction

Opinion: Under Family Code § 6.709, there is only a 30-day window during which a trial court has jurisdiction to enter temporary orders pending appeal. Although court of appeals instructed the trial court to modify its temporary orders regarding spousal support and attorney's fees, it did not provide for an expansion of those orders beyond that limit. Because the trial court's appointment of a receiver was outside the 30-day jurisdictional limitation, the order appointing the receiver is void.

Editor's comment: *With the advent of a revision of the Texas Family Code provisions effective September 1, 2017, this will/should be less of an issue going forward. G.L.S.*

Editor's comment: *Remember that if you want temporary orders pending an appeal, you must file, set, hear, and have an order entered within 30 days of the notice of appeal being filed. No exceptions! It's the only deadline like it in the entire Texas Family Code, so don't let it slip by you! R.T.R.*

A SUPERSEDEAS BOND PRESERVES THE STATUS QUO OF THE MATTERS IN LITIGATION AS THEY EXISTED BEFORE THE ISSUANCE OF THE ORDER OR JUDGMENT FROM WHICH AN APPEAL IS TAKEN.

¶17-5-37. ***In re Fuentes*****,** ___ S.W.3d ___, No. 01-16-00952-CV, 2017 WL 3184761 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding) (07-27-17).

Facts: In December 2015, the trial court signed a Final Decree of Divorce between Husband and Wife, which awarded Wife 3 residential properties in El Paso, Texas, in addition to other property and money. The decree provided that it may "serve as a muniment of title to transfer ownership of all property awarded to any party in this Final Decree of Divorce."

Before the trial court signed the final decree, Carillo and other third parties petitioned to intervene in the case, claiming that Wife was improperly seeking to have property they owned considered as marital assets to distribute as marital property in the divorce. In particular, they claimed that the El Paso properties are owned by Eagle Ridge, a company that, in turn, is owned solely by Carillo, and not by Husband. They assert that, before the divorce decree was signed, Eagle Ridge was the owner of record in the El Paso real property records and the properties were occupied by Carillo and her family.

Husband appealed the decree, and the appeal is pending. Husband posted a bond to supersede the judgment. Before the divorce decree was final and before Husband posted the bond, Wife filed a copy of the decree in the El Paso County real property records and took possession of the 3 properties awarded to her but did not obtain a writ of execution. Husband sought to enforce the supersedeas bond, claiming that Wife's continued possession of the properties violates the bond. When the trial court denied that relief, Husband and various third parties filed a motion seeking enforcement of the bond and a petition for a writ of mandamus.

Holding: Mandamus granted

Opinion: Wife never completed execution on the disputed properties because she never obtained a writ of execution. Rather, she filed the decree with the real property records before the decree became final. Because she did not complete a lawful execution on any of the 3 properties before bond was posted, Wfie's premise that the supersedeas bond did not affect her imposition of a muniment of title and possession of the properties lacks merit.

A supersedeas bond preserves the status quo of the matters in litigation as they existed before the issuance of the order or judgment from which an appeal is taken. Because the posting of a supersedeas bond preserves the status quo prior to the judgment, posting of the bond requires removal of the muniment of title and return of possession of the El Paso Properties to Carillo.

TEMPORARY SPOUSAL SUPPORT PENDING APPEAL IMPERMISSIBLY BASED UPON MAINTAINING A PARTICULAR STANDARD OF LIVING.

¶17-5-38. ***In re Fuentes*****,** No. 01-16-00951-CV, 2017 WL 3184760 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding) (07-27-17).

Facts: In December 2015, the trial court signed a Final Decree of Divorce between Husband and Wife. Husband filed his notice of appeal on March 18, 2016. On April 1, 2016, the trial court issued temporary orders pursuant to section 6.709 requiring Husband to pay Wife $300,000 in monthly support and $50,000 in monthly attorney's fees during the pendency of the appeal. Husband sought and was granted a writ of mandamus because there was no supporting evidence and, after a rehearing, ordered the trial court to modify its order of temporary support and attorney's fees. After a hearing, the trial court ordered $250,000 in monthly spousal support and $100,000. Husband once again sought mandamus relief.

Holding: Mandamus granted

Opinion: It was Wife's burden to prove the amount of support with evidence. In the prior mandamus, the Court had rejected Wife's argument that "the temporary support awarded should be sufficient to maintain her standard of living before the divorce."

Wife has no minor children. In her revised financial information statement filed with the trial court, Wife claimed that she is entitled to spousal support of $396,116.65 per month in expenses and also a lump-sum allotment of previously incurred expenses totaling $4,301,342.59. These expenses include $125,000 per month for travel; $92,000 per month for food, clothing, and personal expenses; $38,500 in monthly expenses and property taxes associated with a home in Houston owned by one of her adult daughters; approximately $6,500 in monthly expenses associated with another home in Juarez owned by the same daughter; $5,000 in monthly expenses associated with a home in Costa Rica owned by another adult daughter; approximately $23,000 in monthly expenses and property taxes associated with multiple properties in El Paso; $86,472.30 per month for personal security in Houston; an additional $16,000 per month for personal security in Mexico and Costa Rica; $10,000 per month for family vacations; and $32,000 per month for medical care.

As with the original temporary orders, these requests for support are impermissibly based upon maintaining a particular standard of living; no evidence was presented that Wife was actually incurring these expenses and the support was necessary for her maintenance. Instead of demonstrating that Wife is without personal means or that her basic needs were not being met, evidence offered at the evidentiary hearing established the opposite. Because the record fails to provide evidence that Wife requires $250,000 in monthly temporary support to maintain her needs and it is undisputed that her basic needs are being met during the appeal, the trial court abused its discretion in awarding monthly spousal support.

Even if the trial court had jurisdiction to grant the lump-sum award of attorney's fees in its modified orders, the record indicates that these past fees have been paid. Further the record reveals that several groups of fees awarded by the trial court lacked evidentiary support. No witness with personal knowledge testify that the awarded fees were reasonably incurred or necessary for Wife's defense of the divorce decree on appeal, or as to any of the required factors prescribed by case law. Family Code section 6.709 authorizes trial courts to "render a temporary order necessary for the preservation of the property and for the protection of the parties *during the appeal*, including an order to . . . require the payment of reasonable attorney's fees and expenses." But the lump-sum attorney's fees requested by Wife and awarded by the trial court include fees incurred before the appeal. No attempt was made to segregate Wife's fees or to limit those fees to amounts incurred during the appeal. Because section 6.709 requires that fees be necessary for the preservation of property or protection of the parties during the appeal, the trial court erred by awarding fees not incurred during the appeal.

Editor's comment: *How many times do the courts of appeals have to say it… the proper standard for temporary support has nothing to do with a bougie life style. Nope. Sorry. M.M.O.*

MOTHER COULD NOT BE ASSESSED TWO SEPARATE PUNISHMENTS FOR ONE CONTEMPTUOUS ACT.

¶17-5-39. *In re L.M.*, No. 02-17-00218-CV, 2017 WL 3381139 (Tex. App.—Fort Worth 2017, orig. proceeding) (mem. op.) (08-07-17).

Facts: A temporary order granted Father telephone access to the Child and forbade Mother from monitoring the phone calls between Father and the Child unless Mother had a good faith reason to believe the Child was having a problem and if she advised Father she was monitoring the call. Father filed a motion to enforce and for contempt, complaining that Mother had monitored a phone call without advising him and without a good faith belief that the Child was having a problem. The trial court held Mother in contempt and sentenced her to 1 day in jail for monitoring the call without a good faith belief that the

Child was having a problem and 10 days in jail for monitoring the call without advising Father that she was doing so. The trial court suspended the 10-day sentence on condition of future compliance and the payment of attorney's fees. Mother served 1 day in jail and filed a petition for writ of habeas corpus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Because Mother was not imprisoned at time of the appellate review, her petition for writ of habeas corpus was construed as a petition for writ of mandamus.

A court signing a contempt order cannot divide one contemptuous act into separate acts and assess punishment for each allegedly separate act. Here, Mother was held in contempt for one bad act, but the trial court punished her for two separate acts.

NEW TRIAL ORDER VOID BECAUSE NO EVIDENCE OF SPECIFIC DATE MOTHER OBTAINED ACTUAL KNOWLEDGE OF JUDGMENT.

¶17-5-40. *In re Mitchell*, No. 05-17-00734-CV, 2017 WL 3392768 (Tex. App.—Dallas 2017, orig. proceeding) (mem. op.) (08-08-17).

Facts: Mother suffered from bipolar disorder and chose not to take her medication during her pregnancy. Shortly after the Child's birth, Mother woke Father with a knife and cut his neck. Mother was arrested and placed in solitary confinement. During her incarceration, her parents visited her twice and described Mother as incoherent. After Mother was arrested, Father initiated a SAPCR and obtained a protective order. Mother was served with both while in jail but claimed to have no recollection of being served. When Mother was transferred out of solitary confinement, she discovered the petitions and orders granting Father sole managing conservatorship and issuing a protective order. Mother filed a motion for new trial 64 days after the judgments were signed, invoking Tex. R. Civ. P. 306a(4), which extends a trial court's plenary power to grant a new trial if the movant failed to receive notice of the judgment within 20 days of it being signed. After a hearing, the trial court granted Mother a new trial with respect to both orders. During the oral rendition, the trial judge stated that Mother did not receive "competent notice" of the proceedings and judgment. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: To invoke the extended deadlines granted by Tex. R. Civ. P. 306a(4), a movant must establish a specific date on which she or her attorney received notice or obtained actual knowledge of the judgment. Here, at most, the evidence established that Mother did not mention the lawsuit to her Mother in late January. Additionally, although Mother testified that she first learned of the lawsuit when she was transferred from solitary confinement to the tank, she offered no evidence regarding the date on which the transfer occurred.

THE PRIMARY CONCERN IN WHETHER TO CHANGE A CHILD'S NAME IS THE CHILD'S BEST INTEREST—NOT THE INTERESTS OF THE PARENTS.

¶17-5-41. ***In re J.N.L.***, ___ S.W.3d ___, No. 14-16-00325-CV, 2017 WL 3441185 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (08-10-17).

Facts: Father was married to Mother, and they are the parents of 9-year-old J.N.L. Father is currently incarcerated after being convicted for aggravated robbery. His parole recently was denied. He is a registered sex offender due to a prior conviction for aggravated sexual assault of a child when he was seventeen. Mother is now married to John Rivera. She filed a petition requesting a name change for J.N.L. alleging that Father is incarcerated, J.N.L. wants to change her last name to Rivera, and changing

J.N.L.'s name to the same last name as the rest of J.N.L.'s siblings would "add unity to" the family. In its findings of fact and conclusions of law, the trial court found that J.N.L. has had no contact with Father, and she is unlikely to have any contact with him before she is an adult because his projected release date is in 2024. Mother testified that J.N.L. will be 18 years old then and that J.N.L. requested the name change. Father participated in the trial via videoconference. The trial court signed an order granting the name change request.

Holding: Affirmed

Opinion: In Texas, the primary concern in determining whether to change a child's name is the child's best interest—not the interests of the parents. Texas courts have applied at least 6 non-exclusive factors to determine whether a name change is in a child's best interest. Courts are not required to attribute the same weight to each factor in a given case. The significance of each factor depends on the facts of a case, so one or more factors may be irrelevant to a dispute. The factors include: (1) whether the name change would reduce anxiety, embarrassment, inconvenience, confusion, or disruption for the child, which may include parental misconduct and the degree of community respect (or disrespect) associated with the name; (2) whether the name change would help the child identify with a family unit; (3) whether the parent bearing the name the child will have assures that she will not change her name in the future; (4) the length of time the child has used a name and the level of identity the child has with the name; (5) the child's preference; and (6) the parent's true motivations for requesting the name change. This Court held that a trial court is not required to make a separate finding that the original name is detrimental to the child even though other courts have held to the contrary.

Anxiety, embarrassment, etc.: Although Mother did not testify that J.N.L. is currently experiencing these feelings, she testified that J.N.L. has been requesting a name change "[e]very day" for "a couple of years." From this, the trial court could infer that J.N.L. experienced some level of discomfort with her current name. Courts have also looked to the potential anxiety that a child might experience resulting from the reputation associated with a particular surname. Father was incarcerated for a violent crime and is a sex offender. Although Father's last name is a common name, the trial court could have inferred that having her father's surname name could cause J.N.L. to experience anxiety and embarrassment. Moreover, the trial court was not required to take complicated inferential steps to determine that Father's last name could cause inconvenience and confusion in a variety of contexts. J.N.L. could experience anxiety as a result of being the only Lopez in the Rivera household. Simple tasks such as picking J.N.L. up from school or taking her to a doctor's appointment may be difficult because of the different last names between J.N.L. and her mother.

Name that would help child identify with her family: Sharing a last name with a sibling or half sibling is relevant to determining whether a surname should be changed. This factor favors one name over another when the noncustodial parent does not maintain a significant relationship with the child. J.N.L. lives with the Riveras full-time and does not have any contact with Lopez. Additionally, J.N.L.'s siblings bear the Rivera name.

Assurances of No Future Name Changes by Rivera: Mother offered no evidence that she would not change her surname in the future. Father argues that because he testified Mother was "married at least 3 times before," this factor weighs against the name change. However, Father offered no evidence as to whether Mother had changed her name each time she married. It would have been reasonable for the trial court to conclude this factor does not favor either party.

Length of Time and Level of Identity Associated with Name: The longer a child has had a certain surname, the less likely a name change would be in her best interest. However, the child's age, in and of itself, does not determine whether this factor weighs in favor or against the name change. It must be considered alongside the level of identity a child has with the name. Mother testified that J.N.L. has had no contact with Father since he went to prison and that J.N.L. was mature enough to understand the significance of changing her name and asked "[e]very day" for her name to be changed to Rivera. This evidence supports the inference that J.N.L. associates with the Lopez name little, if at all, despite the fact that she has had that name for nine years, and thus this factor weighs in favor of the name change.

Child's Preferences: A child's preference is "an extremely significant factor for older children" such as J.N.L. Mother testified that J.N.L. wanted her name changed and had been asking for the name change "[e]very day" for "a couple of years" and that J.N.L. was mature enough to understand the significance of the name change. This factor weighs heavily in favor of the name change.

Motives of Parents: Father argues that the name change petition was an attempt by Mother to alienate J.N.L. from him. He testified that he believed Mother was "keeping [J.N.L.] from [him]" because Mother moved and did not provide Father with an updated address. Concomitantly, in light of Mother's testimony that J.N.L.'s siblings were named Rivera and J.N.L. wanted the name change, the trial court reasonably could have inferred that Mother requested the name change to strengthen J.N.L.'s relationship with the family with which she resided. This factor does not weigh against the name change. This factor is at least neutral or weighs slightly in favor of the name change.

Editor's comment: *This is another quick evidentiary comment. This case does a great job of setting out the factors for what you need to provide to the court in order to prove the best interest of the child with regards to a name change. This should be the focal point of where you start for your testimony and evidence and make sure that all of your testimony and evidence supports these factors. If the court has a record that has some evidence the court can hang its hat on, the likelihood that it will get reversed on appeal greatly diminishes. J.H.J.*

EITHER DECREE TOO AMBIGUOUS TO BE ENFORCEABLE BY CONTEMPT OR EVIDENCE INSUFFICIENT TO SUPPORT FINDING OF CONTEMPT.

¶17-5-42. *In re Campbell*, No. 01-17-00251-CV, 2017 WL 3598251 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding) (mem. op.) (08-22-17).

Facts: Father moved to enforce a final order of divorce entered between him and Mother. Father alleged that Mother violated provisions relating to the possession of and communications with their 3 children. After an evidentiary hearing, the trial court found that Mother violated the decree by:

(1) picking up the children from school, during a period when Father was entitled to possession of them;
(2) not calling Father back by telephone after he attempted to communicate with the children by Skype during designated hours, and purposely being away from her computer and phone during this period in order to thwart his communication with the children; and
(3) failing to assist and encourage the children to return in a timely manner a missed telephone call Father made to them during designated hours.

Based on these violations, the trial court found Mother in contempt of court and entered an order of commitment confining her to the jail for 180 days.

Mother sought a writ of habeas corpus directing the trial court to vacate its contempt order as void, including the award of attorney's fees and imposition of community supervision on
two independent grounds: 1) some of the provisions of the final divorce decree are too vague or ambiguous to serve as a basis for a finding of contempt; and 2) the evidence adduced at the hearing fails to support one or more of the essential elements required to support a finding of contempt of court for disobedience outside of the court's presence.

Holding: Writ for habeas corpus granted

Opinion: First Violation. Because the parties' decree did not unambiguously bar Mother from temporarily taking possession of the children when neither Father or his designee were present to pick up the children, its possession provisions do not provide a basis for contempt.

Second Violation. None of the evidence that the trial court heard supported its second contempt finding, which was premised in part on a determination that Mother "did not return the call." The divorce decree contemplated that there would be times when the children missed Father's calls. On these oc-

casions, it required Mother to "assist and encourage the children in returning the call in a timely manner." There was no evidence that Mother did not return Father's call; the evidence instead showed that Mother and the children spoke by telephone the following day. A trial court ordinarily may infer a contemnor's state of mind from her violation of an unambiguous order. Here, however, there is no proof of an underlying violation by Mother from which the trial court could draw such an inference.

Third Violation. Mother testified that the children were staying with her parents the weekend that Father called. She conceded that the divorce decree gave her possession of the children during this period. She also conceded that she did not assist the children to return Father's call while they were staying at her parents' home. Once the children returned, however, they called Father back.

"Timely" is an inherently ambiguous term when it is unqualified. The divorce decree uses the term as an adjective without further definition. Its plain, ordinary, common meaning encompasses actions taken "in good time" or "at a fitting or suitable time; seasonable, opportune, well-timed." Thus, whether an act is "timely" is contextual and generally a matter about which reasonable people may disagree. The timeliness requirement therefore is too ambiguous or inexact to serve as a basis for contempt under the circumstances.

WIFE NOT ENTITLED TO BILL OF REVIEW BECAUSE SHE WAS ALSO AT FAULT FOR FAILING TO DISCOVER THE DECREE'S DRAFTING ERROR.

¶17-5-43. *Wiegrefe v. Wiegrefe*, No. 03-16-00665-CV, 2017 WL 3908645/2017 WL 3897377 (Tex. App.—Austin 2017, no pet. h.) (mem. op.) (08-29-17).

Facts: Husband and Wife signed an MSA in their divorce that included a provision awarding an investment account to Wife. Husband's attorney drafted the decree, and both parties and their attorneys signed the draft decree. Husband proved up the final decree but failed to provide a copy to Wife despite multiple requests. About six weeks after the decree had been signed, Wife went to the courthouse to get a copy of the decree. About six weeks after that, Wife met with her financial planner, and they discovered that Husband's attorney made an error by including the investment account in the Property Awarded to Husband section instead of the Property Awarded to Wife section. The next day, after Husband refused to agree that the investment account belonged to Wife, she filed for a nunc pro tunc judgment. A few weeks later, she filed a petition for bill of review. After a hearing, the trial court granted Wife's bill of review, declared the final decree of divorce void, and signed a revised decree awarding the investment account to Wife. Husband appealed.

Holding: Reversed, Vacated, and Rendered

Majority Opinion: (J. Field, C.J. Rose)

The fact that an injustice has occurred is not sufficient to justify relief by bill of review. Here, Wife or her attorney contributed fault or negligence to the errors found by the trial court.

First, Wife signed the decree to show her agreement as to form and substance, and her attorney signed the decree to show agreement as to form. Additionally, the decree included a provision that "[t]o the extent any differences exist between the [MSA] and this Final Decree of Divorce, this Final Decree of Divorce shall control in all instances." Regardless of whether Husband's lawyer's error was intentional, Wife contributed to the error by failing to discover it before signing the decree.

Second, although Husband failed to provide Wife with a courtesy copy of the certified, signed decree, the court clerk notified Wife the day it was signed. Wife or her attorney could have obtained a copy from the clerk at any time. Further, Wife did not discover the error until she reviewed the decree with her financial advisor, nearly three months after the decree was signed. Thus, Wife likely would not have noticed the error within the trial court's plenary power even if Husband had timely provided her with a courtesy copy.

Moreover, even if the error was fraudulent on Husband's part, it was not extrinsic fraud and, thus, could not support the granting of a bill of review.

Dissenting Opinion: (J. Bourland)

To succeed on a bill of review, a plaintiff must show that she was *prevented from making a timely appeal* through no fault of her own. Wife could not have raised a timely appeal until after the decree was signed, and any appeal would have been based on the signing of an erroneous decree. Thus, any fault related to a failure to raise a timely appeal would have necessarily had to have arisen after the decree was signed. Thus, Wife's failure to discover the error before the decree was signed by the trial court should not have been considered in determining whether she was at fault for failing to appeal.

Because the error was not discovered prior to proving up the decree, and because the decree was agreed, Wife and her attorney should not have been expected to be anxiously awaiting a copy of the final signed decree for the purpose of looking for appealable errors. As soon as Wife discovered the error, she attempted to resolve it.

"In deciding this was an abuse of discretion, the majority seems to re-weigh the evidence."

MISSING EXHIBITS WERE NOT NECESSARY FOR APPELLATE COURT TO CONDUCT A SUFFICIENCY REVIEW.

ALLOWING CHILD TO DETERMINE WHEN AND IF VISITATION WOULD OCCUR CREATED POTENTIONAL FOR DENIAL OF ALL ACCESS AND GAVE FATHER NO ABILITY TO ENFORCE ORDER BY CONTEMPT.

COURT ORDERING FATHER TO PAY ATTORNEY'S FEES IF HE FILES ANOTHER SUIT PROHIBITED SANCTION.

PARTY NOT ENTITLED TO "HYBRIED REPRESENTATION" BY BEING SIMULTANEOUSLY PRO SE AND REPRESENTED BY AN ATTORNEY.

¶17-5-44. ***In re S.V.***, ___ S.W.3d ___, No. 05-16-00519-CV, 2017 WL 3725981, 2017 WL 3725732 (Tex. App.—Dallas 2017, no pet. h.) (on reh'g) (08-30-17).

Facts: Father, who had been appointed possessory conservator, had the Children at his home for Father's Day. During the visit, the Older Child received a text message from an unknown number. Father yelled at the Older Child not to answer and reached for the phone. In the process, Father struck the Older Child across the face which hurt the Older Child and Father, as he had a broken finger at the time. He reacted by calling the Older Child "bitch" and saying he "hoped she died of cancer." He later apologized. Subsequently, the Children presented to Father a video they made him for Father's Day of them singing a song they had written. Father took a photo of a white board on which the Children had written the lyrics of their song.

After a jury trial in a SAPCR in favor of Mother, Father filed an appeal. The appellate record did not include the video and photograph, which had been lost through no fault of Father's. Father asked the appellate court to grant him a new trial pursuant to Tex. R. App. P. 34.6(f), which would entitle Father to a new trial if:

(1) he timely requested the reporter's record;
(2) a significant exhibit was lost or destroyed through no fault of his own;
(3) the lost exhibit was necessary to the resolution of his appeal; and
(4) the lost evidence could not be replaced by agreement of the parties or with a copy determined by the trial court to duplicate the original evidence accurately and with reasonable certainty.

The appellate court ordered the trial court to conduct a hearing to determine whether the Rule 34.6(f) requirements were met and to file its written findings with the appellate court. The trial court found that the video and photograph were not necessary to the resolution of the appeal. Father contested that finding.

Holding: Affirmed in Part; Reversed in Part

Majority Opinion: (J. Fillmore, J. Bridges) If a missing portion of the record is not necessary to the appeal's resolution, then the loss of that portion of the record is harmless, and a new trial is not required. Here, both Father and the Older Child testified as to the content of the missing video and photograph. The video was played for the jury, and questions were asked of Father regarding whether he coerced the video and his reaction to it. The Older Child testified that the video was made after Father apologized, that it was common for the Children to make similar videos for Father's Days, and that she was trying to keep Father happy. The Older Child testified that the missing photograph showed a white board on which the song lyrics were written, which included the words "we love you."

Father had the burden to establish the missing exhibits were necessary, which is a harm analysis that is reviewed for abuse of discretion. Here, the trial court determined that the testimony describing the video and photograph would sufficiently inform the appellate court as to their contents. The majority concluded that the trial court did not abuse its discretion by finding the missing exhibits were not necessary to the resolution of Father's appeal.

Having determined that the missing exhibits were not necessary, the appellate court addressed the merits of Father's appeal.

The trial court conditioned Father's visitation periods to times "agreeable to the child or children." This possession order created the potential for a denial of all access and gave Father no ability to enforce the order by contempt. The appellate court reversed and remanded with an instruction to either order appropriate times and conditions for Father's visitation or, if supported by the evidence, completely bar Father from access to the Children.

The trial court awarded Mother attorney's fees in the event Father filed any additional suits. Sanctions cannot be awarded for a hypothetical suit that may be filed in the future. If, in the future, Father filed a pleading or sought discovery that was frivolous or harassing or proved to be a vexatious litigant, procedures were available to address that issue when and if it occurs.

While Father was represented by an attorney, he purportedly filed an additional pro-se amended counter-petition. A party is not entitled to "hybrid representation" by being simultaneously pro-se and represented by an attorney. The trial court was under no mandatory duty to accept and consider Father's pro se pleadings while he was represented by an attorney.

Dissenting Opinion: (J. Boatright) The distinction between a finding of fact and conclusion of law is fundamental and determines the standard of review by an appellate court. Regardless of the informal use of the word "findings," if a purported finding is actually a conclusion of law, the conclusion is reviewed de novo. It is not sufficient to simply accept the trial court's characterization of a ruling as a "finding." The issue of whether missing evidence is necessary to resolve an appeal was a question of law that should have been reviewed de novo.

While there was some description of what the video and photograph depicted, there was no evidence of the full lyrics of the song, any additional dialogue, facial expressions, etc. To properly do a factual sufficiency review, the appellate court must review the entire record. Here, because evidence was lost, the appellate court could not review the entire record, and Father should have been granted a new trial.

FATHER NOT ENTITLED TO NEW TRIAL BASED ON *CRADDOCK* TEST BECAUSE FINAL JUDGMENT WAS NOT DEFAULT JUDGMENT.

¶17-5-45. ***In re G.B.A.***, ___ S.W.3d ___, No. 06-17-00049-CV, 2017 WL 3722592 (Tex. App.—Texarkana 2017, no pet. h.) (08-30-17).

Facts: Father was found in arrears for child support, and the trial court signed an income withholding order. Ten years later, Father filed a petition to end or reduce the wage-withholding. Father retained an attorney, who had been notified of the trial date. However, due to a calendaring error, Father's attorney did not appear until judgment had been orally rendered. Father had attempted to present his case to the court, but the trial court denied his petition. Subsequently, Father filed a motion for new trial, assert-

ing the *Craddock* factors had been met. The trial court denied the motion for new trial. Father appealed and raised a single issue complaining of the denial of his motion for new trial.

Holding: Affirmed

Opinion: The *Craddock* test only applies to default judgments. Here, Father was the petitioner and he appeared at and participated in the final trial. The final judgment was not a default judgment.

PROTECTIVE ORDER BASED ON STALKING ALLEGATIONS, WHICH CAUSED HUSBAND TO LOSE RIGHT TO BEAR ARMS, NOT UNCONSTITUTIONAL.

¶17-5-46. ***Webb v. Schlagal***, ___ S.W.3d ___, No. 11-14-00101-CV, 2017 WL 3923527 (Tex. App.—Corpus Chisti 2017, no pet. h.) (08-31-17).

Facts: Husband and Wife had a brief courtship and brief marriage. During the marriage, Husband frequently locked Wife in a room with him to interrogate her about her alleged prostitution ring that she ran out of their home. He had a theory that she had tunnels from their non-existent basement through their 4-inch walls up into the attic, and that this transportation system was used in her prostitution ring. At some point after their separation, Husband went to the hospital because he had been shot. He asserted that Wife shot him or hired someone to do it. Upon investigation, the police determined that Husband had attempted to set up a trip-wire system in his home and that the wound was self-inflicted. The police used a robot to clear Husband's home and removed his weapons, which included three guns. The police described Husband as delusional.

Despite an email from Wife ordering him to cease all contact with her, he continued to harass her on Facebook and via email, asserting that she ran a prostitution ring, had shot him, and had something to do with the death of his mother. Wife filed a motion for a protective order, asserting that Husband had engaged in stalking as defined by Tex. Pen. Code § 42.072. After the trial court granted the protective order, Husband appealed on a number of grounds, including First and Fourth Amendment Constitutional complaints.

Holding: Affirmed

Opinion: Even if Husband had adequately briefed his First Amendment issue, his issue lacked merit because threats are not protected speech. His emails to Wife were "the very vehicle of the crime itself" and not constitutionally protected.

The U.S. Supreme Court has previously held that disallowing gun possession by individuals subject to domestic protection orders is constitutional. Subsequently, the Fourth Circuit elaborated that the right to bear arms is extended to "law-abiding responsible citizen[s.]" The Fourth Circuit applied an intermediate standard of scrutiny to determine whether there was a "reasonable fit" between the challenged regulation and a substantial government objective.

Here, the statute allowing a protective order applies to persons who have engaged in trafficking of a person sexual assault or abuse of a person, stalking, or compelling prostitution. The Texas Legislature determined it was reasonable to permit victims of these types of crimes to obtain an order of protection regardless of the victim's prior relationship with the perpetrator.

Husband demonstrated through his words and actions that he was not only delusional but a significant and life-threatening danger to himself and to Wife. Moreover, the police also thought he was delusional and took his guns before Wife ever filed for a protective order.

MEMORANDUM RULING IN SAPCR DETERMINED TO BE "FINAL" DESPITE LACKING REQUIREMENTS OF TEX. FAM. CODE § 105.006 OR ANY SPECIFICITY AS TO RIGHTS AND DUTIES, POSSESSION AND ACCESS, OR CHILD SUPPORT.

¶17-5-47. *In re B.D.*, No. 05-17-00674-CV, 2017 WL 3765848 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (08-31-17).

Facts: After a jury trial, the trial court issued a memorandum ruling, which contained the case name, case number, trial court name, and provided:

- Pursuant to the Jury verdict, it is ORDERED that MOTHER and FATHER will remain joint managing conservators of the child.
- Pursuant to the Jury verdict, it is ORDERED that FATHER will have the exclusive right to determine the primary residence of the child within Collin County.
- It is ORDERED MOTHER will have an expanded standard possession schedule.
- It is ORDERED that MOTHER will pay guideline child support pursuant to MOTHER'S income of $1,500 net pay every 2 weeks.
- The parties are ORDERED to continue communications using OurFamilyWizard.com.
- Each party is ORDERED to pay for his/her own respective attorney fees.
- Any and all relief not expressly granted is hereby DENIED.

Less than three weeks later, Mother filed a motion to suspend enforcement of judgment pending appeal. A month after that, she filed a motion for new trial. Three days after that, the trial court signed a Final Order in the SAPCR. Two weeks after that, Mother filed her notice of appeal. Subsequently, the Dallas Court of Appeals requested letter briefs from the parties because it questioned whether Mother's notice of appeal was timely.

Holding: Dismissed for Want of Jurisdiction

Opinion: A memorandum ruling will be accorded final judgment status and trigger appellate deadlines if it:

- describes the decision with certainty as to the parties and effect;
- requires no further action to memorialize the ruling;
- contains the name and cause number of the case;
- includes diction that is affirmative rather than anticipatory of a future ruling;
- bears a date;
- was signed by the court;
- was filed with the district clerk.

Here, the trial court's memorandum ruling met all the above requirements. Thus, the appellate court:

> conclude[d] the memorandum substantially complie[d] with the requisites of a formal judgment to be accorded final judgment status triggering the appellate deadline. Although it does not contain the items listed in [Tex. Fam. Code] section 105.006, those items are clerical in nature, not substantive items that would preclude the memorandum from being a final judgment.

Therefore, because the memorandum ruling was a final ruling, the motion for new trial was untimely, the trial court's plenary power was not extended, the subsequently signed "final order" was void, and the appellate court lacked jurisdiction to consider Mother's appeal.

Editor's comment: *I believe that the Dallas Court of Appeals got this one wrong. All cases cited in support of holding that ruling constituted a final order were non-family law cases involving children. Here, not only were the mandatory warnings left out of the alleged "final order", so were the rights and duties of the conservators, so were specific possession times—just stating expanded provides many options—and general terms and conditions of possession, so was a specific amount of child support, when it should start, and where it should be sent, and no provisions regarding who is obligated to obtain and pay for medical support. These provisions require more than clerical changes and cannot be fixed using a nunc pro tunc, and I question whether all changes could be made through clarification. Without this information, it would be virtually impossible to pursue an appeal. So I guess the take away is file a TRCP 329b motion if there is any question at all as to whether a court's ruling, constitutes a final order to buy your client time to enter a real "final order." This is just a trap to deprive folks of their right to appeal.*

Editor's comment: *DANGER! DANGER! The Dallas Court of Appeals has lost its mind! Seriously! Have you read this opinion? Can you imagine the literally thousands of void decrees we have running around our state based on this ill-advised opinion? We can only pray that either the Dallas Court changes its ever-loving mind and finds some common sense… or one of our dear beloved family law justices on SCOTX will knock some sense into their heads. This is just terrible! In the meantime, if you have a judge who issues one of these memorandum-ruling-turned-final-judgment orders then you should immediately file a motion to correct/reform under Rule 329b(g) to extend plenary power and file your request for findings of fact and conclusions of law immediately so nothing gets waived. M.M.O.*

Editor's comment: *This decision just seems wrong to me. And it also flies directly in the face of In re B.W.S., 05-15-01207-CV, 2016 WL 7163866 (Tex. App.—Dallas Nov. 28, 2016, no pet.). To be safe, assume the memo ruling is your final judgment, and run your post-trial deadlines from it! R.T.R.*

Editor's comment: *A harsh result, but the court ruled correctly. This issue could be avoided if the judges would reface their rulings with something like this: "Counsel for _____ is ordered to prepare a final decree that contains the following: . . . " J.V.*

Editor's comment: *Now this ruling is SCARY, and it strikes fear in the heart of any of us that do appeals. The concern here is that for years and years, we have all followed the rule that until the order is a final, typed, written and signed judgment (like a decree), those appellate timelines don't begin to run. The Court of Appeals here found that even though this was a memorandum ruling, it still met all of the requirements for a final judgment. I think the main element that I can't get around is the "requires no further action to memorialize the ruling" element. Almost every letter or memorandum ruling I have seen requires further action, because it needs to be typed into a final order that will be enforceable. Until the Texas Supreme Court takes a look at this, I am under the impression again to be completely on the safe side. To do that, I foresee you calculating two sets of appellate timelines. One set would be calculated from the date of the ruling, and the other would be calculated from the date of the actual signed final order. It may be, just to preserve those time tables, that it is necessary to file requests for findings of fact and conclusions of law and a motion for new trial based on the rendition (treating it as a final order), and then to file a supplement or additional request and motion for new trial once the final order is signed and entered. This seems like a lot of work, but it's better to be safe than sorry when dealing with these deadlines. Hopefully the Texas Supreme Court will sort this out quickly for us. J.H.J.*

GO TO TABLE OF CONTENTS