SECTION REPORT
FAMILY LAW

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IN THIS MONTH'S REPORT

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Section Wear and Publications

MESSAGE FROM THE CHAIR

As my term as Chair is coming to an end, it is truly hard to believe that a year has passed. Thank you for the privilege of serving as Chair of the Family Law Council which has truly been an honor and one of the high points in my career. I hope that as Chair I was able to provide value and effectively serve the best interests of the Section, as well as continue the many accomplishments of the Family Law Section from the past years.

Membership in the Section

There are excellent benefits by being a member of the Family Law Section. These benefits include receiving the following:

- The Family Lawyer's Essential Tool Kit;
- The Family Law Section Report each quarter, which contains informative articles and case digests, a yearly bibliography of recent CLE articles, and a legislative update; and
- Discounts on State Bar family law seminars such as the Advanced Family Law Course, Marriage Dissolution, New Frontiers in Marital Property Law, and Innovations—Breaking Boundaries in Child Custody Litigation.

Innovations

Thank you to Kathy Kinser for putting together an extraordinary program at the Innovations—Breaking Boundaries in Child Custody Litigation course held in New Orleans in February. The presentations were excellent, and I appreciate all of the work that went in to make this program so successful.

Publications

I encourage each of you to check out the publications produced by the Family Law Section that are available through the Family Law Section website. These are great resources for our practices, and the publications include Family Law Checklists, the Predicates Manual, the Texas Family Law Practice Manual, the Family Lawyer's Essential Toolkit, Family Law at Your Fingertips, and Section DVD's.

Legislative Work and Texas Family Law Foundation

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

Steve and Amy Bresnan, the lobbyists for the Texas Family Law Foundation, are actively working in Austin to assist in presenting Section bills and keeping bills that would be detrimental to family law and our state from being passed. The Foundation Bill Review Committee continues to review the bills that were filed by other groups to help the lobbyists. Also thank you to all of the Section volunteers who are donating their time by taking a week off from their practices to work in Austin with our lobbyists.

I encourage each of you to become a member of the Texas Family Law Foundation, an entity that is separate from the Section, whose mission is to improve the practice of family law in Texas. Volunteers participate in research, legislative work and other activities. If you would like to get involved in the Family Law Foundation, please go to www.texasfamilylawfoundation.com.

Pro Bono

I am proud to report that the Family Law Section is once again the recipient of the Pro Bono Award from the State Bar. The Pro Bono Committee has done an excellent job of putting on *family law seminars and webinars across the State and the 2017 seminars are underway.* The price of admission to a seminar or webinar, which qualifies for CLE credit, is the commitment to handle two

family law pro bono matters over a twelve-month period. These seminars have resulted in hundreds of indigent Texans having access to legal help for their family law matter. Members who are interested in speaking at or attending future Family Law Essentials seminars can contact Lisa Hoppes at lisa@hoppescutrer.com.

Continuing Legal Education

Upcoming family law CLE programs include the following:

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

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

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

As I reflect on my year as Chair, I think of the significant contributions made by so many family law lawyers across the State to further the mission of the Family Law Section in promoting the highest degree of professionalism, education, fellowship, and excellence in the practice of family law. It has been such a pleasure working with the Executive Committee, Council Members, Past Chairs, Committee Chairs and volunteers this past year, and I would like to thank them for their hard work, dedication and commitment to the Section.

I am truly proud to have had the opportunity to serve this wonderful organization and I am grateful for the friendships that I have developed. Please join me in welcoming Cindy Tisdale as she will step into the Chair position for next year. I am looking forward to assisting Cindy and the rest of the Executive Committee as my services are needed, and I hope to see many of you at the Marriage Dissolution Course in April.

Kathryn Murphy
Chair, Family Law Section

2017 Recommended Nominations Slate
State Bar of Texas Family Law Section

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

Officers	
Chair:	**Cindy Tisdale**
Chair-Elect:	**Steve Naylor**
Vice-Chair:	**Chris Nickelson**
Treasurer:	**Kristal C. Thomson**
Secretary:	**Jonathan Bates**
Immediate Past Chair:	**Kathyrn Murphy**

Nominations to the Class 2022

1. **Adam Dietrich (Conroe)**
2. **Susan McLarren (Houston)**
3. **Eric Robertson (Austin)**
4. **Nick Rothschild (Corpus Christi)**
5. **Natalie Webb (Dallas)**

The election will take place on **April 20, 2017,** at the section meeting during Marriage Dissolution.

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IN THE LAW REVIEWS AND LEGAL PUBLICATIONS

NON-TEXAS ARTICLES

Is Assisted Procreation an LGBT Right?, Michael **Boucai**, 2016 Wis. L. Rev. 1065 (2016).

The Family Lawyer's Role in Preventive Legal and Conflict Wellness, Forrest S. **Mosten** & Lara **Traum**, 55 Fam. Ct. Rev. 26 (Jan. 2017).

Can this Relationship be Saved? The Legal Profession and Families in Transition, Pauline H. **Tesler**, 55 Fam. Ct. Rev. 38 (Jan. 2017).

The Family Law Bar, the Interdisciplinary Resource Center for Separating and Divorcing Parents, and the 'Spark to Kindle the White Flame of Progress', Andrew **Scepard**, Marsh Line **Pruett**, & Rebecca Love **Kourlis**, 55 Fam. Ct. Rev. 84 (Jan. 2017).

From Talk to Action: How the IAALS Summit Recommendations Can Reshape Family Justice, Natalie A. **Knowlton**, 55 Fam. Ct. Rev. 97 (Jan. 2017).

A Survey of Beliefs and Priorities About Access to Justice of Family Law: The Search for a Multidisciplinary Perspective, Peter **Salem** & Michael **Slaini**, 55 Fam. Ct. Rev. 120 (Jan. 2017).

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

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

Another Look at the Need for Family Law Education Reform: One Law School's Innovations, Barbara A. **Babb**, 55 Fam. Ct. Rev. 59 (Jan. 2017).

Is the Indian Child Welfare Act Losing Steam?: Narrowing Non-Custodial Parental Rights After Adoptive Couple v. Baby Girl, 7 Colum. J. Race & L. 191 (2016).

Low-Income and Never-Married Families: Service and Support at the Intersection of Family Court and Child Support Agency Systems, Jacquelyn L. **Boggess**, 55 Fam. Ct. Rev. 107 (Jan. 2017).

Obergefell's Liberties: All in the Family, Susan Frelich **Appleton**, 77 Ohio St. L.J. 919 (2016).

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

Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?, Deborah L. **Forman**, 19 U. Pa. J. L. & Soc. Change 41 (2016).

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

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

The Case for Arbitration in Family Cases--and for the Uniform Act, Linda D. **Elrod**, 23 No. 2 Disp. Resol. Mag. 18 (Winter 2017).

The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art, Deborah **Zalesne** (Jan. 2017).

Where Did All the Social Workers Go? The Need to Prepare Families for Adoption, Assist Post-Adoptive Families in Crisis, and End Re-Homing, Stacey **Steinberg**, 67 Fla. L. Rev. F. 280 (2016).

Case Comment: Adoptive Couple v. Baby Girl*, 133 S. Ct. 252 (2013)*, Anietie Maureen-Ann **Akpan**, 6 Colum. J. Race & L. 1 (2016).

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The DNA Default and Its Discontents: Establishing Modern Parenthood, Katharine K. **Baker**, 98 B.U. L. Rev. 2037 (Dec. 2016).

Reproduction Reconceived, Courtney Megan **Cahill**, 101 Minn. L. Rev. 617 (Dec. 2016).

Nonmarriage, June **Carbone** & Naomi **Cahn**, 76 Md. L. Rev. 55 (2016).

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

Concord with Which Other Families?: Marriage Equity, Family Demographics, and Race, Nancy D. **Polikoff**, 164 U. Pa. L. Rev. Online 99 (2016).

Should Infants and Toddlers Have Frequent Overnight Parenting Time with Fathers? The Policy Debate and New Data, William V. **Fabricius** & Go Woon **Suh**, 23 Psychol. Pub. Pol'y & L. 68 (Feb. 2017).

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

Fathers and Feminism, Jennifer S. **Hendricks**, 91 Tul. L. Rev. 473 (Feb. 2017).

IN BRIEF

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

Agreements: In a case where the ex-husband failed to make house payments after divorce, the Georgia Supreme Court held that a person may not be held in contempt of court based on violating an alleged informal agreement made outside the divorce decree and separation agreement. *Brown v. Brown,* ___ S.E.2d ___, 2017 WL 279520 (Ga. Jan. 23, 2017). The Nebraska Supreme Court refused to allow a separate complaint for declaratory judgment as to the validity of a prenuptial agreement to proceed while the parties' divorce was pending. *Mansuetta v. Mansuetta,* ___ N.W.2d ___, 295 Neb. 667, 2017 WL 383279 (Neb. Jan. 27, 2017). A Minnesota court did not err when it held an antenuptial agreement invalid for lack of procedural fairness when the man presented it to his fiancée three days before departing on their destination wedding to the Cayman Islands, and the fiancée had only a hurried opportunity to consult with counsel. *Kremer v. Kremer,* 889 S.W.2d 41 (Minn. App. Jan. 9, 2017).

Child support: In Maine, a child is entitled to receive the greater of dependent disability payments or the amount of child support ordered, but when the disability payments exceed child support due, the obligor is not entitled to a "credit" for past or future child support payments. *Dunwoody v. Dunwoody,* ___ A.3d ___, 2017 ME 21, 2017 WL 370898 (Jan. 26, 2017). A North Dakota court erred when, on a motion to modify, it imputed an obligor's oil field earnings of approximately $250,000 to him after oil field work dried up and the obligor could not find a similar job. *Rathbun v. Rathbun,* ___ N.W.2d ___, 2017 ND 24, 2017 WL 632880 (N.D. Feb. 16, 2017). The federal Child Welfare Act, which requires the states to make foster care maintenance payments on behalf of children placed into foster care, creates a private right of action in favor of a foster parent to obtain those payments. *D.O. v. Glisson,* 847 F.3d 374 (6th Cir. Jan. 27, 2017).

Characterization: In New Jersey, marital property does not include that portion of a bonus received after marriage that was based in part on premarital employment, although equitable principles never-

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theless may permit the imposition of a constructive trust on the portion attributable to premarital employment. *Thieme v. Aucoin-Thieme,* 151 A.2d 545 (N.J. Dec. 12, 2016). A Rhode Island trial court did not err when it characterized a lump-sum settlement arising from an ex-husband's employment during marriage as deferred compensation rather than post-divorce severance pay. *Corbin v. Corbin,* ___ A.3d ___, 2017 WL 414572 (R.I. Jan. 31, 2017). The Alaska Supreme Court held that because a wife's premarital student loan had been consolidated into other loans, it had been transmuted into marital debt. *Wagner v. Wagner,* 386 P.3d 1249 (Alas. Jan. 13, 2017). In another decision, the Court held a wife's eligibility for Indian Healthcare Services to be her separate property which the trial court "effectively invaded" upon divorce by using it as an offset to the husband's military-provided health insurance. *Horning v. Horning,* ___ P.3d ___, 2017 WL 655745 (Alas. Feb. 17, 2017).

Grandparents: Washington State grandparents failed in their attempt to obtain custody of their granddaughter upon the mother's incarceration because they presented no "additional circumstances" against the father other than that he had been mostly absent from the child's life and the grandparents had raised her. *In re Custody of L.M.S.,* 387 P.3d 707 (Wash. Jan. 19, 2017). The New Jersey Supreme Court refused to allow a mother to cut off agreed, court-ordered grandparent visitation absent the granting of a motion to modify based on changed circumstances. *Slawinski v. Nicholas,* 150 A.3d 409 (N.J. App. Dec. 6, 2016).

Modification: The Wyoming Supreme Court rejected a mother's argument that the trial court issued temporary orders without an evidentiary hearing when the practice in that court was to proceed on offers of proof by counsel, and the mother failed to object to the lack of evidence. *Tracy v. Tracy,* ___ P.3d ___, 2017 WL 696133 (Wyo. Feb. 22, 2017). The Washington Supreme Court, sitting en banc, held that out-of-network health care costs are uninsured medical expenses, such that by ordering the mother to pay 25% of out-of-network costs, the trial court impermissibly modified the parties' divorce decree, which ordered that the father pay 100%. *In re Marriage of Zandi,* 366 P.3d 1244, 185 Wash.2d 1002 (Wash. Feb. 23, 2017) (en banc). A California appellate court affirmed the denial of a father's request to reduce his child support obligation from $17,500 to $9,842 per month, agreeing with the mother's argument that the father's reduced income "did not constitute a material change in circumstances in light of his extreme wealth," in excess of $67 million. *In re Marriage of Usher,* 6 Cal.App.5th 347 (Cal. App. Dec. 2, 2016).

Spousal support: A South Dakota ex-husband successfully obtained termination of his alimony obligation after discovering that his ex-wife had become employed. *Vandyke v. Choi,* 888 N.W.2d 557 (S.D. Dec. 14, 2016). A New York court held that "increasing the amount or the duration of Defendant's post-divorce spousal maintenance obligation . . . by reason of his refusal to give Plaintiff a Jewish religious divorce or 'Get' would violate the First and Fourteenth Amendments to the United States Constitution." *Masri v. Masri,* ___ N.Y.S.3d ___, 2017 WL 160322 (N.Y. App. Jan. 13, 2017). A California trial court did not abuse its discretion when it denied a wife spousal support based on her conviction for family violence. *In re Marriage of Schu,* 6 Cal.App.5th 470 (Cal. App. Dec. 19, 2016). Another California trial court did not err when it ordered a husband to pay spousal support, against the husband's contention that both he and his wife had a "right to retire," such that requiring him to pay spousal support would force him to continue to work. *In re Marriage of McLain,* 7 Cal.App.5th 562 (Cal. App. Jan. 6, 2017).

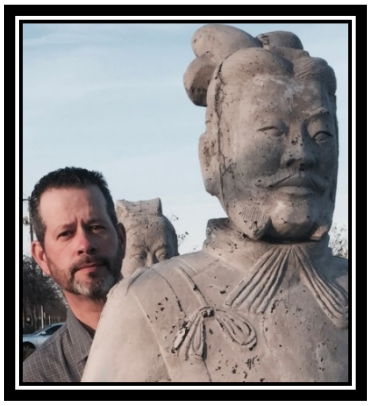
Termination: A divided, en banc Washington Supreme Court reversed the termination of an inmate's parental rights, holding, as characterized by the dissent, that: "The majority acknowledges that findings on the incarcerated parent factors at issue here are not required, yet reverses and remands for the trial court to consider such factors." *In re Parental Rights to K.J.B.,* 387 P.3d 1072 (Wash. Jan. 26, 2017) (en banc). Of the three alternative waiting periods that must pass before termination may occur, the Indiana Department of Child Services "failed to prove the two periods it alleged and failed to allege the

one period it could have proved," warranting reversal of the termination judgment. *Bi. B. v. Indiana Dep't of Child Servs.,* ___ N.E.2d ___, 2017 WL 656315 (Ind. Feb. 17, 2017).

Texting trouble: A father was guilty of second degree harassment when he sent the mother text messages rather than leaving telephone messages, and communicated with her on issues other than when he and the children agreed to adjust the children's visitation schedule, including profanity and threats that "annoyed" and "alarmed" the mother and the children. *James XX. v. Tracey YY.,* 146 A.D.3d 1036, 45 N.Y.S.3d 621 (N.Y. App. Jan. 5, 2017).

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]



Not long ago, I was serenely contemplating a new year, achieving a relaxation of body, mind, and spirit in an elevated state. By that, of course, I mean that I was stuck on an airplane for four hours. Often when this happens, I have an urge, just upon take-off, to get up and walk, much like that tickle you get on the tip of your nose when you cannot scratch it. Still, what an excellent time to contemplate the fresh start, the reset, that a new year presents. It's not like there was a meal on the flight. So, let's get to it.

Like you, I'm worried about my future. (Wait, that doesn't sound right. You probably aren't so worried about my future, but I sure am worried about yours. No, that doesn't sound right either). Anyway, in 2017, just how friendly must we get with Russia? It appears that, under our new President, we will be spending more time together, and it seems kind of like your divorced mom bringing home her new boyfriend, and it turns out he's your school principal. The principal smiles at you a lot and urges you to call him "Vlad," but not at school (he says, laughing but not smiling), and you try to signal covertly to your mom that this guy is not be trusted, but she's busy asking Vlad if he has any interest in the combination to her wall safe. "No, no," says Vlad, "but yes." So, there's that.

I'm a little bit concerned about Mars, as we head into the new year, because we seem to be taking steps to colonize it. Only because Elon Musk wants to do this, and no particular government, do I think it may happen (if Musk decided you should learn Portuguese, you would do so while claiming it was your own idea), and I worry that once Mars becomes available, the North Dallas real estate agents will control it. "Now, never mind the red dust," they'll say, "we can fix that, but just look at the potential! And a community center will go in right over there." That worries me a bit.

Okay, so maybe I think too much about politics, but what if I haven't been in America long enough to be safe? On my father's side, I think I'm only third-generation. Should I stop eating ethnic? All right, I'll focus.

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

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What about technology? On the one hand, we still can't transport ourselves across vast distances like on Star Trek (of course I'm thinking about that now), but I wonder how long it will be before we allow our cars to drive us without keeping an anxious eye on the road. Because once you can read the news and drink coffee without looking up, all while your car speeds down Central Expressway, shooting its own digital digit at other cars for you, that will change everything. Except that, driving in the city and boiling spaghetti are two of my talents, and spaghetti may be all I have left. For now.

I hope you enjoy your new year. Think of all the new colors of socks there are on the market, and be happy about that.

COMPETENT FORENSIC INTERVIEWS? CAN YOU TELL?

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

Can you tell if an evaluator conducted competent forensic interviews? Interviews are a key but overlooked element of the generally accepted triad of forensic psychological evaluation methods—the other elements: psychological testing and collateral information reviews. Too often, lawyers shy from challenging the quality of evaluator interviews, viewing them merely as a routine subjective information-gathering task.

To challenge the quality of those interviews, think first how you interview a prospective client before taking his or her case. You do more than copy two-ours worth of complaints. You listen to the story. You probe for strengths and weaknesses. You consider whether the person's concerns can legally support a case. You assess what evidence might be compelling and admissible at trial.

Hold evaluators to this same thorough interview approach that you adopt in your practice. The American Psychological Association's professional practice guidelines do so, informing psychologists that "the court will expect [them] to demonstrate a level of expertise that reflects contextual insight and forensic integration as well as testing and interview skills." *Guidelines for Child Custody Evaluations in Family Law Proceedings*, Guideline 4, Rationale. But rely on more than the report's accounting of the interviews to test their quality. Also review the evaluator's interview notes from the file. As you do, see if the expert did the following:

- ***Conducted a sufficient number of examinee interviews to competently address the evaluation's referral questions?*** In family law cases, two interviews are really not enough to build sufficient rapport and explore case concerns; three may not be either, particularly when difficult issues are being assessed. And too often, evaluators improperly substitute lengthy questionnaires for extra interviews.
- ***Spent sufficient time exploring specific case issues?*** Insufficient time spent shows when the evaluator asked only a few questions of key issues with no follow-ups to the examinee's answers, or when the evaluator does not ask questions that reflect the professional literature in specific case issues being assessed.
- ***Asked examinees about concerns raised in relevant collateral records?*** Too often, examinees are not asked to explain concerns in collateral records. Too often, evaluators don't

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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.*

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even review those records until the very end of the evaluation period after all interviews with the examinees have been completed.

- ***Asked examinees about concerns raised in the evaluator's collateral interviews with person's who have relevant information of the examinee or family?*** Same concerns as with collateral records.
- ***Presented examinees with problematic social media posts?*** An examinee's social media posts (Facebook, Twitter, Instagram) can sink her case. Did the evaluator who comes into possession of those potentially problematic posts allow the examinee to explain them?
- ***Considered reasonable alternative explanations of the case facts and evaluation data other than the evaluator's opinion?*** This is a bias-buster. If the evaluator has not taken this step, her opinions may be infused with one of more biases (confirmation, hindsight, overconfidence, etc.).

Evaluators should be more than stenographers, merely producing transcripts of examinee complaints and allegations. Hold evaluators to the same thorough interview approach that you bring to your own client interviews.

BEATING RETIREMENT ANXIETY
By Christy Adamcik Gammill, CDFA[1]

It depends. If your benefit is the lion's share of your income, it may be tax-free. If it is a portion of your income, it still may have some advantages with taxation being applied to only 85% or less of your benefit.

Why 85%? Here's an explanation from the Social Security Administration: "In 1993, SSA's Office of the Chief Actuary estimated that the payroll tax contributions of current and future workers would equal less than 15% of the present value of their lifetime benefits (Goss 1993). Therefore, if the ratio of lifetime contributions to benefits is less than 15%, then up to 85% of benefit income can be taxed without risk of double taxation."

If you're retired and collecting Social Security, look for Form SSA-1099 that you should receive in January before preparing your taxes. It summarizes the benefits you received and helps you with your calculations. You may be in for a pleasant surprise with taxation of your benefit being less than what you had expected.

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[1] This article is provided by Christy Adamcik Gammill. Christy Adamcik Gammill offers securities through AXA Advisors, LLC, member FINRA, SIPC. 12377 Merit Drive, Suite 1500, Dallas, TX 75251, offers investment advisory products and services through AXA Advisors, LLC, an investment advisor registered with the SEC and offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC. CBG Wealth Management is not a registered investment advisor and is not owned or operated by AXA Advisors or AXA Network. Contact information: 972-455-9021 or Christy@CBGWealth.com. GE-121466 (12/16) Exp 12/18)

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ARTICLES

The Donor Health Information Act: A Response to the Need for Federal Regulation of Artificial Insemination by Donor

By Caitlin Conner[1]

I. Introduction

Tyler Blackwell had a "ticking time bomb" in his chest. As the product of artificial insemination, the fifteen year-old had no information regarding his biological father's identity, much less his medical history.[2] Had this information been accessible, Tyler would have discovered that he had inherited a life-threatening aortic heart defect from his father. Likewise, he would have learned of his predisposition for developing Marfan syndrome—a genetic connective tissue disorder affecting about one in 5,000 people. According to the Marfan Foundation, there is a fifty percent chance the genetic mutation will be passed along from a person with Marfan syndrome to his or her child.[3] Blackwell was informed of the potentially fatal heart defect when his donor's sister contacted him; she was prompted to reach out to the Blackwell family after her brother's aorta ruptured at forty-three years old.[4]

But Blackwell is not alone in his dilemma. Hundreds of thousands of children will eventually face the daunting reality that half of their genetic make-up is virtually unknown; studies estimate about 30,000 donor-conceived children are born in the United States each year.[5] Even when parents do receive an account of the donor's medical history, the information provided is "only a snapshot of one day in the life of a young and healthy donor."[6] Federal law polices the initial donation by requiring clinics and banks to test the sperm for common diseases, but the regulation ends there. There is no requirement for clinics to verify the truthfulness of information provided by donors, nor are clinics required to continue updating a donor's medical information post-insemination.[7] In fact, the gamete donation process "remains a largely private transaction that is handled through contract and intention with virtually no uniform regulation."[8] The Donor Sibling Registry reports "many U.S. facilities either refuse to update donor/offspring medical information, or, even if they accept updates, refuse to share the information."[9] Likewise, the website

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[1] Ms. Connor is due to graduate from SMU Deadmon School of Law in May 2017 and can be reached at caconner@mail.smu.edu.

[2] *See* Susan Donaldson James, *Sperm Donor's 24 Kids Never Told About Fatal Illness*, ABC NEWS (July 21, 2011), http://abcnews.go.com/Health/sperm-donors-24-children-told-fatal-illness-medical/story?id=14115344.

[3] *What is Marfan Syndrome?*, THE MARFAN FOUNDATION, http://www.marfan.org/about/marfan (last visited Feb. 21, 2016).

[4] *See* James, *supra* note 1.

[5] *See* Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 10 (2008); *but see* Wendy Kramer, *30k-60k US Sperm and Egg Donor Births Per Year?*, HUFFINGTON POST BLOG (Oct. 6, 2015, 9:20AM), http://www.huffingtonpost.com/wendy-kramer/a-call-to-to-stop-using-t_b_8126736.html. Kramer notes this statistic is from a study done by the Office of Technology Assessment in 1988; she contends there is a serious lack of novel research on births as a result of artificial insemination by donor.

[6] *See* Wendy Kramer, *The New "Check Box" That Needs to Be On Pediatrician's Forms*, HUFFINGTON POST BLOG (Dec. 15, 2015, 11:45AM), http://www.huffingtonpost.com/wendy-kramer/the-new-check-box-that-ne_b_8798516.html.

[7] *See* NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATIONS 18 (2009).

[8] *See id.* at 19.

[9] *See Medical Issues*, THE DONOR SIBLING REGISTRY, https://www.donorsiblingregistry.com (accessed Feb. 21, 2016).

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alleges eighty-four percent of sperm donors have never been contacted by their clinics for medical updates.[10]

Assisted reproductive technology (ART) has advanced significantly over the last several decades, which has led to a marked increase in the number of couples seeking "creative reproduction" methods.[11] Though not quite included under the umbrella of ART, the use of artificial insemination by donor (AID) has become increasingly commonplace as well.[12] Some states have enacted legislative guidelines to monitor and standardize the process of AID, but there is no comprehensive federal framework regulating the assisted reproduction industry.[13] Moreover, there is a complete absence of legislation addressing the ability of donor-conceived children to access critical information about their donors. This is significant because it forces donor-conceived children to make important life and medical decisions without the necessary information. In response, this article advocates for the adoption of federal regulation mandating the disclosure of non-identifying medical and genetic information to a donor's offspring.

Part II of this article will analyze the underdeveloped legislative approach to assisted reproductive technology. Despite assorted laws regulating specific aspects of the assisted reproductive process, the field is largely unregulated and completely devoid of any true federal guidance. Moreover, very few states have enacted legislation regarding access to donor information; most of these laws allow for disclosure only when there is "good cause."[14] Part III will examine the medical concerns created when children conceived through AID are denied important genetic history. It will then explore the psychological issues—most notably lack of identity—associated with a donor-conceived child's inability to learn about his or her biological father. Notwithstanding its "second place" status next to key genetic information, general knowledge about one's donor parent is arguably an important aspect of a child's psychological well-being.

Examining other countries' legislative approaches to donor anonymity is beneficial in determining the most viable regulatory framework to implement in the United States. Thus, Part IV will observe legislation from three different countries: the *Swedish Insemination Act of 1984*, England's *Human and Fertilization Embryology Act*, and Canada's *Assisted Human Reproduction Act*. The broad range of legislation provided by these countries allows insight into the advantages and the consequences of removing anonymity—such as in Sweden and England—or protecting a donor's identity, as Canada has chosen to do.

Finally, Part V will present the *Donor Health Information Act*, which would create a federal system to facilitate access to medical information for donor-conceived children. Emphasis on the right to privacy within the United States will likely necessitate the need for continued anonymity concerning "identifying" donor information, but the suggested federal system should produce a mechanism for donors to update and improve upon the information provided if they choose. The possibility of a link—however tenuous—between a donor and child could alleviate some of the "identity-crisis" concerns surrounding donor anonymity.

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[10] *See id.*

[11] *See* Paul R. Brezina, Ning Ning, Eric Mitchell, Howard Z. Zacur, Theodore A. Baramki & Yuliam Zhao, *Recent Advances in Assisted Reproductive Technology*, 1 CURRENT OBSTETRICS & GYNECOLOGY REPORTS, 166, 171 (2012); *see generally* Gerardo Vela, Martha Luna, Benjamin Sandler & Alan B. Copperman, *Advances and Controversies in Assisted Reproductive Technology*, 76 MOUNT SINAI J. OF MED. 506 (2009) ("This technology includes, but is not limited to, in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), embryo cryopreservation, oocyte or embryo donation, and gestational surrogacy.").

[12] *See* Vela, *supra* note 10, at 507 (Treatments in which only sperm are handled do not classify as ART according to the authors).

[13] *See* Dawn R. Swink & J. Brad Reich, *Caveat Vendor: Potential Progeny, Paternity, and Product Liability Online*, 2007 B.Y.U. L. REV. 857, 872-73 (2007).

[14] *See* Lucy R. Dollens, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, 216 (2001); *see also* Dennison, *supra* note 4, at 22.

II. Existing Legislation on AID

Despite the lack of legislation surrounding artificial insemination, the procedure is hardly novel to the medical world. The first successful human insemination occurred in 1790, when Scottish anatomist Dr. John Hunter inseminated a woman using her husband's sperm.[15] Almost a century later, Dr. William Pancoast successfully performed the procedure on a woman at Jefferson Medical College in 1884.[16] Dr. Pancoast inseminated the woman (without her consent) using sperm from a student in his classroom after discovering that her husband was sterile.[17] Her husband was notified of the procedure when it was clear the woman had conceived; her son is considered the first known child by donor insemination.[18] But the practice of artificial insemination by donor was the subject of secrecy and widespread criticism for many decades following Dr. Pancoast's experiment. Because the use of donated sperm was viewed as the equivalent of adultery, both the Catholic Church and the Church of England condemned it on moral grounds.[19] Reports from around the world—including those from the Archbishop of Canterbury and the Pope—denounced the use of donor insemination as a sin and suggested it be made a criminal offense.[20]

Moreover, the cultural and social context of the late 19th and 20th centuries discouraged open dialogue about infertility and assisted reproduction, which stigmatized the use of conception technologies.[21] Discussing the origins of infertility, Margarete Sandelowski illustrates how infertile couples (specifically women) have traditionally been viewed as childless by volition.[22] She writes, "in a cultural milieu characterized by the expectation that conception can be prevented, terminated and initiated at will . . . not having a child—even by default and not by design—is still viewed partly as a product of individual choice."[23] Thus, a woman's failure to achieve motherhood was perceived by society as a selfish denial of her maternal instincts and her "primary female role."[24] Many were also concerned with the legal consequences of donor insemination because the law did not recognize donor-conceived children as legitimate offspring.[25] Instead, these children were considered born out of wedlock and a woman's spouse had absolutely no claim to the baby.[26] Beginning in the 1960's, a wave of new legislation and court decisions signaled a shift in the general perception of artificial insemination by donor.[27]

First, Georgia passed a statute addressing a donor-conceived child's legal status, which states: "All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemina-

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[15] *See Sperm Banking History*, CALIFORNIA CRYOBANK, http://www.cryobank.com/Learning-Center/Sperm-Banking-101/Sperm-Banking-History/ (last visited on Mar. 10, 2016).

[16] *See id.*; *see also* Dennison, *supra* note 4, at 4;

[17] *See Sperm Banking History*, *supra* note 14.

[18] *See id.*; *see also* Ken Daniels, *Donor Gametes: Anonymous or Identified?*, BEST PRACTICE & RES. CLINICAL OBSTETRICS AND GYNECOLOGY 114, 115 (2007).

[19] *See* Dennison, *supra* note 4, at 5.

[20] *See Sperm Banking History*, *supra* note 14.

[21] *See* Dennison, *supra* note 4, at 5; *see also* Daniels, *supra* note 17, at 113.

[22] *See* Margarete J. Sandelowski, *Failures of Volition: Female Agency and Infertility in Historical Perspective*, 15 SIGNS 475, 479 (1990).

[23] *See id.*

[24] *See* JO BRIDGEMAN & SUSAN MILLNS, FEMINIST PERSPECTIVES ON LAW: LAW'S ENGAGEMENT WITH THE FEMALE BODY 109-10 (1998).

[25] *See* Dennison, *supra* note 4, at 6.

[26] *See id.* (Dennison points to an opinion from the Superior Court of Cook County, which held that a child born from donor insemination was "the child of the mother and the father has no right or interest in said child.").

[27] *See id.*

tion."[28] Four years later, the California Supreme Court's decision in *People v. Sorensen* determined that "in the absence of legislation prohibiting artificial insemination, the offspring of [the] defendant's valid marriage to the child's mother was lawfully begotten and was not the product of an illicit or adulterous relationship."[29]

Finally, the Uniform Parentage Act—first promulgated in 1973—provided recognition for a woman's husband as the natural father of a donor-conceived child, so long as a physician had overseen the procedure and the husband had consented.[30] Perhaps the most significant event contributing to the change in attitudes regarding donor insemination was the birth of Louise Brown through in-vitro fertilization (IVF).[31] Michelle Dennison illustrates how Brown's birth served to publicly advertise the success of in-vitro fertilization and indicated general acceptance of assisted reproductive technology.[32] Thus began the gradual transformation of a once stigmatized practice into an industry valued at $3.5 billion in 2012.[33]

The American Society for Reproductive Medicine (ASRM) released a report in 2009 entitled "Oversight of Assisted Reproductive Technology," which detailed the various regulatory bodies controlling the industry.[34] Three main agencies regulate ART at the federal level: the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the Centers for Medicare and Medicaid Services (CMS).[35] Despite the involvement of these agencies, several scholars have referred to the United States as the "wild, wild west" of assisted reproduction because of the numerous gaps left in regulation at the federal level.[36]

A. Fertility Clinic Success Rate and Certification Act

The Fertility Clinic Success Rate and Certification Act (FCSRCA) was passed in 1992, and requires "complete reporting of ART cycle data to support the quality and reliability of fertility programs."[37] The FCSRCA also provides standard definitions and reporting requirements.[38] Data collected under the FCSRCA is used by the CDC to publish the success rates of individual

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[28] *See* Georgia Code Ann. §19-7-21 (West 2007).

[29] *See* People v. Sorenson, 68 Cal.2d 280, 289 (1968).

[30] *See* Dennison, *supra* note 4, at 6 (Section 204 of the current UPA—amended in 2002—states that a father-child relationship is established between a man and a child by "the man's having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child.").

[31] *See* Daniels, *supra* note 17, at 115; *see also* Dennison, *supra* note 4, at 6.

[32] *See* Dennison, *supra* note 4, at 6; *see also* Susan Donaldson James, *Test Tube Baby Louise Brown Turns 35*, ABC NEWS (July 25, 2013), http://abcnews.go.com/Health/test-tube-baby-louise-brown-turns-35-medical/story?id=19764283.

[33] *See* Donna Rosato, *How High-Tech Baby Making Fuels the Infertility Market Boom*, MONEY (July 9, 2014), http://time.com/money/2955345/high-tech-baby-making-is-fueling-a-market-boom/; *see also* Press Release, Marketdata Enterprises, *U.S. Fertility Clinics & Infertility Services Market Worth $3.5 Billion. Recession is Not a Factor* (Nov. 5, 2013), *available at* http://www.marketdataenterprises.com/wp-content/uploads/2014/01/Fertility%20Clinics%20PR%202013.pdf.

[34] *See generally* Executive Summary: Oversight of Assisted Reproductive Technology, American Society for Reproductive Technology (Dec. 2009), *available at* https://www.asrm.org/uploadedFiles/Content/About_Us/Media_and_Public_Affairs/OversiteOfART%20(2).pdf.

[35] *See id.* at 5.

[36] *See generally* China R. Rosas, *A Necessary Compromise: Recognizing the Rights of A Donated Generation to Tame the Wild Wild West of California's Sperm Banking Industry*, 37 SW. U. L. REV. 393 (2008); *see also* Alexander N. Hecht, 1 HOUS. J. HEALTH L. & POL'Y 227 (2001).

[37] *See* Oversight of Assisted Reproductive Technology, *supra* note 33.

[38] *See The Fertility Clinic Success Rate and Certification Act*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/art/nass/policy.html (last visited Mar. 24, 2016) (These requirements are available in sections 2(a), 2(b), 2(c), 6 and 8).

clinics, which promotes the dissemination of accurate and reliable information to potential patients.[39]

Further, the FCSRCA mandated the creation of a model program to certify embryo laboratories; these guidelines were published in 1999 and include "requirements for administration of a continuing certification program by the states, quality assurance and control standards, an inspection system, and conditions under which certification can be suspended or revoked."[40] However, the choice to implement the CDC's model certification scheme is left entirely to the discretion of the states, which raises the question as to how effective the guidelines have actually been in regulating the process.[41] As of 2010, not a single state had applied to participate in the CDC's Model Program.[42]

B. Food & Drug Administration

The FDA also plays an active role in the regulation of assisted reproductive technology. Foremost, doctors are only permitted to prescribe FDA-approved medication and this restriction applies equally to those working in reproductive medicine.[43] Likewise, the FDA maintains "jurisdiction" over reproductive tissues, which allows for the creation of regulations that impose requirements for both egg and sperm donors.[44] These requirements include "thorough medical histories, identification controls, freedom from infectious diseases, and rigorous inspection of the facilities in which these tissues are handled."[45] The Donor Eligibility Rule—enacted on May 25, 2005—requires donated reproductive tissue (DRT) banks to make "donor eligibility determinations" based on the donor's medical record and the results of tests performed on his or her donated tissue.[46] The FDA's main purpose with respect to the reproductive domain is to ensure the quality of donated reproductive tissue and to prevent the spread of communicable disease through infected tissue.[47] For example, the FDA's guidelines prohibit any man who has had sex with another man in the preceding five years from donating sperm, presumably to prevent the spread of HIV.[48]

C. Clinical Laboratory Improvement Act

Last, the Centers for Medicare and Medicaid Services regulate all laboratory testing in the United States through the Clinical Laboratory Improvement Act of 1987.[49] CLIA regulations affect the reproductive field because an infertility diagnosis requires testing and analysis of blood

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[39] *See id.*

[40] *See* Oversight of Assisted Reproductive Technology, *supra* note 33, at 6.

[41] *See id.*; *see also* Yaniv Heled, *The Regulation of Genetic Aspects of Donated Reproductive Tissue—The Need for Federal Regulation*, 11 COLUM. SCI. & TECH. L. REV. 243, 251 (2010).

[42] *See* Heled, *supra* note 40, at 251.

[43] *See* Oversight of Assisted Reproductive Technology, *supra* note 33, at 6.

[44] *See id.*; *see also* Lauren Gill, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donations*, 54 WM. & MARY L. REV. 1715, 1732 (2013) ("Pursuant to section 361 of the Public Health Services Act (PHS Act), the FDA requires that HCT/P [human cell, tissue, and cellular and tissue-based product] businesses register with the FDA, list all HCT/P's under the establishment's control, and screen and test donors for communicable diseases such as HIV, Hepatitis B and C, and other sexually transmitted diseases.").

[45] *See* Oversight of Assisted Reproductive Technology, *supra* note 33, at 6.

[46] *See* Heled, *supra* note 40, at 252 (The banks test for various infectious diseases, including "HIV-1 and HIV-2, human cytomegalovirus, hepatitis B and C, syphilis, gonorrhea, chlamydia, West Nile virus and more.").

[47] *See* Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1090-91 (2014) ("The focus is on the patient who is receiving the donated products, not on the child who may ultimately be born.").

[48] *See* SUSAN FRELICH APPLETON & D. KELLY WEISBERG, ADOPTION AND ASSISTED REPRODUCTION: FAMILIES UNDER CONSTRUCTION 242 (2009).

[49] *See id.* at 7; *see also Clinical Laboratory Improvement Amendments (CLIA)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://wwwn.cdc.gov/clia/regulatory/default.aspx (last visited Mar. 24, 2016).

and semen.[50] Despite seemingly adequate federal regulation regarding the clinical aspects of assisted reproductive technology, there is a massive gap in legislation to manage the process post-insemination. The control possessed by these regulatory agencies appears to end the moment a female patient leaves the fertility clinic following an insemination procedure.

D. State Law

Likewise, state regulation regarding assisted reproductive technology is generally limited to the testing of donated tissue for infectious diseases.[51] Only twenty-four states have passed statutes regarding the "day-to-day medical practices of semen screening and storage" and only thirty-four have enacted legislation specifically addressing artificial insemination by donor.[52] As of 2009, New Hampshire was the only state to require a "detailed medical history for sperm donors" and to enforce "age and health requirements for gamete and embryo recipient qualifications."[53] Naomi Cahn notes that while sperm-donor screening is generally practiced among the states, "heightened screening" is still elective in most states; she attributes this optionality to the "economic interest of cost saving and the widespread practice of nongovernmental self-regulation."[54]

Furthermore, only eighteen states have enacted legislation addressing a donor-conceived child's access to medical information about his or her donor based on an acceptable showing of "good cause."[55] The holding in *Johnson v. Superior Court*[56] best illustrates this balancing of interests. In *Johnson*, the California Court of Appeals created a limitation on a sperm donor's constitutional right to privacy by compelling disclosure of his identity through discovery proceedings.[57]

Johnson involved a lawsuit by the parents of a donor-conceived child—Diane and Ronald Johnson—against the California sperm bank, Cryobank.[58] Mrs. Johnson was inseminated with donor sperm purchased from Cryobank and gave birth to a seemingly healthy baby girl; but six years later the Johnsons' daughter was diagnosed with autosomal dominant polycystic kidney disease (ADPKD).[59] The court reasoned the Johnson's child had contracted ADPKD from her sperm donor because neither of her parents had any familial history of the genetic disorder.[60] The Johnsons' complaint against the sperm bank included allegations of professional negligence, fraud, and breach of contract based on Cryobank's representation to the couple that the sperm had been adequately tested for communicable and genetic diseases.[61] Two doctors at Cryobank—through conducting interviews of the sperm donor—had learned that the donor's mother and his mother's sister both suffered from kidney disease and hypertension.[62] The trial

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[50] *See* Oversight of Assisted Reproductive Technology, *supra* note 33, at 7.

[51] *See* Held, *supra* note 40, at 255.

[52] *See* Swink & Reich, *supra* note 12, at 872-73 (Nineteen of the thirty-four states with statutes addressing AID have based the legislation on the original Uniform Parentage Act.).

[53] *See* Cahn, *supra* note 6, at 60.

[54] *See id.*

[55] *See* Dollens, *supra* note 13, at 216; *see also* Dennison, *supra* note 4, at 11; Dena Moyal & Carolyn Shelley, *Future Child's Rights in New Reproductive Technology: Thinking Outside the Tube and Maintaining the Connections*, 48 FAM. CT. REV. 431, 438 (2010).

[56] See Johnson v. Superior Court, 80 Cal. App. 4th 1050 (2000).

[57] *See* Dollens, *supra* note 13, at 230.

[58] *See Johnson*, 80 Cal. App. 4th at 1055; *see also* Held, *supra* note 40, at 262.

[59] *See* Dollens, *supra* note 13, at 229 (ADPKD is the most common of inherited cystic kidney diseases. According to the PKD Foundation, parents have a fifty percent chance of passing the disease to their children and it does not skip a generation. More information available at http://www.pkdcure.org/learn/resources.).

[60] *See id.*

[61] *See Johnson*, 80 Cal. App. 4th at 1056; *see also* Dollens, *supra* note 13, at 229.

[62] *See Johnson*, 80 Cal. App. 4th at 1056-57.

record noted that "the presence of multiple instances of kidney disease coupled with hypertension and neurological disorders" should have alerted the doctors to the presence of ADKPD in the donor's family and raised concerns that the donor would genetically transfer the kidney disease.[63] But this information was never relayed to the Johnson family; in fact, Cryobank actively misrepresented the safety of the sperm purchased by the couple.[64] Nevertheless, the trial court denied the Johnsons' request to depose the sperm donor and obtain identifying information, citing Cryobank's confidentiality agreement and the donor's privacy interest.[65]

The Johnsons' petition presented a novel issue to the California Court of Appeals: "whether parents and their child, conceived by the sperm of an anonymous sperm donor, may compel the donor's deposition and production of documents in order to discover information relevant to their action against the sperm bank…"[66] Justice Mallano answered this question in the affirmative, but encouraged the parties to take measures protecting the donor's identity to the "fullest extent possible."[67] The court determined the donor's interest in maintaining the confidentiality of his identity and medical history was outweighed by compelling state interests (and those of the petitioners) within the context of the specific facts of the case.[68] The decision to allow disclosure was largely due to a state statue granting access to a fertility bank's records for "good cause."[69]

Thus, while some states have created a mechanism by which donor-conceived children can obtain access to a donor's medical history, it requires going through the court system and engaging in potentially expensive litigation. The statutory path to donor information becomes less traveled when one considers the cost—both monetarily and mentally—of pursuing those records. People using AID are unlikely to possess the resources and time to pursue these lawsuits, especially considering the fact that AID is the least expensive of all assisted reproductive technologies (ranging from $235 to $400 per procedure).[70] Instead, donor-conceived children (and parents) resign themselves to the silent struggle of needing information with no realistic way to obtain it.

III. Importance of Regulation

A. Medical Concerns

One of the most compelling arguments for allowing access to a sperm-donor's medical history is the importance of that information to a child's health. Those who advocate for disclosure argue that a donor-conceived child needs access to a donor's records to determine whether he or she is at risk for developing a genetically transmitted disease.[71] Denial of this knowledge effectively requires a donor-conceived child to make important life decisions—such as whether to have his or her own children—with incomplete medical information. Texas' "Health Passport" program demonstrates the critical need for this information in the analogous context of adop-

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[63] *See id.* at 1057.
[64] *See id.*
[65] *See* Dollens, *supra* note 13, at 229.
[66] *See Johnson*, 80 Cal. App. 4th at 1056.
[67] *See id.*
[68] *See id.* at 1072.
[69] *See* Dennison, *supra* note 4, at 22; *see also Johnson*, 80 Cal. App. 4th at 1065 (California's Family Code Section 7613 provides: "All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician and surgeon or elsewhere, are subject to inspection only upon an order of the court for good cause shown.").
[70] *See* Dollens, *supra* note 13, at 214.
[71] *See* Dennison, *supra* note 4, at 14.

tion.[72] The "Health Passport" is a computer-based data system for children in foster care, which provides a comprehensive digital file of a child's medical records and history.[73]

The Health and Human Services Commission (HHSC) introduced the Health Passport on April 1, 2008, providing more than 30,000 foster children with electronic records that move with them throughout the foster care system.[74] The United States Department of Health and Human Services granted the state of Texas $4 million to build the "Health Passport" system in hopes of triggering a nationwide move toward "health-care IT."[75] Each passport contains a child's personal information (name, birthdate etc.) and includes a list of important contacts such as physicians and caseworkers.[76] Superior HealthPlan Network (the creators of the program) describe the database as a way for providers to "improve care coordination, eliminate waste, and reduce errors by gaining a better understanding of a person's medical history and health interactions."[77] The "Health Passport" system demonstrates the importance of maintaining comprehensive and updated records of a child's health; it also suggests this practice could be possible on a national scale.

There are currently no federal laws that regulate the genetic aspects of donor insemination; all agencies and legislation focus solely on preventing the transmission of communicable diseases.[78] The growing importance of access to one's genetic history cannot be understated as genetics have an increasingly large impact on diagnosis and treatment of disease.[79] Lack of information regarding a child's genetic makeup could lead to misdiagnosis and unnecessary treatment. It could also result in a child declining necessary medical care.[80] Family history and genetic information becomes especially relevant when donor-conceived children begin having their own children; "without information about inheritable conditions and increased genetic risks, their decision-making capacity is significantly compromised."[81]

Disclosure of a donor's full medical history would also alleviate concerns about conditions that manifest in a donor decades later. Vardit Ravitsky presents a scenario in which the donor is merely the carrier of a genetic mutation and the disease is not identifiable until it is exhibited in the donor's offspring.[82] For example, sperm donor F827—a seemingly healthy man who had passed all the tests—transmitted a rare genetic disease called congenital neutropenia to at least five of the eleven children born using his sperm.[83] The families of the children contacted special-

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[72] *See Health Passport – A Guide to Medical Services at CPS*, TEX. DEP'T OF FAM. AND PROTECTIVE SERV., https://www.dfps.state.tx.us/Child_Protection/Medical_Services/guide-passport.asp (last visited Apr. 6, 2016).

[73] *See id.*

[74] *See* Patrick Michels, *Electronic Health Records Improve Care for Texas Foster Children*, GOV'T TECH. (Sept. 29, 2008), http://www.govtech.com/health/Electronic-Health-Records-Improve-Care-for.html ("Through a Web-based interface, each child's guardian, doctors and 'medical consenter' (a legal designation often, but not necessarily, awarded to the foster parent) can access the passport, review the child's medical history and make necessary updates.").

[75] *See id.*

[76] *See id.*

[77] *See Health Passport*, SUPERIOR HEALTHPLAN NETWORK, http://www.superiorhealthplan.com/for-providers/health-passport/ (last visited Apr. 6, 2016).

[78] *See* Heled, *supra* note 40, at 249; *see also* Jaqueline Mroz, *In Choosing a Sperm Donor, a Roll of the Genetic Dice*, N.Y. TIMES D1 (May 15, 2012); *see also* Gill, *supra* note 43, at 1733.

[79] *See* Glenn McGee, Sarah-Vaughan Brakman and Andrea D. Gurmankin, *Gamete Donation and Anonymity*, 16 HUMAN REPROD. 2033, 2034 (2001).

[80] *See* Moyal & Shelley, *supra* note 54, at 437.

[81] *See* Vardit Ravitsky, *"Knowing Where You Come From": The Right of Donor-Conceived Individuals and the Meaning of Genetic Relatedness*, 11 MINN. J. L. SCI. & TECH. 665, 672 (2010).

[82] *See id.* at 673.

[83] *See* Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES (June 6, 2006), http://www.nytimes.com/2006/06/06/health/06opin.html?pagewanted=1&8dpc&_r=0; *see also* Laurence A.

ist Dr. Laurence A. Boxer, who discovered that all five children had sperm donor F827 in common.[84] Dr. Boxer and his colleagues determined the donor likely displayed no symptoms and was oblivious to the fact that he carried the mutation.[85] But the doctors were prevented from testing the donor or his sperm to gain more information; the donor had since moved out of Michigan and genetic analysts could not test his remaining samples at the sperm bank for ethical reasons.[86] Thus, the donor was never warned about the risks of passing on the disease to future children, and the parents of the affected children were road blocked in their search for answers.[87]

Stories like these illustrate the real life dilemmas accompanying anonymous sperm donation. Even when a donor tests negative for inheritable diseases at the time of donation, there is no system to inform the banks (or recipient families) of conditions developed later in the donor's life.[88] Long term communication between sperm banks, donors, and recipient families is crucial in order to keep donor-conceived children well informed about potential health concerns.

The Food and Drug Administration only requires donor records to be maintained for a minimum of ten years.[89] But most professional medical associations recommend that fertility clinics keep current, detailed donor records that can be made available to donor-conceived children.[90] Michelle Dennison points to three different organizations that emphasize the importance of donor records as a medical resource for children.[91] First, the American Society for Reproductive Medicine—in its Guidelines for Embryo and Gamete Donation—opines "a permanent record of each donor's initial selection process and subsequent follow–up evaluations should be maintained."[92] The guidelines emphasize the need for a mechanism to maintain records on the donor for the benefit of donor-conceived children.[93] The American Medical Association recommends keeping permanent records with "identifying and non-identifying health and genetic screening information on sperm donors."[94] Similarly, the American Association of Tissue Banks annually publishes a "standards" manual, which provides particular data collection and record keeping practices for banks.[95] Each of these organizations emphasizes the importance of continued access to a donor's medical and genetic information.

Boxer, Steven Stein, Danielle Buckley, Audrey Anna Bolyard and David C. Dale, *Strong Evidence for Autosomal Dominant Inheritance of Severe Congenital Neutropenia Associated with ELA 2 Mutations*, J. OF PEDIATRICS, 633-636 (May 2006), *available at* http://www.jpeds.com/article/S0022-3476(05)01190-X/pdf.

[84] *See* Grady, *supra* note 82.

[85] *See id.* (Dr. Boxer suspects that Donor F827 had an unusual condition called gonadal mosaicism, which means he carried the "bad gene" only in his sperm cells.).

[86] *See id.*

[87] *See id.*; *see also* Jennifer Wolf, *The Truth About Donor 1084*, SELF MAGAZINE (Oct. 24, 2006, 12:00AM), http://www.self.com/wellness/health/2006/10/sperm-banks-hide-evidence/.

[88] *See* Grady, *supra* note 82.

[89] *See id.* at 672.

[90] *See* Dennison, *supra* note 4, at 15.

[91] *See id.*

[92] *See* The Practice Committee of the American Society for Reproductive Medicine and the Practice Committee of Society for Assisted Reproductive Technology, *Recommendations for Gamete & Embryo Donation: A Committee Opinion* (Jan. 2013), *available at* http://www.fertstert.org/article/S0015-0282(12)02256-X/pdf; *see also* Dennison, *supra* note 4, at 15.

[93] *See id.*

[94] *See* Ethics Committee of the American Society for Reproductive Medicine*, Informing Offspring of Their Conception by Gamete or Embryo Donation: A Committee Opinion*, (July 2013), *available at* https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/informing_offspring_donation.pdf.

[95] *See id.*; *see also AATB Standards for Tissue Banking*, AM. ASS'N OF TISSUE BANKS, http://www.aatb.org/AATB-Standards-for-Tissue-Banking (last visited Mar. 25, 2016).

The prevailing counterargument to disclosure of a donor's medical history stems from scientific advances in "decoding the human genome," which provides access to "comprehensive genetic testing for heritable disease."[96] Maya Sabatello focuses on the argument that "genetic counseling and existing technologies in the field of genetics are often sufficient to diagnose donor-conceived children with known genetic disorders . . . and to avoid the transmission of a disorder to the next generation through pre-implantation genetic diagnosis on the basis of one's genetic composition alone."[97] However, she contends many of these rare genetic diseases go undetected because most primary healthcare providers are not adequately trained to diagnose and test for such conditions.[98]

Furthermore, many fertility clinics impose strict screening guidelines for donated gametes, despite lack of federal and state legislation requiring them to do so.[99] For example, California Cryobank performs a genetic evaluation on every donor applicant before they are eligible to donate.[100] The bank follows guidelines developed by the American College of Medical Genetics, the American College of Obstetrics and Gynecology, and the American Society of Reproductive Medicine to determine which tests should be performed on its donors.[101] Tests performed by the bank include a cystic fibrosis carrier screening, a hemoglobin evaluation, chromosome analysis, spinal muscular atrophy (SMA) carrier screening, Bloom syndrome screening, Canavan disease screening, familiar dysautonomia screening, Gaucher disease screening, Tay-Sachs disease (TSD) screening and several others.[102] However, even the bank admits it is impossible to test a donor for all possible genetic diseases due to the sheer number of congenital disorders.[103]

Despite the genetic testing requirements imposed by certain banks, a lack of "regulatory record-keeping" sometimes prevents the banks from notifying related families when a genetic illness is found in a donor-conceived child.[104] Moreover, there is no reliable way for banks to be alerted when sperm contains a genetic disease because there are no reporting requirements for donor families.[105] This leads to the continued sale of "flawed sperm" and consequently the transmission of a genetic condition to several different children.[106]

Donor-conceived children also express concerns about inadvertent incest between donor siblings. Minimal federal and state legislation has allowed for clinics to create and abide by their own standards, which means the clinics themselves determine how many times a donor is permitted to donate.[107] Consequently, it is common for multiple children to share one biological parent.[108] It is also impossible to monitor how many times a single person has donated because there is no existing system that allows for "cross-clinic" communication.[109] Dennison illustrates

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[96] *See* Dr. Christopher De Jonge & Dr. Christopher L.R. Barratt, *Gamete Donation: A Question of Anonymity*, 85 FERTILITY & STERILITY 500 (2006).

[97] *See* Maya Sabatello, *Disclosure of Gamete Donation in the United States*, 11 IND. HEALTH L. REV. 29, 73-74 (2014).

[98] *See id.* at 74.

[99] *See* De Jonge & Barratt, *supra* note 95, at 500; *see also* Dennison, *supra* note 4, at 14.

[100] *See Donor Screening*, CALIFORNIA CRYOBANK, https://cryobank.com/Services/Genetic-Counseling/Donor-Screening/#answer02 (last visited Mar. 20, 2016).

[101] *See id.*

[102] *See id.* (The bank chooses which tests to perform based on the "reliability, utility . . . [and] the limitations of a particular genetic test.").

[103] *See id.*

[104] *See* Mroz, *supra* note 77.

[105] *See id.*

[106] *See id.*

[107] *See* Dennison, *supra* note 4, at 15 (Dennison notes this is especially true with sperm donations because a single donation can be divided up and sold to several different recipients.).

[108] *See id.*; *see also* Gill, *supra* note 43, at 1734 (Gill notes, "the fact that comercial sperm donors can father a large number of children increases the chance that genetic conditions will be prevalent in the general population.").

[109] *See* Dennison, *supra* note 4, at 16.

this problem through the results of a search on the Donor Sibling Registry (DSR), which revealed that one donor had fathered at least 36 children.[110] Because submissions to the DSR are voluntary, donor-conceived children have no reliable way to ensure their knowledge of all existing half-siblings.[111]

B. Psychological/Identity Concerns

Ravistky recognizes the concept of "identity" as another important aspect of a donor-conceived child's well-being. She writes, "the understanding of oneself—from physical characteristics all the way to personality traits, talents and interests—is associated with an understanding of where these characteristics and traits came from."[112] Thus, a donor-conceived child's need to develop his or her sense of identity would require access to more than just a donor's genetic information.[113]

Many scholars make comparisons between "identity problems" experienced by adopted children and those experienced by donor-conceived children.[114] Researcher H.J. Sants first coined the term "genealogical bewilderment" in reference to adopted children; he defined a "genealogically bewildered" child as "one who either has no knowledge of his natural parents or only uncertain knowledge of them."[115] Sants argued this lack of information has negative effects on a child's mental health and damages a child's sense of security.[116]

Dennison reasons the concept of "genealogical bewilderment" applies similarly to donor-conceived children because a donor generally remains anonymous. Many scholars agree that closed adoptions can have a negative impact on the well-being of an adoptee, specifically in the context of identity.[117] The nature of closed adoptions discourages an adopted child from learning about his or her birth parents, which can sometimes lead to fantasies, distortions, and more serious problems.[118] The difficulties associated with the development of an individual identity result in what clinical social workers Annette Baran and Reuben Pannor term "identity lacunae."[119] The social workers observed that identity issues only worsened as adoptees entered adulthood; marriage plans and pregnancies often resulted in an increased desire for background information, such as a family history.[120] Many states have recently enacted laws that allow for an adoptee to learn the identity of his or her birth parents, which demonstrates a growing ac-

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[110] *See id.* at 15 (The DSR is a website that facilitates mutual contact between genetically related people. The DSR is explained in more detail below).
[111] *See id.*
[112] *See* Ravitsky, *supra* note 80, at 675.
[113] *See id.*
[114] *See* Dennison, *supra* note 4, at 16; *see also* Moyal & Shelley, *supra* note 54, at 437.
[115] *See* Michael Freeman, *The New Birth Right?: Identity and the Child of the Reproductive Revolution*, 4 INT'L J. CHILD. RTS. 273, 289 (1996); *see* Moyal & Shelley, *supra* note 54, at 437; *see also* Dennison, *supra* note 4, at 16; *see* H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRITISH J. OF MED. PSYCHOL., 133 (1964).
[116] *See* Freeman, *supra* note 114, at 289.
[117] *See* Annette Baran and Reuben Pannor, *Perspectives on Open Adoption*, 3 THE FUTURE OF CHILD. 119, 120 (1993); *see also* Sabatello, *supra* note 96, at 56-57.
[118] *See* Baran & Pannor, *supra* note 115, at 120; *see also Informing Offspring of Their Conception by Gamete or Embryo Donation: A Committee Opinion*, *supra* note 92, at 48.
[119] *See* Baran & Pannor, *supra* note 116, at 120 ("Identity lacunae" often leads to feelings of shame, embarrassment, and low self-esteem.).
[120] *See id.*

ceptance and understanding of the benefits of open adoption.[121] Some states have even created registries to facilitate communication between adopted children and birth parents.[122]

In 2001, Geraldine Hewitt[123] conducted a study on 47 donor-conceived people to gather information on identity issues associated with donor-insemination.[124] Hewitt described her findings regarding identity as "extremely disconcerting," noting that only three of the forty-seven people interviewed had not experienced identity issues they attributed to their conception.[125] Most participants expressed frustration regarding insufficient information, and specifically the absence of a complete and updated medical history.[126] But participants also revealed an interest in the social histories and details of a donor "beyond a basic and fairly impersonal physical description."[127] Hewitt claims that lack of research into these issues—coupled with minimal education in the medical community—will continue to result in the best interests of donor-conceived individuals being ignored.[128]

Overall, depriving a child of information pertaining to his or her donor could create a "gap or a void in the formation of personal identity, undermine a sense of continuity and grounding, and lead to troubling and disruptive feelings of incompleteness."[129] Hewitt's study plainly emphasizes the detrimental psychological effects concealment can have on a donor-conceived child. Moreover, the trend toward open adoptions in the United States reflects the understanding that children need information about their biological parents in order to better develop individual identities.

Perhaps the best illustrations of "genealogical bewilderment" are provided by *Anonymous Us*, a website that allows donor-conceived children to post anonymously about their experiences.[130] The website describes itself as a safety-zone for honest insights regarding third party reproduction. Entitled "I wonder," one user's entry poignantly describes his or her struggles with identity:

> To the brothers and sisters I'm unlikely to meet. I wonder if you think about me. I think about you. A lot. I wonder if you're out there, a young adult like me raised in a good loving family, but always thinking about your 'other' family in the back of your head. I wish we could be together, I long to connect with you, talk with you, and be in relationship with you. You are a part of me yet I am deprived of you, and you of me. I miss you even though I've never met you, I don't know your names, or even how many there are of us. But I know you exist. And I care so much about you. We are the diaspora of our donor.[131]

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[121] *See Informing Offspring of Their Conception by Gamete or Embryo Donation: A Committee Opinion*, *supra* note 92, at 48.

[122] *See id.*

[123] Hewitt carried out this study as part of a school project when she was 18. Hewitt is a donor-conceived child and her parents are the founders of the Donor Conception Support Group of Australia.

[124] *See* Geraldine Hewitt, *Missing Links: Identity Issues of Donor-Conceived People*, J. OF FERTILITY COUNSELING (2002), https://www.infertilitynetwork.org/files/MissingLinks.pdf. (Participants were from Australia (34), New Zealand (1), the United Kingdom (5) and the United States (7). The participants' ages ranged from 10-14 years through 50-59. 31 participants (66% were female and 16 (34% were male.).

[125] *See id.* at 6.

[126] *See id.*

[127] *See id.*

[128] *See id.* (Hewitt demonstrates this "ignorance " toward the repercussions of assisted conception with a quote by Shenfield: "There is nothing to say that children have to know their genetic parents; it's not a human right [and] there's absolutely no evidence that it's important.").

[129] *See* Ravitsky, *supra* note 80, at 675.

[130] *See* ANONYMOUS US, https://anonymousus.org/ (last visited Mar. 20, 2016).

[131] *See id.*

The Donor Sibling Registry (DSR) provides another example of the importance donor-conceived children place on finding a biological connection. The DSR was established in 2000 "to assist individuals conceived as a result of sperm, egg or embryo donation that are seeking to make mutually desired contact with others with whom they share genetic ties."[132] The DSR reports that around seventy percent (70%) of DSR inquiries result in matches, and the registry has fostered over 13,000 matches.[133] Wendy Kramer founded the DSR—along with her donor-conceived son Ryan—after recognizing the absence of an existing resource for people to make those connections.[134]

The Internet has made it increasingly easy for donor-conceived children to connect with one another and share their experiences. Despite the progress made in creating these biological ties without sperm bank involvement, the Internet cannot and will not provide adequate information regarding a donor's medical history. And without that information, donor-conceived children are still at risk.

IV. Models of Regulation

Many countries have addressed the numerous concerns regarding AID by developing legislation specifically aimed at regulation. These international models could prove beneficial in aiding the United States in the creation and initiation of its own federal framework. The most prominent countries with an absolute ban on donor anonymity include Sweden, the United Kingdom, Austria, Germany, the Netherlands, New Zealand, and various states in Australia.[135] On the contrary, countries such as France and Canada have maintained some anonymity throughout the AID process.[136]

A. Non-Anonymous Countries

1. Sweden

The first country to legally regulate gamete donation was Sweden in 1985 by completely removing anonymity from the process.[137] The Swedish Government passed the Swedish Law of Artificial Insemination (SLAI), which "gave a child born as a result of DI the right, 'when sufficiently mature,' to receive identifying information about the man who donated spermatozoa to his or her mother."[138] The disclosed information included the donor's identity, but also provided physical details and the donor's profession.[139]

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[132] *See Our History and Mission*, DONOR SIBLING REGISTRY, https://www.donorsiblingregistry.com/about-dsr/history-and-mission (last visited Mar. 22) (The DSR's 2016 goals include: the continuation of facilitating donor family connections; expansion of media coverage of the donor-conceived community's issues; initiation of academic partnerships for research and outreach; the continuation of certain outreach programs; and continued lobbying for the regulation of the fertility industry.).

[133] *See* Home Page, DONOR SIBLING REGISTRY, https://www.donorsiblingregistry.com/ (last visited Mar. 22, 2016).

[134] *See id.*

[135] *See* Moyal & Shelley, *supra* note 54, at 437 (The legislation passed in these countries also entitles children to receive donor-identifying information.).

[136] *See id.* at 438; *see also* Brigette Clark, *A Balancing Act? The Rights of Door-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619, 634-35 (2012).

[137] *See* Moyal & Shelley, *supra* note 54, at 437; *see also* Nicole J. Messing, *Protecting a Man's Right to Choose: Why Mandatory Identity Release for Sperm Donors is a Bad Idea*, 16 MICH. ST. U. J. MED. & L. 429, 444 (2012)

[138] *See* Claes Gottlieb et al., *Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes*, 15 HUM. REPROD. 2052 (2000); *see also* Rosas, supra note 35, at 401-02 (Gottlieb notes the text of the law does not define "sufficiently mature," but that eighteen is considered the age at which "maturity" is attained in Sweden.).

[139] *See* Gottlieb, *supra* note 137, at 2052.

The regulations imposed on the ART process in Sweden are considered some of the most inflexible in the world, which can be attributed to the country's nationalized healthcare system.[140] The nation limits the use of ART services (including AID) to married or "stable" couples, and until 2005 only allowed heterosexual couples to utilize the process.[141] The country also imposes stringent age limitations on women seeking to use AID; "women over the age of thirty-six are not permitted to be on a waiting list for ART services, and women over the age of thirty-eight are exempt from governmental coverage of ART services altogether."[142] Finally, single women are completely proscribed from using AID.[143]

In prohibiting donor anonymity and allowing for a donor-conceived child to access his or her donor's information, the SLAI strongly encourages open donation.[144] But parents are not required by law to disclose to a child his or her true genetic background i.e. his or her conception through donated gametes; the SLAI assumes that parents will tell children about their origins.[145] Thus, parents are ultimately in control of whether a donor-conceived child will have access to his or her donor's information.

Some critics blame the passage of the SLAI for the decrease in available donors shortly after the legislation was enacted.[146] Moreover, the waiting list for couples seeking to use AID increased considerably during this time; one report stated that 500 couples were placed on waitlists at governmental clinics.[147] But some scholars attribute this decline to "fertility tourism," whereby Swedish people seek fertility services in neighboring countries with less strict regulations.[148] Even so, reports of an increase in donors across the country has led some researchers to believe that the decline resulting from the passage of the SLAI was an "immediate impact" and will not have long term implications.[149]

2. The United Kingdom

The United Kingdom first began regulating the fertility industry with the passage of the Human Fertilisation and Embryology Act (HFEA) in 1990.[150] The Human Fertilisation and Embryology Authority (HFE Authority) was created as an independent regulatory agency to enforce the provisions of the HFEA.[151] The HFE Authority is sponsored by the Department of Health and is responsible for regulating all treatment using donated gametes and human embryos.[152] The leg-

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[140] *See* Messing, *supra* note 136, at 444.

[141] *See id.* ("Stable" couples are those who have cohabitated for more than two years.).

[142] *See id.*

[143] *See id.*

[144] *See id.* (Messing notes that some Swedish parents try to avoid this "openness" by simply never telling their child about his/her conception by donor.).

[145] *See* Gottlieb, *supra* note 137, at 2052.

[146] *See* Messing, *supra* note 136, at 445. (A Swedish committee reported there were at least 230 children born through AID each year before the SLAI (1985). But only thirty donor-conceived children were born from 1988-1989.).

[147] *See id.* at 446.

[148] *See* Rosas, *supra* note 35, at 407; *see also* Messing, *supra* note 136, at 446 (Messing notes, "a recent study found that a popular destination for Swedes seeking to escape legal restrictions regarding AID is Denmark, a country where non-anonymous donation is prohibited and where [forty one percent] of services provided for its 'Scandinavian neighbors' was for donor insemination.").

[149] *See* Messing, *supra* note 136, at 446.

[150] *See id.*; *see also* Moyal & Shelley, *supra* note 54, at 437.

[151] *See* Human Fertilisation and Embryology Act, 1990, c.37, §§ 5-8 (U.K.); *see also* Messing, *supra* note 135, at 446-47; *see What We Do*, HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, http://www.hfea.gov.uk/133.html (last updated July 25, 2013).

[152] *See* Human Fertilisation and Embryology Authority, GOV.UK, https://www.gov.uk/government/organisations/human-fertilisation-and-embryology-authority (last visited April 1, 2016).

islation was enacted for three identifiable reasons: (1) to trace and prevent further donations by donors found to have passed on hereditary diseases to children, (2) to address consanguinity concerns regarding unsuspecting donor-siblings, and (3) to direct a change in attitudes about donor anonymity.[153]

The United Kingdom took its first steps toward abolishing anonymity in 2004, when it amended the HFEA of 1990 to allow for a donor-conceived child born on or after April 1, 2005 to access identifying information about their genetic donor when they turn eighteen years old.[154] The HFEA was amended once again in 2008 to allow for donor-conceived children to "inquire about the existence of a genetic donor" at the age of sixteen.[155] The HFEA of 2008 also authorizes the HFE Authority to release information pertaining to donor-conceived siblings, including the sex and date of birth of each sibling.[156] More so, identifying information about these donor-conceived siblings can be released—once both siblings reach eighteen—if the HFE Authority has received consent from both.[157]

The HFE Authority's website provides donor-conceived children with three categories for obtaining donor information. It first notes that children conceived before August 1, 1991 will likely have a more difficult time retrieving information about their donors because there was no "central repository for donor information" before the creation of the HFEA.[158] Children born between August 1, 1991 and March 31, 2005 will have access to all HFEA-collected donor information, including "their physical description . . . the year and country of their birth, their ethnicity, whether they had any children at the time of donation [and] any additional information the donor chose to supply such as occupation, religion, interests and a brief self-description."[159] Finally, children conceived on or after April 1, 2005 have access to the same information listed above (for children conceived after August 1991) in addition to the donor's marital status, his or her medical history, a goodwill message (if provided), and identifying information.[160] The HFE Authority is careful to note that while anonymity was banned after April 1, 2005, the ability to freeze and store anonymous donor sperm created a loophole for which some donors could still remain anonymous, even after the cut-off date.[161]

Much like the allegations regarding the passage of the SLAI, some people blame the amendments to the HFEA for the shortage of donors and extensive waiting lists in the United Kingdom.[162] One year after the passage of the HFEA, reports surfaced of sperm banks being

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[153] *See* Jennifer A. Baines, *Gamete Donors and Mistaken Identities: The Importance of Genetic Awareness and Proposals Favoring Donor Identity Disclosure for Children Born from Gamete Donations in the United States*, 45 FAM. CT. REV. 116, 124 (2007); *see also* Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUM. REPROD. 818 (2001).

[154] *See* Messing, *supra* note 136, at 447 (But a donor-conceived child born before April 1, 2005 is "virtually exempt" from these provisions."); *see also* Clark, *supra* note 135, at 636-37.

[155] *See* Messing, *supra* note 136, at 447 (The child must still wait until they turn eighteen to receive identifying information about his or her donor.).

[156] *See id.*; *see also* Moyal & Shelley, *supra* note 54, at 438.

[157] *See* Messing, *supra* note 136, at 447 (Messing notes that a donor can also request the information available to donor-conceived siblings, such as the number of resulting offspring, their sex, age, and date of birth. But disclosure is not required as it is provided for in a permission provision of the HFEA.).

[158] *See If You Were Conceived Before 1 August 1991*, HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, http://www.hfea.gov.uk/5524.html (last visited Apr. 1, 2016).

[159] *See If You Were Conceived Between 1 August 1991 and 31 March 2005,* HUM. FERTILISATION & EMBRYOLOGY AUTHORITY**,** http://www.hfea.gov.uk/5525.html (last visited Apr. 1, 2016).

[160] *See If You Were Conceived On or After 1 April 2005,* HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, http://www.hfea.gov.uk/5526.html (last visited Apr. 1, 2016).

[161] *See id.*

[162] *See* Messing, *supra* note 136, at 448-49.

forced to import frozen sperm from other countries because of the decline in UK donors.[163] In 2014, data from the HFEA revealed that nearly one in four donated sperm samples is from abroad.[164]

But the HFE Authority maintains that the decline in donors is completely unrelated to the prohibition on donor-anonymity.[165] Others place the blame on the HFEA's restrictions on donor compensation; the 2005 amendments completely prohibit compensation but allow for a donor to receive reimbursement (for lost wages and travel) of up to 250 pounds per cycle.[166] In 2011, the HFE Authority decided to implement a fixed compensation sum that would include the donor's other expenses; men can receive up to thirty-five pounds per donation and women can receive up to 750 pounds per egg cycle.[167]

It is important to recognize the influence of the United Nations Convention on the Rights of the Child (CRC) and the European Convention of Human Rights (ECHR) on European developments regarding AID.[168] The United Nations Committee on the Rights of the Child enforces the CRC, while the European Court of Human Rights reviews decisions based on the ECHR.[169] Together, these organizations have developed and shaped international jurisprudence regarding the right to know one's origins.[170] While the CRC does not explicitly advocate for a child's right to know his or her origins, the United Nations Committee on the Rights of the Child ("Committee") has interpreted the Convention as "bestowing a clear right to donor-conceived children to knowledge of their genetic identity."[171]

The Committee first looks to Article 7 of the Convention for support, which states "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and as far as possible, the right to know and be cared for by his or her parents."[172] Brigitte Clark notes that Article 7's reference to one's parents may be interpreted as granting a right to know one's biological parents; she maintains the term "parents" could be construed as applying to biological and gestational parents as well as social and legal parents.[173] Many legislatures have relied on Article 7 in the passage and enactment of legislation banning anonymity in gamete donation.[174]

Furthermore, Article 8 of the CRC has been construed as lending support to the concept of a child's "right to know."[175] Article 8 provides: "States Parties undertake to respect the right of

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[163] *See* Rosas, *supra* note 35, at 409.

[164] *See* James Gallagher, *UK Facing 'Major' Sperm Shortage*, BBC NEWS (June 2014), http://www.bbc.com/news/health-28061263 ("The figure was one in 10 in 2005.").

[165] *See id.*

[166] *See id.*; *see also* Denis Campbell, *Egg and Sperm Donors to be Paid More in Compensation*, THE GUARDIAN (Oct. 19, 2011), http://www.theguardian.com/society/2011/oct/19/egg-sperm-donors-more-compensation.

[167] *See* Campbell, *supra* note 165 (The egg donor compensation sum (£750) was modeled after an existing system in Spain, whereas the sperm donor compensation sum (£35/donation) was based on Denmark's system.).

[168] *See* Clark, *supra* note 135, at 624.

[169] *See id.* ("In 1989, the CRC was drafted as the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political, and social—to protect children . . . .").

[170] *See id.*

[171] *See id.* at 628.

[172] *See* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[173] *See* Clark, *supra* note 135, at 626.

[174] *See* Moyal & Shelley, *supra* note 54, at 439; *see also* Frith, *supra* note 153, at 820 (For example, "Austria's Medically Assisted Procreation Act 1992 interpreted Article 7 of the Convention on the Rights of the Child, that includes the right to know one's parents and Article 8 of the European Convention on Human Rights, the right to respect for family life, to mean that sperm donation should not be anonymous as this would contravene such rights.").

[175] *See Handbook on European Law Relating to the Rights of the Child*, European Union Agency for Fundamental Rights and Council of Europe 67 (June 2015), *available at* http://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF.

the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."[176] Here, Clark argues the family relations prong of the statute could be extended to include knowledge of one's biological or birth parents.[177] Taking this notion a step further, she contends that Article 8 implies "duties to register and preserve data regarding a child's identity and to make that data accessible to the child."[178]

Finally, Article 3 lends guidance to the understanding of a child's right to know by introducing the concept of the child's best interests.[179] Article 3 reads: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[180] Clark opines this could even stand to support limits on the right to know when the information would be "blatantly contrary to the child's best interests."[181] Taking this into consideration, she determines the child's well-being is likely the main concentration of the CRC, "rather than a bald focus on the child's right to identity, although the two concepts are clearly linked."[182]

Portions of the European Convention on Human Rights have also been interpreted as granting a child's right to information about his or her origins.[183] But the ECHR and the European Court of Human Rights' ("Court") jurisprudence have been less supportive of this right than the Committee's interpretation of the CRC.[184] The Court maintains that a donor-conceived child's right to information is not absolute and Article 8(2) of the ECHR recognizes that the right should be limited when it conflicts with other rights.[185] However, the ECHR—particularly Article 8(1)—is still used to advocate for a child's right to identifying information about his or her donor.[186] An English court's decision in *Rose v. Secretary of State for Health* relied on this article, which states: "Everyone has the right to respect for his private and family life, his home and his correspondence."[187]

The Secretary of State had refused to disclose donor-identifying information to Ms. Rose, prompting her to seek judicial review of the decision.[188] The Queen's Bench Division determined Article 8(1) of the ECHR grants a child "the right to establish the details of his or her own identity."[189] The court understood Article 8 as "plainly including the right to obtain information about a biological parent who [has] inevitably . . . contributed to the identity of his [a sperm donor's] child."[190]

These interpretations and court decisions demonstrate how the international community is considerably ahead of the United States in addressing the concerns of donor-conceived children. Much of the legislation passed regarding these concerns has been influenced and shaped

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[176] *See* CRC, *supra* note 171.
[177] *See* Clark, *supra* note 135, at 627-28.
[178] *See id.* at 628.
[179] *See id.*
[180] *See* CRC, *supra* note 171.
[181] *See* Clark, *supra* note 135, at 628.
[182] *See id.* at 629.
[183] *See* Moyal & Shelley, *supra* note 54, at 439; *see also* Clark, *supra* note 135, at 624.
[184] *See* Clark, *supra* note 135, at 630.
[185] *See id.* (Article 8(2) states: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").
[186] *See* Moyal & Shelley, *supra* note 54, at 439; *see also* Rosas, *supra* note 35, at 409.
[187] *See* Moyal & Shelley, *supra* note 54, at 439; *see also* European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222.
[188] *See* Moyal & Shelley, *supra* note 54, at 439.
[189] *See id.*
[190] *See* Rose v. Secretary of State for Health, [2002] 2 FLR 962, ¶ 48 (Q.B.); *see also* Rosas, *supra* note 35, at 409.

by both the ECHR and the CRC, most notably the United Kingdom's HFEA.[191] Countries having ratified the CRC are obligated to "respect, protect, promote and fulfill the rights as outlined—including adopting or changing laws and policies that are needed to implement the provisions of the agreement."[192] As of 2014, 194 countries have become parties to the CRC, establishing the Convention as "the most widely and rapidly ratified human rights treaty in history."[193] Only two countries have not ratified the CRC: the United States and Somalia.[194]

The United States' failure to ratify the treaty—and the company it keeps in doing so—makes a profound statement on how the government views the rights of children. Despite the fact that only a small portion of the CRC concerns the rights of donor-conceived children, the overall picture illustrates how laws in the United States generally tend to focus on adults. For example, groups actively lobbying against U.S. ratification portray the CRC as a threat to "parental authority."[195] Michael Farris (president of ParentalRights.org) views "the treaty's principle that governments' decisions should be in the best interest of the child as a blanket permit for the authorities to override any parental decision that a government worker—such as a school official or social worker—disagrees with."[196]

But many disagree with Farris' perspective and maintain that ratification would not diminish parental autonomy. Law professor Jonathan Todres observes that nineteen of the treaty's provisions recognize the role of parents, and the treaty as a whole "promotes the family as the best environment for children."[197] Nevertheless, the prolonged debate over ratification of the CRC illustrates the premium placed by the United States on the rights of parents. Although the "best interests of the child" is the absolute standard in U.S. courts, it seems to take a backseat in the context of a child's "right to know."

B. Anonymous Countries

3. Canada

In 2004, Canada passed the *Assisted Human Reproduction Act* (AHRA) to create a regulatory framework for assisted reproductive technology.[198] Two years later, "Assisted Human Reproduction Canada" (AHRC) was established to enforce the legislation and its regulations.[199] The AHRA acknowledges and declares that a donor-conceived child's health is given top priority

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[191] *See* Rosas, *supra* note 35, at 409; *see also* Moyal & Shelley, *supra* note 54, at 439.

[192] *See Using the CRC and Protocols for Children*, UNICEF: Convention on the Rights of the Child, http://www.unicef.org/crc/index_using.html (last visited Apr. 8, 2016); *see also* Rosas, *supra* note 35, at 408 ("The CRC is an international and legally binding treaty, which sets forth basic rights for human children.").

[193] *See Frequently Asked Questions and Resources,* UNICEF: Convention on the Rights of the Child, http://www.unicef.org/crc/index_30225.html (last visited Apr. 8, 2016).

[194] *See* Rosas, *supra* note 35, at 408; *see also Frequently Asked Questions and Resources*, *supra* note 192.

[195] *See Convention on the Rights of the Child*, AMNESTY INT'L, http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child-0 (last visited Apr. 8, 2016); *see also Why Won't America Ratify the UN Convention on Children's Rights?,* THE ECONOMIST (Oct. 6, 2013), http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2.

[196] *See* Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, THE WASH. POST, (Nov. 21, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/; *see also* PARENTALRIGHTS.ORG, http://www.parentalrights.org/ (last visited Apr. 8, 2016) (The organization's mission is "to protect children by empowering parents through adoption of the Parental Rights Amendment to the U.S. Constitution and by preventing U.S. ratification of UN Conventions that threaten parental rights . . . .").

[197] *See* Attiah*, supra* note 195.

[198] *SEE* ASSISTED HUMAN REPRODUCTION ACT, S.C. 2004, C. 2 (CAN.); *SEE ALSO ASSISTED HUMAN REPRODUCTION AND THE LAW*, CBC News (APR. 22, 2012), HTTP://WWW.CBC.CA/NEWS/HEALTH/ASSISTED-HUMAN-REPRODUCTION-AND-THE-LAW-1.1144733.

[199] *See Assisted Human Reproduction*, Health Canada, http://www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/reprod/index-eng.php (last visited Apr. 9, 2016).

in all decisions regarding ART.[200] One provision of the AHRA required the collection of "health reporting information," including the "identity, personal characteristics, genetic information and medical history of donors of human reproductive material . . . ."[201]

Disclosure of a donor's non-identifying medical history is predicated on the assumption that "one's family history, like one's genetic information, 'will become increasingly significant as tests and cures for many single-gene diseases are developed and made available to individuals with a family history of certain genetic diseases."[202] Likewise, a donor's medical history could serve as an early indication of one's predisposition for "late-onset diseases," which would allow offspring to take preemptive action against these conditions.[203] Despite the annulment of this provision in 2012, its original inclusion indicates awareness as to the importance of a child's access to a donor's medical and genetic history.[204]

Notwithstanding the legislature's best intentions, the AHRA has failed to effectively regulate the reproductive market in Canada.[205] Six years after the passage of the AHRA, the Supreme Court of Canada determined that several parts of the legislation were unconstitutional; this was attributed to the provisions' interference with the authority of individual provinces regarding healthcare.[206] Moreover, the government dismantled the AHRC in early 2013 as a result of the Supreme Court's rulings, which had "significantly reduced the federal role in assisted human reproduction."[207] "Health Canada" has stepped into the role of regulatory agency following the disbandment of the AHRC, but many continue to criticize the effectiveness of both the agency and the AHRA.[208]

V. The Donor Health Information Act: A Proposal

The United States is in dire need of regulation in the assisted reproduction context. The Donor Health Information Act (DHIA) does not pretend to address every aspect of the process because many assisted reproductive technologies fall beyond the scope of this article. However, it does present a foundational framework for addressing the concerns of donor-conceived children regarding access to a donor's medical information.

The DHIA would be enforced by the U.S. Department of Health and Human Services (DHHS), perhaps in connection with the Food & Drug Administration. The purpose of the DHIA is (1) to acknowledge the importance of a child's best interests in the context of assisted reproduction, (2) to establish federal guidelines and regulations to standardize the process of artificial insemination by donor, and (3) to create a national database through which information may be accessed by physicians, donor-conceived children, and the parents of these children.

It is imperative that the United States establishes its dedication to the health and welfare of its children, especially considering its status as only one of two countries that have not ratified the Convention on the Rights of the Child. Thus, the first goal of the DHIA is to reaffirm the na-

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[200] *See* Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.).

[201] *See* Moyal & Shelley, *supra* note 54, at 438.

[202] *See* Vanessa Gruben, *Assisted Reproduction Without Assisting Over-Collection: Fair Information Practices and the Assisted Human Reproduction Agency of Canada*, 17 HEALTH LAW J. 239 (2009).

[203] *See id.*

[204] *See* Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.); *see also* Gruben, *supra* note 201, at 235.

[205] *See Assisted Human Reproduction and the Law*, *supra* note 197.

[206] *See* Carly Weeks, *We Need to Talk about Assisted Reproduction in Canada*, GLOBE AND MAIL (Feb. 15, 2015), http://www.theglobeandmail.com/life/health-and-fitness/health/we-need-to-talk-about-assisted-reproduction-in-canada/article22988791/.

[207] *See Assisted Human Reproduction, supra* note 198; *see also Assisted Human Reproduction and the Law*, *supra* note 197.

[208] *See Assisted Human Reproduction*, *supra* note 198; *see also* Weeks, *supra* note 205 (Weeks is especially critical of the AHRA, arguing that it "helped create a quasi-black market" and forced prospective parents seeking ART services to leave the country.).

tion's commitment to its children and demonstrate that its laws are keeping up with the rapidly developing technology in this field. The "best interests of the child" is the primary, overreaching concern of the U.S. family court system and consistently determines the outcome of cases where a child is the subject of the lawsuit.[209] This concept should be equally applied in the context of assisted reproduction. The first prong of the DHIA will communicate to frustrated donor-conceived children that the United States recognizes their concerns and is actively working towards a solution.

The second portion of the DHIA would create federal guidelines for fertility clinics, sperm banks, and other donation centers to regulate and standardize the process. Furthermore, it would create a licensing structure to ensure compliance and enable the federal government to enforce the DHIA and its regulations. Annual licensing fees paid by participating clinics would be collected under the Act to support these programs. The policies authorized by the DHIA would require genetic testing to be performed on all donated sperm in addition to testing required by the FDA. The guidelines would also limit the number of children a sperm donor could father, which would address consanguinity concerns and limit the risk of disease transmission in the event of a condition going undetected.[210] The DHIA would ensure that clinics across the nation adhere to the highest medical and ethical standards in providing these services.

Finally, the DHIA would create an online federal database to provide non-identifying donor information to children. In addition to licensing fees, a surcharge on receipt of donated tissue will be imposed on prospective parents to generate revenue for the creation and maintenance of the database. The registry will provide donor offspring with immediate access to a donor's medical and genetic history; it will also allow for a child to digitally "follow" a donor's medical life and utilize the information when making his or her own medical decisions. The registry would also provide information to a donor about his offspring if the child later develops a genetic condition, such as the example Ravistky highlighted.

Naturally conceived children have the advantage of observing their parents, grandparents and other family members as they age. For example, when a child's mother develops Huntington's disease (HD) at 38 years old, the child is automatically aware of his or her potential for inheriting the disease.[211] This knowledge will likely affect every decision-making process in his or her life, including the decision to have children. Because Huntington's disease does not generally develop until a person reaches their 30s or 40s, a child would be ignorant of his or her predisposition until the mother was tested and confirmed.[212] Now assume the anonymous sperm donor—and not the mother— was the biological parent carrying HD. No federal regulations require sperm banks to test for HD and no system exists to alert a donor-conceived child once the condition has developed in his or her donor.[213] Thus, the donor-conceived child is precluded from discovering his or her predisposition for developing HD and is consequently denied the ability to

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[209] *See* Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. Department of Health and Human Services: Children's Bureau (2013), *available at* https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

[210] *See* Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES D1 (Sept. 6, 2011) *available at* http://www.nytimes.com/2011/09/06/health/06donor.html?_r=0 (The ASRM recommends "restricting conceptions by individual donors to 25 births per population of 800,000).

[211] *See What is Huntington's Disease?*, HUNTINGTON'S DISEASE SOCIETY OF AMERICA, http://hdsa.org/what-is-hd/ (last visited Apr. 10, 2016) ("Huntington's disease (HD) is a fatal genetic disorder that causes the progressive breakdown of nerve cells in the brain. HD is known as the quintessential family disease because every child of a parent with HD has a 50/50 chance of carrying the faulty gene.").

[212] *See id.*; *see also Huntington's Disease*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/huntingtons-disease/basics/definition/con-20030685 (last visited Apr. 10, 2016).

[213] *See* Donor Screening, *supra* note 99 (The California Cryobank compiles its list of genetic tests using practice guidelines developed by several organizations; Huntington's disease is not on the list.).

make personal decisions with the condition in mind. The DHIA's final goal is to ensure that no child grows up missing his or her genetic and medical information.

The DHIA will borrow some general concepts from Canada's AHRA, which authorized the creation of a personal health information registry to assist physicians in the collection of "health reporting information" from donors.[214] Likewise, physicians in the United States will be authorized to collect and submit a donor's information to the national registry, which will be overseen by the DHHS—although fertility clinics and physicians will perform most of the registry input. The United States can avoid the same pitfalls of the AHRA by expeditiously creating legislation to enforce the provisions of the DHIA. Similarly, by using a preexisting regulatory agency to oversee the database and enforce regulations, the United States does not need to worry about creating and funding an entirely new agency. This enables the country to sidestep problems encountered by Canada with the now terminated Assisted Human Reproduction Canada.

Although an in-depth analysis of those concerns is beyond the scope of this article, some of the constitutional concerns acknowledged by the Supreme Court of Canada may also be raised in the United States. Canada's Supreme Court struck down many provisions of the AHRA because they "interfered with the provinces' authority on the delivery of health care."[215] However, recent legislation in the United States—such as the *Patient Protection and Affordable Care Act* (PPACA)—has demonstrated the federal government's overriding interest in the health of its citizens.[216] Thus, it is more likely that opposition to certain provisions of the DHIA will focus on an individual's right to privacy. The database will ensure a donor's privacy remains protected by utilizing an anonymous identification system. It follows that challenges to the DHIA are likely to fail when appellate courts balance the donor's privacy interests against the best interests of the child. Furthermore, an argument can be made that individuals who donate have waived their right to privacy by placing their reproductive tissue into the marketplace.

The purpose of the registry is to allow for a donor's medical information to be continuously updated, subsequently providing a donor-conceived child with his/her "genetic history" as it develops. The initial collection of information will be the responsibility of the sperm bank or fertility clinic where the donation is made; this will create the donor's profile within the database. To maintain a balance between the privacy rights of the donor and the child's interest in access to information, the donor's identity will not be stored within the database unless the donor consents otherwise. In this way, the DHIA deviates from the complete ban on donor anonymity enforced by the UK's HFEA and Sweden's SLIA. To combat the identity concerns of donor-conceived children, the database will serve as a digital link between the child and donor. Should the donor choose to provide more personal information, he will be able to do so through his profile on the database. Donors will receive an anonymous identification number (similar to those currently used by banks) to be used throughout his/her life. Failure to consistently update the database could result in the revocation of a bank or clinic's license.

Likewise, physicians will be directed to collect and submit a donor's information to the registry as needed. Every time a donor seeks medical care, he will be required to disclose his donor status to the physician through standard medical history forms. The physician is then obligated to report to the database any diagnoses of a hereditary disease or condition that could be genetically passed to the recipient of donated tissue. Donor-conceived children will be registered in the database according to the donor's identification number, which will give them access to the donor's health information and genetic history. The DHIA will likely impose an age restriction

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[214] *See* Gruben, *supra* note 201, at 239.

[215] *See* Weeks, *supra* note 205.

[216] *See* Affordable Care Act Summary, OBAMACARE FACTS, http://obamacarefacts.com/affordablecareact-summary/ (last visited Apr. 16, 2016) (The PPACA (commonly known as ObamaCare) is a nationwide health care reform law. In 2012, the Supreme Court upheld one of the more controversial provisions of the PPACA, which required all Americans to obtain health insurance by 2015.).

similar to the HFEA's requirements (18 years or older) for when a child may access donor information; but parents will always have access on behalf of their children.

Long term, the database does not need to belong exclusively to sperm donors. It will be structured in a way that allows for eventual extension to all donors of any "biological agent." Despite an estimated 307 million tissue specimens stored in the United States, there is no central database to accumulate and share this information throughout the country.[217] The database will be created with the potential to encompass information from blood banks, organ banks, DNA repositories, umbilical cord blood banks and more.

VI. Conclusion

The need for federal regulation of assisted reproductive technologies (artificial insemination by donor in particular) is obvious and significant. Legislation from around the world has adequately demonstrated that the United States is falling behind in addressing the needs and concerns of donor-conceived children. The creation of a federal database to collect donor information can alleviate these concerns by providing children with access to the other half of their genetic and medical histories. The availability of this information does not mean the elimination of anonymity; the proper federal framework will protect and balance the interests of both parties. However, the U.S. needs to take action before stories like Tyler Blackwell's become commonplace.

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[217] *See* ELISE EISEMAN & SUSAN B. HAGA, HANDBOOK OF HUMAN TISSUE SOURCES: A NATIONAL RESOURCE OF HUMAN TISSUE SAMPLES xvii (1999).

The Systematic Destruction of Foster Youth through Frequent Placement Changes

Courtney Devney[1]

Texas' Foster Care System is Broken, and it Has Been That Way for Decades.[2]

I. Introduction

A.M. entered the foster care system at the age of seven due to parental neglectful supervision as her father was on death row and her mother was currently on trial for homicide.[3] For the first seven years of her life, A.M. learned to be the primary caregiver for her two younger sisters because she was the only one around when they cried.[4] All she had ever known was raising her siblings and was consumed with caring for her "babies."[5] Once placed under the care of the Texas Department of Family and Protective Services, it was only a matter of time before the siblings were separated and A.M.'s youngest sister was quickly adopted.[6]

She was first placed in a psychiatric hospital at the age of eight for threatening to harm herself and her foster parents.[7] After some improvement, A.M. was moved to a foster home with her remaining non-adopted sister but only to be warned that if she continued to misbehave, she would be moved out of the home.[8] A few months later a court agreed that it would be in the best interest of the remaining two siblings to separate them, allowing the adoption of A.M.'s sister.[9] While still living with this foster family, they chose to only formally adopted A.M.'s younger sister, changing only her last name.[10] A.M. was left wondering if her last name would be changed too but the caseworker avoided the question.[11] Some short weeks later, A.M. experienced a major meltdown and was immediately moved to an emergency respite care facility.[12] This was followed by another stay at a psychiatric hospital for an outburst at school and her overall deteriorating behavior.[13] It was at this point that her foster family gave notice that they no longer wished to care for A.M and once she was moved out of the home, she spent three years in a residential treatment center (RTC).[14] For a brief moment, a family was interested in adopting A.M. but the arrangement never materialized, further devastating her.[15] Eventually, CPS made the decision to stop all active recruitment efforts in finding A.M. a forever family.[16]

A.M. was moved to ten additional placements including a number of intensive RTCs.[17] She spent six weeks at a psychiatric hospital because no family and no facility wanted her.[18] She sometimes would improve at a placement, but suddenly would be moved because her needs were no longer intense enough to justify the facility's high cost.[19] Throughout her time in state

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[2] *M.D. v. Abbott,* No. 2:11-CV-84, 2015 WL 9244873, 254 (S.D. Tex. Dec. 17, 2015).
[3] *Id.* at 90-97.
[4] *Id.*
[5] *M.D. v. Abbott, supra* at 90-97.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

care, A.M. changed placement at least 21 times, leaving her without any lasting stability or sense of belonging.[20] She entered the foster care system requiring the minimal basic level of care but will age out as a damaged young adult who is wholly unprepared for the real world.[21] This is what our foster care system does to our children.[22]

A.M.'s story is excruciatingly unfortunate but is also unfortunately common. For decades, the call for child welfare reform has been ignored or been abated with half-hearted remedies. The worsening child welfare system is a national crisis, affecting nearly all states across the country.[23] This changed on December 17, 2015 when U.S. District Court Judge Janis Jack released a 260 page opinion scolding the Texas Department of Family and Protective Services for their copious and systematic failure to protect children from harm while in the state's care.[24] Judge Janis Jack found that Texas violated foster children's Fourteenth Amendment substantive due process right to be free from an unreasonable risk of harm.[25] Her ruling mandates the appointment of a Special Master to create and implement the necessary reform of the broken foster care system.[26] This will include restructuring the way DFPS manages and files cases, shrinking the workload required of caseworkers, lowering caseworker turnover rates, and correcting the current inadequate foster child placement array.[27] Texas has the opportunity to fundamentally change the child welfare system, a vital task because the lives of children hang in the balance.

The correction of Texas' dismal placement options is the focus of this article. When a child enters CPS custody, she is assigned a level of care that is dependent on her particular needs and the complexity of services a placement will need to provide.[28] The Special Master shall recommend provisions to solve the problem of children being removed from placements where they are succeeding because their level of care has changed.[29] As seen through the tragic story of A.M., children are frequently bounced from one placement to another, causing significant issues and furthering damaging children that are vulnerable and in need of stability. This article examines three possible approaches the Special Master could adopt to solve the issue of placement instability: 1) improvement and expansion of Texas' current Foster Care Redesign program, 2) Florida's community-based care agency approach, and 3) revisiting orphanages, structured like Nebraska's Boys Town. To correct the problem of placement instability among Texas foster youth, the Special Master should balance the benefits of community-based, family style care with a continuum of care strategy that will expand services available without having to relocate children when their level of needs change.

This article is divided into in seven parts. Part II provides a background of the Texas foster care system. It also sets forth the legal protections provided by the U.S. Constitution and federal legislation for children in state custody. Part III outlines common reasons placements disrupt and the harm associated with frequent placement changes. Part IV discusses the current state of CPS reform in Texas by delving deeper into the mandates set forth in *M.D. v. Abbott*. Part V covers three proposed solutions to the placement challenge and examines the benefits and negatives of each. Part VI and VII analyze common themes found among the three proposed

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[20] *M.D. v. Abbott, supra* at 90-97.
[21] *Id.*
[22] *Id.*
[23] Logan Nakyanzi, *Foster Care System Faces Problems* (2015), http://abcnews.go.com/Primetime/story?id=132011&page=1
[24] *M.D. v. Abbott, supra* at 254.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *See Placement Options for Children in the Conservatorship of DFPS*, https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_4000.asp (last visited Apr. 6, 2016) (Levels of care increase in intensity and range from basic, moderate, specialized and intense).
[29] *M.D. v. Abbott, supra* at 254.

solutions and offer a final recommendation to solve the current inadequate placement options for children in foster care.

I. Background

A. Overview of Texas Foster Care System

Child Protective Services ("CPS") is one division of many that falls under the responsibility of the Texas Department of Family and Protective Services ("DFPS").[30] The agency works with families and children to ensure the protection of children across the State of Texas.[31] CPS is responsible for investigating all reports of child abuse and neglect in order to determine if a child is safe living with her parents or legal guardian.[32] Abuse is defined in Texas Family Code Section 261.001 as "an intentional, knowing, or reckless act or omission...that causes or may cause emotional harm or physical injury to, or the death of, a child..."[33] Neglect is defined as, "a negligent act or omission... that causes or may cause substantial emotional harm or physical injury to, or the death of, a child..."[34]

Once a report is made to CPS, the statewide intake division (SWI) proceeds with an initial assessment based upon the seriousness of the allegation to determine if the case requires an investigation.[35] During this investigation, CPS contacts individuals who have relevant information about the allegations.[36] Based upon the findings, CPS will close an investigation if the investigator found future harm to the child unlikely or if the investigator lacks sufficient information or contacts to make a determination about future harm.[37] As well, if an anonymous individual makes a report to CPS and the investigator cannot corroborate the allegation, the case can be closed.[38]

If the investigator finds by a preponderance of evidence supporting the allegation of abuse or neglect through conducting interviews with the alleged perpetrator, visiting the home, or possibly speaking to the child's teacher, the case is designated confirmed.[39] Allegations of child abuse are categorized based on type and include neglectful supervision, physical abuse, physical neglect, sexual abuse, medical neglect, emotional abuse, abandonment, and refusal to accept parental responsibility.[40] Neglectful supervision is the most common allegation that is confirmed during CPS investigations.[41] If CPS makes a determination that a child is at risk, the agency will petition a court to obtain Temporary Managing Conservatorship ("TMC") prior to removing the child from the home.[42] Alternatively, CPS may make a finding that exigent circumstances exist and can take immediate emergency custody without first obtaining a court order.[43] Following the precedent set forth in *Gates v. the Texas Department of Family and Protective Services*, exigent circumstances exist if there is "reasonable cause to believe that the child is in imminent danger of physical or sexual abuse if they remain in the parent's custody."[44] The investigator will look at a variety of factors to make this determination including whether there is

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[30] Texas Department of Family and Protective Services, *About Child Protective Services*, http://www.dfps.state.tx.us/child—protection_ Protection/About—Child—Protective—Services_Child_Protective_Services/ (last visited Feb. 28, 2016).
[31] *Id.*
[32] *Id.*
[33] Tex. Fam. Code Ann. § 261.001(a)(1)
[34] Tex. Fam. Code Ann. § 261.001(a)(3)
[35] *The Guide to Texas Child Protective Services* (2010), http://library.cppp.org/files/4/CPSpaper_web.pdf.
[36] *Id.* at 14.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 17
[40] Tex. Fam. Code Ann. § 261
[41] *Guide*, *supra* at 17.
[42] Tex. Fam. Code Ann. § 262.101
[43] Tex. Fam. Code Ann. § 262.104
[44] *Gates v. Texas Dep't of Family & Protective Servs.*, 252 S.W.3d 90 (Tex. App. 2008).

enough time to get a court order, how strong the evidence is in support of the allegation, the risk a parent will take the child and flee, possible harm to the child if they are not immediately removed, and the severity of the abuse.[45]

An investigator also conducts a safety assessment to decide if a family involved with a CPS allegation needs services and further supervision.[46] This stage of the process is not conditioned on CPS confirming the allegations regarding the child.[47] For instance, services could be required for parents even though the allegation was not confirmed because the investigator determined there is ongoing risk, or a case can have confirmed abuse but the family is not assigned services because the risk no longer exists.[48] Parents or guardians can be court ordered to complete a service plan that might include substance abuse treatment, parenting classes, ongoing drug testing, or individual counseling.[49]

When a child is removed from home, CPS is responsible for placing her in a temporary placement until a permanent option is located.[50] The goal for every child that enters state custody is "permanency," a term that means a child leaves the foster care system for a permanent, stable living environment.[51] Permanency can be attained through the child being returned to her home once it is safe to do so, being moved into the home of a family member, being adopted, or being placed into long-term foster care.[52] Until permanency can be reached, a child will be placed in substitute care, which can be with a relative, with a family friend, or in foster care.[53] When a relative is asked to step in and take temporary custody the child, CPS calls this type of placement kinship care.[54] This type of temporary custody is preferred and at removal, CPS will ask parents for potential relatives willing and able to provide for the child during this time.[55] In the absence of any suitable relatives or if proposed relatives fail to pass a home study, the child may be placed in foster care.[56]

The TMC stage can last up to one year with an extension available for six months.[57] However, if the state does not find a suitable permanent living situation for a child after the allotted time, the child will enter into the Permanent Managing Conservatorship ("PMC") of the State.[58] CPS can be granted custody of the child if parental rights have or have not been terminated.[59] This transition from TMC to PMC is significant. While children are in the TMC phase of state care, the State requires a permanency review hearing once every four months to review efforts being made towards permanency.[60] These status hearings are significant because they encourage all parties to continually be searching for a permanent home that will best serve the child.[61] The Texas Family Code mandates that all TMC children are appointed an attorney ad litem, an

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[45] *Guide*, *supra* at 21.
[46] *Id.* at 18.
[47] *Id.*
[48] *Id.* at 20.
[49] *Id.* at 22.
[50] *A Parent's Guide to Child Protective Services (CPS) Investigations*, https://www.dfps.state.tx.us/Child_Protection/Investigations/parent_guide.asp (last visited Apr. 4, 2016).
[51] *Id.*
[52] *About State Care*, https://www.dfps.state.tx.us/Child_Protection/State_Care/ (last visited Mar. 24, 2016).
[53] *Id.*
[54] *Kinship Care*, https://www.dfps.state.tx.us/Adoption_and_Foster_Care/Kinship_Care/default.asp (last visited Apr. 6, 2016).
[55] *Id.*
[56] *Foster Care,* https://www.dfps.state.tx.us/Adoption_and_Foster_Care/About_Foster_Care/default.asp (last visited Apr. 6, 2016).
[57] Tex. Fam. Code Ann. § 263.401
[58] April C. Wilson et al., *Understanding Texas' Child Protective Services System* (Oct. 2014), http://texprotects.org/media/uploads/10_7_14_combined_cps_systems__flowchart_final.pdf
[59] Tex. Fam. Code Ann. § 263.404; Tex. Fam. Code Ann. § 263.407
[60] *See* Tex. Fam. Code Ann. § 263.305 (Permanency hearings for children in PMC are held every 6 months).
[61] *Guide*, *supra* at 29.

attorney who provides legal services to the child, and an guardian ad litem, a person appointed to represent the best interests of a child.[62] Frequently, one attorney will serve both roles.[63] While not statutorily required, in some cases children may also be appointed a Court Appointed Special Advocate ("CASA"), a volunteer appointed by the court to keep an eye on children in foster care and advocate for their specific needs.[64] However, when a child enters the PMC stage of care, there are a reduced number of permanency review hearings and children do not always get to keep their attorney ad litem or CASA, depending on the case.[65] Frequently, PMC children are stripped of their personal advocates who are looking out for their best interest.[66] These children not only lose their advocates, but PMC children also typically receive fewer visits from their CPS caseworkers and less effort is made in finding them a permanent solution.[67] The PMC stage becomes a type of purgatory, where the state maintains children until they reach the age of 18 and age out of the State's care.

DFPS is required to find the best available placement option for each foster care child when they enter the state's care.[68] In order to find this best placement, DFPS assigns each child a service level of care.[69] The levels of care include basic, moderate, specialized and intense.[70] The higher the level of care, the more structure and support a child needs.[71] When assessing what temporary placement would be appropriate for the child, the caseworker will first identify the child's needs.[72] Based on these specific needs, the caseworker will make a recommendation of one of the four above listed service levels of care.[73]

The basic service level includes supportive, family like settings that are intended to maintain a child's functioning.[74] As the least intense level, children who need basic services would be best suited in a foster home setting.[75] Children requiring a moderate service level are those who would do best in a setting with increased structure and routine compared to the basic level.[76] At the moderate service level, children have access to therapeutic, habilitative, and medical services that will help them achieve and maintain appropriate functioning.[77] Characteristics for children needing a moderate service level of care include children with occasional physical aggression, children who abuse alcohol and drugs, or children with developmental delays.[78] The third level of care assigned to children in foster care is the specialized service level. This level consists of more treatment style care with 24-hour supervision and access to therapeutic, habilitative, and medical support.[79] Children requiring this level may include children with physical aggression, those who are withdrawn and isolated, have attempted suicide, abuse alcohol and drugs, have severe development delays and impairments, or require frequent medical interven-

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[62] Tex. Fam. Code Ann. § 107.001
[63] Tex. Fam. Code Ann. § 107.031(D)
[64] Tex. Fam. Code Ann. § 107.031
[65] Tex. Fam. Code Ann. § 263.501
[66] *M.D. v. Abbott, supra* at 8.
[67] *Id.*
[68] *Children's Placements – Providing Input & Addressing Concerns*, http://texascasa.org/learning-center/resources/childrens-placements-resources-provide-input-address-concerns/ (last visited Apr. 6, 2016).
[69] *Placement Options for Children in the Conservatorship of DFPS*, https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_4000.asp (last visited Apr. 6, 2016).
[70] *Id.*
[71] *Service Levels for Foster Care*, https://www.dfps.state.tx.us/Adoption_and_Foster_Care/About_Foster_Care/Care_Levels.asp (last visited Apr. 6, 2016).
[72] Wilson, *supra*.
[73] *Id.*
[74] *Service Levels*, *supra*.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

tion for a condition.[80] The last and most demanding service level is intense. The intense service level consists of highly structured environments that limit a child's contact with the outside world.[81] These children require 24-hour supervision and care to ensure their medical or habilitative needs are met.[82] Children requiring this intense level exhibit extreme aggression, self-harm, severe mental impairment, substance dependency, severe developmental delays requiring one-to-one supervision, and need frequent, chronic intervention for medical conditions.[83] Children that are heightened to this intense level of care are unable to perform daily living or self-care skills and require constant support and assistance.[84]

As a child's needs evolve throughout her time in foster care, her level of care changes in accordance. Placement moves are a result of these changing levels of care because placements may only be qualified to handle children with certain needs.[85] In 2014, 28.7% of children in the PMC stage of care experienced five or more placements during their stay and 7.69% experienced ten or more.[86] This lack of placement stability has severe, detrimental consequences for children in state care.

B. Legal Precedent on Foster Children's Substantive Due Process Protections

The United States Supreme Court in *DeShaney v. Winnebago Dep't of Soc. Servs.*, held that the State typically does not have an obligation to protect its citizens from private harm.[87] There is an exception carved out for individuals that are taken into state custody.[88] When the State takes an individual into custody and limits their freedom to act on their own behalf, the Constitution requires the State to take an affirmative duty of care and protection for this individual.[89] By taking an individual into custody, a special relationship is created with the State, triggering due process protections.[90]

The affirmative duty of care and protection for individuals in state custody stems from two Supreme Court cases, *Estelle v. Gamble* and *Youngberg v. Romero*.[91] In *Estelle v. Gamble*, the Court held that the state is obligated to provide medical care for its prisoners under the Eighth Amendment's ban of cruel and unusual punishment.[92] In *Youngberg v. Romero,* the Court extended these rights to individuals who are involuntarily committed to a state mental hospital.[93] Here, the Court reasoned that it must be unconstitutional to confine involuntarily committed patients in unsafe conditions if it is unconstitutional to confine prisoners in unsafe conditions.[94] These cases indicate that when the State takes away an individual's personal freedom, the state must assume the affirmative duty to provide for their basic needs including food, shelter, clothing and medical care.[95]

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[80] *Service Levels*, *supra*.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *M.D. v. Abbott, supra* at 221.
[86] *Id.*
[87] *See DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 195-96 (1989). (The U.S. Supreme Court decided the State did not have a special duty to protect four-year-old Joshua DeShaney from his father's physical harm when the State did not create the harm. The state's failure to protect a citizen from private violence does not violate the 14th Amendment's Due Process Clause).
[88] *Id.* at 200.
[89] *Id.* at 198-200.
[90] *Id.*
[91] Mark Strasser, *Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context*, 15 Duke J. Gender L. & Pol'y 223-244, 227 (2008).
[92] *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976).
[93] *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).
[94] *Id.* at 315-16.
[95] *DeShaney v. Winnebago, supra* at 200.

The 5th Circuit has recognized that when the State takes a child into the foster care system, the "special relationship" triggers substantive due process protections similar to those for prisoners and involuntarily committed patients.[96] This special relationship was first recognized in *Griffith v. Johnston,* and the Court held that the State has a duty to provide adequate care to children in the custody of the State.[97] This right to adequate care under State care was further discussed in *Doe ex rel. Magee v. Covington Cnty.Sch. Dist. ex rel. Keys*.[98] Here, the Court specifically addressed children in foster care and recognized this state custody as one of the "special relationships" that trigger an affirmative duty of care.[99] This includes a foster child's right to be free from unreasonable risk of physical and psychological harm.[100]

C. The Adoption and Safe Families Act of 1997

The foster care system was in the exclusive domain of state agencies up until 1997.[101] At this point, Congress held hearings to address the growing concern about the foster care system and it became increasingly alarming how the entire system was ineffectively and poorly managed.[102] Congress passed the Adoption and Safe Families Act of 1997 in response to these concerns.[103] Congress wanted to reform the child welfare system to work better for the children and families by requiring better state efforts to reunify children with their families, and to find more stable, permanent placements.[104] The Act mandated three goals for all state child welfare agencies including safety, permanency and the well-being for children and families.[105] The key principle of the Act was to ensure the safety and health of a child when considering whether to remove her from home and when to reunify a family.[106] Following the 1997 Adoption and Safe Families Act, the federal government began to evaluate how states have dealt with the issue of placement instability in foster care.[107]

II. Consequences of Placement Instability

The Adoption and Safe Families Act of 1997 was a turning point in child welfare policy because states were forced to make placement stability and permanency a priority.[108] This article identifies four broad categorical reasons that children experience placement disruption, followed by the negative consequences of this disruption. Research in this area is critical simply because of the high number of children currently in the Texas foster care system.[109]

Prior to diving into the consequences placement instability has for foster children, it would be beneficial to define some key terms. A common phrase used to describe when a child is

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[96] *M.D. v. Abbott, supra* at 15.
[97] *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990).
[98] *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys* 675 F.3d 849, 858-59 (5th Cir. 2012).
[99] *Id.*
[100] *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d at 846, 851 (7th Cir. 1990).
[101] Judge Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997 Confronting an American Tragedy*, 46 La. B.J. 477-81, 478 (1999).
[102] *Id.*
[103] Adoption and Safe Families Act of 1997, P.L. 105-89, eff. Nov. 19, 1997.
[104] Gray, *supra* at 479.
[105] Dana Sullivan & Michiel Van Zyl, *The well-being of children in foster care: Exploring physical and mental health needs*, 30 Children and Youth Services Review 774–786, 774 (2008).
[106] Sec. 101(a)(15)(A) of P.L. 105-89 amending 42 U.S.C. § 671(a)(15)(A).
[107] Gray, *supra* at 479.
[108] D. M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care*, 119 Pediatrics 336–344, 337 (2007).
[109] *CPS: Children in Foster Care During the Fiscal Year* (2014), https://www.dfps.state.tx.us/About_DFPS/Data_and_Statistics/child_protective_services/cps-chart_Children_in_Foster_Care_During_Fiscal_Year.asp (For the 2014 fiscal year, there were 31,176 children in Texas foster care).

moved from one placement to another is 'foster care drift.'[110] One way to define placement disruption is "an unplanned change in foster placement made in response to a demand for replacement by a child's caregiver."[111] Defining instability is more difficult because studies use different measurements intervals. For example, a study by John Pardeck defines instability as a child experiencing three or more placements throughout their time in care.[112] A study done in 2001 used a different interval and defined instability as a child experiencing two or more placements within four months.[113] For the sake of this article, the term placement instability will refer to two or more placements changes while a child is in foster care.

A. Why Placements Disrupt

Placements for foster children disrupt for many reasons and generally fall into one of four broad categories.[114] First, children change placements for system or policy reasons in order to comply with procedural mandates.[115] This occurs when children are moved to be placed with a sibling, or when an alternative placement would better suit their level of care.[116] Other reasons include the use of emergency placements, mismatches between the foster child and the foster family, and if too many children are placed in one foster home.[117]

A second broad category of placements disruption is foster family-related placement changes.[118] This occurs when a foster family moves, there is a death of a foster parents or when foster parents wish to discontinue participating in foster care.[119] Occasionally, placements disrupt because foster families were simply unprepared for the responsibility because they had unrealistic expectations or lacked experience.[120]

The third broad category includes changes in placements due to issues with the child's biological parent.[121] Foster children can be moved when biological parents threaten and harass the foster parents, or when general conflict occurs between the two parties.[122] Substance and alcohol use by the biological parents has also been found to disrupt a child's placement when this creates problems during visits.[123]

The last category includes child-related factors associated with the child's behavior.[124] Most commonly this occurs when a child displays aggressive, disruptive or destructive behaviors and these behaviors cause the placement to breakdown.[125] There are certain demographic characteristics that are associated with increased amount of placement changes.[126] Older children who have been in state care for at least 3 years have the greatest chance for placement

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[110] Johan Strijker, Erik J Knorth & Jana Knot-Dickscheit, *Placement History of Foster Children: A Study of Placement History and Outcomes in Long-Term Family Foster Care*, 87 Child Welfare League of America 107–124, 110 (2008).
[111] Kathleen Proch & Merlin Taber, *Placement disruption: a review of research,* 7 Children and Youth Services Review 309-320, 309 (1985).
[112] John Pardeck, *Multiple placement of children in foster family care: An empirical analysis*, 29 Social Work 506-509, 506 (1987).
[113] James G. Barber, et al., *The Predictors of Unsuccessful Transition to Foster Care*, 42 Journal of Child Psychology and Psychiatry 785–790, 786 (2001).
[114] Sigrid James, *Why Do Foster Care Placements Disrupt? An Investigation of Reasons for Placement Change in Foster Care*, 78 Social Service Review 601–627, 611 (2004).
[115] *Id.*
[116] *Id.*
[117] Joan M. Blakey et al., *A review of how states are addressing placement stability*, 34 Children and Youth Services Review 369–378, 370 (2012).
[118] James, *supra* at 611.
[119] *Id.* at 613.
[120] Blakey, *supra* at 370.
[121] James, *supra* at 613.
[122] *Id.*
[123] Blakey, *supra* at 370.
[124] James, *supra* at 614.
[125] *Id.*
[126] Blakey, *supra* at 371.

disruption.[127] Caucasian children experience more placement changes than their African American counterparts because African American children are more frequently placed with family and these placements are more stable.[128] Gender may also plays a role in placement disruptions as studies have found that males have a greater risk of being moved.[129]

B. Harm Associated with Frequent Placement Changes

Finding a solution to minimize the times a child is moved from placement to placement has long been an issue is the realm of child welfare. Some placement moves can benefit the foster child but others can be detrimental to their development.[130] The concern over foster care drift is substantial because research continually indicates placement instability has severely negative effects on foster children.[131] Literature indicates that when a child repeatedly changes environments, there are consequences for the child's social relationships, behavioral and emotional functioning, education, and ability to attach to a family unity.[132] Placement instability is associated with poor access to health care services and minimal continuity of medical care.[133] The more placement changes a foster child experiences, the greater likelihood they will be placed in a group setting, and children in group settings are at a higher risk for developmental issues.[134] Additionally, the higher number of placement changes a child experiences, the decreased likelihood of reunification with family.[135] Each move decreases the likelihood that a child will find a permanent family and instead will age out of the system when they reach 18.[136] When foster children age out of care, they leave without a family and are at risk of being unable to adapt and conform to society.[137]

Placement stability is imperative for children to build healthy relationships where they feel secure and safe.[138] Children who are placed in foster care after the age of 11 have a greater risk of not establishing a bond with their new families, which increases the chance of yet another placement move.[139] When a child is removed from home, they are removed from their caretakers and are likely to be separated from any siblings they may have.[140] These children experience a profound sense of loss, distress, distrust and fear.[141] Foster children experience lower self-esteem and problems with identity due to the constant change.[142] These devastating emotions form a barrier that keeps children from forming secure, healthy relationships with those around them.[143] Children may become detached and act out, causing strain between the child

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[127] Pardeck, *supra* at 508.
[128] Wes Crum*, Foster parent parenting characteristics that lead to increased placement stability or disruption,* 32 Children and Youth Services Review 185-190, 188 (2010).
[129] Blakey, *supra* at 371.
[130] Harriet Ward, *Patterns of instability: Moves within the care system, their reasons, contexts and consequences*, 31 Children and Youth Services Review 1113–1118, 1113 (2009).
[131] Strijker, *supra* at 110.
[132] Blakey, *supra* at 371.
[133] Robyn Gilbertson & James G Barber, *Breakdown of foster care placement: carer perspectives and system factors*, 56 Australian Social Work 329–340, 330 (2003).
[134] Jeffrey J. Koob & Susan M. Love, *The implementation of solution-focused therapy to increase foster care placement stability*, 32 Children and Youth Services Review 1346–1350, 1346 (2010).
[135] James, *supra* at 614.
[136] Koob, *supra* at 1347.
[137] *Id.*
[138] *Placement Stability in Child Welfare Services* (2008), http://www.childsworld.ca.gov/res/pdf/placementstability.pdf
[139] Koob, *supra* at 1346.
[140] *Id.* at 4.
[141] Renae L. DeVolld & Myra Louise Rickman, *Attachment, Fostering Parenting and Placement Stability* (2014), http://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1031&context=etd
[142] Ward, *supra* at 1113.
[143] S. Rock et al., *Understanding Foster Placement Instability for Looked After Children: A Systematic Review and Narrative Synthesis of Quantitative and Qualitative Evidence*, 45 British Journal of Social Work 177–203, 178 (2013).

and foster parent relationships.[144] The dread foster children experience with a new the move is best described by Eliza, age 12: "I used to hate it when I either had to change social workers or change placements or something like that because it was just another thing to get used to...just settling into new families and starting all over again..."[145] Children view placement changes as another disruption in their already disrupted existence. The constant shuffle of people and places that accompany placement change make it difficult for foster children to form meaningful relationships.[146] Earlier relationships may also be lost as a child is moved.[147] Overall, children who experience frequent moves are prevented from attaching to a foster family and developing a loving, stable relationship.[148]

Frequent placement changes also causes concern for the physiological development of young children.[149] Evidence suggests that when a child experiences frequent placement disruptions, the resulting stress induces responses that can alter the brain.[150] According to research by James Herman and William Cullinan in 1997, children in foster care show atypical hypothalamic-pituitary-adrenal (HPA) axis activity.[151] This increased activity indicates increased responses associated with psychological and physical stressors.[152] Additionally, a study in 2002 found that children placed in out-of-home care show higher cortisol levels.[153] Increased cortisol levels gradually tears down the body by interfering with memory and learning, lowering immune function and bone density, and increasing blood pressure and cholesterol.[154] The effects of frequent placement changes significantly impair a foster child's ability to successfully handle stress.

When a child moves placements, they typically move schools and this causes substantial educational problems for a child. Before a child can start attending class, she must be registered, assigned an appropriate classroom placement, and if a child is in need of special education services, she must have these programs set up and implemented.[155] These hurdles require time and often delay a child from getting into the classroom.[156] Breaks away from the classroom occur because CPS is concerned primarily with the safety of the child and the education aspect is often set on the back burner.[157] The lack of consistent education creates severe educational deficiencies for the child. The new school may be unaware of what her needs specifically are or even be unaware that she is a foster child.[158] When a new school fails to implement necessary special education programs for the foster child, her impairment might go undiagnosed and her services never started.[159] Foster children must adapt to a new home, a new school, a new teacher, and new friends.[160] They might be placed in a foster home that does not make educa-

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[144] Strijker, *supra* at 110.
[145] Ward, *supra* at 1116.
[146] *Id.*
[147] Strijker, *supra* at 110.
[148] *Id.*
[149] *Placement Stability*, *supra*.
[150] *Id.*
[151] James Herman and William Cullinan, *Neurocircuitry of stress: central control of the hypothalamo-pituitary-adrenocortical axis*, 20 Trends Neurosci 78-83 (1997).
[152] *Placement Stability*, *supra*.
[153] *Id.*
[154] Christopher Bergland, *Cortisol: Why "The Stress Hormone" Is Public Enemy No.1* (2013), https://www.psychologytoday.com/blog/the-athletes-way/201301/cortisol-why-the-stress-hormone-is-public-enemy-no-1.
[155] Barton Allen & James S. Vacca, *Frequent moving has a negative affect on the school achievement of foster children makes the case for reform*, 32 Children and Youth Services Review 829–832, 830 (2010).
[156] *Id.*
[157] *Id.* at 831.
[158] *Id.*
[159] Alexandra L. Trout et al., *The academic status of children and youth in out-of-home care: A review of the literature*, 30 Children and Youth Services Review 979–994, 980 (2008).
[160] *Id.*

tion a priority or be with a family that does not have the time needed to help the child catch up on material they missed during the transition.[161]

Several studies indicate that foster children have higher rates of being absent from school, more disciplinary referrals, higher rates of grade retention, and increased rates of being placed in special education programs than their non-foster peers.[162] Foster children also perform significantly lower on standardized tests in reading and math.[163] These children also disproportionately experience severe academic skill delays than their counterparts.[164] Youth in out-of-home care have higher rates of dropping out of high school and are three times more likely to be suspended for misbehaving.[165] The longer the child is in state care, the more likely they will be suspended or expelled.[166] Not only are children in foster care not provided educational opportunities to help them achieve; they are not encouraged to pursue higher education.[167] These behaviors associated with poor academic functioning influence how the child views school.[168] Children in foster care have a negative association with education and this is detrimental to their future success in future education and employment.[169]

III. Current State of CPS Reform in Texas - *M.D. v. Abbott*

On December 17, 2015, U.S. District Judge Janis Graham Jack of Corpus Christi handed down a long awaited opinion condemning Texas' foster care system. The class action lawsuit was filed by minor children in Texas foster care seeking an injunction for violations to their 14th amendment right to be free from an unreasonable risk of harm.[170] Judge Jack found that Texas, indeed, violated the constitutional rights of foster children in its care by exposing them to an unreasonable risk of harm.[171] The Judge held: Texas DFPS is deliberately indifferent to its excessive caseloads, has substantially departed from professional judgment regarding those caseloads, is deliberately indifferent to its faulty abuse and neglect investigations, is deliberately indifferent to its insufficient placement options, and is deliberately indifferent to the safety of children placed in foster group homes.[172]

The Judge vowed to appoint a Special Master to help draft reform and implement the changes mandated.[173] Instead, Judge Jack appointed a co-team of Special Masters including Kevin Ryan, former New Jersey Commissioner of Children and Families, and Francis McGovern, long time mediator and class-action lawsuit specialist.[174] The mandates fall along a wide range of necessary reform of the child welfare system. These mandates include reorganizing how CPS manages and maintains their case files, implementing a manageable caseload for caseworkers, a complete overhaul of how CPS makes decisions on child placements, and the

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[161] *Id.*
[162] Allen, *supra* at 831.
[163] Bonnie T Zima, Regina Bussing & Stephanny Freeman, *Behavior Problems, Academic Skill Delays and School Failure Among School-Aged Children in Foster Care: Their Relationship to Placement Characteristics*, 9 Journal of Child and Family Studies 87–103, 89 (2000).
[164] *Id.* at 100
[165] Trout, *supra* at 980-81.
[166] Zima, *supra* at 99.
[167] Allen, *supra* at 831.
[168] *Id.*
[169] Trout, *supra* at 980.
[170] *M.D. v. Abbott, supra* at 4.
[171] *Id.* at 242-43; *See* Craig Malisow, *CPS Workers Call for State to Drop Appeal of Foster Care Reform,* http://www.houstonpress.com/news/cps-workers-call-for-state-to-drop-appeal-of-foster-care-reform-8232325 (Mar. 2016) (The State has filed an appeal claiming the original complaint should not have been certified as a class-action).
[172] *Id.*
[173] *M.D. v. Abbott, supra* 245.
[174] Robert Garrett, *Federal judge picks 'best of the best' to help her overhaul Texas foster care,* http://trailblazersblog.dallasnews.com/2016/03/federal-judge-picks-best-of-the-best-to-help-her-overhaul-texas-foster-care.html/ (Mar. 2016).

immediately termination of placing PMC children in foster group homes because they lack the necessary 24-hour awake supervision for safety.[175]

The mandate to correct CPS' inadequate placement array is the focus of this article. The Judge has tasked the Special Master with, "recommending provisions to solve the problem of children being removed from placements where they are succeeding because their level of care has altered."[176] As noted above, frequent placement changes have disastrous effects on foster child's physical, emotional and developmental health. The case cites endless testimony from children involved in the Texas foster care system that left considerably more damaged than when they entered.[177] Similar to A.M.'s story told above, M.D., S.A., J.S., Z.H, K.E., L.H, and C.H. each had an excessive amount of placement changes.

S.A. came into the foster care system at the age of five and eventually aged out at the age of 18.[178] During these years, she had over 45 placement changes including psychiatric hospitals, and residential treatment centers.[179] In 2003, S.A. entered Hill County Youth Ranch, a residential treatment center located in Texas.[180] By 2007, she had achieved remarkable improvement academically, socially and emotionally because she was able to find a sense of stability over the three years.[181] However, CPS removed her from this treatment center and placed into a therapeutic foster home.[182] The staff at Hill County Youth Ranch were saddened by the removal and deeply protested the sudden change just as S.A. was beginning to blossom and show incredible improvements.[183] Upon entering her new placement, S.A. was removed after only two days for being violent and defiant.[184] From here, she was bumped from another therapeutic foster home to then deteriorating so greatly that she was admitted to a psychiatric hospital.[185]

S.A.'s time in care is marked with inappropriate placements and consistent deterioration. When she entered into state care, her psychological screening indicated she only had Disruptive Behavior Disorder and was functioning at an average intellectual level.[186] She worsened throughout her time in state care and over time was diagnosed with ADHD, Intermittent Explosive Disorder, Bipolar Disorder, Reading Disorder, Mathematic Disorders, Disorder of Written Expression, PTSD, Reactive Attachment Disorder, Cyclothymic Disorder, Oppositional Defiant Disorder, Major Depressive Disorder, Conduct Disorder, Dysthymia, and Impulsive Disorder.[187] In 2010, a psychologist indicated S.A. was now functioning at a level of "clear mild mental retardation."[188] At the age of 17, she could not read past a third grade reading level.[189] While under the care of CPS, S.A. completely deteriorated to a point where she would need to be kept in a closed community to keep her safe and to assist her with basic functioning.[190] S.A. aged out of foster care with no sense of belonging and no sense of who she was.[191] The level of learned hopelessness she exhibited stemmed from learning as a child that her circumstances were unlikely to change and it would never get better.[192] Two months after aging out with no family, no

[175] *Id.*
[176] *Id.* at 254.
[177] *Id.* at 56-155.
[178] *Id.* at 79
[179] *Id.* at 82.
[180] *Id.*
[181] *Id.*
[182] *Id.* at 83.
[183] *M.D. v. Abbott, supra* at 83
[184] *Id.*
[185] *Id.*
[186] *Id.* at 87.
[187] *Id.*
[188] *Id.* at 88.
[189] *Id.* at 89.
[190] *M.D. v. Abbott, supra* at 83
[191] *Id.*
[192] *Id.*

support system and no life skills, she walked into oncoming highway traffic.[193] Fortunately she survived; however she still has no one in her life and no skills to help her function as a successful adult.[194] S.A.'s experience is typical for children in the foster care. Testimony from children like S.A. and A.M. illustrate the importance of placement stability for children in foster care.

IV. Potential Remedies

Placement instability has been a challenge for virtually all CPS agencies across the nation. In 2006, the Administration for Children and Families conducted a child and family services review and found that 60% of states failed to meet targets for placement stability.[195] As a result, many states were forced to re-evaluate and set forth new strategies to reduce placement instability.[196] This article will pinpoint three of the most effective strategies that could be adopted by the Special Masters to solve the placement problem.

A. Improvements to Texas' Foster Care Redesign

Foster Care Redesign was a program started in January 2010 by DFPS with the goal of reforming the CPS system.[197] While the program promised mighty improvements, there has been little documented success over the last six years.[198] A group of foster care providers, child welfare advocates, former foster care children, foster care providers, and members of the judiciary formed the Public Private Partnership (PPP) that responsible for developing a variety of recommendations with the purpose of improving the foster care system.[199] Interestingly, this reform was aimed primarily at addressing the lack of appropriate placement options for children in foster care, the same problem *MD v. Abbott* is addressing now.

Foster Care Redesign focused on two recommendations that should have significantly improved the system for children. First, DFPS should change the way they contract for services.[200] Previously, DFPS used an open enrollment process to acquire specific placements with specific childcare services available to the children.[201] Under Foster Care Redesign, DFPS would switch from this open enrollment process to acquiring Single Source Continuum Contractors (SSCC).[202] These SSCCs are competitive contractors that can provide a full spectrum of services for foster children that are located in various geographic areas.[203] These contractors could include for profit and nonprofit entities that are both in Texas and out of state that could provide this range of services for the children.[204] Under the "no eject, no reject" policy, contractors would be held accountable for improving the overall well-being of foster care children, finding *all* children a temporary placement, and improving permanency outcomes.[205] Placements would be encouraged to achieve performance outcomes that are outlined in their contracts by monetary incentives and remedies.[206]

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[193] *Id.*
[194] *Id.*
[195] *Child and Family Services Procedure Manual*, http://www.acf.hhs.gov/programs/cb/cwmonitoring/tools_guide/procedures/manual.pdf (2006).
[196] Blakey, *supra* at 370.
[197] *Improving Child Placement Outcomes: A System Redesign* (2011), https://www.dfps.state.tx.us/About_DFPS/Reports_and_Presentations/CPS/documents/2011/2011-02-14_FosterRedesignReport.doc
[198] Alexa Ura, *State Contractor Pulls Out of Foster Care Redesign,* https://www.texastribune.org/2014/08/01/state-contractor-pulls-out-foster-care-redesign/ (Aug. 2014).
[199] *Improving*, *supra* at 1-2.
[200] *Id.*
[201] *Id.*
[202] *Id.* at 4-5.
[203] *Id.*
[204] *Id.*
[205] *Id*. at 4.
[206] *Improving*, *supra* at 2.

The second point of reform identified included changing the way DFPS pays for the services provided to children in state care. [207] Previously, placements were reimbursed a day rate based on the level of service a child required and the placement type, ranging from child placing agencies to residential treatment centers.[208] Under Foster Care Redesign, the reimbursement rate would instead be determined by combining a single blended rate with a case rate. The single blended rate would be a reimbursement rate for all children in foster care in a particular geographic location, regardless of the child's service level or placement type.[209] This would be multiplied by a case rate, a rate that reflects the total number of days a child is expected to be in foster care.[210] Based upon Legislative approval, an SSCC could be rewarded additional money or expected to return money, if the overall number of days a child spends in foster care is less or greater than the number predicted in the case rate.[211]

Foster Care Redesign vowed improved system outcomes for children in state care and promised a number of specific improvements. Foster Care Redesign was supposed to increase the likelihood that a child is placed with their siblings in their home community, while also increasing the number of children who are able to stay in their home school while being in state care.[212] In addition, this system promised to decrease the average time a child spent in foster care, decrease the number of placement moves, and decrease the duration and intensity of services provided to children in an effort to improve their health and behavior functioning.[213] The overall wellbeing of children in foster care would be improved by providing incentives to SSCCs to better serve the children.[214] Lastly, Foster Care Redesign intended to create a "robust and sustainable service continuums in communities throughout Texas."[215]

Unfortunately, Foster Care Redesign was put on hold ten months after its launch.[216] The largest private contractor, Providence Service Corporation of Texas, voluntarily terminated its contract in August 2014 citing unexpected costs and overall underfunding.[217] Providence served 60 counties in rural west and north Texas, receiving $30 million annually.[218] However, just nine months into the program, the contractor was already $2 million over budget.[219] The entire program was ceased to operate due to these funding complications.

The theories and structure behind Foster Care Redesign are notable but execution of such a large-scale project would need more oversight and better geographic structure. The budget created to pay the private contractors was based on using financial data from CPS when the CPS system itself was already severely underfunded.[220] This led to challenges when unexpected costs occurred such as high transportation costs to move children across rural Texas.[221] Additionally, the jurisdiction of each private contractor would be need to be shrunk significantly in order to provide more community-based care to children and to decrease the cited high

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[207] *Initial insights*, *supra* at 4.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Foster Care Redesign*, https://www.dfps.state.tx.us/Adoption_and_Foster_Care/About_Foster_Care/Foster_Care_Redesign/ (Last visited Feb. 26)
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] Brian Rosenthal, *State foster care overhaul back on track with more money, oversight,* http://www.houstonchronicle.com/news/politics/texas/article/State-foster-care-overhaul-back-on-track-with-6338497.php (June 2015).
[217] Ura, *supra.*
[218] Rosenthal, *supra.*
[219] Ura, *supra*.
[220] *Id.*
[221] Rosenthal, *supra.*

transportation costs. Contracting 60 counties into the care of Providence was unwise, as instead of transferring responsibility to an organization that could effectively provide appropriate services to children, there was a lack of accountability. Our Community Our Kids was a second private contractor for the State with only six counties in its jurisdiction.[222] After six months, more children were placed within 50 miles of their home, more siblings kept together, and children were kept safe in high quality placements.[223] Our Community Our Kids worked when Providence failed because there was a focus on making decisions locally and remaining accountable to performance, strategies made possible by a smaller jurisdiction.[224]

B. Florida's Community-Based Care Approach

Similar to Texas, Florida was desperate for child welfare reform prior to the 1997 push to dramatically change the system.[225] The state implemented the Rights for Kids initiative that promised to prioritize children and families, construct new outcomes that would improve placement accountability, and improve overall transparency within the system.[226] The goal was to transfer many of the state's responsibilities to local, non-profit agencies.[227] Florida Legislature followed the progress of four pilot programs across the state to create a complete transformation for all foster care children in their care.[228]

Under the Rights for Kids initiative, Florida contracts with 20 non-profit organizations that serve as lead agencies for specific counties in the state.[229] Many of these lead agencies are well known non-profits organizations including the Sarasota Family YMCA and Heartland for Children.[230] The Department of Children and Families is still responsible for investigation allegations of child abuse and neglect, but these lead agencies are responsible for acquiring and providing all services once a child enters into state care.[231]

The intent of a community-based, private agency is to minimize the issues families have when they must navigate through numerous individual agencies to acquire services.[232] The responsibilities of these lead agencies include coordinating and managing all child and family services, ensuring a continuity of care for each child from start to finish within the system, and providing a network of service providers to children and families.[233] Each lead agency is responsible for finding and placing a child in a safe foster homes and their success has a direct impact on the agency's ability to renew their contract the following year.[234] For example, Child Net employs Intake and Placement Advocates, staff whose only focus is to match children with the most effective and appropriate placements.[235] This decision is based on reviewing the child's case file, the use of a trauma-informed emergency services assessment completed by clinicians, and the advocates extensive knowledge on each placement and what they can offer the

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[222] *New Approach to Foster Care in North Texas Leads to Better Quality of Life,* http://www.prnewswire.com/news-releases/new-approach-to-foster-care-in-north-texas-leads-to-better-quality-of-life-increased-safety-300073528.html (April 2015).
[223] *Id.*
[224] *Id.*
[225] Jonathan Ingram, *Florida's Right for Kids Reform* (2013), http://rightforkids.org/files/6813/8184/8564/floridafostercarereformpaper.pdf.
[226] *Id.* at 7.
[227] *Id.*
[228] *Id.* at 8.
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] Robert Paulson Et Al., *Evaluation Of The Florida Department Of Children And Families Community-Based Care Initiative* (2003), http://www5.myflorida.com/cf_web/myflorida2/healthhuman/publications/pubs.html.
[233] *Id.*
[234] *Id.*
[235] *Child Net's Approach to Utilization Management* (2015), https://www.childnet.us/portal/documents/27327/1143313/Utilization+Management+Overview+2014-2015.pdf

child.[236] Advocates visit and review placements weekly and a conference is held every two weeks to ensure the placement is providing the appropriate level of care.[237] Nearly all residential placements are intended to be the one and only placement until a child is returned home or adopted.[238] Once a child is placed, Child Net coordinates *all* services for the child including behavioral health treatment, mental health care, substance abuse treatment, and family counseling.

During this sweeping reform, Florida addressed the issue of incentives for agencies in relation to improving the welfare of children. Previously, Florida paid each agency and placement a fee for each day that a child remains in foster care.[239] This type of reimbursement creates an incentive for placements to increase the number of days a child spends in foster care because this increases the amount paid to the placement.[240] By increasing the amount of time in care, children are reunified with their families slower or spend more time waiting to be placed with their forever home.

As a solution, the state now pays based on performance by the agency.[241] The pot of funds available for child welfare is allocated to the various agencies based on a specific share of children they provide services for compared to the total number of children in the state's care.[242] This child-focused funding strategy allows for the lead agencies to take on risk because their contracts require them to continue to provide all services to the children, regardless of the amount their agency is allocated.[243] If a lead agency fails to meet contractual outcomes and performance standards, they lose their contact with the state.[244] By putting the expectation on the lead agencies to meet these standards, they are rewarded for pinpointing safe, permanent homes for children as quickly as possible.[245]

The benefits of this funding strategy benefit the children and families involved with the child welfare system, and benefit the lead agencies responsible for the children. There is a safety net in place if a particular community has a sudden increase in the amount of children entering foster care and the state has a "risk pool" of money to offset this unexpected boom.[246] Florida was also able to receive a federal waiver for Title IV-E funds, which allows the state to use funding typically unreachable to expand services focused on keeping children in their homes, while also expediting permanency for children who are unable to return home.[247]

The shift to community-based lead agencies began in 2000, but it was not until 2005 that every county was linked with a lead agency.[248] Taking a look at the last 16 years, available data has shown that community-based agencies are able to safety and quickly provide permanency for children, increase placement stability, and deliver higher quality services to foster children.[249] During the years of 1998-2005, Florida had a 12.6% adoption rate but this increased to 18.8% from 2006-2011.[250] The number of children waiting to be adopted was increasing 8% each year

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[236] *Child Net's Approach, supra.*
[237] *Id.*
[238] *Id.*
[239] *Florida's Experiment with Privatizing Child Welfare Services* (2004), http://www.afscme.org/news-publications/publications/privatization/pdf/flchild.pdf
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] Ingram, *supra* at 9.
[244] *Id.*
[245] *Id.*
[246] Ingram, *supra* at 9.
[247] *Child Welfare and Privatization: Trends and Considerations*, http://www.afscme.org/issues/privatization/resources/child-welfare-and-privatization-trends-and-considerations (Last visited Mar. 2016).
[248] Ingram, *supra* at 9.
[249] *Id.*
[250] *Id.* at 10.

prior to the reform, but is now declining an average of 8% a year after the implementation of community-based care.[251] Since 2006, the number of children who age out of the system has declined by 15%.[252] Children are also able to find forever homes quicker. Since this innovative reform, 42% of children have been adopted within 2 years and this is only growing.[253] Children are also being reunited with their families at an incredibly faster rate. During 1998-2005, 56% of children were safety reunited with family within 1 year.[254] During 2006-2011, this increased to 70.4% within a year.[255] Overall, within a few years, Florida was able to provide superior placements, improved services, and better outcomes for the foster children and families.

The shift to community-based, private care has also created a stronger workforce supporting foster children. Fewer children are bounced from caseworker to caseworker, and caseworker visits have increased.[256] During the transition implementation period, the Foundation for Government Accountability compared the frequency of caseworker visits of lead agency caseworkers and caseworkers working for the Department of Children and Families.[257] Lead agencies caseworkers were 3 times more likely to have weekly contact with their assigned foster children than those working for the Department of Children and Families.[258] Florida has also experienced an increase in more educated caseworkers and staff working directly with children and families.[259] By creating a child welfare system where caseworkers report higher satisfaction with their job, caseworkers simply do their job better and this positively impacts the children they serve.

An area of particular interest for this article is Florida's Rights for Kids reform's effect on providing stability for children in foster care. Florida was also experiencing a rise in the likelihood that a child would be moved from three or more foster homes during their time in the system.[260] Since implementation, Florida has reversed this alarming trend and improved stability for children across the state.[261] Children are also less likely to be placed in institutions and group homes now.[262] This is significant achievement because research has shown that these children remain in the system longer, are adopted less frequently, and experience higher instability.[263] As a result of shifting a more child-focused system, Florida has kept more families together, provided better services to children, decreased the amount of placement changes and found children their forever homes more quickly.[264]

C. Returning to Orphanage Style Care – Nebraska's Boys Town

The term "orphanage" typically stirs negative images of grossly overcrowded dormitories filled to the brim with unwanted children who are constantly being disciplined.[265] However, orphanages of the past are not the orphanages of today. Private orphanages are still thriving around the nation and provide an alternative to standard foster placements.[266]

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[251] *Id.* at 9.
[252] *Id.*
[253] *Id.* at 10.
[254] *Id*. at 10.
[255] Ingram, *supra* at 11.
[256] Gary VanLandingham, *Child welfare system performance mixed in first year of statewide community-based care* (2006), http://www.oppaga.state. fl.us/reports/pdf/0650rpt.pdf.
[257] Ingram, *supra* at 11.
[258] *Id.*
[259] *Id.*
[260] Ingram, *supra* at 11.
[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] VanLandingham, *supra*.
[265] Eve Smith, *Bring Back the Orphanages? What Policymakers of Today can Learn from the Past*, 95 Child Welfare League of America 115-142, 132-33 (1995).
[266] Craig Shealy, *From Boys Town to Oliver Twist: Separating Fact From Fiction in Welfare Reform*, 8 American Psychologist 565-580, 566 (1995).

Boys Town located in Omaha, Nebraska is a nonprofit child and family care organization that has provided residential care to abused and neglected children since 1917.[267] Boys Town started in Nebraska and has since expanded to 11 affiliate locations located throughout the United States.[268] Nebraska's Boys Town is structured as an integrated continuum of care facility that offers foster family services, a family home program, and a residential treatment center on site.[269] The organization provides a range of placement options because every child has different needs but all needs can be served throughout the one facility.

While the ultimate goal is reunification with the child's family, foster family services trains and provides 24/7 support to foster families to assist them with meeting the physical, emotional, and education needs of the children.[270] Children should be placed in the least restrictive placement but sometimes children are unable to remain at home safely or foster homes cannot meet their needs. Boys Town's solution is the family home program, a family-style care that exists on campus for youth with behavioral or emotional issues.[271] Six to eight children live in homes located on the property under the supervision of family-teachers.[272] These family teachers are married couples that live with the children full time in order to provide consistent, compassionate care to the children.[273] Children in family homes attend school and participate in extracurricular activities, daily chores and activities, all on the Boys Town campus.

The most intense level of care Boys Town provides is placement at the residential treatment center.[274] This center is located on campus at the Boys Town National Research Hospital.[275] Children in this program typically have severe mental and behavioral problems that require intense therapy and more supervision.[276] The locked down facility has around the clock supervision and provides academic, social, behavioral and mental health services to children.[277]

The continuum of care approach works because regardless of what intensity of placement a child needs, they are able to remain on one centralize campus or if in the foster family services, they continue to have access to all that Boys Town offers.[278] As a child improves behaviorally, mentally or academically during their stay and their level of care decreases, she is able to access a variety of services, without having to move placements.

A potential limitation of the Boys Town approach is the cost associated with providing high quality family home and residential care placements. For residential care, the short-term costs may be higher, but the long-term benefits for the child and their families are remarkable.[279] Research has shown that failing to save one high-risk youth can cost society $3.75 million, indicating the long-run savings far exceed the short-term costs of residential care.[280] With the foster

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[267] Barton S. Allen & James S. Vacca, *Bring back orphanages—An alternative to foster care?,* 33 Children and Youth Services Review 1067–1071, 1069 (2011).
[268] *Our Impact*, http://www.boystown.org/who-we-help/our-impact (Last Visited Mar. 2016).
[269] *Family Homes*, http://www.boystown.org/what-we-do/integrated-continuum/family-homes (Last Visited Mar. 2016).
[270] *Foster Family Services*, http://www.boystown.org/what-we-do/integrated-continuum/foster-family-services (Last Visited Mar. 2016).
[271] *Family Homes*, *supra*.
[272] *Id.*
[273] *Id.*
[274] *Residential Treatment Center,* http://www.boystown.org/what-we-do/integrated-continuum/residential-treatment-center (Last Visited Mar. 2016).
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *What makes Boys Town Different*, http://www.boystown.org/what-we-do/integrated-continuum (Last Visited Mar. 2016).
[279] Ronald Thompson et. al., *Why Quality Residential Care is Good for America's At-Risk Kids: A Boys Town Initiative* (2014), http://www.aacrc-dc.org/sites/default/files/residential_advocacy_boystown.pdf.
[280] MA Cohen & AR Piquero, *New evidence on the monetary value of saving a high-risk youth,* 25 J Quant Crim 25-49 (2009).

care system is in a state of seemingly never ending crisis, perhaps the solution is a model from the past.

V. Recommended Remedy

Examining Texas' failed Foster Care Redesign, Florida's community-based care approach, and Boys Town's continuum of care model shed light on which characteristics of child welfare programs truly help foster children succeed while in state care. The Special Masters should combine the community-based care and incentive structure from Florida with Boys Town's comprehensive continuum of care stratefy to remodel Foster Care Redesign.

In theory, Foster Care Redesign should provide the very best placement options for every child that enters Texas' foster care system. The reliance on private contractors is a common theme throughout all three possible strategies. By creating competition among contractors, theoretically only those that can provide the most beneficial, cost-effective placement options will win the contract. Private contractors are also the best option because the state clearly does not have the manpower to handle the increasing number of children entering into the system. By transferring responsibility of finding placements and services for children to nonprofit or for profit organizations, the state will be able to better investigate cases of neglect and abuse, potentially decreasing the number of children who actually need to be in state care.

Community-based care is an area that Foster Care Redesign needs extensive restructuring. Assigning a private contractor 60 counties was foolish and Texas should instead adopt a geographic scheme similar to Florida's. Contractors will better serve children in a community-based approach and this cannot be achieved by assigning one contractor too many counties. Florida's Child Net Intake Placement Advocates are an excellent example of when contractors are responsible for a smaller subset of foster care in one community; they have more resources and expertise to better match a child with the best placement available. When a child is matched with a suitable placement, she experiences fewer disruptions.

The community-based theme is also highlighted in Boys Town's model under the idea that children have a better chance at thriving emotionally, behaviorally and academically when they can achieve some sense of stability, either by remaining in a placement or remaining in a school. The Boys Town campus structure keeps a child in one placement and at one school while providing a range of high quality services, regardless of a child's changing needs. This idea can be reorganized on a larger community scale. If Foster Care Redesign were to promote community-based care, private contractors would prioritize keeping a child in one placement while also locating necessary service providers that are near the placement.

Boys Town's Continuum of Care spotlights the importance of providing a spectrum of placement types because every child is different and has different needs. Residential care is a necessary investment, regardless of the high cost. When a child comes into state care, the state must provide the best placement and often times a child has needs that just cannot be met in foster care. Perhaps family homes similar to those at Boys Town could relieve some of this cost by providing a placement that has more structure than a foster family but less structure than a residential treatment center. Children thrive in the least restrictive option, and if a foster family cannot meet their needs, a family home is the next best alternative. Children would still experience the social support of a family-style living arrangement while also having greater access to services. Foster Care Redesign should work with private contractors to ensure a variety of placement options available in each community in order to decrease the likelihood that a child must change placements just because her needs change.

Regardless of how the Special Masters attempt to solve the placement issue, the incentive structure must change. Both Foster Care Redesign and Florida's approach remove the incentive for placements to keep children longer because they get paid per child per day. Private contractors must be paid for performance; otherwise there is no incentive to help a child reach permanency. Foster Care Redesign and Florida's pay structures have different names but essentially

do the same thing: pay contractors a set amount for the percentage of children they are accountable for, regardless of their level of care. Florida's risk pool strategy should be added to Foster Care Redesign as an effective safety net for unexpected influx of children in a particular area, if funding permits. Changing the incentive structure is crucial for child welfare reform and unless this occurs, children will continue to struggle in finding permanency.

VI. Conclusion

For the first time in Texas history, a judge has mandated the complete overhaul of its child welfare agency. The Texas Department of Family and Protective Services has the leadership of the Special Masters and the support of Texas citizens rooting for its success in reforming our broken system. This is a historic moment not only for Texas, but also for the Nation because we have a chance to finally make things right and change the disappointing foster care narrative. Foster Care Redesign laid forth a plan that was implemented half-heartedly and lacked focus. However, by enhancing its foundation with strategies pulled from Florida and Nebraska, Foster Care Redesign can achieve what it promised: disrupting the lives of foster children as little as possible by keeping them closer to home, providing stability and higher quality services, and helping children achieve permanency faster.

Guest Editors this month includes Jimmy Verner (*J.V.),* Rebecca Tilllery Rowan (*R.T.T.*), and Jessica H. Janicek (*J.H.J.*)

DIVORCE
Jurisdiction and Procedure

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

¶17-2-01. *In re Rodriguez*, No. 13-16-00411-CV, 2017 WL 395257 (Tex. App.—Corpus Christi 2016, orig. proceeding) (mem. op.) (on reh'g) (01-27-17).

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

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

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

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

Here, the trial court's docket control order contained no restriction regarding amended pleadings, and Father filed his amended pleading more than seven days before trial. No leave of court was necessary under the Texas Rules of Civil Procedure. Further, because Father's counter petition addressed the same central issue as Mother's petition, she could not claim surprise.

Because a jury determination on attorney's fees is merely advisory, the trial court did not err in refusing Father's request to submit those issues to a jury. However, the appellate court noted that Father's amended pleadings invoked other issues on which Father would be entitled to submit to a jury, such as issues pertaining to modification of conservatorship and the imposition of a geographic restriction on the children's residence.

Editor's comment: *I disagree with the holding in this mandamus. When Father filed a counter-petition requesting he be named primary parent, for the first time, 12 days before trial, I think that constitutes surprise, and certainly doesn't leave Mother sufficient time to conduct discovery to prepare her defense. The court of appeals reasons that all the pleadings constitute and concern the best interest of the child, so Mother should not be surprised, but best interest of the child is so broad. R.T.T.*

Editor's comment: *From the perspective of judicial economy, this opinion might make sense, but its reasoning is flawed: An original counter-petition is not an amended pleading. What pleading does it amend? J.V.*

Editor's comment: *One thing many trial lawyers forget is the defense of "no unfair surprise." This rule applies to the failure to produce discovery, respond to discovery responses, and it also applies to allegations within pleadings. It is a defense that can get you out of many a bad situation. Here, one way that this issue could have been resolved would have been for the pretrial order to have a specific deadline as to when amended pleadings and responsive pleadings could be filed. For example, having everyone amend their pleadings seven days before trial may not work in specific cases where a responsive pleading may need to be filed after a party reviews the last and final amended pleading. A better resolution may be to have the amendment date be further out from trial to allow time to file responsive amended pleadings. For example, the pretrial order could state that pleadings would be due 30 days prior to trial, and any amended, responsive pleadings would be due seven days after that timeframe. J.H.J.*

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

ORDER VACATED BECAUSE IT DID NOT STRICTLY COMPLY WITH PARTIES' AGREEMENT.

¶17-2-02. ***Hudson v. Aceves*****,** ___ S.W.3d ___, No. 13-14-00400-CV, 2016 WL 7011401 (Tex. App.—Corpus Christi 2016, orig. proceeding) (12-01-16).

Facts: Wife filed for divorce from her third Husband. Subsequently, Husband filed a motion to dismiss on the grounds that Wife was still married to a prior husband in Mexico and that due to the nature of the parties' property, the proceedings should be heard in Mexico. Husband further asserted that Wife's second husband had filed suit in Mexico to invalidate that marriage because Wife was still married to her first husband. Additionally, criminal charges were pending in Mexico against Wife based on fraud charges relating to title to real property in Mexico.

The trial court denied Husband's motion to dismiss and set the case for trial. During a preliminary hearing, the trial court recessed and met with the parties in chambers, after which, an agreement was read into the record. Part of the agreement included a provision that Father would not initiate any further criminal complaints against Mother and would not provide any additional information regarding the Mexican criminal charges without first notifying the court and counsel. The court signed an agreed order providing that Husband was "ordered not to proceed with any further criminal prosecutions or other proceedings in Mexico against [Wife]…[and] not to initiate…any further proceedings in Mexico or pursue pending proceedings…" Husband appealed complaining that the order did not comport with the parties' agreement.

Before the appellate court ruled, the parties entered into an MSA that included a release clause in which Husband would terminate/dismiss all proceedings in Mexico. However, the trial court subsequently granted Husband's motion to set aside the MSA. In response to this appeal, among other defenses, Wife argued that the subsequent MSA constituted a waiver of Husband's complaint on appeal.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The order on appeal was best characterized as a temporary injunction. Temporary orders in family law are not appealable; however, Husband requested that the appellate court construe his appeal as a petition for writ of mandamus if it lacked jurisdiction over his appeal.

An agreed judgment based upon a settlement agreement must be in strict or literal compliance with the terms of that agreement. When the agreement was read into the record, Husband's counsel stated that the parties had agreed that Husband would not initiate any further criminal complaints against Wife in Mexico. However, the order prohibited Husband from engaging in any further criminal proceedings *or other proceedings* in Mexico against Wife. Although Wife argued that the order reflected the agreement reached in chambers, any agreement not on the record would not be enforceable. Therefore, appellate court directed the trial court to vacate its order and render judgment effectuating the precise terms of the parties' Rule 11 Agreement.

Because the MSA was not before the appellate court and was not before the trial court at the time it rendered the appealed order, it could not constitute a waiver of Husband's complaint. Events subsequent to the issuance of a temporary injunction are only considered by the appellate court if the subsequent events render the requested relief moot.

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

QDRO USED TO ENFORCE OKLAHOMA JUDGMENT FOR AGREED SPOUSAL SUPPORT.

¶17-2-03. *Dalton v. Dalton*, No. 12-15-00203-CV, 2017 WL 382421 (Tex. App.—Tyler 2017, no pet. h.) (mem. op.) (01-11-17).

Facts: Husband and Wife separated in Oklahoma and reached a settlement agreement regarding all property and child-related issues. An Oklahoma court rendered an "Order of Separate Maintenance" reflecting the parties' agreement. The order included a spousal support obligation for $1,309.014.00 to be paid at a rate of $6,060.25 per month until paid in full. Subsequently, a Texas court rendered a divorce decree that dissolved the parties' marriage and gave full faith and credit to and incorporated the Oklahoma Order. A month later, the Texas court rendered a wage withholding order for child support and spousal support.

When Husband failed to comply with the orders, Wife moved for enforcement and sought judgments for arrearages and contempt. Additionally, Wife filed a petition for a QDRO regarding the full amount of spousal support not covered by the withholding order, along with all judgments for unpaid child support, spousal support, and attorney's fees. The court granted Wife's requested relief. Husband appealed, arguing that the court erred by rendering a QDRO that altered the terms of the divorce decree and that the amount awarded was unsupported by the record. Additionally, Husband contended that wage garnishment was not an available remedy to enforce the contractual alimony.

Holding: Affirmed as Modified

Opinion: ERISA supersedes any and all state laws insofar as they may relate to any employee benefit plan. ERISA does not permit the assignment or alienation of pension benefits. However, the anti-assignment rule does not apply to domestic relations orders, including provisions for alimony payments made pursuant to a state domestic relations law.

Here, the Texas divorce decree gave full faith and credit to and incorporated the Oklahoma Order that disposed of all the parties' claims and provided for spousal support. Under Oklahoma law, when the agreement was incorporated into the Oklahoma Order, the agreement was extinguished, and the rights of the parties were no longer contractual but became determinable and enforceable based upon that judgment. Thus, the provision for spousal support was a "domestic relations order" and was assignable by the Texas court through a QDRO.

Further, because the agreement was extinguished when incorporated into the Oklahoma Order, the spousal support obligation was for spousal maintenance and was not a contract for support. Therefore, a wage withholding order was a permissible means of collecting spousal maintenance.

However, the evidence conclusively established an arrearage obligation about $25,000 less than what was awarded. Accordingly, the appellate court modified the award and affirmed the order as modified.

Editor's comment: *The use of a QDRO to collect unpaid child or spousal support is an underutilized remedy. J.V.*

REGARDLESS OF WHETHER WIFE RECEIVED SOCIAL SECURITY DISABILITY PAYMENTS, TRIAL COURT HAD DISCRETION TO DENY WIFE'S PETITION FOR CONTINUATION OF SPOUSAL MAINTENANCE.

¶17-2-04. *Wiedenfeld v. Markgraf*, No. 04-16-00172-CV, 2017 WL 685762 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (02-22-17).

Facts: In their divorce decree, Husband was ordered to pay spousal maintenance to Wife, until the earlies of one of the following:

1. a review of the Order in three (3) years to see if [the] Spousal Maintenance Obligation should be continued; or
2. the death of either [Husband] or [Wife]; or
3. the remarriage of [Wife]; or
4. further orders of the court affecting the spousal maintenance obligation.

About three years later, Wife filed a petition requesting the continuation of her spousal maintenance. The trial court denied Wife's petition, and she appealed.

Holding: Affirmed

Opinion: Because the order for spousal maintenance was subject to periodic review and because the parties had no children, the order was presumably pursuant to Tex. Fam. Code § 8.051(2)(A), which meant that Wife had the burden to establish that she continued to have an incapacitating physical disability and that her disability prevented her from earning sufficient income to provide for her minimum reasonable needs.

Even if a spouse is permanently disabled, the court's decision to continue spousal maintenance is still discretionary. Thus, the trial court was not required to rely on Wife's receipt of social security disability payments as evidence of a permanent disability.

Additionally, although Wife testified that she was unable to maintain employment, she did not controvert Husband's assertion that she had worked jobs for cash during the marriage, including work for her current boyfriend.

Editor's comment: *So, a trial court does "have the jurisdiction to make a finding contrary to a government entitlement." J.V.*

DIVORCE
PROPERTY DIVISION

DESPITE MEXICAN MARRIAGE LICENSE INDICATING PARTIES' CHOICE TO FOLLOW SEPARATE PROPERTY REGIME, TEXAS COMMUNITY PROPERTY PRESUMPTION APPLIED BECAUSE PARTIES DIVORCED IN TEXAS AND LICENSE NOT SIGNED BY THE PARTIES SO NOT AN ENFORCEABLE PREMARITAL AGREEMENT.

¶17-2-05. *Ruiz v. Ruiz*, No. 04-16-00016-CV, 2016 WL 7445121 (Tex. App.—San Antonio 2016, no pet. h.) (mem. op.) (12-28-16).

Facts: Husband and Wife married in Mexico. In their Texas divorce proceeding, a Mexican law expert testified that when a couple obtains a Mexican marriage license, the couple must choose between either a community or a separate property regime. According to Husband, at the time they obtained their Mexican marriage license, he and Wife opted for a separate property regime. Wife, however, did not recall discussing regimes or premarital agreements before the wedding. Husband offered a copy of the marriage license into evidence showing the separate regime selection, but it was not signed by the parties. Husband argued that the license constituted a valid, enforceable, premarital agreement. Husband further argued that because the parties married in Mexico and had chosen the separate property regime, the Texas community property presumption did not apply, and he was not required to utilize any tracing principles to establish the separate character of his property. In the final divorce decree, the trial court found that the parties elected the separate property regime, but Husband failed to meet his burden of proof to show tracing to overcome the community property presumption. Husband appealed.

Holding: Affirmed

Opinion: The marriage license failed to meet the requirements of an enforceable premarital agreement because it was not signed by the parties. Further, no case law supported Husband's assertion that he had no burden to demonstrate that the property was separate. The divorce was filed in Texas, and the parties met the domiciliary and residency requirements of the Tex. Fam. Code. Thus, Texas law applied.

Editor's comment: *It's interesting to note that the holding of this opinion indicates that if Husband had been able to produce and offer a signed Mexican marriage license, it would have met the TFC requirements to be a valid and enforceable premarital agreement. However, since the marriage license/premarital agreement did not include a list of separate property assets, this court found that Husband would have still been obligated to trace, through records, his separate property estate. After 16 years of marriage, that would likely be a tough task. R.T.T.*

Editor's comment: *A lot can depend on where you get divorced. J.V.*

Editor's comment: *This case is a reminder that, while certain agreements from other countries and states may serve as premarital agreements in the state of Texas, they must still meet all of the Texas requirements to do so. In addition, having a premarital agreement doesn't necessarily change the community property presumption. It does simplify tracing and set out specifically what property should be a party's separate property (or was at the time of marriage), but in almost every case, mutations and commingling of property occur. That's why it is very important that, even if the premarital agreement is not contested, the proper tracing is completed to show the tracing evidence from the assets listed as separate property in the agreement. J.H.J.*

EVIDENCE SUPPORTED FINDING THAT HUSBAND AND WIFE EACH COMMITTED WASTE AND EACH PARTY'S WASTE OFFSET THE OTHER'S WASTE.

¶17-2-06. ***Wheeling v. Wheeling*****,** ___ S.W.3d ___, No. 08-15-00064-CV, 2017 WL 192912 (Tex. App.—El Paso 2017, no pet. h.) (01-18-17).

Facts: When Husband and Wife separated, Husband agreed to continue paying for all of Wife's expenses, including her home, utilities, and automobile, in addition to $5000 a month for "fuel, fun and food." In her petition for divorce, Wife included a claim that Husband wasted community assets. At trial, she introduced summaries of Husband's expenditures, which tallied Husband's expenses on trips, gifts, restaurants, clothing, flowers, guns and ammunition, alcohol, spas, golf, and furniture during the parties' two-year separation. Wife also provided documentation of Husband's ATM withdrawals, gifts to his girlfriend, and a trip Husband took with his girlfriend to Hawaii. Husband introduced his own evidence accounting for the expenditures that Wife claimed he wasted, most of which were attributable to his employment and the maintenance of the community estate. At trial, Husband claimed Wife wasted money on food, entertainment, and numerous vacations in and out of Texas with her boyfriend. He further alleged that Wife wasted funds on staying in shape. Additionally, Husband was particularly upset with the time Wife's boyfriend spent at the marital residence using the basketball court, the internet in the home office, the outdoor grill, and one of Husband's cars. Husband also complained that it was wasteful that Wife failed to rehabilitate and educate herself during the separation. In its findings of fact, the trial court found that:

> During the marriage, each party committed waste and each party's waste is offset and otherwise negated by the other party's waste.

The findings did not attribute any value to either party's waste. On appeal, Wife argued that there was no evidence or insufficient evidence to support finding that she committed waste or that it offset Husband's waste.

Holding: Affirmed

Opinion: The Texas Supreme Court has recognized waste of community assets as a factor to be taken into consideration in the division of the community estate. The breach of a legal or equitable duty which violates this fiduciary relationship existing between spouses is termed "fraud on the community," a judicially created concept based on the theory of constructive fraud. Any such conduct in the marital relationship is termed fraud on the community because, although not actually fraudulent, it has all the consequences and legal effects of actual fraud in that such conduct tends to deceive the other spouse or violate confidences that exist as a result of the marriage. The court may consider three factors in considering a claim of constructive fraud: (1)

the size of the gift in relation to the total size of the community estate; (2) the adequacy of the remaining estate; and (3) the relationship of the parties involved in the transaction.

Evidence of a spouse using excessive funds without the other spouse's consent supports a waste finding. Expenditures for the benefit of a paramour also establish waste. Further, while waste claims are often premised on specific transfers or gifts of community property to a third party, a waste judgment can also be sustained by evidence of community funds unaccounted for by the spouse in control of those funds. Other courts of appeals have likewise affirmed waste judgments that were not based on disputes over a specific gift of community assets, but instead based in whole or in part on the failure of the dissipating party to account for community funds in that party's control.

Here, wife supported her contention that Husband committed waste by showing significant funds unaccounted for by Husband, trips taken by Husband with his girlfriend, gifts to his girlfriend, and business expenses. However, Husband controverted and rebutted these claims. Husband supported his waste claim by presenting evidence that Wife never made an effort to support herself financially, she never sought out any job opportunities or formulated a plan for obtaining a job, she spent community funds on her boyfriend, she went on several trips with her boyfriend, and her boyfriend spent time at the marital residence using community assets. Additionally, although the parties agreed to a disbursement that provided each of them with $175,000 to purchase their own separate home, Wife approached Husband a month later to ask for an additional $325,000 for her home. Moreover, although Husband agreed to provide for Wife and the children during their separation, Wife regularly overdrew her bank account incurring fees and causing Husband to have to transfer additional funds into her account.

Husband and Wife similarly disposed of community property during the parties' separation, indicating that any waste was not as one-sided as Wife asserted. Additionally, the trial court could have reasonably determined that Wife's excessive spending in general and spending community funds on trips and gifts, some of which were for her boyfriend, constituted waste. Moreover, even if the trial court erred in finding that both parties committed waste, Wife failed to establish that the court's decision resulted in an inequitable division. The findings of fact did not include the waste values attributed to either party, so the reviewing court could not know the value of waste each party committed relative to the entire community property estate. Wife could not show that the error, if any, had more than a de minimus effect on the just and right division.

Editor's comment: *This case offers a good refresher on the law surrounding waste claims. It's also important to remember that, on appeal, you must be able to establish that the court's decision resulted in an inequitable division (similar to what you have to do when you're complaining about the division of property). The only way to be able to do that effectively is to make sure your findings of fact and conclusions of law delineate the waste claims AND the values! You cannot blow off findings of fact and conclusions of law – consult with an appellate lawyer if need be, but make sure you get them right if you think there is a chance of your client wanting to appeal. R.T.T.*

Editor's comment: *This is a good reminder that waste claims are not dollar for dollar, they are simply equitable claims that the judge can use in his or her discretion to determine whether a disproportionate share of the community estate should be awarded. One thing I noticed was not discussed in this case is the reconstituted estate. The purpose of the reconstituted estate doctrine is to provide more of a dollar for dollar equitable claim. For example, if husband in this case spent $100,000 in waste and wife spent $50,000 in waste, but the judge reconstituted the estate with both of these claims, wife may have come out ahead which she didn't on a simple equitable waste claim. I'm curious to know how the result would have been different had reconstituted estate been the issue, rather than only waste. J.H.J.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

RECEIVERSHIP ORDER IMPROPERLY MODIFIED DECREE BY GRANTING RECEIVER AUTHORITY TO SELL HOUSE AT SOLE DISCRETION, RATHER THAN AT A "REASONABLE" TIME FOR A "REASONABLE" PRICE.

¶17-2-07. ***Perry v. Perry*****,** ___ S.W.3d ___, No. 01-16-00156-CV, 2016 WL 7212578 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (12-13-16).

Facts: In Husband and Wife's divorce decree, Husband was awarded the house, and Wife was ordered to sign any deeds or documents needed to transfer title to Husband. Additionally, a handwritten provision provided that Husband agreed to give Wife 50% of the profit of the sale of the house.

Several years later, Husband filed a suit to enforce the decree, alleging Wife failed to sign the necessary documents to transfer title. Wife countersued, requesting a clarification order. Wife alleged that Husband told her he was planning to sell the house but was not going to give her half of the profits. Wife moved for the appointment of a receiver to sell the house. Husband contested the appointment of a receiver, arguing that the decree did not require him to sell the house. After a hearing, the trial court appointed a receiver to sell the house if Husband failed to do so by a date certain. Husband appealed.

Holding: Vacated and Remanded

Opinion: When reading together the provision regarding the award of the house with the provision regarding the award of proceeds of the sale of the house, the only reasonable interpretation was that Husband was awarded the house and was responsible for selling it. Additionally, to avoid forfeiture of an agreement, the court may apply terms that can be reasonably implied. When a sale price or time for performance are not specified, the law presumes that the parties intended a reasonable price and a reasonable time. Thus, because the receivership order authorized the receiver to sell the house "in his sole discretion…upon terms and conditions determined by him…," it improperly modified the decree by not requiring the receiver to sell the house at a reasonable time for a reasonable price.

Editor's comment: *This holding seems unnecessary. If the law presumes that the parties intended a reasonable price and sale within a reasonable time, them would it not also presume that a receiver would reasonably exercise his or her discretion with respect to price and terms and conditions of sale? Isn't reasonableness inherent in the concept of discretion? J.V.*

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JUDGMENT FINDING HUSBAND LIABLE FOR INCREASED DEBT ON LINE OF CREDIT PREVIOUSLY DIVIDED IN DIVORCE DID NOT MODIFY PROPERTY DIVISION BECAUSE ADDITIONAL DEBT INCURRED SOLELY BY HUSBAND AFTER DIVORCE.

¶17-2-08. *Friend v. Friend*, No. 02-15-00166-CV, 2016 WL 7240596 (Tex. App.—Fort Worth 2016, no pet. h.) (mem. op.) (12-15-16).

Facts: During the marriage, Husband and Wife obtained a line of credit secured by their residence. In their divorce decree, Wife was awarded the residence and was ordered to pay the mortgage. The decree found that the line of credit was $204,000 and ordered Husband to pay it. Wife was ordered to pay Husband $634 monthly, which Husband was required to apply to the line of credit.

After the divorce, Husband took draws against the line of credit without Wife's knowledge or consent. Additionally, Husband started applying only a portion of Wife's monthly payments to the line of credit. Wife filed suit against Husband, alleging that his actions had put her at risk of losing her residence through disclosure and had reduced her equity in residence, preventing her from refinancing the mortgage. She raised claims for breach of contract, tortious interference with prospective business relationships, conversion, intentional infliction of emotional distress, fraudulent inducement, unjust enrichment, and money had and received. Additionally, she sought an injunction to prevent Husband from further draws, as well as actual damages, exemplary damages, and attorney's fees. After a bench trial, the court held that Husband was solely responsible for all amounts in excess of $177,360.40, ordered that Wife make her monthly payments to the bank instead of Husband, and awarded Wife exemplary damages and attorney's fees. Husband appealed, raising a number of issues, including complaints that the trial court improperly modified the divorce decree's property division and that Wife was not entitled to punitive damages.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: In addition to provisions relating to payment of the line of credit, the divorce decree ordered that Husband would be responsible for any and all debts, charges, liabilities, and other obligations incurred solely by him from and after a certain date. If Husband had adhered to the decree and applied Wife's payments to the line of credit, it would have been reduced accordingly. Additionally, he was responsible for the additional draws on the line of credit, which he incurred after the divorce. Thus, the court's judgment making him responsible for all amounts in excess of $177,360.40 did not alter the substantive division of property.

If a plaintiff pleads multiple theories of recovery for a single injury and does not elect her remedies before the trial court proceeds to judgment, the trial court should render the judgment offering the greatest recovery. The trial court awarded damages in the form of a credit against the balance of the line of credit, about $26,000 in attorney's fees, and $25,000 in exemplary damages. Exemplary damages are not recoverable for breach of contract, and attorney's fees are not recoverable for any of the other claims raised by Wife. Because the trial court's award for attorney's fees exceed the exemplary damages, Wife's breach of contract claim afforded her the greatest recovery. Thus, Wife was entitled to the award for attorney's fees, but she could not recover any exemplary damages.

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EQUITABLE LIEN AGAINST WIFE'S PROPERTY PERMISSIBLE TO ENSURE REPAYMENT OF WIFE'S DEBT PAID BY HUSBAND, BUT NOT PERMISSIBLE TO ENSURE PAYMENT OF ATTORNEY'S FEES INCURRED IN POST-DIVORCE ENFORCEMENT ACTION.

¶17-2-09. *Higgins v. Higgins*, No. 04-16-00178-CV, 2017 WL 361761 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (01-25-17).

Facts: Husband and Wife were divorced by an agreed decree, in which Wife was awarded certain real property and a business, in addition to the debts associated with each. The decree further provided that Wife was obligated to pay Husband a cash payment within 90-days of the signing of the decree. To secure that debt, the decree imposed an encumbrance for owelty of partition against the real property and business awarded to her.

After the decree was entered, Wife was unable to secure a loan to pay the cash award to Husband, so he enforced his right of foreclosure. Husband purchased the real property at auction, the business was sold to a third party, and Husband received the cash proceeds of the sale of the business.

Because the cash proceeds from the sale of the business was less than the amount Wife was obligated to pay Husband pursuant to the divorce decree, Husband filed a motion to enforce and for contempt. Wife responded by asserting that Husband's equity in the real property granted him a windfall, and she was entitled to any additional equity beyond that which she was obligated to pay. Husband moved for summary judgments, which were granted. The trial court found Wife owed Husband reimbursement for the amount he had paid to discharge the debt associated with the real property and also awarded Husband attorney's fees. Additionally, the trial court granted Husband an equitable lien on Wife's real and personal property until the judgments were paid. Wife appealed.

Holding: Affirmed in Part; Reversed in Part

Opinion: Trial courts may not impose liens on a spouse's separate property for the general purpose of securing a just and right division. However, they may do so to secure the discharge of payments owed by one spouse to the other. Here, under the terms of the divorce decree the debt secured by the real property owed to the bank was Wife's obligation, and she agreed to indemnify and hold Husband and his property harmless from any failure on her part to discharge that obligation. Thus, her agreement to indemnify arose from the just and right division, and the money judgment awarded to Husband was a means of discharging that obligation from one spouse to another. However, the attorney's fees award did not arise from the division of the marital estate but arose from a post-divorce cause of action, so a lien could not be imposed to secure the attorney's fees award.

Editor's comment: *Husband does not have an equitable lien for attorney's fees against Wife's separate property, but he still has a judgment lien which allows him to execute on Wife's non-exempt property, if there is any, and whether or not the trial court confirmed it as Wife's separate property. There is no community or separate property after divorce because the ex-spouses are single. For that reason, if Wife has property that the trial court found to be her separate property on divorce, that property is fair game for execution unless exempt. J.V.*

CLARIFICATION ORDER PROVIDING SPECIFIC TERMS FOR DIVORCE DECREE'S ORDER TO REFINANCE HOUSE DID NOT MODIFY PROPERTY DIVISION.

¶17-2-10. *Gills v. Harris*, No. 11-15-00018-CV, 2017 WL 469407 (Tex. App.—Eastland 2017, no pet. h.) (mem. op.) (02-02-17).

Facts: Husband was awarded the parties' house and associated mortgage in the divorce decree. He was ordered to use his "best efforts" to refinance the house in his name and, if that failed, indemnify Wife and hold her harmless from his failure to discharge such debts. After five years without refinancing, Wife filed a Petition to Clarify & Enforce Property Division. Wife asserted that the order to refinance was not specific enough to enforce by contempt and requested a clarification order. The trial court granted Wife's request and ordered Husband to refinance the house within 90 days and to pay all fees associated with the mortgage by the first day of each month. Husband appealed, arguing that the "best efforts" provision was too indefinite to be enforced and was not subject to clarification. Additionally, Husband complained that the clarification order functioned to amend, modify, alter, or change the underlying property division.

Holding: Affirmed

Opinion: A property settlement agreement may be reformed to correct a mutual mistake and to reflect the true intent of the parties; thus, a clarification proceeding may be used to accomplish that. The clarification order did not impose any new burdens on Husband; it merely detailed what should have been done under the prior order. The imposition of a specific time and manner to pay the existing obligation did not amend, modify, alter, or change the underlying property division.

Editor's comment: *This case is a little scary. How often do we practioners put into a mediated settlement agreement/final order that our client will use their "best efforts" to refinance the mortgage on the home, assuming that it is likely not REALLY enforceable? As it turns out, not only is it enforceable, this court changed the obligation to get it refinanced within 90 days, and the court of appeals upheld it! I'm going to think twice the next time I let my client agree to use their "best efforts" to do anything. R.T.T.*

Editor's comment: *The court says, "A property settlement agreement may be reformed to correct a mutual mistake and to reflect the true intent of the parties; thus, a clarification proceeding may be used to accomplish that." But it does not say what the "true intent" of the parties was in this case. J.V.*

Editor's comment: *I don't really agree with this case and the outcome. If the parties had wanted to bargain for a specific date on when the refinance would occur, I believe they would have done that. That did not happen here. Rather, they agreed that husband would use his best efforts to refinance. I do agree the court could clarify what "best efforts" actually means, but I don't agree that the court could just impose a deadline by which this had to be done. That was not the original agreement of the parties, and that is a new and material change in the property division of the order. I can't tell you how many cases I have done where we have included similar language that I knew was not necessarily enforceable, but would at least get the case completed and give my client time to try and get the property refinanced. This case definitely makes me think twice about the language used. J.H.J.*

SAPCR
PROCEDURE AND JURISDICTION

DISSENT: MANDAMUS RELIEF SHOULD HAVE BEEN GRANTED TO DISMISS SAPCR BECAUSE TEXAS WAS NOT THE CHILD'S HOME STATE.

¶17-2-11. ***In re Hamons*****,** ___ S.W.3d ___, No. 10-16-00361-CV, 2017 WL 123950 (Tex. App.—Waco 2017, no pet. h.) (01-11-17).

Facts: Father was in the military and was stationed in South Carolina. Mother and Father married, lived, and had a Child in South Carolina. At the end of Father's military service, Wife planned to stay in South Carolina, and Husband planned to move to Texas. The parties reached an informal agreement regarding custody of the Child. Subsequently, Father and the Child moved to Texas. Less than three months later, Father filed an Original Petition for Divorce and SAPCR in Texas. Mother filed objections to Texas's jurisdiction. The trial court denied Mother's objections, and she filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied (without opinion)

Opinion: While the mandamus record was less than ideal, the facts and procedural development of the case were not in dispute. Although there may have been a question as to whether Husband complied with Texas Family Code requirements when filing his petition for divorce, there was no question that Texas was not the Child's home state. Because Texas lacked subject-matter jurisdiction to make an initial child-custody determination, mandamus relief should have been granted.

NO EVIDENCE MOTHER INTENDED TO RELINQUISH CARE, CONTROL, AND POSSESSION OF THE CHILDREN TO ANYONE OTHER THAN FATHER WHILE MOTHER UNABLE TO RETURN TO U.S.

¶17-2-12. *In re L.D.L.*, No. 13-15-00099-CV, 2017 WL 371486 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (01-26-17).

Facts: Father traveled for work frequently and met Mother while traveling to Mexico. After entering a relationship, Mother immigrated to the U.S., where the first three Children were born. The parents married and established a residence in McAllen. While pregnant with their fourth Child, Mother travelled to Mexico but was denied access back into the U.S. on the basis that she had previously been unlawfully present in the U.S. for one year or more. For the next 18 months, Mother remained in Mexico. Husband visited her monthly, but he did not bring the Children due to safety concerns. During that period, Father's mother assumed a more active role with the Children and purchased a home in Fredericksburg, in which she and the Children lived. Father petitioned the U.S. AG for Mother's return alleging her absence constituted an "extreme hardship" and caused him enormous anxiety and stress. Immigration authorities issued Mother a visa, and she travelled immediately to reunite with her three older Children. Because the school year was still in session, she and Father agreed to allow the two oldest Children to remain with Grandmother to remain in school until summer. Once the Children were released for summer vacation, Mother picked up the two oldest Children to return to McAllen. Father remained in

Fredericksburg for unknown reasons. He committed suicide the next day. Soon after Father's death, Grandmother obtained an order allowing her to take possession of all four Children. After a bench trial, the trial court appointed Grandmother sole managing conservator of the Children, based on findings that Mother had voluntarily relinquished actual care control and possession of the Children to Grandmother and that Mother would significantly impair the Children's physical health or emotional development if she were appointed conservator. Mother appealed, arguing that Grandmother failed to overcome the parental presumption.

Holding: Reversed and Remanded

Opinion: Relinquishment of a child by one parent to another parent does not rebut the parental presumption. Whether Grandmother assumed a parental role in Mother's absence was irrelevant. Mother and Father arranged for Father to retain care of the Children. Mother communicated with the Children by telephone through Father, not through Grandmother. Mother wasted no time in reuniting with the Children once she returned to the U.S. Mother asserted a right of conservatorship over the Children since Father's death. Additionally, the record was devoid of any evidence that appointing Mother as conservator would significantly impair the Children's physical health or emotional development.

UCCJEA DID NOT REQUIRE TEXAS COURT TO CONSIDER MOTHER'S ALLEGEDLY "UNJUSTIFIABLE CONDUCT" BECAUSE FATHER—NOT MOTHER—SOUGHT TO INVOKE TEXAS'S JURISDICTION.

¶17-2-13. *In re P.M.K.*, No. 05-15-01181-CV, 2017 WL 462343 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (01-30-17).

Facts: The Child was born in Arizona in 2014. In January 2015, the family moved to Texas. On March 19, 2015, Mother and the Child moved to Louisiana. The next day, Father filed a SAPCR in Texas. That same day, Mother filed a petition to establish custody and visitation in Louisiana. In Texas, Mother filed a special appearance, plea to the jurisdiction, and request that Texas decline jurisdiction. The Texas and Louisiana courts held a combined telephonic hearing to address jurisdiction under the UCCJEA. Both parties presented evidence and examined witnesses, and court reporters from both courts recorded the proceedings. Ultimately, the Texas court held that Texas had jurisdiction because Texas was the Child's home state. However, the court also held that Louisiana was the more appropriate forum. Both courts signed a joint order incorporating these holdings. Father appealed, complaining that the Texas court erred in finding Texas was an inconvenient forum and that Louisiana was the more appropriate forum. Father further argued that Texas court failed to find that Mother engaged in unjustifiable conduct by moving the Child to Louisiana. Father failed to provide the appellate court with any reporter's records.

Holding: Affirmed

Opinion: Because both parties filed SAPCRs in different states on the same day, the Texas court was statutorily required to communicate with the Louisiana court. The two courts chose to communicate by holding a combined hearing, and nothing in the appellate record indicated Father complained about this procedure.

Because Texas was the Child's home state, the Texas court was required to decide whether Louisiana was the more appropriate forum, which it did. The Louisiana court's additional signature on the joint order was not error.

Tex. Fam. Code § 152.208 provides that if a Texas court has jurisdiction over a child custody dispute because a person seeking to invoke Texas's jurisdiction engaged in unjustifiable conduct, then with certain exceptions, "the court shall decline to exercise jurisdiction." This section focuses on the conduct of the party seeking to invoke Texas's jurisdiction, which was Father, not Mother.

TEXAS COURT NOT AUTHORIZED TO DETERMINE WHETHER ANOTHER STATE WITH JURISDICTION UNDER UCCJEA WAS INCONVENIENT FORUM.

¶17-2-14. *In re W.T.H.*, No. 04-16-00055-CV, 2017 WL 603649 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (02-15-17).

Facts: Mother and Father never married. Mother had two Children, one with Father. The other Child's father was not known. The foursome lived in Wisconsin until Father died. Shortly after that, Mother and the Children moved to Texas. About four months later, Mother died. Father's biological Child ("Brother") went to live with his maternal Aunt, and the other Child ("Sister") went to live with her maternal Grandfather.

Just short of six months before the Children would have been in Texas for six months, Grandfather filed an original SAPCR in Texas and was appointed nonparent sole managing conservator of both Children. The record before the appellate court did not indicate who, if anyone, was given notice of the suit, or who, if anyone, appeared in the proceeding.

Around the same time, maternal Grandmother filed in Wisconsin a petition for permanent guardianship of Brother. Grandfather and Aunt filed an answer, and Grandfather informed the court of the Texas order. Grandmother filed a petition for bill of review in the Texas court and succeeded in having that judgment set aside. The Texas court severed the two Children's SAPCRs and granted a new trial as to Brother only. Subsequently, the Texas court determined that Wisconsin had jurisdiction over Brother and granted Grandmother's plea to the jurisdiction, leaving the order as to Sister unchallenged. Grandfather appealed.

Holding: Affirmed

Opinion: Wisconsin obtained continuing, exclusive jurisdiction over child custody matters when it had previously appointed the parents joint managing conservators of the Children in a paternity suit. Wisconsin did not lose jurisdiction upon the parents' deaths. Further, even if Wisconsin hadn't obtained jurisdiction, it was still the Children's home state because the Children had not lived in Texas for six months before Grandfather filed his petition.

Tex. Fam. Code § 152.207 only applies when Texas has jurisdiction but determines it is not a convenient forum. It is not applicable to address whether another state with jurisdiction may be an inconvenient forum.

Finally, while the appellate court appreciated Grandfather's attempts to keep the siblings together, best interest is not a factor in determining whether a court has subject matter jurisdiction under the UCCJEA.

MOTHER'S MOVE WITH CHILD FROM INDIA TO TEXAS WITHOUT FATHER'S KNOWLEDGE, BY ITSELF, WAS NOT ENOUGH TO GIVE TEXAS COURT EMERGENCY JURISDICTION UNDER UCCJEA.

¶17-2-15. ***In re S.J.***, ___ S.W.3d ___, No. 14-17-00054-CV, 2017 WL 716398 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (02-23-17).

Facts: Father was a citizen of India, and Mother and the Child were U.S. citizens. The parents married in India but lived in the U.S. for the first 18 months of their marriage. The Child was born in the U.S. When the family moved to India, Mother was the Child's primary caregiver. Mother testified that Father was frequently drunk, violent, and mean. Out of fear for her and the Child's safety, Mother moved to Texas without Father's knowledge or consent. Father tracked Mother down and asserted that he had filed pleadings to initiate a divorce and to obtain custody of the Child. Mother asserted that the pleadings were only for the restitution of conjugal rights. Father filed an original SAPCR in Texas and asked the court to assume temporary emergency jurisdiction under the UCCJEA, appoint Father sole managing conservator, and enter orders preventing international parental abduction of the Child. After a three-day hearing, the trial court granted Father's requested relief and ordered Mother to return the Child to India. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The UCCJEA provides that a court of this state may have temporary emergency jurisdiction if the child is present in this state, and the child has been abandoned or it is necessary in an emergency to protect the child because the child is subjected to or threatened with mistreatment or abuse.

Here, Father offered no evidence that the Child was subjected to or threatened with mistreatment or abuse. On appeal, he asserted that Mother's removal of the Child from India to Texas without his knowledge or consent was mistreatment. The appellate court disagreed and cited cases from three other courts of appeals that had reached the same conclusion.

Editor's comment: *This holding makes sense: If merely removing the child constitutes mistreatment or abuse, then there always will be emergency jurisdiction in such cases. J.V.*

Editor's comment: *It seems like this case could have been resolved had father put on appropriate evidence with regards to the fact that the mere removal of the child to Texas was emotionally and physically damaging to the child. ie, uprooting the child from school, taking the child from the father, taking the child from friends and family, etc. Evidentiary rulings by the court are discretionary, so it's vital to make sure that the record is fully padded with information that would support the judge's decision, or otherwise would provide proof why the judge abused his or her discretion. J.H.J.*

DEFAULT JUDGMENT REVERSED DUE TO DEFECTIVE RETURN OF SERVICE.

¶17-2-16. *In re K.M.C.*, No. 05-16-00635-CV, 2017 WL 745802 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (02-27-17).

Facts: Husband filed a petition for divorce. After unsuccessful service attempts on Wife, Husband obtained an order for alternate service and served Wife by affixing the petition to her door. After completing service, Husband obtained a default divorce decree. Subsequently, Wife filed a

restricted appeal, claiming that error was apparent on the face of the record because service was defective.

Holding: Reversed and Remanded

Opinion: Tex. R. Civ. P. 107(b)(4) requires a return of service include information concerning "the date and time the process was received for service." Here, the return and the document to which it was attached did not show either the date or the time "the process was received for service."

MOTHER ENTITLED TO DEFAULT JUDGMENT IN CHILD SUPPORT ENFORCEMENT HEARING BECAUSE FATHER, THOUGH PERSONALLY SERVED 14 DAYS BEFORE HEARING, FAILED TO APPEAR.

¶17-2-17. *Ladd-Keller v. Ladd*, No. 14-15-00758-CV, 2017 WL 830545 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (mem. op.) (02-28-17).

Facts: Mother and Father divorced in 1999, and Father was ordered to pay child support for their only Child. In 2014, Mother filed a motion for enforcement, asserting Father owed arrearages of $79,075.84 plus interest of $38,107.30, for a total of $117,183.14. Father was personally served at his residence in Oregon. Father filed a pro se general denial but failed to appear at the show cause hearing. Mother offered evidence to prove up her claims and was awarded a default judgment. Father challenged the judgment, asserting he was entitled to reasonable notice of no less than fort-five days before the court conducted a hearing.

Holding: Affirmed

Opinion: Child support enforcement proceedings are governed by the Tex. Fam. Code, and Tex. Fam. Code 157.062 provides that if an enforcement proceeding is not joined with another claim, the respondent must be afforded 10 days' notice prior to a hearing. (If it is joined with another claim, the hearing may not be held before 10 a.m. on the first Monday after the 20th day after the date of service.) Here, Father personally received notice 14 days before the hearing, but failed to appear.

Editor's comment: *I just had to comment on this one, because this case deals with the statute that many people confuse or completely forget about. Enforcements of child support and possession allow parties to only give 10-days' notice of the hearing. That means that if an answer is not filed within those 10 days, a default action can be taken and may be upheld. Usually, even if the enforcement is combined with something else, it's always good practice to just get an answer on file within 10 days. You can always amend the answer to include other specific affirmative defenses, but it saves you the worry and concern about a default action. J.H.J.*

SAPCR
MODIFICATION

CHANGED NEEDS OF CHILDREN PLUS FATHER'S REMARRIAGE AND CHANGE OF RESIDENCE CONSTITUTED MATERIAL AND SUBSTANTIAL CHANGE.

¶17-2-18. *In re E.A.DP.*, No. 05-15-01210-CV, 2016 WL 7449369 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (12-28-16).

Facts: A divorce decree appointed Mother and Father joint managing conservators of their three Children and granted Mother the exclusive right to designate the Children's primary residence. Subsequently, Father filed a petition to modify the parent-child relationship, seeking to be appointed the conservator with the exclusive right to designate the Children's primary residence. After a bench trial, the trial court signed an order granting Father's requested modifications. Mother appealed, arguing in part that the evidence was legally insufficient to support a finding that a party's or a child's circumstances had materially and substantially changed since the date of the divorce decree.

Holding: Affirmed

Opinion: At the time of the divorce, Father lived with Father's mother. Mother lived in a one-bedroom apartment, in which she slept in one bed, the two sons slept in a bunk bed, and the daughter slept in a toddler bed. At the time of the hearing, three years later, Father had remarried, and he lived in a three-bedroom house, in which the sons shared a room, and the daughter had her own room. Mother lived in a motel suite, and she had told Father that she was "getting kicked out" of the motel. Mother and one son shared a double bed, the other son slept in a single bed, and the daughter slept in a trundle bed. Additionally, Mother's teenage son from another relationship occasionally slept on the floor. In the months before the hearing, Mother indicated that she was moving to more permanent housing, but she had not done so by the time of the hearing.

A parent's remarriage and change in home has been held to constitute a material change. Further, while an increase in the age of a child alone may not be a change in circumstances sufficient to justify modification of conservatorship, changed needs of the child may constitute a material change of circumstances and a child's need for dependable, secure, and stable environment may be different as the child grows older. Here, by virtue of their growth and maturity, there was a change in the Children's needs for physical space that was better accommodated by Father's home.

COUNSELOR'S CONCERN THAT PROPOSED MOVE WOULD HAVE DEBILITATING EFFECT ON THE CHILDREN SATISFIED IMPAIRMENT EXCEPTION TO TEX. FAM. CODE PROHIBITION AGAINST CHANGING THE PERSON WITH THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILDREN'S PRIMARY RESIDENCE THROUGH TEMPORARY ORDERS.

¶17-2-19. *In re Walton*, No. 11-16-00230-CV, 2017 WL 922418 (Tex. App.—Eastland 2017, orig. proceeding) (mem. op.) (02-28-17).

Facts: Mother and Father divorced, and Mother was granted the exclusive right to designate the Children's primary residence. Subsequently, Mother wanted to move to be with her fiancé. Father filed a SAPCR, and in temporary orders, the trial court granted Father the exclusive right to designate the Children's primary residence. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied.

Majority Opinion: (J. Bailey, J. Countiss) One of the Children's counselor testified that forcing a Child to move would have a pretty debilitating effect. The appellate court held that this constituted some evidence that the Children's present circumstances, by virtue of the announced move, would significantly impair their physical health or emotional development.

Dissenting Opinion: (J. Wilson) Tex. Fam. Code § 156.006 prohibits modification of the person with the exclusive right to designate the child's primary residence unless the change is in the best interest of the child *and* the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development. Five other appellate courts have found that emotional distress caused by separation from a parent is insufficient to satisfy this heightened burden.

Here, the counselor—who was not court appointed, did not perform a custody evaluation, and only treated one of the Children—offered no opinions that the Children suffered from any physical conditions, ailments, or illnesses that significantly impaired their physical health. Moreover, the counselor further testified that if the Children moved, they would adapt, just as they would adapt to a new step-parent. He described Mother as an excellent parent, whom the Children loved. Father conceded that he did not claim Mother was a bad mother.

Based on the evidence presented, the trial court could not have reasonably concluded that Mother's contemplated move significantly impaired or endangered the Children's physical health or emotional development, and Mother was entitled to mandamus relief.

Editor's comment: *I really disagree with the majority. There is a limit to the abuse of discretion standard and this should have been it. Dissent is right on this one. I hope these folks are able to take this one to Austin. G.L.S.*

Editor's comment: *The dissenting opinion here is worth a read if you have a relocation case. It's very well-written and thorough. It presents a compelling case for reversing the trial court's decision but ultimately the stringent abuse of discretion standard prevails. R.T.T.*

Editor's comment: *When it said that there was legally sufficient evidence to support the trial court's order, the majority treated this case as though Mother had mounted a "no evidence" challenge to a jury verdict in a civil case. But as the dissent notes, the majority failed to follow the well-settled family law that requires more than conclusory statements to establish that "the child's present circumstances would significantly impair the child's physical health or emotional development." Hopefully, the majority's holding will be treated as the abberation that it is. J.V.*

SAPCR
CHILD SUPPORT ENFORCEMENT

NO ABUSE OF DISCRETION IN ORDERING 17-YEARS WORTH OF RETROACTIVE CHILD SUPPORT BECAUSE FATHER KNEW OF CHILD AND SOUGHT TO AVOID SUPPORT OBLIGATION.

¶17-2-20. *In re C.J.C.*, No. 13-15-00415-CV, 2016 WL ####### (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (12-21-16).

Facts: Mother filed a SAPCR seeking retroactive child support for her 17-year-old child. After a hearing, the trial court found in Mother's favor and ordered Father to pay retroactive child support dating back to the child's birth. Father appealed, arguing that the Texas Family Code prohibited a retroactive child support order in excess of four years. Additionally, Father argued that the judgment placed an undue financial hardship on him.

Holding: Affirmed

Opinion: The four-year limitation on retroactive child support can be rebutted if (1) the obligor knew or should have known he was the Child's father and (2) he sought to avoid a child support obligation. Here, Mother and Father had a sexual relationship. Mother told Father she was pregnant, and he tried to convince her to have an abortion. Father threatened that if Mother sought child support, he would obtain custody of the Child. After the Child's birth, he wanted proof that he was the Child's father.

When ordering retroactive child support, the court must consider whether the obligation will impose an "undue financial hardship on the obligor." Here, although Father testified that he lived on a tight budget, he did not point to any specific evidence that the judgment would create a financial hardship.

Editor's comment: *I also find this case a little strange. Obviously, the kicker here is that father clearly didn't put on evidence sufficient to support any argument that he was unable to afford the retroactive support, and it looks like he didn't put on enough evidence to rebut mother's arguments that he was avoiding child support. With that being said, I also feel like mother had an obligation and a duty to do something about this prior to the child reaching 17 years old. It looks like the court took that information into consideration, and father's evidence, in making a ruling. And, determining if mother proved her claim is within the court's sound discretion as trier of fact. J.H.J.*

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SAPCR
Enforcement of Possession

ORDER GRANTING GRANDPARENTS 35 HOURS OF VISITATION A MONTH WAS NOT SPECIFIC ENOUGH TO BE ENFORCEABLE BY CONTEMPT.

¶17-2-21. ***In re Martin***, ___ S.W.3d ___, No. 05-16-00987-CV, 2017 WL 474466 (Tex. App.—Dallas 2017, orig. proceeding) (02-03-17).

Facts: After Mother's death, an agreed order appointed Father sole managing conservator of the Children and provided maternal Grandparents with no less than 35 hours of unsupervised visitation with the Children each month.

A few years later, Grandparents initiated a modification suit, seeking joint managing conservatorship and the exclusive right to designate the Children's primary residence. Additionally, Grandparents moved to enforce their visitation, with which Father had allegedly not complied. Father filed a motion to dismiss, arguing Grandparents lacked standing. The trial court denied Father's motion to dismiss. The court also held Father in contempt and awarded Grandparents visitation the first and third weekend of every month to make up for their missed visitation time. Father filed a petition for writ of mandamus challenging both rulings.

Holding: Conditionally Granted in Part; Denied in Part

Opinion: A contempt order for which the contemnor has not been confined is reviewable by mandamus. Although the order was specific and clear regarding the amount of time Grandparents were entitled to visit the Children, the order did not set out when the visitation could occur. Thus, it was not enforceable by contempt.

An order denying a motion to dismiss in a SAPCR proceeding is reviewable by mandamus, even though it is an incidental ruling, Because Grandparents were clearly affected by the order, they had standing to seek a modification of the order.

SAPCR
Termination of Parental Rights

DENIAL OF FOSTER PARENTS PETITION FOR CONSERVATORSHIP IN INITIAL TERMINATION PROCEEDING WAS NOT RES JUDICATA AGAINST THEIR CLAIM FOR CONSERVATORSHIP IN SUBSEQUENT TERMINATION PROCEEDING.

¶17-2-22. ***In re A.L.H.***, ___ S.W.3d ___, No. 14-16-00578-CV & No. 14-16-00556, 2017 WL 103927 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (01-10-17).

Facts: Mother and Father's rights were terminated, and both parents appealed. While the appeals were pending, paternal Aunt and Foster Parents sought to be named managing conservator of the Child. The appellate court affirmed the termination as to Mother, but reversed the termination of Father's parental rights due to legally insufficient evidence. Subsequently, Foster Parents filed a petition to terminate Father's parental rights and to adopt the Child. A jury found

in favor of terminating Father's parental rights, appointing Foster Parents as the Child's managing conservator, and denying conservatorship to Aunt. Father and Aunt both appealed and, among many other issues, complained that Foster Parents' claim for conservatorship was barred by res judicata and collateral estoppel because the trial court had denied their request for conservatorship in the first termination suit.

Holding: Affirmed

Opinion: A final judgment in a custody proceeding is res judicata of the best interests of a child as to conditions then existing. Additionally, the first termination and this proceeding did not involve the same parties or the same issues. For example, Aunt was not a party to the first termination suit, and Father's parental rights had been reinstated since the first suit. Further, the Child had lived with and bonded with Foster Parents for eighteen additional months.

Editor's comment: *The court mentions that Father called a court-appointed special investigator, Ms. McCartney, about "varying topics," including "UFOs and aliens; websites he wanted McCartney to visit; his association with the Rockefeller family; his ability to eliminate everyone's debt; and his desire to get a checking account with McCartney so they could go into business together." But termination was not based on these communications. It was based on seven of the statutory grounds, including failure to support, constructive abandonment and failure to follow his plan. J.V.*

EVIDENCE SUPPORTED FINDING THAT FATHER ABANDONED CHILD.

¶17-2-23. ***In re R.A.G.,*** ___ S.W.3d ___, No. 08-16-00178-CV, 2017 WL 105131 (Tex. App.—El Paso 2017, no pet. h.) (01-11-17).

Facts: Mother and Father were both incarcerated for drug trafficking from Mexico and were still incarcerated during the Child's birth. After Father was released, he was deported to Mexico. Subsequently, TDFPS became involved when Mother was arrested for shoplifting while the Child was left unattended in a running vehicle. After a hearing, at which Father appeared by telephone, Father's rights were terminated on grounds of endangerment, abandonment, and failure to comply with a court order. Father appealed.

Holding: Affirmed

Opinion: Father's actions led him to incarceration and deportation. While the deportation understandably prevented Father from visiting with the Child, Father made no effort to contact the Child in any other way. Father's phone number and Facebook accounts had not changed since the Child's birth, yet he used neither to contact the Child. In fact, the Child did not know that Father was his father.

TERMINATION ORDERS VOID—CHAPTER 262 DID NOT GRANT JURISDICTION TO ENTER FINAL ORDERS WHEN ANOTHER COURT HAD CONTINUING, EXCLUSIVE JURISDICTION.

¶17-2-24. ***In re D.W.***, ___ S.W.3d ___, No. 06-16-00076-CV, 2017 WL 510557 (Tex. App.—Texarkana 2017, no pet. h.) (02-08-17).

Facts: TDFPS filed a petition for protection of the Children and for termination of the parents' parental rights. The court appointed Father as sole managing conservator, ordered Mother to pay child support, and dismissed TDFPS as a party.

Four years later, TDFPS filed another petition for protection of the Children and for termination of the parent's rights, but in a different county than the prior case. The Department asserted the court had jurisdiction under Chapter 262. After temporary orders were entered, the Chapter 262 court set the case for final trial. Father argued that another court had continuing, exclusive jurisdiction. On a motion from TDFPS, the Chapter 262 initiated a transfer to itself from the court of continuing exclusive jurisdiction. The case was transferred, and the Chapter 262 court terminated the parents' parental rights. The parents appealed.

Holding: Trial court's order vacated, case dismissed

Opinion: Chapter 262 of the Tex. Fam. Code allows TDFPS to file an emergency suit in the county where the child is found and grants that trial court jurisdiction to enter emergency orders, hold a full adversary hearing, and enter temporary orders. However, once temporary orders have been entered, TDFPS "shall" determine whether a court of continuing, exclusive jurisdiction exists and, if so, transfer the case to the court with continuing, exclusive jurisdiction. An exception exists if grounds exist for a mandatory transfer to the Chapter 262 court pursuant to Tex. Fam. Code § 155.201. In that case only, the Chapter 262 is authorized to initiate the transfer from the court of continuing, exclusive jurisdiction.

Here, no evidence supported grounds for a mandatory transfer. Thus, the Chapter 262 court did not have jurisdiction to initiate a transfer or to enter final orders.

NOT ALL *HOLLEY* FACTORS REQUIRED TO SUPPORT BEST INTEREST FINDING FOR TERMINATION.

¶17-2-25. ***In re M.T.***, ___ S.W.3d ___, No. 04-16-00547-CV, 2017 WL 685723 (Tex. App.—San Antonio 2017, no pet. h.) (02-22-17).

Facts: TDFPS sought to terminate Mother's parental rights on grounds of endangerment, failure to comply with a court order, and drug use. At trial, TDFPS introduced evidence of Mother's drug use and her abusive boyfriend. During the pendency of the proceedings, Mother completed a psychological evaluation, a parenting class, and a family violence class. However, Mother promised not to see her boyfriend anymore, but she was seen with him on multiple occasions. The trial court terminated Mother's parental rights, and she appealed the best interest finding.

Holding: Affirmed

Majority Opinion: (J. Angelina, J. Chapa) A court is not prohibited from reasonably forming a strong conviction or belief that termination is in a Child's best interest simply because there may not be evidence of one or more of the *Holley* factors.

Dissenting Opinions: (J. Martinez) TDFPS relied primarily on conclusory allegations of domestic violence to support its alleged endangerment grounds as a basis for termination. A TDFPS investigator testified that "they had hit a grandmother and her granddaughter in the [doctor's] office while they were holding [the Child] in the office." There was no indication of who "hit" whom, nor who "they" were. There was no evidence that the Child was injured or even frightened at the time. Additionally, there was no evidence with respect to most of the *Holley* factors. The trial court focused too much on Mother's boyfriend's actions, rather than Mother's actions.

Editor's comment: *Remember that the Holley factors are not all-inclusive, meaning that the court can consider all, some, or even additional factors depending on the situation of the case. It is always good practice, when trying a SAPCR case, to go through those factors in your direct or cross examination. You will notice that many of these cases on appeal involve arguments about whether or not there was sufficient evidence for the court to make a specific ruling. If you want the court to rule a certain way, make sure and provide all of the evidence the court needs to do so. And, if you think the court will not rule your way, it is still vital to make sure your record contains all of the evidence you want the judge to hear so that the appellate court can do a proper review. J.H.J.*

MISCELLANOUS

FATHER'S MISCONDUCT WARRANTED STRIKING HIS PLEADINGS BUT DID NOT WARRANT SANCTIONS STRIKING HIS JURY DEMAND AND PROHIBITING HIM FROM CALLING WITNESSES OR INTRODUCING EVIDENCE AT TRIAL.

¶17-2-26. *Young v. Young*, No. 03-14-00720-CV, 2016 WL 7339117 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (12-15-16).

Facts: Father filed a SAPCR seeking joint managing conservatorship of the Child. Mother filed a counterpetition seeking sole managing conservatorship. Shortly before a final hearing, Father moved for a child-custody evaluation and sought a continuance. The trial court granted Father's request and ordered him to pay the costs of the evaluation. Subsequently, Father failed to schedule any appointments with the evaluator or to make any payments as ordered. Mother filed a motion for sanctions for Father's failure to comply with the order for evaluation and for Father's failure to comply with discovery requests. (His discovery responses provided minimal information and comprised mostly of objections.) After a hearing, the trial court signed an order prohibiting Father from calling witnesses or introducing exhibits at trial, striking Father's pleadings, and striking Father's jury demand. Father appealed, challenging the sanctions.

Holding: Reversed and Remanded

Opinion: An imposed sanction must be just. There must be a direct relationship between the misconduct and sanction imposed, and the sanction must not be excessive. A court must consider the availability of lesser sanctions before imposing sanctions. When imposing a death-penalty sanction, the court must find (1) that the party's misconduct justifies a presumption that his claims or defenses lack merit and (2) that lesser sanctions were previously tested and were ineffective. In cases involving conservatorship and possession, the trial court must also consider the child's best interest when ruling on death-penalty sanctions. In such cases, "[i]t is in the court's primary interest to have as much evidence before it as possible."

Order prohibiting calling witnesses or introducing documents: The court made no inquiry into whether Father's failure to fully respond to discovery was Father's fault or the fault of his attorney. By prohibiting witnesses and evidence at trial, the sanction only punished Father, even though the trial court noted "it's up to the attorneys…to answer discovery properly." Further, the record did not indicate any lesser sanctions were considered.

Order striking Father's pleadings: Father repeatedly failed to comply with multiple orders and refused to schedule appointments with or pay the custody evaluator. Additionally, the sanctions were not excessive because the trial court gave Father multiple opportunities to comply and warned Father of the possibility that his pleadings would be struck. Finally, the trial court emphasized the centrality of the evaluation to the effective resolution of the case and indicated that the results would have a lot of weight on the final conservatorship determination. Because Father failed to comply with the evaluation order, the trial court could have reasonably presumed that the results of the evaluation would not reflect favorably on Father's request for joint managing conservatorship, which would support a finding that Father's claims lacked merit. Further, Father's persistent refusal to comply with the evaluation orders despite multiple admonitions from the court was "particularly unacceptable in a child-custody case."

Order striking Father's jury demand: There was no connection between Father's misconduct and the denial of his constitutional right to a jury trial. Moreover, the legislature has mandated that jury decisions regarding certain custody-related issues are binding upon the trial court. Absent a connection between the misconduct and the sanction, Father was entitled to have a jury resolve those issues.

Editor's comment: *A great discussion of how/what/when/where/why to request sanctions. R.T.T.*

IN MOTHER'S MOTION FOR NEW TRIAL, JURORS NOT PERMITTED TO TESTIFY AS TO MATTERS OR STATEMENTS MADE DURING DELIBERATIONS.

¶17-2-27. *In re Atun*, No. 09-16-00334-CV, 2016 WL 7242819 (Tex. App.—Beaumont 2016, orig. proceeding) (mem. op.) (12-15-16).

Facts: After a jury trial, the trial court signed a final order in a SAPCR. Subsequently, Mother filed a motion for new trial, alleging juror misconduct. At the hearing on Mother's motion, five of the twelve jurors testified. Over Father's objections, the trial court permitted the jurors to testify about one juror's internet research on his cell phone to determine whether a martial arts school was near Father's residence. The jurors testified about how the new information impacted their personal decision and how quickly after the information was revealed the vote changed from 9-3 to 10-2. At the hearing's conclusion, the trial court granted Mother's motion for new trial. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: To support an order for a new trial under Tex. R. Civ. P. 327(a), the movant must establish that juror misconduct occurred, it was material, and it probably caused injury. Pursuant to Tex. R. Civ. P. 327(b), a juror may testify as to whether any outside influence was improperly brought to bear upon any juror, but it does not allow a juror to discuss matters or statements that were made by the jurors during deliberations. Here, the evidence at the new trial hearing violated Rule 327(b), and the mandamus petition, response, and appendices did not support granting a new trial under Rule 327(a).

ERROR TO RENDER JUDGMENT BASED ON RULE 11 AGREEMENT TO WHICH WIFE REVOKED CONSENT; WIFE'S DETAILED AFFIDAVIT SUFFICIENT TO ESTABLISH ECONOMIC NECESSITY EXCEPTION TO ACCEPTANCE OF BENEFITS DOCTRINE.

¶17-2-28. *Lopez v. Lopez*, No. 13-14-00514-CV, 2016 WL ####### (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (12-21-16).

Facts: During Husband and Wife's divorce proceeding, they dictated a purported agreement to the court reporter but outside the presence of the judge. Subsequently, Husband filed a motion for entry of a divorce decree based on the agreement. Wife responded that she had repudiated any purported agreement. At a hearing on Husband's motion to enter, Husband argued that the agreement met the requirements of a Rule 11 agreement and that he was entitled to judgment. Wife countered that even if the requirements of Rule 11 were met, she had repudiated the agreement. The court entered a decree based on the agreement. Wife appealed. Husband filed a response asserting Wife was estopped from appealing because she had accepted benefits of the decree from which she had appealed.

Holding: Reversed and Remanded

Opinion: Wife was not estopped by the acceptance of benefits doctrine because her detailed affidavit itemizing her living expenses and financial burdens established that the economic necessity exception applied.

The agreement was not mediated. Even if it were a Rule 11 agreement, such agreement is no longer enforceable if consent is revoked before a judgment is signed. Because Wife revoked her consent, the judgment based on the alleged agreement was void.

Editor's comment: *Showing economic necessity in response to an acceptance-of-benefits accusation requires detailed evidence. Mother prevailed by filing essentially the kind of financial information statement presented at temporary orders hearings, and then some. J.V.*

CONTINGENT FEE AGREEMENT PROHIBITING WIFE FROM ACCEPTING SETTLEMENT OFFER WITHOUT ATTORNEY'S APPROVAL WAS VOIDABLE AT WIFE'S OPTION.

¶17-2-29. *Lopez v. Maldonado*, No. 13-15-00042-CV, 2016 WL ####### (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (12-21-16).

Facts: In preparation for her divorce proceeding, Wife hired Attorney and signed an attorney-client contract providing that Attorney would be reimbursed for expenses and was entitled to 20% of the amount Wife recovered under the divorce. Additionally, the agreement included a provision that Wife would "make no settlement of the claim herein, or accept any sum as reimbursement for any bodily injuries or expenses, without the Attorney's consent."

During non-mediated settlement discussions, Attorney pressured Wife into entering into an agreement that included property valuations and distributions that were not in Wife's interest. Subsequently, Wife terminated Attorney's representation, and by written letter from her new counsel, Wife withdrew her consent to the purported agreement.

Attorney filed an intervention in the divorce proceeding asserting he was entitled to attorney's fees and costs. Wife filed a response and raised a counterclaim for malpractice. Attorney filed a motion for summary judgment, to which he attached the contingent fee agreement and a list of purported "case expenses." After the trial court granted Attorney a summary judgment,

Wife appealed, arguing in part that the contingent fee contract was not enforceable under Texas law.

Holding: Reversed and Remanded

Opinion: Prior case law has held that a provision in an attorney-client contract that authorizes an attorney to settle a client's case without the client's consent violates Tex. Disciplinary R. Prof'l Conduct 1.02(a)(1), rendering the entire contract voidable at the client's option, and that a contract prohibiting settlement without the attorney's consent violates Tex. Disciplinary R. Prof'l Conduct 1.02(a)(2), making the contract unenforceable as against public policy.

Moreover, even if the offensive provision was severable from the remaining contract—if the entire contract was not void—the contract provided that if Wife terminated the contract, Attorney was only entitled to a "reasonable fee." Attorney offered no evidence supporting a claim for reasonable attorneys' fees and failed to establish that his expenses were necessary or reasonable.

★★★TEXAS SUPREME COURT★★★

MERELY USING, HOLDING, CONTROLLING, OR SECURING POSSESSION OF COMMUNITY PROPERTY AWARDED IN A DIVORCE DECREE DOES NOT CONSTITUTE CLEAR INTENT TO ACQUIESCE IN THE JUDGMENT AND WILL NOT PRECLUDE AN APPEAL UNDER THE ACCEPTANCE OF BENEFITS DOCTRINE ABSENT A SHOWING OF PREJUDICE BY THE NONAPPEALING PARTY.

¶17-2-30. ***Kramer v. Kastleman*****,** ___ S.W.3d ___, No. 14-1038, 2017 WL 382421 (Tex. 2017) (01-27-17).

Facts: Husband and Wife were married nine years, had one child, and had a $30 million marital estate. During the divorce proceedings, the parties executed two agreements, one property-related and one child-related, settling all the issues between them. Before a final decree was signed, Wife revoked her consent to the property agreement and moved to have it set aside. Husband responded with a motion to enter judgment and a motion for sanctions against Wife. The trial court granted the Husband's motions and entered a final decree of divorce.

Wife appealed, and Husband moved to dismiss the appeal under the acceptance-of-benefits doctrine, arguing Wife was estopped from challenging the decree because she had collected $20,000 a month in rental income from property awarded to her in the decree and because she attempted to "enforce" the decree by requesting an opportunity to retrieve personal property allocated to her from a condo Husband had vacated in connection with an impending sale. The court of appeals dismissed Wife's appeal, finding she had accepted the benefits of the granted her under the decree when she accepted the rental proceeds and had refinanced the rental property. Though the divorce decree required Wife to refinance those properties under threat of forced sale, the appellate court held that "[a] party accepts the benefits of a judgment when she seeks and obtains legal title to real property awarded in the judgment." The appellate court further held that none of the exceptions to the acceptance-of-benefits doctrine applied. Wife sought review from the Texas Supreme Court.

Holding: Reversed and Remanded

Opinion: The acceptance-of-benefits doctrine is based on the principle of estoppel, which prevents litigants from taking contradictory positions as a means of gaming an unfair advantage by

taking an inconsistent stance of simultaneously adopting a judgment as right while repudiating it as wrong. The doctrine is anchored in equity and bars appeal if the appellant voluntarily accepts the judgment's benefits, and the opposing party is thereby disadvantaged. The doctrine infers an agreement to terminate the litigation because the judgment has been voluntarily paid and accepted, or implies a waiver, release of errors, or admission that the decree is valid. The existence of prejudice plays a fundamental role in determining whether it would be unconscionable and inequitable to permit an appeal to move forward.

Judgments in divorce cases typically divide assets in which a party's right to possession and control precedes the final decree. Thus, invoking estoppel based on dominion over that property while the litigation is ongoing presents a more complex scenario than in other civil disputes. Some other states have found that no hard and fast rule is appropriate in applying the acceptance-of-benefits in divorce cases. Many treat prejudice or manifest intent to accept the judgment's validity as critical inquiries bearing on whether equity demands an estoppel. Two states have expressly abrogated the acceptance-of-benefits doctrine in divorce cases.

Characterization of economic necessity as an "exception" appears to be a misnomer of sorts, because rather than *excusing* a voluntary acceptance, it recognizes that there is no contradiction in pursuing an appeal—and thus no estoppel—if acceptance was not voluntary. Absent voluntariness, the doctrine simply does not apply. Further, in characterizing economic necessity as an exception to the rule, some courts have shifted the burden of disproving voluntariness to the appealing party, rather than requiring the complaining party to establish the matter to invoke an estoppel in the first instance.

Similarly, when a party has been fraudulently induced into extracting the benefits of a judgment, that cannot equate to voluntary acceptance. The cash-benefits and severability exceptions (e.g., allowing an appeal of child-related issues despite acceptance of benefits) focus on the absence of prejudice.

If voluntary acceptance of benefits is established merely by securing or retaining possession and control of community property, and exceptions are stingily applied, an unwarranted risk arises that the practicalities of life after divorce will force many appellants to accept some benefits and run the risk of dismissal. In applying the doctrine, the critical inquiry is whether the nonappealing spouse would be prejudiced by possession of a portion of the community estate or consumption of cash benefits.

Before denying a merits-based resolution to a dispute, courts must evaluate whether:

1) the appealing party clearly intended to acquiesce in the judgment;
2) the assets have been so dissipated as to prevent their recovery if the judgment is reversed or modified; and
3) the opposing party will be unfairly prejudiced.

Equity simply will not tolerate a Catch-22 that involves a choice between relinquishing possession and control of community property and relinquishing the right to appeal. Texas policy prefers adjudication on the merits.

Several nonexclusive factors inform the estoppel inquiry, including:

- whether acceptance of benefits was voluntary or was the product of financial duress;
- whether the right to joint or individual possession and control preceded the judgment on appeal or exists only by virtue of the judgment;
- whether the assets have been so dissipated, wasted, or converted as to prevent their recovery if the judgment is reversed or modified;
- whether the appealing party is entitled to the benefit as a matter of right or by the nonappealing party's concession;
- whether the appeal, if successful, may result in a more favorable judgment, but there is no risk of a less favorable one;

- if a less favorable judgment is possible, whether there is no risk the appellant could receive an award less than the value of the assets dissipated, wasted, or converted;
- whether the appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment;
- whether the issue on appeal is severable from the benefits accepted;
- the presence of actual or reasonably certain prejudice; and
- whether any prejudice is curable.

These factors may overlap to varying degrees, and one or more may be dispositive. For example, absence of prejudice should prevent the doctrine's application in most cases, while the existence of prejudice may not be sufficient if, for example, acceptance was compelled by economic necessity. Moreover, mere deprivation of possession, use, and enjoyment of property that had been jointly owned is not, in and of itself, sufficient to constitute prejudice.

Here, Wife's actions to secure the property and refinance loans ensured it was not lost to the marital estate and, thus, visited no prejudice on Husband in the event of remand. Further, there was no evidence that the partnerships could not be returned and taken into account in a new just-and-right division if Wife were to succeed on her appeal. Husband's claims of prejudice in this case were merely speculative, and speculative evidence is no evidence. Moreover, Husband's insistence that Wife's appeal be dismissed and that she keep permanently her distribution indicated his satisfaction with the property awarded to her. Evidently, the assets were not so unique that Husband would be disadvantaged by their permanent loss, much less a temporary loss of possession and control.

Further, Husband did not dispute that the payments Wife accepted constituted a relatively small portion of the estate or that she could restore the value of those proceeds if the marital assets were divided anew. Nor was there evidence or allegation that the assets had been so dissipated, wasted, or converted as to prevent a just-and-right division of the property if it were reversed or modified.

Editor's comment: *A thoughtful opinion by Justice Guzman, in which she painstakingly reviews the acceptance-of-benefits doctrine, emphasizing that the doctrine is equitable rather than formulaic in nature and applies only when the party claiming acceptance of benefits would be irremediably damaged absent application of the doctrine. J.V.*

HUSBAND DENIED BILL OF REVIEW BECAUSE HE FAILED TO SHOW WHETHER HE RECEIVED NOTICE OF DEFAULT JUDGMENT BEFORE OR AFTER TRIAL COURT LOST ITS PLENARY POWER.

¶17-2-31. *Grant v. Calligan*, No. 14-15-01084-CV, 2017 WL 455731 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (mem. op.) (02-02-17).

Facts: Husband filed a petition for divorce. The trial court entered a scheduling order setting a date for trial. Neither Husband nor his attorney received the scheduling order. Husband did not appear at trial, and Wife obtained a divorce decree. During the hearing on Husband's subsequent petition for bill of review, Husband's attorney testified that immediately after receiving notice of the divorce decree, he contacted appellate counsel. No evidence was offered as to the date Husband's attorney received notice or when he contacted the appellate counsel. The trial court denied Husband's petition for bill of review, and he appealed.

Holding: Affirmed

Opinion: Presuming Husband did not receive adequate notice of the final trial, a bill-of-review petitioner must still show that he diligently pursued all available adequate legal remedies. Here, Husband claimed that he did not receive notice of the default judgment until after the trial court's plenary power expired. However, Husband put on no evidence of what date he or his attorney actually received the default judgment, so the court could not determine whether it was received before or after the trial court's plenary power expired.

TRIAL COURT ERRED IN ORDERING APPLICANT TO PAY COURT COSTS DESPITE VALID UNSWORN DECLARATION OF INDIGENCY.

¶17-2-32. *In re N.L.P.*, No. 06-17-00010-CV, 2017 WL 490701 (Tex. App.—Texarkana 2017, no pet. h.) (mem. op.) (02-07-17).

Facts: Applicant filed an Unsworn Declaration of Indigency. At a hearing on Applicant's motion for temporary orders, the trial court determined Applicant was not indigent and was able to pay court costs. The trial court denied Applicant's motion to reconsider, so Applicant appealed.

Holding: Reversed and Remanded

Opinion: Tex. R. Civ. P. 145 was rewritten, effective September 1, 2016 and provides that "[a] party who files a Statement of Inability to Afford Payment of Court Costs cannot be required to pay costs except by order of the court as provided by this rule." The Rule requires the affidavit be signed before a notary and be made under penalty of perjury. The clerk may not refuse a filing for any defect beyond these two requirements. A court may request a correction or clarification if the statement contains a material defect or omission.

Here, Applicant filed an affidavit that was signed before a notary and made under penalty of perjury. The trial court did not request any corrections or clarification. No evidence before the court prior to the trial court sua sponte holding a hearing on the issue indicated that Applicant was able to pay costs. Applicant was not provided 10 days' notice prior to the hearing and appeared to be caught completely off guard. Applicant testified that he had no employment but was searching for work. He had recently closed his business and had $1000 to live on. His monthly expenses included a car payment, insurance payment, gasoline, and his mother's medications. No evidence was offered to dispute Applicant's credibility.

FATHER LACKED STANDING TO SEEK TO VACATE OR RESCIND PROTECTIVE ORDER GRANTED UNDER THE TEXAS CODE OF CRIMINAL PROCEDURE BECAUSE HE WAS NOT THE VICTIM.

¶17-2-33. ***Molinar v. S.M.***, ___ S.W.3d ___, No. 08-15-00083-CV, 2017 WL 511888 (Tex. App.—El Paso 2017, no pet. h.) (02-08-17).

Facts: While Father was being criminally investigated for charges of sexual assault against his minor Child, an agreed protective order was entered against him to protect the child. The order recited that its application was based on both the Texas Family Code and Article 7A of the Code of Criminal Procedure. Subsequently, Father was not convicted of any crime. Seventeen months later, Father filed a motion to vacate the agreed protective order, alleging there was no threat to the Child. His motion was denied. Nineteen months after that, he filed a second motion to vacate, which was also denied. Father appealed that denial.

Holding: Affirmed

Opinion: A protective order entered under Article 7A of the Code of Criminal Procedure may be rescinded only upon the request of the victim. The agreed order provided relief under both the Family Code and the Code of Criminal Procedure. Father did not have standing to file a motion to vacate or rescind the agreed protective order.

TEXAS FAMILY CODE DID NOT PROHIBIT APPELLATE COURT FROM ORDERING MOTHER TO PAY COSTS OF FATHER'S APPEAL OF CHILD-SUPPORT MODIFICATION ORDER TO WHICH THE OAG WAS A PARTY.

¶17-2-34. ***In re C.Y.K.S.,*** ___ S.W.3d ___, No. 14-15-00554-CV, 2017 WL 536644 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (supp. op.) (02-09-17).

Facts: After a child-support modification proceeding involving the Attorney General's Office, Father appealed. After granting Father's appeal, the appellate court ordered Mother to pay all costs incurred in the appeal. Mother filed a motion for rehearing, raising the sole issue that the order for appellate costs violated the Texas Family Code.

Holding: Rehearing Denied

Opinion: Tex. Fam. Code § 231.211(a) prohibits assessment of attorney's fees at the conclusion of the Title IV-D case against a party to whom a Title IV-D agency has provided services. Under the plain language of the statute, the conclusion would be the end of the trial court proceedings. "To apply [the section] to an appeal would mean that there were two conclusions—an interpretation that would be contrary to the plain meaning of 'at the conclusion.'" While three other courts of appeals have reached the opposite conclusion, the 14th District "respectfully decline[d] to follow" their reasoning.

Tex. Fam. Code § 231.204, though worded similarly to § 231.211, does not include any explicit language referencing a party to who a Title IV-D agency has provided services, so that section likewise did not prohibit the appellate court from assessing costs against Mother.

EVIDENCE CONTROVERTED FATHER'S CLAIMS AGAINST MOTHER FOR BREACH OF CONTRACT AND DEFAMATION.

¶17-2-35. *In re J.M.*, No. 05-15-01161-CV, 2017 WL 563341 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (02-13-17).

Facts: Mother and Father signed an agreed SAPCR order providing in part that neither party would initiate a modification suit absent an immediate and present danger to the Children's well-being. One year later, Mother initiated a modification suit. Father filed civil suits for breach of contract, intrusion on seclusion, defamation, threat of bodily injury, and intentional infliction of emotional distress. The two cases were consolidated, and the trial court granted the modification and denied Father's breach of contract and defamation claims. Father appealed the denial of his breach of contract and defamation claims, asserting that he established all the elements of each claim, and the judgment was not supported by the evidence.

Holding: Affirmed

Opinion: The trial court heard testimony and exhibits were entered into evidence that pertained to Mother's complaint of an immediate and present danger to the Children. For example, the social study contained a discussion of physical aggression between Father and his wife, and the court-ordered psychologist testified that after meeting with one of the Children, she became concerned that Father was sexually abusing that Child. Accordingly, the trial court did not err in finding Mother did not breach the Agreed SAPCR Order by initiating suit within three years.

Father's defamation claim was based on an allegation by Mother to the ad litem attorney that Mother was concerned that Father was sexually abusing his niece. Although TDFPS found no evidence of abuse, to prove defamation, Father was required to show that Mother knew or should have known that the allegation of sexual abuse by Father against his niece was false. The TDFPS supervisor testified that Mother had expressed a "genuine concern" about the safety of the niece and was "sincerely worried" about her. Additionally, the Tex. Fam. Code requires that "[a] person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect" shall immediately report the allegation to the proper authorities.

JUDGMENT NUNC PRO TUNC APPROPRIATE TO REMOVE STIPULATION ON GEOGRAPHICAL RESTRICTION FROM WRITTEN ORDER THAT WAS NOT INCLUDED IN TRIAL COURT'S ORAL RENDITION.

¶17-2-36. ***In re A.M.R.***, ___ S.W.3d ___, No. 08-16-00083-CV, 2017 WL 769889 (Tex. App.—El Paso 2017, no pet. h.) (02-28-17).

Facts: Mother had the exclusive right to designate the Child's primary residence without geographical restriction. Upon announcing her intention to move to Virginia, Father filed a motion to modify, seeking a geographical restriction on the Child's residence. The trial court granted Father's motion. Subsequently, the trial court signed an order imposing the geographical restriction, which included a provision that the restriction would be lifted if Father did not reside in the county to which the Child's residence was restricted. Father filed a motion for judgment nunc pro tunc to have the stipulation on his residence removed. The trial court entered the judgment nunc pro tunc, and Mother appealed, arguing that the subsequent judgment corrected a judicial error, rather than a clerical one.

Holding: Affirmed

Opinion: Neither party disputed, and the record showed, that when the trial court orally rendered its ruling, it granted Father's motion to include a geographic restriction without any stipulations.

In a footnote, the appellate court noted that the trial court was well-aware that the Father lived in New Mexico, and the stipulation on the residency requirement would make Father's petition futile.