

# SECTION REPORT FAMILY LAW

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## MESSAGE FROM THE CHAIR

This year marks the **50<sup>th</sup> Anniversary** of the founding of the Section, so a gala celebration to commemorate this event is being planned for the **Annual Advanced Family Law Course in San Antonio August 9-13**. Interviews of many early pioneers in Texas family law will be shown at the Course. With nearly 5000 members, the Section is among the largest sections in the Bar, and is at the forefront of services and benefits to its members. To help celebrate the sections many accomplishments, the report includes the curriculum for the first Advanced Family Law Seminar and the history of the formation of the Texas Family Code. **The Legislative Committee** of the Section worked diligently with members of the **Texas Family Law Foundation** to advance our legislation and keep poor legislation affecting family law from becoming law. A summary of the legislative initiatives is in this Section Report. The Section Report also has direct links to statutes and case law made possible by Thompson-West. Members of the Section will notice that the look of the Section Report has been updated, and our Web Site at [www.sbotfam.org](http://www.sbotfam.org) has been revamped. Also available on line are the many publications produced by the Section, including the Family Law Practice Manual, new videos for client preparation before a temporary hearing and before a deposition, attorney checklists, and client handbooks to be distributed to new and prospective clients. **The Pro Bono Committee** continues to provide free high-quality CLE at no cost as a recruiting tool for Legal Service Providers across the state, especially in underserved locales. All in all, this has been a most productive year for the Section.

-----**Charlie Hodges, Chair**

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## *EDITOR'S NOTE*

I wish to thank my outgoing law clerk, Quinn Martindale, for his hard work this past year summarizing the many cases that have come out this year. I also wish to welcome aboard Steven Morris, a third-year law student at Texas Wesleyan School of Law. In this issue we are very fortunate to have Professor Joseph McKnight's article setting forth the creation of the Texas Family Code. Also included in the course curriculum for what was the first "Advanced Family Law" course held in March 1967. The registration fee was \$15.00, which included the reception. Lunch was available for an additional \$2.50 for the 3-day course. I have also added a new feature – Therapy on the Go, which provides good advice with a sense of humor.

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## *IN THE LAW REVIEWS AND LEGAL PUBLICATIONS*

### TEXAS ARTICLES

- Jodi L. Bender, [\*Snowflakes in Texas? Enacting Legislation to Allow for Embryo Adoption\*](#), 16 Tex. Wesleyan L. Rev. 413 (2010).
- Kellie Brady, [\*Some People Just Shouldn't Have Kids!: Probation Conditions Limiting the Fundamental Right to Procreate and How Texas Courts Should Handle the Issue\*](#), 16 Tex. Wesleyan L. Rev. 225 (2010).
- Sandra Leigh King, [\*Failure to Launch: How the Delinquent Politics and Policies of the Texas Legislature Have Failed to Remedy Texas's Antiquated Judicial System and How Voters Have Accepted the Status Quo for Far Too Long\*](#), 16 Tex. Wesleyan L. Rev. 369 (2010).

Benjamin Major, *Cryopreserved Sperm and the Shortcomings of Probate Law*, 1 Est. Plan. & Community Prop. L.J. 477 (2009).

Courtney Wheeler, *Who's Your Daddy? Exhumation to Establish Paternity Must be Reigned in by a Uniform Procedure*, 2 Est. Plan. & Community Prop. L.J. 249 (2009).

## LEAD ARTICLES

[Linda D. Elrod, \*A Review of the Year in Family Law: Looking at Interjurisdictional Recognition\*, 43 Fam. L.Q. 923 \(2010\).](#)

[Nancy Ver Steegh, \*Annual Survey of Periodical Literature\*, 43 Fam. L.Q. 923 \(2010\).](#)

Rebecca Probert, [Common Misunderstandings: A Review of Common Law Marriage: A Legal Institution for Cohabitation by Göran Lind](#), 43 FAM. L.Q. 587 (2009) (book review).

## ASK THE EDITOR

**Dear Editor:** My client lives in Dallas County and his wife lives in Collin County. His wife filed for divorce first in Collin County without my client's knowledge. We filed for divorce in Dallas County this week and served the wife two days later. The next day, she served him with the Collin County divorce even though she has known where my client lived ever since he moved out six months ago. Wife has now filed a plea in abatement in the Dallas County suit claiming that Collin County has dominant jurisdiction. Is there any way that we can keep the divorce in Dallas County?  
*Inquiring in Irving*

**Dear Inquiring in Irving:** Yes. There are three exceptions to the general rule that the court in which a suit is first filed acquires dominant jurisdiction: (1) conduct by a party that estops him from asserting prior active jurisdiction; (2) lack of persons to be joined if feasible, or the power to bring them before the court; and (3) lack of intent to prosecute the first lawsuit. [Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 248 \(Tex. 1988\)](#). "Bringing suit" involves both filing a petition within the applicable time period and exercising due diligence in serving the defendant with citation. See [Gant v. DeLeon, 786 S.W.2d 259, 260 \(Tex. 1990\)](#). A plea in abatement might properly be overruled where the party asserting it had delayed unreasonably in procuring a citation. [Curtis, 511 S.W.2d at 267](#). The existence of due diligence is usually a fact question determined by a two-prong test:

1. whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances; and
2. whether the plaintiff acted diligently up until the time the defendant was served.

[Rodriguez v. Tinsman & Houser, Inc., 13 S.W.3d 47, 49 \(Tex. App.—San Antonio 1999, pet. denied\)](#). A lack of diligence can be found as a matter of law only if:

1. no valid excuse for lack of service is offered; or
2. the lapse of time and the plaintiff's acts or inaction conclusively negate diligence.

*Rodriquez*, [13 S.W.2d at 49](#). *G.L.S.*

If you have a question, please submit via email to the Editor at [georganna@simpsonmartin.com](mailto:georganna@simpsonmartin.com).

## ***THERAPY TO GO***

Quick and useful advice from a real, live, licensed professional counselor and licensed marriage and family therapist—Melanie Wells, LPT, LMFT

*Dear T-T-G,*

*Can you suggest any strategies for dealing with an alcoholic client? I find that they can be abusive, dishonest and unpredictable – very difficult to deal with. Thanks for any advice you can give - Dan the Dashing Divorce Attorney*

Well, Dan, I'm sure you've heard the old joke: "How do you know a lawyer is lying? His lips are moving." It's a tacky joke of course, and completely inaccurate and unfair as a description of attorneys. Obviously. But where addicts are concerned, it is generally considered to be true. So – rule number one when you're dealing with an addict who is not in recovery: don't believe a single word they say. This may sound harsh, but it will provide a bright shining beacon of guidance for both you and your client.

It is a very good bet that the addict will become increasingly unstable as the emotional and financial stakes rise in a divorce. This is NORMAL behavior for an addict. It is to be expected and prepared for. That said, it is important that you keep your client in line, especially if he or she has children or if there are any other delicate interests at stake (a business partnership, for example).

Part of your job description, then, becomes to minimize collateral damage by controlling – or rather insisting that the addict control – the abuse of the substance or behavior in question. I personally refuse to work with addicts who are not willing to abstain from their addiction and take part in a recovery program. At minimum, three 12-step meetings a week should be required. Counseling with a licensed addictions specialist (LCDC) is strongly recommended. And get your client into inpatient therapy if needed. Yesterday.

Active substance abuse is like an IED. It can explode without warning under the slightest amount of pressure. Bring in the pros, or the IED will take your arm off and destroy the lives of everyone within the blast range. Not worth the risk. Even in a blast suit.

*Melanie Wells saw her first therapy client when Ronald Reagan was President. She holds two masters degrees and is a licensed psychotherapist and licensed marriage and family therapist, as well as an LPC supervisor and LMFT supervisor. She is a clinical member of AAMFT and has taught counseling at the graduate level at Our Lady of the Lake University and Dallas Theological Seminary. Melanie is the founder and director of The LifeWorks Group, P.A., a collaborative community of psychotherapists with offices in Dallas and Ft. Worth ([www.wefixbrains.com](http://www.wefixbrains.com)). Her clinical specialties are family therapy and last-ditch marital therapy. You can contact her at [mwells@wefixbrains.com](mailto:mwells@wefixbrains.com)*

## *IN BRIEF*

### Family Law From Around the Nation

by  
Jimmy L. Verner, Jr.

**Characterization:** Whether premarital stock options that vest during marriage are marital property depends on whether they are “generated by the marriage” or accumulated during marriage, said the Georgia Supreme Court. [\*Newman v. Patton\*, 286 Ga. 805, 692 S.E.2d 322 \(2010\)](#). The Illinois Supreme Court held that vacation and sick days are not marital property when a spouse has no present right to be paid for them absent retirement or termination of employment. [\*In re: Marriage of Abrell\*, 236 Ill.2d 249, 923 N.E.2d 791 \(2010\)](#). A Wisconsin appellate court held that a pension in pay status must be divided between the spouses rather than awarded to one spouse who would then pay a portion of the pension to the other spouse. [\*In re: Marriage of Kelly\*, 2010 WL 814030 \(WI App. 2010\)](#). In a federal garnishment proceeding against a husband, the Fifth Circuit refused to give effect to an agreement that purported to partition over \$2 million in assets to the wife as her separate property. [\*United States v. Loftis\*, \\_\\_\\_ F.3d \\_\\_\\_, 2010 WL 1956257 \(5<sup>th</sup> Cir. 2010\)](#).

**Child support:** A California appellate court held that imputation of income to a parent in the CalWORKS program would be contrary to public policy because CalWORKS is a “welfare-to-work” program. [\*Mendoza v. Ramos\*, 182 Cal. App.4th 680, 105 Cal. Rptr.3d 853 \(2010\)](#). The Kentucky Supreme Court ruled that a child’s receipt of Social Security disability benefits paid because of the custodial parent’s disability does not entitle the noncustodial parent to a child-support credit. [\*Artrip v. Noe\*, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1636678 \(Ky. 2010\)](#). Kansas appellate court upheld a trial court’s order that a husband obtain life insurance at the wife’s expense to secure child support and maintenance payments to her. [\*In re: Marriage of Hall\*, 225 P.3d 764 \(Kan. 2010\)](#).

**Division:** The New Hampshire Supreme Court upheld a lump-sum award to a wife based on a QDRO that calculated the lump sum as 50% of the retirement plan’s value even though the plan’s value had since declined. [\*In the Matter of Taber-McCarthy\*, 993 A.2d 240 \(N.H. 2010\)](#). A Louisiana court did not err when it granted wife additional community assets to compensate her for Social Security benefits that would have been community property absent federal preemption. [\*Bhati v. Bhati\*, 32 So.3d 1107 \(La. App. 2010\)](#). A former husband failed in his attempt to convey real estate in which he held only a life estate granted to him under a divorce decree because the divorce decree, although not timely recorded, nevertheless had the same force and effect as a deed. [\*Price v. Price\*, 286 Ga. 753, \\_\\_\\_ S.E.2d \\_\\_\\_, 2010 WL 1005023 \(2010\)](#).

**Hague Convention:** In *Barzilay II* (see *Section Report* vol. 2008-3 (Fall)), the Eighth Circuit agreed with the district court that the habitual residence of Israeli ex-pats’ Missouri-born children lay in the United States despite the parties’ stipulation in an Israeli court that the children’s habitual residence lay in Israel. [\*Barzilay v. Barzilay\*, 600 F.3d 912 \(8<sup>th</sup> Cir. 2010\)](#). A California appellate court affirmed a district court’s decision not to return a child to Chile because the eight-year-old child did not want to return and met the Convention’s standard that he “had attained an age and degree of maturity at which it was appropriate to take account of his views.” [\*Escobar v. Flores\*, 183 Cal. App. 4th 737 \(2010\)](#).

**Stepfathers:** Concurring with the lower court that exceptional circumstances existed, the North Dakota Supreme Court affirmed a grant of visitation and other rights to a stepfather who raised the child as his own after the mother, who was pregnant with the child, moved in with the stepfather. [\*McAllister v. McAllister\*, 2010 N.D. 40, 779 N.W.2d 652 \(2010\)](#). The Washington Supreme Court declined to extend de facto parent status, which it previously applied to afford parental rights to a non-parent after a same-sex breakup, to a stepfather when the child was born of a heterosexual marriage such that the child already had “two fit parents.” [\*In the Matter of Parentage of M.F.\*, 168 Wash. 2d 528, 228 P.3d 1270 \(2010\)](#). A California appellate court refused to credit a father’s contention that he could not be compelled to pay child support to a child’s stepfather, after

the death of the child's mother, because the father remained obligated to support the child as one of the child's custodial parents. *In re: Marriage of Schopfer*, Cal.Rptr.3d, 2010 WL1971609 (2010).

**UCCJEA:** The Maine Supreme Court held that even though a child had not lived in Maine long enough to establish home-state status, the Maine trial court properly exercised its jurisdiction when the other state's court had ceded jurisdiction to Maine, the mother and child came to Maine to escape domestic violence, and the mother's relatives in Maine constituted significant contacts with Maine. *Rainbow v. Ransom*, 2010 ME 22, 990 A.2d 535 (2010). A California court affirmed a trial court's determination that Iowa was a child's home state when, during the pendency of the California appeal, the parties agreed in an Iowa court that the child's home state was Iowa, but then one of the parties argued in California that the Iowa agreement was not enforceable. *S.M. v. E.P.*, Cal.Rptr.3d, 2010 WL 2044670 (2010).

**Valuation:** A New York appellate court reversed a trial court's medical practice valuation for "double counting." Part of the medical practice valuation relied upon the doctor's projected future excess earnings. This approach necessarily "converted a certain amount of the defendant's projected future income stream into an asset." The "double counting" occurred when the trial court also included that future income stream in the doctor's total income for purposes of calculating maintenance. *Rodriguez v. Rodriguez*, 70 A.D.3d 799, 894 N.Y.S.2d 147 (N.Y. App. 2010). A Florida trial court erred when it valued a husband's 51% share in a closely-held corporation at \$1.53 million, apparently based on an unsolicited \$3 million offer to purchase all stock in the corporation by a company defunct at the time of trial, when the minority shareholder owned the technology utilized by the corporation, the corporation grossed \$300,000 to \$400,000 per annum, the corporation never had shown a profit, the husband's expert testified that the corporation had no marketable value, and the \$1.53 million amounted to 93% of the husband's equitable distribution in the divorce. *Nunez v. Nunez*, 29 So. 3d 1191 (Fla. App. 2010).

## COLUMNS

### ***PSYCHOLOGICAL TESTS AND CATCHING LIES***

**by John A. Zervopoulos, Ph.D., J.D., ABPP<sup>1</sup>**

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

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

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

<sup>1</sup> John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs PSYCHOLOGYLAW PARTNERS, a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. He also authored an ABA-published book, *Confronting Mental Health Evidence: A Practical Guide to Reliability and Experts in Family Law*. Dr. Zervopoulos is online at [www.psychologylawpartners.com](http://www.psychologylawpartners.com) and can be contacted at 972-458-8007 or at [jzerv@psychologylawpartners.com](mailto:jzerv@psychologylawpartners.com).

Evaluators often are expected to sort through dueling allegations and then use psychological testing to tell which parent is telling the truth—sometimes, both are telling the truth from their own perspectives. But psychologists do not have fool-proof abilities to discern whether people are telling the truth or deceptively shading the truth, if not outright lying. Yet courts appoint psychologists to provide reliable, trustworthy information to help determine children’s best interests in possession and access cases

Psychologists must base that information on reliable methodology. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). In child custody evaluations, that methodology includes interviews with the parents and children, psychological testing, and collateral contacts—i.e. record reviews and interviews with significant people outside the family. Lawyers understand the importance of family member interviews, records reviews, and interviews with significant people outside the family—they include such data gathering in their own case preparation. It is the psychological testing, such as the MMPI-2 and its validity scales, that lawyers sometimes misunderstand, believing that tests can objectively and statistically identify whether the examinee is “telling the truth.”

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

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

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

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

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

Reliable test interpretation cannot begin without first addressing the response style issue. Answers to these questions, then, will give Ms. Smith a richer understanding into how the expert interpreted test results and how those results informed the expert opinion.

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## ***ALIMONY IN A TEXAS DIVORCE*** **by Christy Adamcik Gammill, CDFA<sup>2</sup>**

Alimony is payment to a spouse or former spouse under a divorce decree or separation instrument. Internal Revenue Service, “Divorced or Separated Individuals”, Publication 504, at 13 (2009). In the state of Texas there are two types of Alimony, Court Ordered and Contractual. The Court Ordered instrument is just as it says, ordered by a court, however, Contractual Alimony is more flexible and allows for creativity in creating options to provide a stream of income for an ex-spouse for a period of time.

In order to qualify for Court Ordered Alimony in Texas one of the four requirements must be met:

- 1) Must have been married a minimum of ten (10) years and requesting spouse lacks sufficient property to provide for minimal needs and is the custodian of a child who requires substantial care and personal supervision making it necessary for that spouse to stay home with the child;
- 2) Must have been married a minimum of ten (10) years and requesting spouse lacks sufficient property to provide for minimal needs and that spouse’s earning capabilities do not provide for that spouse’s minimal needs;
- 3) The paying spouse committed a felony within 2 years of filing for divorce; or
- 4) Must have been married a minimum of ten (10) years and requesting spouse is unable to support him/herself through appropriate employment because of an incapacitating physical or mental disability.

If Spousal Maintenance is ordered in any of the first three scenarios the maximum period of time alimony will be required is three (3) years and the amount cannot exceed 20% of the paying party’s gross income or \$2,500 per month, whichever is less.

One reason that Court Ordered Alimony is more desirable than Contractual Alimony is because of the ability to enforce the order. When it is statutory maintenance and a spouse fails to pay support he is considered to be in contempt of court. “A contempt action cannot be used to enforce the payment of Contractual Alimony – even if it was ordered by the court.” Diana S. Friedman, “Child Support and Spousal Support”, <http://www.dianafriedman.com>.

Although contempt action cannot be used for enforcement, Contractual Alimony can be secured through other means in the event of non-payment especially if there is property to secure the payments such as securities, a business, or Promissory Note. In the event of death or disability, the proper use of insurance policies is essential to protect the recipient spouse’s future payments.

Contractual Alimony may be used in a situation where a divorcing couple does not necessarily have a lot of liquidity in the estate or it is not a good time to sale assets but there is property that needs to be divided and the lesser earning spouse is in a lower tax bracket or needs known income. In this instance it may make sense to create a payment structure over a period of years to equalize the estate and make payments over time from the higher wage earning spouse to the lesser or non-wage earning spouse. One advantage to paying a spouse over time versus a lump sum is that is tax deductible by the payer spouse and must be included in income to the recipient spouse.

Because the IRS may look at Spousal Maintenance payments that end within certain contingencies as a potentially faux property settlement or child support it is important to be aware of the rules applicable when structuring any type of Contractual Alimony payments. The Alimony payments may be considered child support if they qualify for a Contingency and are not clearly identified otherwise.

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IRS Publication 504 – 2009 defines a Contingency relating to your child if it depends on any event relating to the child including becoming employed, dying, leaving the household, leaving school, marrying or reaching a specified age or income level (16). In addition to a contingent event, it is considered by the IRS to be clearly associated with the happening of a contingency if a) payments are reduced not more than 6 months before or after the date the child will reach Age 18, 21 or local age of majority or b) the payments are reduced two or more times that occur within one year before or after a different one of your children reaches a certain age from 18 to 24.

- Furthermore, it is important to structure the amounts and time period so that the payer spouse does not fall under the category of recapture looking as if the alimony payments are actually a faux property settlement. If support payments are reduced or terminated during the first 3 years they may be subject to Recapture rules which means the payer will have to include in income payments that would have otherwise been deducted. Payments are subject to Recapture if there is a reduction of more than \$15,000 per year between the second and third year or if the alimony paid in year 1 is significantly greater than amounts paid in subsequent years 2 or 3. IRS Publication 504, at 18 (2009)
- Exceptions to this are 1) Payments made under a temporary support order; 2) Payments required over a period of at least 3 calendar years that vary because they are a fixed part of your income from a business or property, or from compensation for employment or self-employment; or 3) Payments that decrease because of the death of either spouse or the remarriage of the spouse receiving the payments before the end of the third year.

Alimony has its appropriate and often mutually advantageous place in divorce settlements that can make it a win-win proposition for both parties to look at creative option building strategies and determine if an alimony package makes sense. Whether it is to have a spouse take a lesser percentage of the estate up front because they lack the ability to manage funds and a future stream of payments for a period of time provides more financial security, it is important to know how to structure the Alimony package within the rules and guidelines permitted. Finally, before the decree is finalized in a divorce it is imperative that the attorney and team of tax and financial professionals properly secure the future stream of payments to the extent possible to protect the recipient spouse's interest as well as understand the proper tax rules to protect the paying spouse's tax deductibility of Court Ordered or Contractual Alimony.

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## **Texas Advanced Paralegal Seminar (TAPS) 2010** **September 29-October 1, 2010 - Austin, TX**

The Paralegal Division of the State Bar of Texas is sponsoring a three day CLE seminar in Austin, TX on September 29 - October 1, 2010. This event is attended by over 250 paralegals from across the State of Texas each year. The seminar features a total of 65 speakers that present various areas of law topics and social networking events for paralegals. This year, the attendees' luncheon will feature, as the keynote speaker, Howard T. Prince II, Ph.D., Director of the Center for Ethical Leadership, Lyndon B. Johnson School of Public Affairs (LBJ School) at the University of Texas at Austin. Dr. Prince will present *The Importance of Leadership In Your Profession and Community* during the Friday attendee luncheon.

This CLE seminar features several prominent Austin family law speakers and topics. The seminar will cover such topics as *Changes in SAPCR Issues and Trends for the Future* presented by Thomas Ausley and Kelly Ausley-Flores of Austin; *The Ten Rules of Handling Family Law Cases* by Claude Ducloux of Austin; *Possession with Bad Fact Parents: Problematic Possession Orders* by David Kazen of Austin; and *Insulation & Facilitation – The Paralegal and the Client* by Martin Boozer of Austin. There are a total of 13 family law CLE hours that are available by attending this event.

The Family Law Section of the State Bar of Texas is one of three sponsors of the Grand Door Prize for this event and will also host an exhibit booth at this seminar. The Paralegal Division is extremely grateful for all of the Texas family lawyers support.

Serving on the TAPS 2010 Planning Committee are two family law paralegals: Jennifer Barnes of Houston who works for Peltier, Bosker & Griffin, P.C. and Shannon Watts, TBLS Board Certified Paralegal in Family Law, from Longview who works for the Law Offices of R. L. Whitehead, Jr., P.C.

*Any interested paralegal may attend this event. For more information on TAPS please visit [www.txpd.org/taps](http://www.txpd.org/taps). Updates will be made as new information becomes available. A seminar brochure will be included in the Summer2010 Texas Paralegal Journal.*

## **ARTICLES**

### **THE FIRST ADVANCED FAMILY LAW COURSE**

Below is the curriculum for the first Advanced Family Law Course held in 1967. The registration fee was \$15.00, which included the reception. Lunch was available for an additional \$2.50 for the 3-day course.

#### **INSTITUTE ON THE FAMILY CODE**

**March 16-18 1967**

**Waco, Texas**

Thursday, March 16

#### Morning Session

The Family Code and Religious Beliefs

- 9:00 The Catholic View  
Callan Graham, Executive Director, Texas Catholic Conference, Austin, Texas
- 9:50 The Jewish View  
Nathaniel Delikow, Attorney, New York City
- 10:40 Intermission  
Coffee, Lounge
- 11:15 The Protestant View  
Dr. John Davidson, Professor of Religion, Baylor University, Waco, Texas
- 12:15 Luncheon Intermission

#### Afternoon Session

- 2:00 Effective Use of Social Workers in Family Relations  
Charles Laughton, Ph.D. Associate Director, University of Texas School of Social Work
- 3:00 Intermission
- 3:15 A Family Counselor Looks at Family Law  
Edward I. Rydman, Ph.D., Executive Director and Marriage Counselor, Planned Parenthood of Dallas, Dallas, Texas
- 4:00 Question and Answer Period with afternoon lecturers participating

Friday, March 17Morning Session

- 9:30 Family Law Problems of Law Enforcement Officials  
Wayland D. Pilcher, Legal Assistant, Police Department, Corpus Christi, Texas
- 10:30 Intermission  
Coffee, Lounge
- 11:00 The Psychology of Family Relations and Its Recognition in Family Law  
Maurice Korman, Ph.D., Professor and Chairman, Division of Psychology, The University of Texas Southwestern Medical School, Dallas, Texas
- 12:00 Lunch Intermission

Afternoon Session

- 2:00 Psychiatric Evaluation: Present and Prospective Use in Adjustment of Family Law Problems  
Ann Hughes, M.D., Professor of Psychiatry, the University of Texas Southwestern Medical School, Dallas, Texas
- 3:00 Intermission
- 3:30 Panel Discussion with Dr. Korman, Dr. Hughes and Fred S. Cohen, Professor of Law, University of Texas School of Law, Austin, Texas; Presiding, Dean Charles O. Galvin, Southern Methodist University of Law, Dallas, Texas
- 5:30 Reception for participants and registrants, Alico Center Inn

Saturday, March 18

- 9:00 Illegitimacy and Family Law—A Proposal for New Treatment  
Harry J. Krause, Professor of Law, University of Illinois College of Law, Champaign, Illinois
- 9:45 Treatment of Child Custody Problems in the Family Code  
Robert J. Levy, Professor of Law, University of Minnesota School of Law, Minneapolis, Minnesota
- 10:30 Intermission  
Coffee, Lounge
- 11:00 The Family Code and the Indigent  
Sam D. Johnson, Executive Director, Houston Legal Foundation, Houston, Texas
- 11:50 Closing Remarks  
Dean Angus S. McSwain

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***MAKING A FAMILY CODE***By Professor Joseph W. McKnight<sup>1</sup>***1. Beginnings***

A small group of four or five men and women are enough for a start—four or five people of good will and a realization that job needs to be done. The understanding of the first phase should not be too grand in scope, for any effort toward law reform may be anticipated as a slow process. Hence the task selected should not overstrain the potential staying-power of the core-participants. But law is not for the short-winded.

This small group will develop its own leadership for the various objectives attempted. Individual commitment is the most that can be asked of each to the common goal. Experience in the field of law sought to be

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<sup>1</sup> Professor McKnight is the Larry and Jane Harlan Faculty Fellow and a Professor of Law at SMU Dedman School of Law. More importantly, he was one of the founding fathers of the Texas Family Law Code.

reformed is vital. But the experience of each individual can and should be varied: office-oriented, trial centered or academic. Our experience was that judicial participation can be usefully postponed to a later stage. The academic can give that attention to detail that would otherwise be brought to bear by a member of the judiciary in the early planning and drafting phase. At least one of this core-group (and preferably several) should have a working knowledge of related legal fields: civil procedure, succession, probate, conveyancing, torts and crimes affecting juveniles. This is virtually inevitable but nonetheless vital.

Some sort of clearing-house or base should be established. In our initial phase the base was established in a law school. In our case this did not occur by design. Those of us initially involved had no inkling of the shape of our ultimate product. We had simply got together to achieve the relatively limited goal of rationalizing marital property law. Given the personalities of the participants, the objective in large measure generated its own momentum.

The substantive starting place of the Texas Family Code may seem odd. It was matrimonial property law, a subject that is far too limited in most American jurisdictions even to constitute a recognizable *subject area*. But in our case this proved to be a useful point of departure. The existing statutory rules dealt with the principles most in need of reform—a need long recognized. The anachronistic rules of the system were also threatened by the consequences of proposed enactment of an Equal Rights Amendment to the state constitution. Many members of the state legislature were less than enthusiastic about the proposed amendment. But they feared the political consequences of opposition without demonstrable good cause.

One of the arguments put forward in favor of the amendment was that some of the rules of the matrimonial property system were discriminatory to married women. It was assumed, in turn, that enactment of the amendment would cure these discriminations. But property lawyers realized that if that result should occur, the state of the law could be foreseen as well-nigh chaotic for those who like to predict certainty in property transactions.

A principal counter-argument to the passage of the amendment was that all legitimate aims of the amendment could be met by statutory enactment. But since no one had come forward with a plan for statutory reform, the argument had a distinctly hollow ring.

With its concern for the stability of property transaction, one of the principal opponents of the constitutional amendment was the organized bar. The issue had been put to a state-wide referendum of the law in 1964 and passage of the amendment had been opposed by a vote of 2 to 1. Bar leaders regarded the outcome of the referendum as a mandate from bar members to oppose the proposed amendment. But to justify their stand that all legitimate objectives of the proposal could be satisfied by legislative reform, they were casting about for some statutory proposal to meet their needs.

A really forward-looking bar committee or section might have created this situation as the proper environment to nurture a code reform. A bar group attentive to the needs of law reform should have seen this as an opportunity to set up a project for drafting reform legislation. In our case, however, the Family Law Section of our bar was newly organized and not yet prepared to think in terms of such a bold project. The circumstances of the situation were not quite ready for that result, but two years later they were.

It was fortuitous – as it later turned out – that a couple of academics had begun to compose a revised matrimonial property code. Both had seen an earlier reform effort of other academics go down to defeat seven years earlier. As a by-product of that effort and the constant agitation for women's rights that had been going on for over a decade, remedial legislation had been passed a year previously to remove some of the disabilities of coverture. These two self-appointed draftsmen had long suffered the frustrations of trying to make an orderly presentation of disorderly legal materials. Both had some experience in drafting legislation and as consultants to draftsmen of the recent married women's reform legislation and an earlier divorce reform measure. Both hoped that legislative sponsors could be found for the proposed reforms they might draft, and

past experience indicated that there were members of both houses of the legislature who would be favorably inclined to sponsor such legislation.

The task they set themselves was more formidable than either supposed at the time. But the number of statutory articles they sought to revise were not very numerous or terribly detailed in their provisions – just inconsistent and jumbled. They proposed to revise eighteen articles then stated in just under two thousand words. The provisions were, however, the subject matter of judicial glosses vigorously produced for well over a century.

The subject matter under consideration had been subjected to a good deal of scholarly probing as well as judicial glossing. It was also the subject of first-class teaching materials from which many capable practitioners had been instructed. The task of reformers of any legal topic is greatly eased by a long-sustained analysis of the subject. It may be, therefore, assumed that the academicians specializing in the subject are well-versed in this literature and that practitioners have made themselves familiar with some of it as the exigencies of practice have demanded. An accumulation of scholarly literature also relieves a proposed project for law reform of its study phase. There is no need to explore and probe the nuances of the subject matter if that has already been done and findings of explorers are readily available.

The two self-appointed academicians were also relieving the reform project of another preliminary phase – that of preparing a first draft of projected legislation and solving some of the problems of organization and nomenclature that can be very time consuming in the early phases of statutory drafting. Our experience indicates that these preliminary phases of drafting can be usefully turned over to two or three confidential experts. One expert with an assistant may very well suffice, but somehow the projected shape of any reform should be formulated early. Problems of derail can be solved later.

The academic draftsmen brought over ten years teaching experience to bear on the subject they were remodeling. After three months their preliminary draft had begun to look like a finished work though it lacked commentary, and a number of the articles were unfinished. It seemed finished enough, though, that its existence might be discussed around the state capitol in the hope that legislative sponsors might be found for an introductory run in the legislative session then in progress. Past experience had indicated that a trial run in one regular legislative session tends to prepare the way for enactment of a reform measure at the next regular biennial session.

In Texas the enactment of reform measures is a two or three-step legislative process anyway. Consideration of a reform bill at one regular session may be equated to its first reading in a more compressed legislative process. The bill is introduced, referred to committee and hearings are had in committee where amendments are made. The bill may be pretty thoroughly emasculated in the process or it may move along virtually unscathed. But a new bill on a subject not previously discussed may very well die in committee at the end of the session or, having been reported from committee, it may die awaiting its turn for floor hearing on adjournment.

This sort of process encourages the introduction of unfinished bills not really complete before introduction, as it is anticipated that inexperienced legislators will try their hands at improving them. It also anticipates that the bill will not make it through both houses during a four-month biennial session and that the first run is merely an unveiling of an idea – a period of familiarization.

But if by some accident or fortuitous circumstance the bill should pass at the session at which it is first introduced, there is strong likelihood that the act will be amended at the next regular sitting of the legislature after the new enactment has been given a year and a half of application. This Texas approach to reform may seem disorderly to one who has not worked within it or in some comparable system, but every legislature has its own ways, and anyone who is drafting for a legislative body should learn the unwritten rules of that group before he undertakes to write a reform bill that body will consider.

The third step involves further revision and polishing four to six years after first enactment. Once so revised, the reform process is complete. Then some responsible bar group should monitor subsequent sporadic efforts toward reform, frequently triggered by litigation lost by a lawyer-legislator.

An unfinished academic effort toward statutory reform is usually not as readily embraced by bar leaders as this one was. In this instance, the opponents of the Equal Rights Amendment were casting about desperately for a bill to offer as an alternative to the amendment. Any sort of proposal responsive to significant objectives of the amendment would have done just as well. Ours happened to be a proposed recodification and reform of the matrimonial property statutes.

But our draft was not finished. We had only mentioned it to bar leaders in the hope of finding an ultimate sponsor and of generating a little long-term interest in what we were about. The bar leaders needed it desperately, however, as a bar-sponsored alternative to the constitutional amendment. The academic draftsmen thought the bill should be as finished as they could make it before introduction in the legislature. They later learned that there would be much time for subsequent polishing and adjusting provided one learns how to time the amendments and provided, of course, one has a legislative sponsor who is adept in the legislative process.

The legislature was sitting and into the second month of its four-month session. Though we hesitated to allow our draftsmanship to be used by bar leaders as mere stratagem (especially in its incomplete state), we hoped to turn the situation to some advantage. At least our proposal would get its "first reading," and we would have an opportunity to familiarize some members of the legislature with the need for reform in this branch of family law.

Selection of the right legislative sponsor in both houses is very important. Many legislators will feel honored to be asked to introduce a bar-recommended measure. But many may treat association with the bill *merely* as an honor. If the reform is likely to be received as *radical* (in the sense of having liberal social or economic consequences) and "old pol" with a rightist, *safe* reputation is to be preferred as a sponsor. Someone trusted by the business-establishment lobby should be found to introduce such a measure. On the other hand, if the measure may be subject to criticism as economically repressive, a sponsor with impeccable, liberal credentials should be found. In short, a legislative leader should be found who might be included among those who would vote against the reform or, at least, to question the good intentions of the draftsmen.

Less than three weeks after the unfinished draft was requested, it was completed. Suitable sponsors were found, and it was introduced in both houses of the legislature and referred to appropriate committees that could be anticipated to give it a friendly response. Proponents of the constitutional amendment had already introduced legislation related in subject matter. When the public hearing on the bar-bill came in the committee of the upper house, those favoring the other bill came to protest its failings. After the hearing, it was clear that there were substantial differences between the academic draftsmen and bar leaders on the one hand and the legislative committee of the Business and Professional Women's Clubs, the principal proponents of the constitutional amendment, on the other. Playing for time against the sponsors of the amendment, bar and legislative leaders suggested a conference of a joint committee to be appointed by the bar president and the president of the women's group. By the time the committee was named and the meeting was set, several weeks had elapsed. Legislative leaders let it be known that the bar's proposal was regarded as preferable to the amendment.

When the joint committee met, there was some mistrust by the conferees named by the women's groups for those representing the bar. But as the day-long conference wore on, the women's representatives seemed to accept the position that agreement should be reached on a bill that had some prospect of passage. The academic draft was adopted as the vehicle for reform provided that modifications acceptable to the amendment's proponents could be built into it. After a long day of proposals and counter-proposals, some agreement was reached but substantial areas of disagreement were unresolved. It was agreed, however, that one of the academic draftsmen should work with the legislative chairman of the women's group to resolve those points.

The academic draftsmen (if not their professional backers) and the representatives of the women's clubs had concluded independently that the opportunity had at least been offered by which some improvement in the law of matrimonial property could be achieved. A week later the two conferees (one representing each faction) reported a mutually acceptable draft to the Senate committee. This turn of events may have come as some surprise to those bar leaders who had indicated little sympathy for the reform proposals of the women *or* the professors.

The legislative session was well into its last month when the compromise bill was reported out of the Senate committee and passed on third reading. It was thereafter lodged in a House committee until the session adjourned. But though no reform bill had been passed, the legislature had been familiarized with the need for reform and with a proposal by which needed changes might be achieved. In its effort to beat down the constitutional amendment, the bar (almost inadvertently) had become an advocate of reform. The women's group sponsoring the amendment had also indicated its support for a particular set of proposals. A commitment had also been made by the incoming bar leadership that efforts expended on the bill would not be for naught.

But if the momentum for reform was to be kept up it had to be sustained by the bar. Though the bar-sponsored bill offered to the legislature had not been the work of the relatively young Family Law Section of the state bar, members of the section had been active in pushing the proposal forward during the legislative session. The small group of lawyers committed to the objective of family property law reform concluded that the Family Law Section should undertake the further sponsorship of the measure. Fortunately, some of these lawyers were already active in the section's work.

Given the condition of Texas matrimonial property law at the time, passage of the proposed constitutional amendment was calculated to have very disruptive effects. Since some of those favoring family property law reform also favored passage of the amendment, statutory reform was to them a matter of some urgency. Those who opposed the amendment as unnecessary if statutory law were properly revised were also anxious to proceed with the preparation of a legislative proposal that might be offered at the next regular session of the legislature in 1967. After the close of the session in May 1965, it was realized that there was just over a year remaining in which to prepare a bill that could be properly reviewed for bar sponsorship.

The chairman of the Family Law Section appointed a committee of five to draft a revision of all the matrimonial property statutes and matters immediately related to them that would lend themselves to codification. The committee included a senior lawyer from a medium-sized town who had served in the state legislature as a young man, a lawyer from the state capitol, a sitting legislator with long experience from a small town, a lawyer from a large city, and the chairman of the section sitting as an *ex-officio* member. All members of the committee were male except the chairman. All were engaged in a general practice, but only two of the five could be reasonably described as family law specialists. Four of the five were officers or former officers of the section. Six academic advisors from three of the state's leading law schools were appointed to assist the committee. These were all family property law specialists.

The function of the advisors was merely to *advise*. When a vote or consensus of the committee was taken, only committee members voted. It was generally agreed that codes prepared by academicians are viewed with much suspicion by the bar and by the legislatures. Lawyer legislators are inclined to regard themselves as experts on family law. When a bill is before a legislative committee, it may be useful to have professors on hand to answer questions. But it is generally far more useful to have the practicing lawyers there who can say that they made the decisions of inclusion and exclusion in the proposed code. If the proposal must also run the preliminary gauntlet of one or more bar committees whose responsibility it is to determine whether a particular measure is worthy of bar sponsorship, the views of practitioners will generally be given greater credence than those of the ivory-tower set, however, well-informed the latter may be.

The six meetings of the committee held during the ensuing year were well attended. Work was the object of these meetings scheduled on weekends at locations convenient to the members. A law school library

or office conference room was selected for these sessions so that an adequate library would be available to the participants. Each meeting usually lasted for the better part of a working date.

These meetings were devoted to determination of policy – inclusion and exclusion of subject matter – and an arrangement of the subjects included. As time went on, more and more time was devoted to phraseology and preparation of the commentary to accompany and explain the bill. The committee began its work on the third preliminary draft. The initial draft introduced in the legislature and that of the joint committee were the materials from which this third draft was constructed. Before the work of the committee was completed, the bill had gone through seven full drafts of text and commentary. After each of its six sessions a new working draft was prepared to incorporate decisions and changes made. Usually this task was performed by the principal academic draftsman, but sometimes one member or another of the committee or one of the academics would undertake the job of putting the committee's decisions in final form. The chairman and the principal draftsman worked together to move the work of the committee along from subject to subject.

As the work of the committee proceeded it became apparent that some external financing of the work would be desirable. Initial meeting costs were merely those of travel and meals that fell on the bar section, but an increasingly larger burden for supporting academic and secretarial time began to be felt by the university where much of the work was being done. It also began to be apparent to all those who had worked on this recodification effort that far more of Texas family law needed legislative attention than merely those provisions dealing with property rights. The adage that the law is a seamless web is borne out by this experience of law reform. Once the process starts, it becomes increasingly difficult to find a stopping place – at least until the participants tire and find they can no longer maintain the momentum of reform and the legislature finally balks at considering further recommendations for betterment of the legal system.

By mid-1966 when the work on the family property law committee was nearing completion, the leaders of the Family Law Section became convinced that a full scale effort to produce a Family Code should be undertaken. At this point substantial financial assistance was sought and received through Texas foundations. Once the reform project began to be institutionalized, it was realized that work on the first phase and its financial burden might have been eased by earlier realization of a need of some staff assistance and independent funding.

A code reform project can be bar-based or academically based as those organizing it deem more appropriate. Under the circumstances it seemed advisable to give the project a university base in order to provide academic resources to the bar section, which would continue to give direction and make all final decisions with respect to legislative drafting policy. It also seemed that financing could be better achieved in this way. Though public funds might have been made available to a public university, the Family Law Section chose to continue its work with the faculty of a private university and to seek funding from private foundation sources.

Basing a law reform project at a distance of two hundred miles from the state capital has advantages and disadvantages. It would be very difficult to assess the consequences of the choice that was made as compared to other choices in terms of the results achieved or that might have been achieved. But our experience indicates that a successful law reform project can be carried out away from the center of political activity.

## **2. *Matrimonial Property Act of 1967***

After approval by the Family Law and the Real Estate, Probate, and Trust Law Sections of the State Bar of Texas in 1966, the proposed revision of Texas marital property law was submitted to the Legislative Committee and the Board of Directors of the State Bar for approval as a bar-sponsored measure at the regular legislative session of 1967. The bill was approved as drafted and submitted to the legislature early in the session. There were, of course, some legislative wrangles with respect to particular provisions but after all was said and done, the bill was passed by both houses with only minor legislative amendments.

It was the objective of the draftsmen to formulate a bill that would depart as little as possible from the appearance and contents of the existing statutory format. The revision followed the numeration and subject matter of the existing statutes in almost every instance. Even if that existing order seemed somewhat illogical, the subject matter of the new provisions was fitted into the old framework in order to give the appearance of its being as little changed as possible. It was felt that this adherence to statutory continuity was necessary to allay all legislative fears that radical changes were being proposed with respect to the legal rules affecting family life. Most lawyer legislators feel themselves well informed on the existing basic rules of family law, if not of many others. Their views often tended to be simplistic and misguided, but it seemed helpful to convince as many as possible that the changes proposed did not do any substantial violence to their perceptions of the existing system.

The Texas community property system like that of other American jurisdictions is an adaptation of the laws of Castile. It is a system of marital partnership, a sharing of the profits of marriage between the spouses. In 1913, it was determined that the wife should be given a significant share of management of the community property, which up to that time had been in ordinary circumstances managed by the husband alone. But the effective control given married women in 1913 was modest. It was the objective of the draftsmen of the 1967 revision to carry the objectives of the 1913 plan to its logical conclusion.

The Castilian system put the management of community property in the hands of the husband though ownership of the property was in undivided moieties. That system then constituted a partnership with a sole managing partner. Like its parent Spanish system (but unlike some other American community property systems) Texas community property has always consisted not only of the earning of the spouses but also of the profits of their separate properties. Various approaches to community management are therefore available.

- (1) The **pure partnership** approach was considered but rejected as too radical to be acceptable to the Texas Legislature. Such a scheme would allow **several management**, that is, allowing each partner to dispose of and deal with partnership property and to incur liabilities on behalf of the partnership in the same manner as a general partner of a business partnership.
- (2) A second possible approach was that of **joint management**, requiring that both spouses participate in all, or substantially all, significant transactions. This solution was regarded by many lawyers as too cumbersome to meet the needs of a commercial society. Unlike a number of other community property states, Texas had no experience in requiring joinder of spouses in disposing of community real estate, other than the homestead.
- (3) The solution found most attractive by the Texas recodifiers was that with which Texas lawyers had some degree of experience. This is a scheme of **joint or several management** of the community estate, depending upon the nature or source of the community property. The basic scheme is one of adopting two family partnerships (rather than one) with each partnership having a different spouse as managing partner. This was the design of the Texas revision of 1913. All earnings of the wife and the income from her separate property are community property subject to her management. It was concluded, however, that if the spouses should mix or combine those two identifiable groups of community property, the spouses become joint managers of the mixture. In home-buying and banking, it was realized that **joint management** will ordinarily be the rule. In business dealings where the spouses conduct their affairs separately, **several management** would usually be the approach adopted by the spouses as a result of their not missing the product of their labors and profits of their separate property. These rules of joint and several management were laid down for the protection of the draftsmen that third persons would need some additional assurance of protection in dealing with spouses. Whereas for mutual convenience spouses might wish to give each other written powers of attorney or merely oral authority to deal with properties subject to other forms of control, a third person should be protected in business transactions by rules of ostensible authority. It was therefore provided that a third person (without notice of facts to the contrary) might deal safely with a spouse in connection with particular property if that spouse's authority is indicated by formal title to the property, or mere possession of it if the property were not of the sort expected to have formal indicia of title.

As to liability it was concluded that a spouse's non-tortious obligations should always be met from his or her separate property or the community property subject to his or her **sole management**. Introducing a principle of general partnership law, it was also provided that liability should fall on property subject to **joint management** as well, even though the obligation was not jointly entered into. But with respect to tortious liability it was concluded that the victim should not have the burden of determining the source of community property subject to liability. **All community property** was therefore made subject to the reach of creditors with claims arising from tortious conduct of either spouse regardless of the nature of powers of management. In order to balance the interests of the spouses in particular situations of this sort, it was further provided that on motion of a spouse a court might order marshaling of assets subject to contractual or tortious liability so that **separate property** and community property subject to the **sole** management of a spouse would be first taken by a victim of a spouse's wrongdoing. This balancing of the rights of spouses *inter se* and recognition of the rights of third parties in the spouse's dealings *inter alia* were to produce the greatest degree of mutual fairness for all concerned.

With respect to unilateral gifts of community property, neither the draftsmen nor the legislature could formulate a proposal that seemed to altogether satisfactory. Co-ownership presents greater difficulties of management than sole ownership with respect to family property, though community property states feel that co-ownership is a more equitable solution. Disposition of community property without value received presents one of the most difficult situations. But whereas Texans are prepared to allow one spouse to have management of community property generated by that spouse for business purposes and to dispose of that property for value, disposition without value suggests a fraud on the other spouse. Requiring joinder in making all gifts is a possible solution of the problem, but the draftsmen rejected it as being too restrictive on the powers of the manager of particular community property in many situations. But absolutely free disposition by gift in all situations was also rejected as conducive to fraud. With some dissent the draftsmen suggested a formula by which the managing spouse might make unilateral donative dispositions of community property if "in discharge of a legal, moral or civic obligation." But the legislature was unable to accept this formulation and therefore left this area of law to be developed by the courts. The general rule since devised by the courts is that a spouse with management powers over particular community property may make a gift to any third person of the other spouse's interest in that property (as well as that of the donor-spouse), provided the other is otherwise adequately provided for under the circumstances. The burden of proof of reasonableness of the gift under the circumstances is upon the donee. As a practical matter, this burden is more easily discharged by donees who are blood relations and those to whom a duty of financial assistance is owed.

Texas does not have any concept of "quasi community property" for purposes of post-mortem division of property acquired in another jurisdiction that would have been community property if acquired while the spouses are domiciled in Texas. The statutes with respect to post-mortem management and liability of property had been conformed to those prescribed for *inter vivos* management and liability. Under Texas laws of succession, if there are descendants of a spouse, the descendants take the decedent's share of community property on intestacy and the surviving spouse has the other half. Each spouse has complete testamentary power of disposition of one-half of the community property and all of that spouse's separate property. It is only with respect to separate property undisposed of by will that there is a right of intestate taking somewhat akin to common law dower and courtesy.

Since separate and community property are defined in the Texas Constitution, some difficulties are encountered with respect to legislative definition and allowing spouses to redefine the nature of either. Nevertheless it had long been felt that that part of a personal injury recovery representing physical or psychic loss (as opposed to loss measureable by earning power) should be the separate property of the injured spouse. The draftsmen so provided in the 1967 bill and the legislature accepted this modification of an earlier statute that had been declared unconstitutional. It has been most gratifying that the Texas Supreme Court has found this reformulation of Texas law constitutional under the existing constitutional definition of matrimonial property law.

Two other definitional problems have given rise to difficulty in the past:

- (1) allowing the spouses by a marriage contract to adopt a matrimonial property regime other than that of the constitutional definition and
- (2) voluntary partition of community property as separate shares of separate property during the marriage.

The latter difficulty was overcome by constitutional amendment in 1948 and hence has not caused further difficulty. In 1967, a new marriage contract provision was adopted with the hope that it will solve the problem in those instances when proposed spouses wish to provide that their future acquisitions take on separate character rather than that of community as prescribed in the ordinary course of things.

The bill enacted in the summer of 1967 provided that its contents would become effective January 1, 1968. It was thought that some lead time should be provided in order that couples might put their affairs in order to adjust to changes made by the legislature.

### **3. *Family Code of 1969***

In the summer of 1966, it was realized that the work of the Family Law Section should be expanded to encompass the whole of family law other than that already included in the probate code. While the draftsmen of the Matrimonial Property Act continued their work, additional committees of the section were appointed to begin work on marriage and divorce, custody and support of children, adoption, and juvenile delinquency. Until the Matrimonial Property Act was enacted in the summer of 1967, the other committees were beginning their studies of existing law and formulating plans for revision and amplification. Once the family property bill was enacted, the Council of the Family Law Section could devote its principal attention to these other matters, leaving to its family property law committee such minor matters of detail as might have been overlooked by the legislature and the draftsmen of the 1967 bill.

After another year's work the Family Law Section Council began to hammer out a recodified version of the whole of family law in code form. Once enacted, the Matrimonial Property Act was recast as two chapters of the code preceded by three chapters on marriage and divorce. Together these five chapters constitute Title 1 of the Texas Family Code (Husband and Wife). At the start it was hoped that Title 2 (Parent and Child) might also be ready for enactment in 1969. But the most that the council could complete in time for bar sponsorship at the 1969 session of the legislature was the whole of Title 1.

Over a long period a well-developed body of law had enunciated principles of informal marriage about which there were substantial disagreements as to retention. One school of thought took the view that all marriages should be formally sanctioned. Another group felt that the recognition of stable, informal relationships is useful to society and that the institution should not only be preserved but also made more easily proved. The consequences of these differences of view were that the Family Law Section recommended abolition of the institution as of January 1, 1970, but also recommended that a system of recordation be instituted whereby prior, informal unions might be recorded as a means of giving prima facie evidence of that validity. In that the code provision dealing with the parent-child relationship was not ready for introduction in 1969, the Section ultimately withdrew its recommendation of abolition of the informal marriage in the face of a very considerable legislative hostility to alteration of the prevailing scheme.

Apart from formal recognition of marriage the Texas statutory law of marriage was mainly made up of gaps. Gaps in the law of marriage were particularly the rule with respect to void and voidable marriages and the grounds for adjudication. There was very little legislation on the subject and almost no case law. These are subjects of family law that are not frequently litigated at the appellate level, and hence the rules were in particular need of legislative enunciation. Early in the discussion of codification, it was realized that it would be necessary to formulate principles concerning void and voidable marriages and the means of ascertaining their status of questionable marriages. It was the view of the Family Law Section that bigamous and consan-

guious marriages should be designated *void* but there were considerable differences in opinion with regard to the bar of affinity. It was finally resolved by a close vote that the bar of affinity should be abolished and those marriages subsisting after January 1, 1970 would have previously been a bar should be validated. The draftsmen also provided detailed provisions with respect to marriages that would be defined as *voidable*. Two separate types of suit were also instituted for dealing with these situations: (1) a suit to declare the marriage void to be used in conjunction with void marriages and (2) the suit of annulment to deal with voidable ones. It was also thought wise to provide that in cases of voidable marriages a discretionary division of property should be provided.

Though the California divorce reform had received a considerable amount of attention in the press, little had been said of the reform in Texas, where the principle of non-fault divorce was embodied in the law. Though it seemed to the draftsmen that some type of general non-fault divorce should be instituted, it also seemed unwise to attempt to abolish all existing fault and non-fault grounds for divorce in a proposed code of the size of that being dealt with. Rather than jeopardize the passage of the entire code by embroiling the legislature in arguments with respect to abolition of fault grounds, the non-fault ground of insupportability was merely added to the existing fault and non-fault grounds. The hope was that the existing grounds would fall into disuse and might at some time in the future be abolished. While reforming the divorce law, the draftsmen thought it advisable to abolish the defenses of recrimination and condonation. Numerous other less significant changes were made in the divorce law. Provisions for counseling of estranged couples were also added although it was realized by the draftsmen that they might not be effectively implemented since very few professional counselors were actually available for counseling on marital breakdown. It was nevertheless hoped that counseling might someday be extensively utilized to prepare parents for dealing with their children after divorce even if counseling would not have any significant effect toward saving a marriage.

Since enactment of its first divorce law of 1841, Texas has allowed temporary alimony pending divorce but has not had a system of permanent alimony. With the adoption of a general non-fault ground for divorce without a substantial waiting period in case both spouses were not agreeable to dissolution, it was regarded as advisable to propose the allowance of short-term alimony after marriage that could extend as long as three years. Called a readjustment allowance and based on the model of the Texas statute for widow's allowance, the proposal nevertheless failed to kindle any legislative enthusiasm. As it had before, the Texas legislature nevertheless allowed the divorce court to make an equitable division of the community estate on divorce, without restriction as to divestiture to title to separate realty as previously prohibited.

Title 1 of the Family Code was presented to the legislature in the spring of 1969 and, with a few minor changes, passed and became effective on January 1, 1970. Just as the work on marriage, annulment, and divorce had proceeded while work on family property law was going on, the work on the parent-child relationship proceeded through the spring and summer of 1969 while Title 1 of the Family Code was being enacted. The Council of the Family Law Section was able to give the parent-child relationship its almost undivided attention after enactment of Title 1 of the code. Though a recodification of the law of parent and child was offered for enactment in the spring of 1971, legislative momentum with respect to family law reform had already begun to wane, and this reform was not successfully offered until the spring of 1973.

It had been thought that the work of the Family Law Section would not really be complete until some statutory scheme for dealing with the problems of the elderly had also been formulated and passed. But by the time that those parts of the Family Code dealing with the parent-child relationships and juvenile delinquency had been enacted in 1973, momentum for reform had been virtually spent, and the enthusiasm of bar members, the legislature, and financial resources had been virtually exhausted. It is nevertheless hoped that this last increment of the Texas Family Code will be enacted.

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## 2011 LEGISLATIVE PACKAGE

By Jack Marr<sup>1</sup>

The Family Law Section has completed its legislative package for the 2011 legislative session. A summary of the significant provisions of the package are set forth below.

### A. Spousal Maintenance

Chapter 8, Tex. Fam. Code, (Maintenance) would be amended as follows:

1. The duration of maintenance ([Texas Family Code § 8.054](#)) will be modified to provide that the court may award maintenance of varying duration in the event of a marriage of 10 years or more. These periods are:
  - Marriages of 10 years or more, but less than 20 years - maintenance may be ordered for a period not to exceed five (5) years.
  - Marriages of 20 years or more but less than 30 years - maintenance may be ordered for a period not to exceed seven (7) years.
  - Marriages of 30 years or more - maintenance may be ordered for a period not to exceed ten (10) years.
2. The limit on the monthly amount of maintenance which may be ordered is increased to the lesser of:
  - \$5,000.00; or
  - 20% of the spouse's average gross monthly income.

The definition of "gross" income is clarified.

3. Chapter 8 is modified to clearly limit the court's ability to enforce maintenance by contempt. The court may not enforce by contempt any provision of an agreed order for maintenance for any period of maintenance that extends beyond the statutory period the court could have ordered under Chapter 8.
4. New [§ 8.0591](#) is added. It requires a maintenance obligee to return excess payments of maintenance. If the obligee fails to return excess maintenance paid, the obligor may file to recover excess payments.
5. There are several clarifying amendments, which are not designed to substantively change the existing law.

### B. Fraud on the Community Estate

[The Texas Supreme Court opinion in \*Schlueter v. Schlueter\*, 975 S.W.2d 854 \(Tex. 1998\)](#) severely limited the ability of an innocent spouse to be "made whole" when the community estate of the parties was dissipated by fraudulent acts of the other spouse.

The Legislative Committee of the Family Law Section has drafted legislation to address the inequity arising from [Schlueter v. Schlueter, 975 S.W.2d 854 \(Tex. 1998\)](#).

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This proposed legislation amends [Texas Family Code § 7.002](#). The proposed legislation adds Subsections (d) - (i) to existing [§ 7.002](#).

This legislation defines “fraud on the community.”

The legislation provides that the court, as a part of the just and right division of the community estate required by [Texas Family Code § 7.001](#), will calculate the value by which the community estate has been depleted as a result of the fraud on the community. This lost value will be added to the remaining community estate (to be defined as the “reconstituted estate”). The “reconstituted estate” is divided by the court.

The proposed legislation makes it clear that the ability of the court to make a just and right division of the community estate is not limited to the value of assets remaining after the fraud.

### **C. Paternity Fraud**

This proposed legislation addresses some aspects of the paternity fraud problem. It amends [Texas Family Code § 161.005](#) by adding subsections (c) through (h), which establish standing to initiate a suit to terminate the parent-child relationship and the procedure for prosecution of the suit for termination. New subsections (i) through (o) address substantive consequences of termination and procedural issues upon termination.

Suit for termination of the parent-child relationship may be brought by a man who signed an acknowledgment of paternity without first obtaining genetic testing, or a man who was adjudicated to be the father of a child in a previous proceeding under Title 5, in which genetic testing did not occur.

The man seeking termination must, by verified pleading, allege facts that demonstrate that his prior belief that he was the biological father was induced by misrepresentations.

Beginning September 1, 2012, there will be a one year statute of limitations, beginning on the date the man becomes aware of facts indicating he is not the child’s biological father. There is not a statute of limitations with respect to suits for termination filed before September 1, 2012.

### **D. Appeals of Termination of Parental Rights**

This proposal generally addresses appeals of termination orders by indigent parents.

The proposal provides that appeals from termination orders are governed as in civil cases generally under the Texas Rules of Appellate Procedure. Appeals are to be given precedence over other civil cases and shall be accelerated by the appellate courts. Procedures for accelerated appeals under the Texas Rules of Appellate Procedure are applicable.

The Supreme Court is required to adopt rules accelerating the disposition of appeals by the appellate courts.

The requirement of [Texas Family Code § 263.405](#) that the parent file a motion for new trial or statement of points of appeal within 15 days of the date of signing of the termination order are deleted.

### **E. Extended Protective Order Bill**

This legislation authorizes a court, in limited circumstances, to render a protective order for a duration which exceeds 2 years. If the subject of the application for protective order has caused serious bodily injury ([Texas Penal Code § 1.07](#)) to the applicant or member of applicant’s family or household for whom protection is sought or the subject of the application has been subjected to 2 prior protective orders, each containing findings required by [Texas Family Code § 85.001\(a\)](#), granting protection to the applicant or a member of appli-

cant’s family or household for whom protection is sought, the court may render a protective order for a duration in excess of 2 years. The duration shall be that duration sufficient to protect the applicant and members of the applicant’s family or household.

The bill also amends [Texas Family Code § 85.025\(b\)](#) to make it clear that a person seeking to shorten the duration of a protective order has the burden to provide there is no continuing need for the protective order. The proposal further declares that mere proof of compliance with the terms of the protective order is not sufficient to establish that there is no continuing need for the protective order.

#### **F. Teen Dating Violence Protective Order**

[Texas Family Code § 82.002\(b\)](#) will be amended to authorize a minor to file an application for a protective order.

[Family Code Section 82.009](#) will be amended to authorize a minor to verify an application of an exparte protective order.

[Family Code Section 261.001\(1\)](#) is amended to include, as “abuse” dating violence against a child.

#### **G. Possession of and Access to Child Under 3 years of age**

This proposal amends [Texas Family Code § 153.254](#) by adding new subsections (c), (d) and (e).

It requires the court to consider all relevant factors, including the 13 enumerated factors, when rendering an order governing possession of and access to a child under age 3. These factors include:

1. the caregiving provided to the child prior to and during the present suit;
2. the effect on the child of being separated from either parent; and
3. the personal availability of conservators as caregivers and their willingness to personally care for the child;

The court is also required to make findings in support of its order, if requested by a party during or within 10 days after the date of the hearing.

#### **H. Child’s Hearsay**

This proposal amends [Texas Family Code § 104.006](#) to provide that it is applicable to hearings on applications for protective orders. Currently Family Code [§ 104.006](#) is applicable to suits affecting the parent-child relationships.

#### **I. Military Deployment**

[Family Code Sections 153.702\(a\)](#) and (c) and [153.703\(b\)](#) are amended. These sections deal with temporary orders in military deployment cases.

The amendments to [Family code § 153.702\(a\) and \(c\)](#) are for clarification purposes. The amendments provide that a request for temporary orders in cases involving military deployment does not require proof of a material and substantial change of circumstances, other than the deployment.

It is also made clear that a person designated to exercise the rights of the deployed spouse cannot be ordered to pay child support.

It is made clear that [Family Code § 153.703\(b\)](#) refers to a nonparent.

## J. Gestational Agreements

This bill was previously submitted for legislative consideration (S.B. No. 2027, during the 2009 Legislative Session). It has yet to make it through the legislative process.

It amends several provisions of Family Code Chapter 160, which address gestational agreements. A review of the bill can be accomplished by review of the referenced Senate bill at the legislative web site.

## K. Clean-Up Amendments to Chapter 33, Family Code

This proposal “cleans up” current references to the “Department of Protective and Regulatory Services.” The amendments reflect the new departmental name of “Department of Family and Protective Services.”

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### *What would you do?*

## **How to help your clients when they ask for more than legal advice**

By Christina McGhee, MSW<sup>1</sup>

Earlier this month the American Academy of Matrimonial Lawyers (AAML) published results from a survey, which looked at how frequently clients seek out information from their attorneys that is unrelated to realm of family law. Not surprisingly, they found that 67% of family lawyers had clients who requested advice about what to say to their children. My guess is that talking to children about divorce isn't the only area outside of the law that clients are asking you about. As mentioned in the last edition article: “*Helping clients to love their children more than they hate their ex,*” most parents come to this process feeling extremely uncertain and unprepared. While most parents have their children's best interest at heart, they frequently lack the insight to see beyond the immediate moment and gauge how their choices will impact their children's future. In this vulnerable and often tenuous state, clients have a tendency to view you as more than a legal expert but also as a “trusted guide.” Sometimes a client's need for guidance may take other forms. Often lawyers have shared with me that they frequently find themselves facing other questions from clients such as “What would you do if you were in my situation?”

Over the years in working with family lawyers, I have discussed this conundrum of how to promote child-centered practice, keep parents focused on children's needs while maintaining your role as legal counsel. To review, the focus of a child-centered perspective involves:

- Encouraging parents to divorce with integrity.
- Keeping the focus on the needs of children throughout process.
- Supporting the principle of placing a higher value on the love parents have for they have for their children rather than the feelings they have towards one another.

In this article I have set out five ways you can support your clients in successfully managing child related issues without becoming their personal therapist.

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## Five ways to assist your clients in developing and maintaining a child centered perspective

### 1. Explore with clients what they want.

As a professional working with separating parents, it's easy to fall into the trap of feeling pressured to produce outcomes. Avoid making the assumption that a court-based outcome is what your client truly wants. Likewise, keep in mind that they may not know what they want or have the ability to think beyond their immediate circumstances. In the beginning stages, parents often don't have enough information or support to know what they want or what they can truly hope to achieve. Parents can benefit tremendously from you asking them a few clarifying questions.

#### What can you do?

- Guide clients to see beyond the immediate moment by exploring long-term consequences of their choices.
- Ask clarifying questions to gain understanding of what your client wants, for example
  - What would an ideal outcome look like for you? For your children?
  - Right now, what are your top three priorities?
  - How can I help you support those priorities?

### 2. Honor your client's agenda

*(Except where the goal is destructive or harmful to children's safety and well-being)*

In early stages when emotions are strongest, clients are most vulnerable and frequently approach this transition unprepared for the task they face. As a result, they may view you as someone who is an expert on all matters concerning separation and divorce, not just family law. With support and information most parents are capable of making reasonable arrangements for children. Instead of supplying them with answers, parents will benefit more if you seek to understand the problem and guide them to create their own solutions.

#### What can you do?

- Take yourself out of the role of expert.
- Develop a partnership with clients and co-create a direction for the process.
- Assist clients in identifying their core values and support them in achieving higher aspirations.

### 3. Disengage from your client's perceptions

Remember, clients may seek to present their very best self to you. In the beginning stages they often have difficulty taking ownership for their part in the conflict and may have a strong need to be blameless or right.

Also when situations are emotionally charged clients may use broad terms (i.e. always, never, frequently and occasionally) to describe an issue or conflict. For example, when your client tells you Dad *never* returns the children on time, you may be under the assumption that always means 100% of the time this lousy father is not bringing the kids back when he is supposed to. To your client however, *never* may mean 50 % of the time or perhaps it may have been an incident that only happened once.

#### What can you do?

- Be sure to clarify issues or situations with your client.
- Instead of supporting your client's perception of the other parent when possible offer a more balanced view. When issues become conflictual, help parents see one another's perspective and more important, the perspective of their children.

**Questions you can possibly ask?**

- How does it benefit your children for you to maintain a negative image of their other parent? What does it cost them?
- If you had to manage this issue with another person how would you handle it?
- If you were still married or in a relationship with your ex how would you handle this situation?

**4. Redirect your client's focus back to their children**

As stress levels increase for parents their ability to respond in a rational or controlled way decreases. During these times they may have a difficulty acknowledging how their choices and actions are impacting their children.

**What can you do?**

- Support a two home concept and avoid being a broker of time.  
Regardless of how time is spent between households, reinforce with parents that children benefit substantially when they feel like they belong and have a place in each home. Instead of asking “*When will Johnny be having time with Mom this weekend?*” consider asking, “*What will Johnny's time with Mom look like or what kind of weekend do you want Johnny to have when he is with Mom?*”

If your client is not the parent with day-to-day care responsibilities encourage them to establish and maintain a home environment for children instead of falling into a pattern of “visiting” their children.

- Change how you talk to your clients about parenting arrangements.  
Language is both a subtle and powerful way of shaping parents thinking about their role with children and one another.

*In speaking with clients:*

- Instead of “visitation or possession” use “time with a parent”
- Instead of “residential parent or non-residential parent” refer to parents by first name, Mom or Dad, children's father, children's mother
- Instead of “primary residence”, use Mom's house, Dad's house
- Instead of “custody or visitation arrangement” use parenting schedule

**5. Use your influence to help guide parents towards support, information and resources**

In the early stages of separation and divorce families benefit substantially when they have access to good information and support. Keep in mind, as family lawyer you have the ability to significantly shape your client's divorce experience.

**What can you do?**

- Become familiar with the local resources and professionals in your area.
- Provide clients with basic information about resources such as parenting classes for separated and divorced parents or helpful books and guides.
- When possible refer clients to resources that support a child centered process.

Sources:

American Academy of Matrimonial Lawyers, PR News Wire. *Survey Finds Parents Asking Divorce Lawyers: 'What Should We Tell The Children?'* May 5, 2010 (electronic copy available at <http://www.prnewswire.com/news-releases/survey-finds-parents-asking-divorce-lawyers-what-should-we-tell-the-children-92867604.html> )

Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*), Christopher Nickelson (*C.N.*), Jeremy C. Martin (*J.C.M.*), Jimmy A. Vaught (*J.A.V.*), Sallee S. Smyth (*S.S.S.*)

## ***DIVORCE*** **GROUNDS AND PROCEDURE**

### **TRIAL COURT ERRED BY DENYING FATHER'S PLEA IN ABATEMENT WHEN FATHER HAD STATUTORY RIGHT TO FILE CLAIM FOR INTERFERENCE WITH POSSESSORY RIGHT IN DIFFERENT COUNTY THAN HE FILED ORIGINAL DIVORCE DECREE.**

¶10-3-01. [Rodriguez v. Rodriguez, 04-09-00101-CV, 2010 WL 816186](#) (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (3/10/10).

**Facts:** In 04/05, father filed for divorce in Denton County. In 08/05, mother filed an answer and a counter petition for divorce. Trial court issued temporary orders for children. In 04/07, father filed a lawsuit in Maverick County against mother and other defendants asserting tort claims and a claim for interference with possessory rights based on the temporary orders. Mother filed a counterclaim for divorce in response. Father filed a plea in abatement, claiming that Denton County had dominant jurisdiction of the divorce. Mother responded that father's filing of a suit in Maverick County estopped him from asserting that Denton County had dominant jurisdiction. Trial court in Maverick County denied father's plea in abatement and issued a final divorce decree. Father appealed.

**Held:** Reversed and remanded.

**Opinion:** A party may be estopped from claiming another jurisdiction is dominant when the first-filed suit was filed merely to obtain priority or when party prevented their adversaries from filing first by fraudulently claiming they would settle. Father's claim of interference with possessory right is established by TFC Chapter 42. [TFC 42.005](#) allows father to file such a suit in the county in which he resides. Trial court therefore erroneously denied father's plea in abatement. Maverick County trial court's final divorce decree must therefore be reversed.

**Editor's Comment:** *The trial court's decision doesn't make much sense. Estoppel is an equitable defense invoked to keep one party from obtaining an unfair advantage over another. How exactly was father's filing a lawsuit in Maverick County unfair to mother since the statute required him to file his lawsuit in Maverick County because that is where mother and others allegedly interfered with his possessory rights? How exactly did father waive dominant jurisdiction? The trial court's decision would have encouraged interference with custodial rights in the hopes of defeating dominant jurisdiction. C.N.*

### **ALTERNATIVE SERVICE WAS DEFECTIVE WHEN IT DID NOT STRICTLY COMPLY WITH TRIAL COURT'S ORDER.**

¶10-3-02. [Ratcliff v. Ratcliff, 09-09-00138-CV, 2010 WL 1087517](#) (Tex. App.—Beaumont 2010, no pet. h.) (mem. op.) (3/25/10)

**Facts:** Wife filed a petition for divorce and for division of the marital estate. Trial court signed a temporary restraining order the next day. The petition and restraining order were not served on husband despite an attempt. Wife amended her petition and requested alternative citation, which trial court granted. Trial court authorized wife to serve petition of divorce by serving anyone over sixteen at husband's business or residence, or by affixing the notice to the door of husband's residence. Temporary restraining order and citation

were posted on husband's business's door. After husband failed to respond, trial court signed a default judgment granting divorce. Husband then filed an answer and a motion for new trial.

**Held:** Reversed and remanded.

**Opinion:** [TRCP 106](#) allows a trial court to authorize service of citation by leaving a true copy of the petition with anyone over 16 years of age at the location specified in such affidavit or in any other manner that the evidence shows will be reasonably effective to give defendant notice. Service is invalid if not in strict compliance with the requirements of the order authorizing the substitute service. Since wife obtained service by posting the notice on door of husband's business instead of his residence as specified in trial court's order, service was defective. Since service was defective, trial court did not have jurisdiction to render the default judgment.

**Editor's Comment:** *When you are relying on substituted service, you should always take the time to review the return and make sure that compliance is strictly followed by your process server. If not, have them re-do it at no charge! S.S.S.*

**Editor's Comment:** *I know that service is invalid if not in strict compliance with the requirements of the order authorizing the substitute service. However, it seems that there should be some common sense in these cases. The wife should have a chance to argue that the husband received adequate notice of the service of citation when the notice of service was posted on the door of the husband's business instead of his residence as specified in trial court's order. J.A.V.*

**Editor's Comment:** *It's amazing what you find when you read the rules of civil procedure. C.N.*

#### **A DEFAULT DIVORCE DECREE MUST BE SET ASIDE WHEN THE PARTY WHO FAILED TO APPEAR RECEIVED NO NOTICE THAT THE COURT RESET THE TRIAL DATE**

¶10-3-03. [Rivas v. Rivas, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1347726 \(Tex. App.—El Paso 2010, no pet. h.\) \(4/07/10\).](#)

**Facts:** Husband and wife filed for divorce in 2002. Over the course of several years, trial court reset the case on multiple occasions. Trial court set the final hearing date for June 11, 2008. On May, 6 2008, wife filed a *pro se* motion requesting continuance due to her inability to obtain counsel. The clerk's record showed that on May 19, 2009, trial court, in error, issued an order resetting the final hearing date to March 2, 2009. Additionally, the clerk's record contained a facsimile transmission verification report verifying that husband's counsel received the reset order on May 19, 2009. Nevertheless, husband and his counsel appeared in court on June 11, 2008, the original final hearing date. Wife, however, did not appear on June 11 2008. Because wife did not appear, trial court entered a default divorce decree. Trial court subsequently denied wife's motion for a new trial stating that wife failed to appear at the final hearing. Wife appealed.

**Held:** Default divorce decree reversed and remanded for new trial on merits.

**Opinion:** A trial court must set aside a default judgment when a movant demonstrates that a failure to appear was not due to conscious indifference. Conscious indifference occurs when a party fails to take some action that a reasonable person in similar circumstances would not fail to take. When a party receives no notice of a trial set date, the party cannot be held consciously indifferent for failing to appear at trial. Here, no record evidence indicates wife received notice that trial court sent the reset order in error, or that trial court revoked or set aside the order. Upholding the June 11, 2008 default divorce decree would violate wife's Fourteenth Amendment due process rights.

**Editor's comment:** *Two other notable factors in this case: (1) husband's lawyer did not offer any evidence to rebut the presumption created by the fax confirmation sheet that he had notice of the 3-2-09 reset; and (2) husband offered no evidence to rebut wife's affidavit in support of her motion for new trial. While the appellate court did not go there, it could have just as easily reversed based on her uncontroverted affidavit. See *Onyeanu v. Rivertree Apartments*, 920 S.W.2d 397, 398 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (“Because it is uncontroverted, the affidavit must be taken as true.”). J.C.M.*

**TRIAL COURT ABUSED DISCRETION IN DIVIDING COMMUNITY PROPERTY IN DEFAULT DIVORCE WHEN THE RECORD CONTAINED NO EVIDENCE OF PROPERTY VALUES.**

¶10-3-04. [\*In re E.M.V.\*, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1818061 \(Tex. App.—Dallas 2010, no pet. h.\) \(5/07/10\).](#)

**Facts:** In a restricted appeal, father appealed from default judgment granting final divorce decree. The divorce decree divided the couple's property and determined custody of the child. In dividing the property, the court awarded mother two houses in Dallas County and the father a house and land in Mexico. The divorce decree provided a legal description of the Dallas homes including the physical addresses, but merely described the father's property as “the house and 3 lots in Mexico.” Father appealed arguing that the evidence was legally insufficient to support trial court's division of the property.

**Holding:** Affirmed in part, reversed & remanded with respect to trial court's division of community property

**Opinion:** Generally, no evidence is required to uphold a default judgment. However, TFC 6.701 provides that in divorce petitions, “the petition may not be taken as confessed if respondent does not file an answer. Thus, even if a respondent fails to appear, the petitioner must prove up material allegations with sufficient evidence. Here, father failed to appear before the court on the trial date. Trial court, therefore, entered a default judgment against him. Nevertheless, because this is a petition for divorce, mother must still prove her material allegations with sufficient evidence.

A trial court has discretion with respect to the division of community property. The trial court is not required to divide community property equally, but its division of property must be equitable. The trial court's discretion to divide community property unequally must be reasonably supported by the evidence at trial. Here, the record contains no evidence that mother provided trial court with the value of any of the couple's properties. Thus, the trial court had insufficient evidence to equitably divide the property. Trial court, therefore, abused its discretion in the division of the property.

**Editor's Comment:** *I am surprised by how many family lawyers are unaware that they must present some evidence of the value of the community estate in a default judgment. Testimony by the spouse concerning value, appraisal district records, an inventory, or even a hand written sheet of paper listing the assets and liabilities that the spouse testifies is true and accurate should suffice. The same requirement for evidence applies to a default in a SAPCR. J.A.V.*

**Editor's Comment:** *How many times do the appellate courts have to tell trial lawyers that you have to present evidence at a default hearing? This includes evidence supporting a just and right division of the marital estate (nature and value of assets) and evidence regarding best interest of the child. Avoid results like this by preparing an inventory before the default hearing and offer it as an exhibit. M.M.O.*

**Editor's Comment:** *Put a star by this case and remember it the next time you are asked to undo a no-answer default judgment. The vast majority of records from no-answer default judgment hearings probably do not include sufficient detail to authorize the trial court to properly exercise its equitable powers to divide the parties' community estate. C.N.*

**HUSBAND’S FAILURE TO SERVE WIFE WITH NOTICE OF HEARING DATE TO ENTER A PROPOSED JUDGMENT COULD NOT BE OVERCOME BY SHOWING THAT WIFE PREVIOUSLY REVIEWED AND SIGNED THE PROPOSED JUDGMENT.**

¶10-3-05. [Shook v. Shook, No. 01-09-00649-CV, 2010 WL 2025772](#) (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (5/20/10).

**Facts:** Husband petitioned trial court for divorce. Wife answered and counter-petitioned. Trial court set trial date for April 6, 2009. On that date, both parties appeared and requested a continuance to attend mediation. Trial court granted the continuance. On April 9, 2009, wife arrived for scheduled mediation without her attorney. (Apparently, wife sent a letter to her attorney terminating his services, but he never moved the court to withdraw from representing wife and in fact continued to represent her.) At the mediation meeting, wife signed a proposed judgment titled “agreed settlement” reciting that the parties agreed to “a just and equitable division of the community property.” Afterward, wife returned to her out-of-state home. Trial court set April 14, 2009 as the hearing date to enter the proposed final divorce decree. On that date, husband appeared. Neither wife nor her attorney appeared. Consequently, trial court signed the agreed decree wife signed at mediation meeting.

Wife moved for a new trial arguing husband failed to provide notice of the April 14, 2009 hearing. Trial court denied wife’s motion. Wife appealed. On appeal, father argued that he satisfied service of process because pursuant to TRCP 305, requiring a party to serve a proposed judgment on “all other parties to the suit who have appeared and remain in the case,” relieved him of his obligation to serve wife’s attorney because the attorney no longer represented wife.

**Holding:** Trial court’s denial of motion for new trial reversed and case remanded

**Opinion:** Under [TRCP 21\(a\)](#), all notices required by the TRCPs, and every pleading, plea, motion or other form of request may be served by delivering a copy to the party to be served, or the party’s authorized agent or attorney of record. Proposed judgments under [TRCP 305](#) must be served in accordance with [TRCP 21\(a\)](#). Here, wife’s attorney never withdrew from representing wife and in fact continued to represent wife. At the hearing on wife’s motion for new trial, husband provided no evidence he attempted to serve wife or her attorney with notice of the April 14, 2009 proposed judgment entry. Husband cannot rely on [TRCP 305](#) because, even though wife reviewed the proposed judgment at the mediation meeting, she was still entitled to notice of the scheduled hearing for entry of that judgment. Accordingly, trial court abused its discretion in denying wife’s motion for a new trial.

***DIVORCE***  
**DIVISION OF PROPERTY**

**TRIAL COURT ERRED BY ENTERING CONSENT JUDGMENT THAT WAS NOT IN STRICT COMPLIANCE WITH THE TERMS OF HUSBAND AND WIFE’S SETTLEMENT AGREEMENT.**

¶10-3-06. [Pohla v. Pohla, No. 09-09-00023-CV, 2010 WL 877555](#) (Tex. App.—Beaumont 2010, no pet. h.) (mem. op.) (3/11/10).

**Facts:** Husband and wife agreed to a division of property that assigned 58% of community assets to wife and 42% to husband and that assigned each their own separate property. The agreement listed community assets on a worksheet, and the division of the community estate was to be accomplished by offset of an IRA account

in husband's name based on its value on 04/30/08. One asset, wife's Teacher's Retirement System of Texas Retirement account, was not listed on the worksheet.

Trial court asked both parties if they were asking the court to grant the divorce and approve the agreement, and both parties answered affirmatively. After this questioning, trial court pronounced judgment granting the parties a divorce and approving the property settlement agreement. It then set an entry date for the Final Decree of Divorce. After this, wife's attorney stated on the record that wife had a retirement account and said, "Her teacher's retirement account that I think goes without saying it goes to her." Husband's attorney asked husband if that was "okay," and husband said yes.

In 09/08, wife filed a motion to sign Final Decree of Divorce and a proposed Final Decree of Divorce that awarded the retirement account to wife as community property without affecting the offset of husband's IRA account. Husband objected to the motion to enter. At a hearing in 11/08, husband agreed that the retirement account should be awarded to wife but argued that it should affect the division of the community estate. Wife argued that husband had already agreed that she should receive the full balance of the retirement account. Trial court overruled husband' objection and awarded wife 100% of the retirement account without adjusting the community property division. Husband appealed.

**Held:** Reversed and remanded.

**Opinion:** Although husband could not revoke his consent to the settlement agreement after trial court pronounced judgment of divorce, the discussion about the retirement account occurred after trial court pronounced judgment. Additionally, the retirement account did not appear on the community property worksheet. The retirement account, therefore, was outside the scope of the agreed judgment. Trial court's award of the retirement account to wife without a corresponding offset to the IRA account significantly altered the terms of the settlement agreement on which trial court rendered judgment. As the consent judgment is not in strict compliance with the terms of the parties' settlement agreement, the judgment must be set aside. Trial court's judgment granting the divorce is affirmed while its judgment dividing the marital estate is reversed and remanded entry of judgment in conformity with the terms of the parties' agreement.

**Editor's Comment:** *I suppose if you have an agreement situation where additional recitations are made after the court pronounces "rendition," you should be careful to ask the court to set the "rendition" aside so that these additional matters can be timely included. S.S.S.*

**Editor's Comment:** *Where there is an MSA, the trial court has no authority to deviate from the parties' agreement. If the MSA leaves out something, then it is ripe for trial. The trial court can't just pull a ruling out of thin air without hearing evidence and argument of both parties. M.M.O.*

**Editor's Comment:** *Put two stars by this case. It has an easily understandable fact pattern and coherently explains the problem family law practitioners face when a settlement agreement does not cover all of the community assets. When this happens you can get a judgment based on the assets divided in the settlement agreement, but you have to have a trial on division of the property left out of the agreement. C.N.*

## **TRIAL COURT ERRED BY DIVESTING HUSBAND OF SEPARATE PROPERTY PROCEEDS FROM SALE OF MARITAL RESIDENCE.**

¶10-3-07. [Kite v. Kite, No. 01-08-00643-CV, 2010 WL 1053014](#) (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (3/11/10).

**Facts:** Husband and wife married 06/26/93 and separated in 09/05. Wife filed a petition for divorce that was dismissed for lack of prosecution. Wife later filed a separate petition for divorce. After a bench trial on

04/28/08, trial court divided the marital estate. Among other things, trial court divided the net sale proceeds of the marital residence, awarding 1/3 to husband and 2/3s to wife. Husband appealed.

**Held:** Reversed and remanded.

**Opinion:** Husband claimed the marital residence was his separate property rather than community property. The marital residence was built on real property that husband received as a gift. Because the marital residence was built on husband's separate property, it is separate property. Since husband and wife used community funds to improve husband's separate property by building the marital residence, the community estate had a claim for economic contribution. Wife, however, failed to present adequate evidence to calculate economic contribution.

When a party demonstrates by clear and convincing evidence that property is separate, trial court may not divest the party of the separate property. Although it is unclear how trial court characterized the proceeds from the marital residence, it erred in its division of the property. Treating the proceeds from the marital residence as community property was error, and even if it treated the proceeds as separate property, it erroneously divested husband of his separate property.

**TRIAL COURT DID NOT ERR BY EXCLUDING WIFE'S EVIDENCE OF THE VALUE OF HUSBAND'S INTEREST IN PROFESSIONAL ASSOCIATION.**

¶10-3-08. [Mandell v. Mandell](#), \_\_\_ S.W.3d \_\_\_, 2010 WL 1006406 (Tex. App.—Fort Worth 2010, no pet. h.) (3/18/10).

**Facts:** Husband and wife, both physicians, married in 1989. While married, husband entered into an employment agreement and a stock purchase agreement with a business association. The stock purchase agreement stated that the association would sell husband 22,000 shares for a total purchase price of \$11,000. Association required husband and wife to sign a Shareholders' Agreement that gave the association or other shareholders the right to purchase shares at \$0.50 in the event of retirement or withdrawal from the association and in the event of an involuntary transfer such as in the event of a divorce. The agreement stated that in the event that the marital relationship of a shareholder is terminated by divorce, and the divorced shareholder does not succeed to his former spouse's community interest in his shares, the shareholder shall purchase all of his stock back from his former spouse at \$0.50 per share within 180 days. Neither husband nor wife signed the agreement.

Three years after husband executed the stock purchase agreement, wife filed for divorce. Three months after wife filed for divorce, the association refunded husband the money he had paid for the stock stating that it had never issued husband a stock certificate because he and wife never signed the Shareholders Agreement. After association returned husband's money, wife joined it as a third-party defendant, claiming that it and others had conspired with husband to defraud her. Following a summary judgment motion from 3<sup>rd</sup> party defendants, trial court held as a matter of law that the Stock Purchase Agreement was subject to its accompanying Shareholders Agreements, and the agreement was valid and enforceable against wife. Before trial, wife settled with third-party defendants and entered into an agreement on the record that the association would issue the 22,000 shares of stock to husband in exchange for \$11,000. Husband paid the money, and the association issued the stock.

At the jury trial, wife sought to introduce expert testimony of the value of husband's stock. Husband objected, and trial court sustained the objection on the basis of its previous ruling that the Shareholder's Agreement governed the value of the stock. After trial, trial court divided the community property roughly evenly and valued husband's shares of the association at \$11,000. Wife appealed.

**Held:** Affirmed.

**Opinion:** Wife argued that the Shareholders Agreement does not establish the fair market value of husband's interest in the ongoing business of the Association. While as a general rule, the value accorded to community property is market value, such a valuation is not appropriate when a community estate owns shares in a closely held corporation that restricts sales of shares to stockholders by agreement. In such a case, the parties may show the actual value of the property interest to the owner. Methods that might be used include the book value method and the comparable sales method. Wife's excluded experts would have presented evidence that the book value of the association in 2006 was \$5 million and that husband one-fourth interest was worth from \$800,000 to \$1.1 million depending on the accounting method used. Husband's evidence, which was admitted, established that previous shareholders had been paid \$0.50 per share when they retired or left the practice.

Wife is not entitled to a percentage of husband's future earnings. The association is by law the equivalent of a for-profit corporation. Its property, accounts receivable, retained earnings and surplus funds are not community property and are not subject to division by the trial court. The only community asset was the stock itself, not the association as an ongoing business. The association's assets are not analogous to partnership profits because partnership profits belong to individual partners. Trial court was therefore correct to value the stock at \$22,000.

**Editor's Comment:** *While Wife's lawyer took the HUGE first step of making an offer of proof (yea!!!), it wasn't enough to merit reversal because it did not include testimony or evidence that might have been relevant to establish that the value of Husband's shares of stock to him was greater than the \$11,000 value set by the Shareholders Agreement. J.C.M.*

**Editor's Comment:** *Under the right facts, a buy-sell agreement can control the value of a closely held business in a divorce over the market approach or other appropriate methods of valuation. This seems crazy to me. The opinion points to the fact that the wife signed the shareholder agreement in support of enforcing the buy-sell, but the shareholder agreement does not meet the terms of a partition/exchange agreement. Further, it seems unconscionable that a spouse may collude with his business partners to agree that an asset has a ridiculously low value, which is then upheld in a divorce case. The accepted market approach seems, to me, to take into account the discounts for goodwill and marketability that would reduce the community value of the business without having to rely on the buy-sell agreements collusively low value. M.M.O.*

**A PARTY SEEKING TO IMPOSE A CONSTRUCTIVE TRUST BASED ON AN OPPOSING PARTY'S LOAN REPAYMENT PROMISE, THE PARTY MUST CLEARLY TRACE THE TRUST FUNDS TO SPECIFIC PROPERTY EXISTING AT THE TIME OF THE PROMISE**

¶10-3-09. [\*In re Marriage of Harrison\*, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1490925 \(Tex. App.—Amarillo 2010, no pet. h.\)](#) (4/14/10).

**Facts:** Husband and wife married in 2006 and moved to husband's separate property home in Kentucky. While husband and wife were out of town, husband's home and its contents were destroyed by fire. The couple decided to purchase a new home in Lubbock, Texas. As a down payment on the new Lubbock home, the couple paid \$215,817 in cash, which represented the insurance payment proceeds for the casualty loss on husband's Kentucky home. To pay for furnishing the new Lubbock home, wife withdrew a total of \$230,000 from her 401(k) account. Afterward, in order to avoid a tax penalty for early withdrawal from wife's 401(k) account, the couple borrowed a total of \$200,000 from wife's father in two installments of \$100,000 each. Wife deposited the full \$200,000 into her 401(k) account.

On June 29, 2007, husband filed for divorce. On September 4, 2007, the trial court entered temporary orders requiring the \$217,239 in proceeds from the sale of the couple's Lubbock home to be placed into the court's registry. Wife's father intervened alleging husband defrauded father of the \$200,000 loans. Father requested trial court to impose a constructive trust in the amount of \$200,000 in his favor. Trial court granted the constructive trust. Husband appealed.

**Held:** Trial court's constructive trust judgment against husband reversed

**Opinion:** Before a party can impose a constructive trust over funds, the party must prove that the trust funds can be clearly traced into other specific property; that nothing must be left to conjecture, and that no presumptions, except the usual and necessary deductions from facts proven, can be indulged. Here, Father claimed the \$215,817 casualty insurance payment for husband's Kentucky home as the source of constructive trust funds. Father testified that sometime between March 7, 2008 and April 14, 2008, the first loan payment from father, that husband promised to repay father for loans out of the proceeds of the casualty insurance payment on husband's Kentucky home. However, on February 8, 2008, husband and wife closed the purchase of their Lubbock home with the \$215,817 insurance proceeds as a down payment. At the time husband made his promise to repay father from the proceeds of the casualty insurance payment, husband could not have been referring to the \$215,817 payment because the couple had already used the money as a down payment on their Lubbock home. Father is unable to clearly trace the husband's promise to the \$215,817 insurance payment. Because father cannot clearly trace the constructive trust funds into specific property existing at the time husband made his promise to repay, father is not entitled to the funds from the sale of the Lubbock home.

**Editor's Comment:** *Note to self: when loaning \$200,000 to daughter and son-in-law so they can furnish their house, get collateral for the loan and a security agreement. C.N.*

**TRIAL COURT DID NOT NEED TO MAKE FINDING THAT HUSBAND SIGNED AN ADMITTED COPY OF A POSTNUPTIAL AGREEMENT WHEN WIFE PRESENTED EVIDENCE THAT HUSBAND SIGNED THE ORIGINAL.**

¶10-3-10. [Guajardo v. Olvera, No. 14-08-00652-CV, 2010 WL 1752342 \(Tex. App.—Houston \[14 Dist.\] 2010, no pet. h.\) \(mem. op.\) \(5/04/10\).](#)

**Facts:** Husband filed for divorce and sought judgment in accordance with a 2001 postnuptial agreement. Husband failed to produce the signed agreement at trial. Wife moved the court to accept an unsigned agreement as a substantial copy of the original pursuant to [TRCP 77](#). Mother presented evidence at trial that husband previously conceded that the couple signed the 2001 agreement in the presence of a notary. Additionally, the notary testified that the unexecuted document mother presented at trial was the same as the agreement the couple signed in 2001. The agreement stated: "It is our intent that, during our marriage, we will not own any community property." Trial court divided the couple's assets according to the unsigned postnuptial agreement wife presented. Father appealed arguing the court failed to find that he signed the postnuptial marital agreement.

**Holding:** Trial court's decision affirmed

**Opinion:** Under [TRCP 77](#), an unexecuted copy of a document has the same force and effect as the signed original. Here, wife presented uncontroverted evidence that the postnuptial agreement she presented at trial was a substantial copy of the original agreement the couple signed in 2001. Husband could have objected to the trial court's admission of the document, but he failed to do so. Accordingly, trial court did not need to make a separate finding that husband signed the original admitted document.

**Editor's Comment:** *While the opinion does not indicate one way or the other, the court of appeals was not prohibited from implying a finding that husband signed the agreement unless husband specifically asked the trial court to make such a finding and the trial court refused to do so. This case also stands for the proposition that an appellant can raise an issue for the first time in a reply brief if the trial court makes additional findings of fact subsequent to the filing of the principal brief. J.C.M.*

**HUSBAND BREACHED AN ATTORNEY-CLIENT FIDUCIARY DUTY OWED TO HIS WIFE BY WITHHOLDING FROM WIFE THE VALUE OF COMMUNITY PROPERTY AND THEN ENCOURAGING WIFE TO SIGN POST-MARITAL AGREEMENT DESIGNATING MOST OF THE COUPLE'S PROPERTY AS HIS SEPARATE PROPERTY.**

¶10-3-11. [Izzo v. Izzo, No. 03-09-00395-CV, 2010 WL 1930179 \(Tex. App.—Austin 2010, no pet. h.\)](#) (mem. op.) (5/14/10).

**Facts:** Prior to marriage, husband convinced wife to withdraw \$80,000 from her mutual funds account and reinvest the money in property for husband's law practice. Under husband's direction, the couple formed an investment firm for the purpose of purchasing land and constructing a building for husband's law practice. In return for her \$80,000, wife received 80,000 shares of the investment firm. Afterward, the couple married. During the marriage, the couple purchased additional property valued at \$40,000 in equity. After three years of marriage, husband directed an associate at his firm to draft a post-marital property agreement to divide the couple's property. The agreement converted wife's 80,000 shares into an \$80,000 loan payable over ten years at 4.2% interest. As a result, husband became sole owner of the investment firm which had attained a value of over \$750,000. The agreement designated \$800,000 in community property to husband and \$7,500 in community property to wife. Husband filed for divorce.

At trial, wife testified that she did not want to sign the post-marital agreement. Wife testified that she signed the agreement because husband pressured her and led her to believe the marriage could not continue unless she signed the agreement. Wife additionally testified that she was afraid of losing her \$80,000 investment if she did not sign the agreement. Wife presented evidence that she was unaware of the significantly increased value of husband's law firm. Following trial, trial court found that because of the couple's investment agreement, husband became custodian of wife's funds, and an attorney-client fiduciary relationship arose. Because of the existence of a fiduciary relationship, and the extreme pressure husband applied to wife, the trial court found that wife did not voluntarily sign the post-marital agreement. Accordingly, trial court refused to enforce the agreement. Husband appealed.

**Holding:** Trial decision affirmed

**Opinion:** Under [TFC 4.105](#), a partition or exchange agreement is not enforceable if the party against whom enforcement is requested proves that the party did not sign the agreement voluntarily. The existence of a fiduciary relationship is relevant to whether an agreement is executed voluntarily. An attorney-client fiduciary duty requires absolute candor, honesty, and an absence of concealment or deception. An attorney-client relationship may arise from the actions of the parties and does not depend on the payment of a fee.

Here, husband directed, organized, and managed the formation of the couple's property investment firm. By signing the formation documents and investing \$80,000, wife manifested her intent to receive legal services. Husband provided wife those services. Therefore, an attorney-client fiduciary duty arose between husband and wife. Husband encouraged wife to invest the \$80,000 for an ownership interest in the property investment firm but then failed to inform wife of the substantial increase in its value when he encouraged her to convert her \$80,000 ownership interest into a loan. Husband's actions led wife to believe that if she did not

convert her investment to a loan (by signing the post-marital agreement), she could lose her investment. By failing to offer wife absolute candor and honesty, and by concealing the true value of the firm, husband breached his fiduciary duty to wife. In light of husband's breach and the pressure he applied to wife, wife clearly did not voluntarily sign the agreement. Accordingly, trial court did not abuse its discretion in deciding not to enforce the agreement.

**TRIAL COURT ERRED IN AWARDING WIFE HUSBAND'S SEPARATE PROPERTY THAT HE INHERITED PRIOR TO THE COUPLE'S MARRIAGE.**

¶10-3-12. [Sikes v. Sikes, No. 11-08-00296-CV, 2010 WL 2112809 \(Tex. App.—Eastland 2010, no pet. h.\)](#) (mem. op.) (5/27/10).

**Facts:** Husband and wife filed for divorce. Husband claimed a residence as his separate property. Trial court proceeded with the hearing. At the hearing, wife testified that prior to their marriage, husband inherited two tracts of land and that she improved the land by installing fences. Wife also testified that during the marriage, she sold her separate property for \$25,000 to pay for husband's criminal defense. Wife testified further that after the couple's separation, she left personal property in husband's separate property residence and that husband discarded the property. At the conclusion of the hearing, trial court awarded wife the two tracts of land. Trial court additionally awarded wife a \$25,000 lien for reimbursement and an \$8,500 lien for economic contribution. Husband appealed arguing that trial court erred in awarding wife his separate property and awarding wife a lien for economic contribution.

**Holding:** Affirmed in part, reversed and vacated in part, remanded in part.

**Opinion:** A trial court may not divest a party of its separate property when ordering a division of property. Here, during her testimony, wife identified two tracts of land that husband inherited before the couple married. This testimony establishes the two tracts were husband's separate property. Trial court, however, awarded wife husband's separate property. Accordingly, trial court erred in awarding wife husband's separate property.

Capital improvements and debt reduction can give rise to an economic contribution claim. When the economic contribution represents capital improvements, the spouse seeking a recovery must produce evidence of the net equity of the separate property as of the date of the first economic contribution by the community estate, the amount of economic contributions by the marital estate, and the net equity of the separate property as of the date of divorce. Here, although wife testified that she improved the two tracts of land, she failed to provide trial court with any equity evidence or the value of the improvements. Accordingly, the evidence is insufficient to sustain economic contribution.

An equitable right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. Mislabeling an award as reimbursement rather than economic contribution does not require reversal as long as the pleadings support the evidence, the evidence supports the implied findings of fact, and the findings support the judgment. Here, trial court could have concluded that wife's lost personal property supported a claim of reimbursement. Wife pleaded a separate and distinct \$25,000 reimbursement claim, and the evidence supports an implied finding that wife's separate estate benefitted husband's estate and that wife's estate did not receive a reciprocal benefit. Accordingly, the \$8,500 lien representing economic contribution is modified to reflect the lien is for reimbursement.

## ***DIVORCE***

### **SPOUSAL MAINTENANCE**

#### **SPOUSE WITH EMPLOYMENT EARNING CAPACITY AND RENTAL PROPERTY INCOME IS NOT ENTITLED TO SPOUSAL MAINTENANCE AWARD.**

¶10-3-13. [\*Browne v. Browne\*, No. 03-08-00185-CV, 2010 WL 1730066 \(Tex. App.—Austin 2010, no pet. h.\)](#) (mem. op.) (4/29/10).

**Facts:** Husband and wife filed for divorce in March 2007. During the marriage, wife maintained steady employment but terminated employment prior to trial. At trial, wife testified that she intended to work after the divorce and presented evidence of her ability to regain employment. Trial court awarded two of the couple's four properties to wife and two of the four properties to husband. Additionally, trial court awarded remaining assets equally to each party including husband's \$200,000 401(k) retirement savings.

Wife appealed on several grounds including 1) the trial court's failure to award her spousal maintenance; and 2) trial court failed to issue her a peace bond. Husband motioned appellate court to sanction wife for filing frivolous appeal and to order wife pay for appellate attorney's fees.

**Holding:** Trial court's judgment affirmed.

**Opinion:** A spousal maintenance award is intended to provide temporary and rehabilitative assistance to a spouse whose ability to self-support has eroded over the course of a marriage or when the spouse lacks adequate capital assets to provide self-support. At its discretion, a trial court may order spousal maintenance if the marriage lasted longer than ten years, the spouse lacks sufficient property to provide for minimum needs and the spouse lacks adequate earning capacity. Here, wife testified that she planned to work and that she was capable of earning \$25,000 - \$35,000 annually. Wife additionally testified that her rental properties could net \$1800 per month in rental revenue and that she received \$54,000 from court ordered sale of additional property. Based on the record, wife does not lack sufficient property or adequate earning capacity to provide for her minimal needs. Trial court did not abuse its discretion in refusing to award spousal maintenance.

Generally, in a criminal context, a magistrate issues a peace bond based on an affiant's sworn testimony that another person has committed a crime or is about to commit a crime against the affiant. Here, wife testified at trial that during divorce proceedings, husband harassed her in email and telephone conversations. Wife testified further, that husband's conduct forced her to move to a different city. However, wife also testified that husband contacted her frequently to discuss the handling of their mutually owned rental properties. Wife, therefore failed to show, that husband had committed a crime or was about to commit a crime against her.

If an appellate court finds the appellant filed a frivolous appeal, it may sanction the appellant by awarding appellee attorney's fees. The appellate court must exercise caution and prudence, and grant sanctions against appellant only in the most egregious circumstances. Here, although wife's appeal contained several deficiencies, she could have believed she had reasonable grounds to reverse trial court's judgment. Husband's motion for an award of appellate attorney's fees is therefore denied.

**Editor's Comment:** *Appellate clients frequently ask appellate lawyers to file for sanctions because the appeal is frivolous. Sometimes we even do it. The Court, here, points out that the standard for granting sanctions for a frivolous appeal goes to the subjective state of mind of the appellant. As long as the appellant might have thought the appeal had merit, then it is not frivolous. Translation: appellate courts almost never award sanctions. M.M.O.*

## ***DIVORCE*** **POST-DECREE ENFORCEMENT**

### **WIFE'S BREACH OF CONTRACT CLAIM BASED ON COLLABORATIVE LAW AGREEMENT WAS BARRED BY RES JUDICATA**

¶10-3-14. [\*Pribyl v. Pribyl\*](#), \_\_\_\_\_ S.W.3d \_\_\_\_, 2010 WL 850172 (Tex. App.—Austin 2010, no pet. h.) (3/11/10).

**Facts:** On 01/07/04, husband filed for divorce. On 01/21/04, husband and wife executed a Collaborative Law Participation Agreement that stated that participation was based upon the assumption that both parties disclosed their assets in good faith. After failing to reach an agreement through the Collaborative Law process, husband and wife participated in a mediation that resulted in a settlement agreement. On 09/17/04, trial court entered a final decree of divorce in accordance with the settlement agreement. In 06/07, wife learned that husband's employer had awarded him stock options while the divorce was pending that he had not disclosed. Although the settlement agreement did not reference these options specifically, it did award husband all unspecified stock options.

On 09/06/07, wife filed for post-divorce division of property, breach of contract, and fraud claiming that husband violated the Collaborative Law Participation Agreement by failing to disclose his stock options. After a bench trial, trial court awarded wife 50% of the previously undisclosed stock options, pre- and post-judgment interest, attorney's fees, and costs on 11/25/08. This order did not reference or claim to alter the 2004 divorce decree. Husband appealed.

**Held:** Reversed and rendered.

**Opinion:** The doctrine of res judicata applies to a final divorce decree just as it applies to any other final judgment. Trial court's 2004 judgment awarded all unspecified stock options, including the ones husband failed to disclose, to husband. Wife's claims sought damages based on the amounts she would have received in the 2004 judgment had she known of the undisclosed stock options. They are barred by res judicata because they are an attempt to modify the property division set out in the original agreed divorce decree without modifying or altering the original decree.

Once trial court's plenary power has expired, an otherwise valid judgment cannot be set aside by trial court except by a bill of review for sufficient cause. Wife's attempt to attack the 2004 agreed divorce decree through her breach of contract claim is not permitted. The 2008 judgment is therefore reversed and vacated.

**Editor's Comment:** *Unfortunately, it would seem from the facts recited in the opinion that any statute of limitations for a bill of review will have now expired. This case supports the notion that when faced with similar facts, a party seeking relief should plead in the alternative for any and all causes of action they can justify and be cautious not to abandon claims until they have been fully researched and developed. This is particularly unfortunate in this case because H admitted he knew about the options and failed to disclose them, making W's recovery almost virtually secured if she had filed the right claim. S.S.S.*

**RES JUDICATA BARRED HUSBAND’S SUIT SEEKING TITLE TO HOUSE AWARDED TO WIFE IN DIVORCE DECREE.**

¶10-3-15. [DeAcetis v. Whitley, No. 14-08-00429-CV, 2010 WL 1077904](#) (Tex. App.—Houston[14th Dist.] 2010, no pet. h.) (mem. op.) (3/25/10).

**Facts:** On 05/29/03, trial court signed final divorce decree awarding ownership of house to wife. At that time, however, though husband and wife lived in house neither held record title to house. Rather, the owner was a corporation with children as sole shareholders and officers. While community property paid for the purchase and maintenance of house, on paper, husband and wife were only tenants living in house under a lease from corporation. Furthermore, between the time trial court rendered divorce and signed the final decree, child, acting as president of corporation, made an oral agreement with father to convey record title to him. Child resigned as officer of corporation the next day.

After trial court signed divorce decree, husband refused to vacate house. On 07/17/03, other child signed a warranty deed conveying title to house from corporation to wife. After wife filed a motion to enforce divorce decree, trial court found that husband violated the divorce decree by remaining in the house, and ordered him to vacate by 01/15/04. After husband continued to remain in house, wife filed a forcible detainer suit. Trial court then held husband in contempt and committed him to jail. On 12/14/04, the parties entered into a Rule 11 Agreement regarding husband’s jail commitment, and trial court signed an order suspending commitment and ordering husband to be released on 12/20/04. After being released, husband vacated house and did not appeal any of trial court’s rulings.

In 03/05, wife conveyed title of house to purchasers. In 12/05, husband sued child with whom he had an oral agreement. In 02/06, purchasers conveyed title of house to second purchaser. In 08/06, husband amended his suit to include wife, children and both sets of purchasers, seeking a declaratory judgment as to ownership of house. Husband alleged trespass to try title, fraud, conversion and conspiracy. Wife filed a traditional motion for summary judgment based on res judicata. All defendants filed no-evidence motions for summary judgment. Trial court granted all summary judgment motions against husband. Husband appealed.

**Held:** Affirmed.

**Opinion:** Trial court’s divorce decree and subsequent enforcement orders awarded her ownership of house. Husband’s claim to house arises out of the same subject matter as the divorce proceeding and had the opportunity to assert claims to house during that proceeding. Since there is a final judgment in that proceeding, res judicata bars all of husband’s claims against wife. Since husband failed to file a response to any of the no-evidence motions, trial court did not err by granting them.

**HUSBAND’S OBLIGATION TO PAY CREDIT CARD DEBT AS PART OF DIVORCE DECREE IS NOT ENFORCABLE BY CONTEMPT.**

¶10-3-16. [Shumate v. Shumate, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1222045](#) (Tex. App.—Amarillo 2010, no pet. h.) (3/30/10).

**Facts:** On 07/29/06, trial court signed final decree of divorce in which it ordered husband to indemnify wife for credit card debts and to make every effort possible to transfer the accounts into his name and remove his wife’s names from the account. On 10/17/06, wife filed a petition for enforcement in which she alleged father failed to pay the amounts due on the credit cards and asked that trial court hold husband in contempt. Husband filed a motion for summary judgment arguing that the credit card obligations were not enforceable by contempt. Trial court granted summary judgment. Wife appealed.

**Held:** Affirmed.

**Opinion:** An order to pay a debt is not generally enforceable contempt because it violates the Texas Constitution's prohibition against imprisonment for failure to pay a debt. An order for a party to a divorce to pay an obligation owed to a third-party is not enforceable by coercive contempt even if it is part of the division of the community estate. The only exception is when trial court designates specific funds or community property to pay the debt. In that situation, husband would be acting as a constructive trustee for the benefit of the other spouse, and the order would not be considered payment of a debt. Since trial court did not identify specific funds to pay the debt, husband is not a constructive trustee, and husband's obligation to make the credit card payments is merely a debt owed to the credit card companies. Thus the obligation is not enforceable by contempt.

Wife sought a money judgment from husband for the unpaid balance on the credit cards, but she did not demonstrate that she had paid any card debt. Since husband owes the debts to the credit card companies and not to wife, wife is not entitled to a money judgment.

**NEITHER THE DISCOVERY RULE, THE DOCTRINE OF FRAUDULENT CONCEALMENT, NOR A BREACH OF FIDUCIARY DUTY CLAIM CAN AVOID A STATUTE OF LIMITATIONS DEFENSE WHEN THE PLAINTIFF, AFTER NOTIFICATION OF INJURY, FAILS TO FILE A CLAIM WITHIN THE STATUTORY PERIOD.**

¶10-3-17. [Treuil v. Treuil](#), \_\_\_ S.W.3d \_\_\_, 2009 WL 6327398 (Tex. App.— Beaumont 2010, no pet. h.) (4/08/10).

**Facts:** Husband and wife divorced in 1982. Trial court issued a divorce decree awarding wife a portion of husband's retirement payable upon his retirement. On January 1, 2002, husband took a lump sum payment upon his retirement but failed to pay wife her portion of his retirement. Over five years later, on September 26, 2007, wife petitioned trial court to enforce the divorce decree. Husband asserted an affirmative statute of limitations defense. At trial, the couple's daughter testified that in 2002, she told wife that father had retired and opened a business funded by a cash payment from his retirement. Wife did not challenge daughter's testimony, but daughter additionally testified that she could not recall how wife reacted to the information daughter provided in 2002. Wife testified that in August 2007, she discovered husband's withdrawal of retirement funds only after calling husband's former employer to inquire the status of his retirement. Because daughter could not recall wife's reaction to the 2002 conversation, trial court determined that wife discovered husband's withdrawal of retirement funds in August 2007, well within the four year statute of limitations. Trial court awarded wife her portion of husband's retirement funds. Husband appealed.

On appeal, wife argued that the discovery rule, the doctrine of fraudulent concealment, and the husband's breach of his fiduciary duty excused her failure to timely file her suit. Under [TFC 9.003\(b\)](#), suits to enforce a trial court's division of property not in existence at time of decree is two years from the date that the property matures or accrues. Wife argued, however that her claims involved breach of contract and breach of fiduciary duty tort claims requiring a four-year statute of limitations. For purposes of its analysis, appellate court assumed without deciding, that a four year statute of limitations applied to wife's claims.

**Holding:** Trial court's judgment awarding wife her portion of retirement funds reversed. Wife takes nothing.

**Opinion:** Generally, absent a reason to toll the clock for purposes of statutes of limitations, the clock begins to run when a wrongful act causes the injury. The discovery rule, however, provides that a limitations clock will be tolled and only begins to run when a plaintiff discovers or should have discovered the injury after a reasonable inquiry. The discovery rule only applies when an injury is of the type that a plaintiff is unlikely to

discover within the limitations period. The limitations clock begins to run immediately upon plaintiff's actual or constructive discovery of the injury, not when all elements of plaintiff's claim are discovered. Here, wife filed her suit on September 26, 2007. Therefore in order for the discovery rule to apply, the rule must have been operating to toll the limitations clock through September 25, 2003. However, daughter's uncontroverted trial testimony shows that in 2002, wife had notice of facts which upon further reasonable inquiry would have revealed husband's withdrawal of retirement funds. The fact that wife did not appreciate the full scope of her injury until August 2007 is irrelevant. In 2002, daughter's information regarding husband's withdrawal of retirement funds gave wife constructive knowledge of her injury and the four-year limitations clock began running. Mother filed her claim against husband on September 26, 2007, well beyond the four-year statute of limitations.

The doctrine of fraudulent concealment imposes a duty on a defendant to disclose material facts when a plaintiff would not ordinarily discover the material facts through the exercise of ordinary diligence or a reasonable investigation. A defendant's fraudulent concealment of material facts from a plaintiff tolls a limitations clock until a plaintiff discovers or should have discovered the injury. Here, wife had constructive knowledge of her injury in 2002, which started her four-year limitations period. Wife failed to file her claim until September 26, 2007, well after the four-year limitations period.

When a fiduciary's wrongful conduct is inherently undiscoverable, persons to whom the fiduciary owes a duty are relieved of reasonable inquiry into the fiduciary's conduct so long as the fiduciary relationship exists or until the conduct becomes so apparent that it cannot be ignored. here, husband owed a fiduciary duty to wife until such time as he paid wife her portion of his retirement. wife was relieved of her duty to investigate husband's alleged wrongful conduct until she discovered husband's failure to remit her portion of his retirement. Wife had constructive notice of husband's wrongful conduct in 2002 at which point she had four years to file her claim. Wife failed to file her claim within four years of discovering her injury. in sum, because wife filed her claim more than four years after she constructively discovered her injury, her claim is barred by the four-year statute of limitations.

**Dissent:** Decree named husband a trustee of wife's funds. The nature of a trust and the duty of full disclosure alter the burden of proof. Husband took control of wife's funds in 2002 and held them in trust for her. He did not notify wife of a repudiation of the trust. Without a termination of the trust relationship, husband continued as trustee until he lost all of wife's money. When a trustee commingles trust property with his own, the commingled funds become the property of the trust until the trustee can trace what is his. Husband held wife's money until 2004 and suit was filed in 2007, within four years of the date all of her monies held in trust disappeared. Because of the trustee's duty to fully disclose, the discovery rule is applied differently to a trustee. A beneficiary has no duty to investigate until she has actual notice. Under common law, limitations do not begin to run until the trustee repudiates the trust and notifies the beneficiary. Regardless of the circumstances, the law provides that the beneficiary is entitled to rely on a trustee to fully disclose relevant information. "The beneficiary is entitled to presume that a trustee holding trust property does so as a trustee, and the trust relationship continues unless plainly repudiated.

**Editor's Comment:** *The opinion does not specifically detail the causes of action that were included in W's pleading however W claimed that although her pleading was entitled "Petition for Enforcement of Property Division," she was relying on a 4 year SOL and application of the discovery rule to govern what she felt were independent claims for breach of contract and breach of fiduciary duty. Clearly W had a meritorious claim for relief regardless of the theory but failed to protect it according to the COA. This case would suggest that any information regarding a former spouse's retirement should trigger a diligent and immediate inquiry into the specifics regarding distribution of any retirement benefits. S.S.S.*

**Editor's Comment:** *This issue of whether the ex-spouse's status as a trust beneficiary affects the duty to investigate will come up again. While the dissent gives the supreme court jurisdiction, I would imagine the supreme court would want to wait until more intermediate appellate courts have weighed in on this issue. No motion for rehearing appears to have been filed. The petition for review was due 5-24-10, and no motion for extension of time to file a petition for review appears to have been filed in the supreme court. J.C.M.*

**MILITARY RETIREE CANNOT BREACH A CONSTRUCTIVE TRUST FIDUCIARY DUTY UNDER DIVORCE DECREE BY ELECTING DISABILITY BENEFITS IN LIEU OF DISPOSABLE RETIREMENT INCOME**

¶10-3-18. [\*Jackson v. Jackson\*, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1486641 \(Tex. App.—San Antonio 2010, no. pet. h.\) \(4/14/10\).](#)

**Facts:** Husband and wife divorced in 1994. The divorce decree provided wife a 39.58% interest in husband's disposable retired or retainer pay to be paid as a result of husband's service in the U.S. Army. The divorce decree directed the Secretary of the Army to pay wife's interest when husband's retirement pay became due to be paid. The divorce decree appointed husband as trustee of wife's interest in his retirement pay only if the Secretary of the Army failed to directly pay wife her interest in husband's retirement pay. Pursuant to the divorce decree, the Defense Finance and Accounting Service paid wife her interest in husband's retirement pay from 1995 until 1999.

In 1999, husband received a 100% disability rating requiring husband to waive 100% of his military disposable income in lieu of Department of Veterans Affairs (DVA) disability benefits. As a result, wife no longer received any payments from husband's disposable retirement pay. However, in 2004, a change in federal law permitted husband to receive his military retirement pay concurrently with his DVA disability benefits. As a result, wife once again began receiving her interest in husband's military disposable retired pay. In 2004, due to another change in federal law, husband elected to receive Combat Related Special Retirement Compensation (CRSC) in lieu of his concurrent disposable retired and DVA pay. When husband elected to receive CRSC, wife was no longer entitled to receive her interest in husband's disposable retirement pay because CRSC is not considered retirement pay.

Wife filed a motion of enforcement in trial court arguing that husband's election to receive CRSC breached his fiduciary duty to protect mother's interest in husband's military disposable retirement pay. Trial court denied wife's motion and wife appealed.

**Holding:** Trial court's denial of wife's enforcement motion affirmed

**Opinion:** Under the federal Uniformed Services Former Spouses' Protection Act (FSPA), state courts may treat military "disposable retirement or retainer" pay as property of the individual retiree or as marital community property in accordance with state law. In its definition of "disposable retirement or retainer" pay, FSPA expressly excludes "military retirement pay waived in order to receive veterans' disability payments." Thus, FSPA grants state courts authority to treat disposable retired pay as community property, but does not grant state courts authority to treat total retired pay, including disability benefits, as community property. Because federal law expressly limits state authority in the apportionment of military disability benefits among spouses in divorce, a divorce decree cannot prohibit a military retiree from waiving military retirement to obtain disability benefits.

Here, wife failed to prove husband breached his fiduciary duty under the divorce decree for two reasons. First, the terms of the decree expressly provide that husband will act as trustee only if the Secretary of the Army failed to pay wife her interest in husband's disposable retirement pay. The evidence indicates husband never received any portion of wife's interest in his disposable retirement pay. Second, federal law permitted husband to waive his military retirement pay to receive CRSC, a form of disability pay. The divorce decree contains no language indicating husband agreed not to waive his disposable retirement, and the enforceability of such language would be questionable under Texas and federal law. Because husband was entitled under federal law to waive his disposable retirement pay, any finding that husband breached his fiduciary electing CRSC in lieu of his military retirement would be contrary to federal law. Husband, therefore, did not breach his fiduciary duty under the divorce decree.

**Editor's Comment:** *Because the federal laws regarding military retirement benefits continues to evolve, former spouses continue to be subjected to the loss of benefits that they allegedly received at the time of divorce. When representing the non-military spouse, great consideration should be given to obtaining assets other than the military retirement, which is great if it is actually received, but if the military spouse becomes eligible for these ever evolving alternate compensations, your client may be left out in the cold and coming back to you for an explanation. G.L.S.*

**TRIAL COURT DID NOT ALTER OR AMEND DIVORCE DECREE IN REFUSING TO ENFORCE PROPERTY DIVISION WHEN HUSBAND COULD NOT SHOW HE ATTEMPTED TO RETRIEVE CONTESTED PROPERTY.**

¶10-3-19. [In re Crook, No. 05-09-00724-CV, 2010 WL 1713992 \(Tex. App.—Dallas 2010, no pet. h.\)](#) (mem. op.) (4/29/10).

**Facts:** Divorce decree awarded husband and wife various household items and personal property pursuant to a mediated settlement. Following divorce, husband motioned trial court to enforce the decree. Husband alleged wife failed to remit to him specified personal property provided in divorce decree. Following a hearing, trial court denied husband's motion to enforce. Husband appealed arguing that by failing to enforce the property division, trial court was altering the court's prior property division.

**Holding:** Trial decision affirmed

**Opinion:** A trial court does not abuse its discretion by refusing to enforce a divorce decree when a petitioner seeking to enforce a property division fails to offer evidence that either 1) the petitioner attempted to obtain the property from the opposing party; 2) the opposing party refused petitioner access to the property; or 3) the petitioner did not voluntarily abandon the property. Here, husband testified he did not discover the missing items until 25 days after the divorce. Additionally, husband offered no testimony that he attempted to retrieve the property from wife. Furthermore, husband offered conflicting testimony as to whether husband or wife had control of the residence following divorce and whether wife actually took contested property. Based on the record, trial court did not abuse its discretion in refusing to enforce the property division and, therefore, did not alter or amend the divorce decree.

**TRIAL COURT'S ORDER FOR HUSBAND TO PAY WIFE IN CASH RATHER THAN "IN KIND" SUBSTANTIALLY CHANGED THE DIVORCE DECREE'S DIVISION OF PROPERTY.**

¶10-3-20. [Rosenberg v. Rosenberg, No. 01-09-00398-CV, 2010 WL 1840244](#) (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (5/06/10).

**Facts:** Husband and wife voluntarily submitted divorce action to binding arbitration. Based on arbitration, trial court signed a divorce decree. A provision of the decree stated: "[all] rights of ownership interest to the following brokerage accounts ... except the \$50,053.51 (*in kind*) of the community property portion awarded [to wife]."

After trial, wife filed a turnover application with the trial court demanding husband to surrender \$50,053.51 in cash to wife. At trial, husband argued that the account in question always contained less than \$50,000; contained mostly stocks and IRA's; and if forced to convert to cash, he would bear all of the tax

penalties for removing monies early. Father additionally argued that since the decree became valid, the stocks in the account decreased in value, and that he would bear the brunt of a fluctuating market if trial court forced him to convert to cash. Following the trial, trial court ordered husband to turnover \$50,053.51 in cash or cashier's check to wife. Husband appealed arguing trial court substantively modified the divorce decree's property division.

**Holding:** Trial decision reversed and remanded

**Opinion:** In enforcing a divorce decree's property division, a trial court may not amend, modify, alter, or change the division of property. An order to enforce the division is limited to an order to assist in the implementation of or to clarify the prior order and may not alter or change the substantive division of property. Black's Law Dictionary defines "in kind" as "in goods or services rather than money."

Here, trial court's turnover order requires husband to "turnover the amount of \$50,053.51 in cash or cashier's check." By ordering husband to pay wife in cash rather than "in kind," trial court substantively changed the divorce decree's division of property. Trial court's turnover order caused husband to suffer all of the depletion of the assets in the account. Likewise, wife's percentage in the community assets in the account actually increased because husband alone was forced to bear the burden of the reduction in value. Accordingly, trial court abused its discretion by ordering husband to pay wife in cash.

## *SAPCR* STANDING AND PROCEDURE

**FOLLOWING DISMISSAL FOR WANT OF PROSECUTION UNDER TRCP 165(a)(3), TRIAL COURT MUST EXPRESSLY REINSTATE A CASE BEFORE ISSUING AN ENFORCEMENT ORDER, OTHERWISE THE COURT LACKS JURISDICTION TO ISSUE THE ORDER.**

¶10-3-21. [\*In re R.C.M.\*, No. 2-09-080-CV, 2010 WL 1267759 \(Tex. App.—Fort Worth 2010, no pet. h.\)](#) (mem. op.) (4/01/10).

**Facts:** Mother and Father divorced in 1999. The divorce decree ordered Father to pay child support payments for couple's three children through the Tarrant County Child Support Office. Father's payments directly to Mother would not be credited toward his account. In February 2008, Mother filed enforcement motion alleging Father violated the divorce decree and Father owed \$108,318 arrearage.

In August 2008, trial court sent both parties notice of dismissal for want of prosecution. Pursuant to [TRCP 165\(a\)](#), trial court placed the case on its dismissal docket and advised that absent an appearance by Mother to reinstate the case, trial court would dismiss the case at any time beginning October 1, 2008 until October 29, 2008. On October 17, 2008, Mother and Father agreed to and signed an Associate Judge's Report on Enforcement (report). The report ordered Father to confinement in county jail but suspended confinement pursuant to Father's adherence to timely payments to the child support office until he satisfied his arrearage.

On October 30, trial court dismissed the motion for failure to prosecute. On November 21, Mother filed a motion to reinstate. Mother set reinstatement hearing date for December 19. On December 17, Mother filed a separate motion to enforce the October 17 report. On December 19, trial court held Father in contempt for failure to pay child support in accordance with the October 17 report. Trial court assessed attorney's fees against Father and ordered him confined to county jail but suspended confinement subject to community supervision and timely monthly child support payments. Trial court, however, failed to expressly reinstate the case.

Father challenged trial court's enforcement order contending the order was improper under [TRCP 165\(a\)\(3\)](#), because trial court dismissed the case and never signed an order of reinstatement. Mother countered that trial court had plenary power to "vacate, modify, correct or reform" its dismissal under [TRCP 165\(a\)\(4\)](#) and [TRCP 329\(b\)](#).

**Held:** Trial court enforcement order vacated.

**Opinion:** [TRCP 165\(a\)\(3\)](#) governs reinstatement procedures after a court dismisses a motion for want of prosecution. Under [TRCP 165\(a\)\(3\)](#), after a party files a verified motion to reinstate, trial court possesses plenary power to reinstate a case for thirty days after the motion is overruled by a written and signed order. If a trial court does not expressly reinstate a case in writing within seventy-five days, the motion is "deemed overruled by operation of law." If trial court fails to issue a written judgment within 105 days, the judgment will be final. A court order reinstating a dismissed case must be in writing and must expressly reinstate the case. Here, trial court signed an order holding Father in contempt on December 19 and ordered Father to suspended confinement. Trial court, however, neither expressly nor impliedly reinstated the case after its October 30th dismissal. Because trial court never reinstated the case, it lacked jurisdiction to enter the December 19, enforcement order. Trial court cannot reinstate a case by ordering a judgment on a motion previously dismissed for lack of prosecution.

**Editor's Comment:** *Add this to your list of orders that must be in writing and signed prior to the expiration of the trial court's plenary power (see also orders granting motions for new trial). J.C.M.*

#### **MOTHER'S AMENDED PETITION SUPERCEDED ORIGINAL PETITION AND CONTROLLED MOTHER'S THEORY OF RECOVERY.**

¶10-3-22. [In re D.L.Z., No. 09-09-00148-CV, 2010 WL 1611028 \(Tex. App.— Beaumont 2010, no pet. h.\)](#) (mem. op.) (4/22/10).

**Facts:** Mother and father separated in August 2005. At that time, DLZ began living with paternal grandparents. Mother and father divorced in December 2006. The divorce decree appointed father as sole managing conservator and appointed mother as possessory conservator. In May 2008, mother filed a modification petition requesting trial court to appoint her as primary conservator. On May 18, 2008, paternal grandparents filed a similar petition seeking to be appointed as co-sole managing conservators. Two days later mother filed amended petition seeking an order to detail mother's possessory rights under the divorce decree. After hearing evidence, trial court found mother voluntarily relinquished control of DLZ. Trial court appointed paternal grandparents as co-managing conservators and appointed mother and father as possessory conservators. Mother appealed.

**Holding:** Trial court decision affirmed.

**Opinion:** Generally, where a party receives all of the relief requested from a trial court, the party cannot seek relief from an appellate court. When a plaintiff timely files an amended pleading, the amended pleading supercedes all previously filed pleadings and controls all theories of recovery in a case. An oral statement at trial cannot amend a party's pleadings. Here, mother's amended complaint seeking an order for trial court to detail her possessory rights superceded her first complaint seeking primary conservatorship. Trial court detailed mother's possessory rights under the divorce decree by designating her as a possessory conservator. Mother cannot seek appellate relief because she received all of the relief she requested from trial court.

**Editor's Comment:** *An amended pleading supercedes the prior pleading. Law school 101. So, either call it "supplemental" so you don't waive anything, or double and triple check that you are asking for everything the client might want. M.M.O.*

**TRIAL COURT ABUSED DISCRETION BY GRANTING TEMPORARY MANAGING CONSERVATORSHIP WITHOUT A LIVE PLEADING REQUESTING MANAGING CONSERVATORSHIP.**

¶10-3-23. [In re Dukes, No. 04-10-00257-CV, 2010 WL 1708251](#) (Tex. App.—San Antonio 2010, orig. proceeding) (mem. op.) (4/28/10).

**Facts:** Father, sole surviving parent of child, lived with child and child's paternal grandparents. Criminal court revoked father's probation and ordered him to two year's incarceration. Child continued to live with paternal grandparents. Maternal grandparents filed suit affecting parent-child relationship seeking managing conservatorship of child. In response, father motioned trial court to dismiss arguing maternal grandparents lacked general standing under [TFC 102.003](#) or grandparent standing under [TFC 102.004](#). Grandparents amended petition seeking only access and possession to child under [TFC 153.142](#). Maternal grandparents additionally motioned court for temporary orders requesting trial court to grant them temporary possession of child. Trial court granted temporary orders granting maternal grandparents temporary managing conservatorship. Father filed mandamus proceeding.

**Holding:** Mandamus conditionally granted. Trial court ordered to withdraw temporary orders.

**Opinion:** In order for a trial court to grant temporary managing conservatorship, petitioners must have a live pleading requesting managing conservatorship. Here, maternal grandparents did not have a live pleading requesting managing conservatorship of child. Maternal grandparents merely requested possession of or access to child under [TFC 153.142](#). Trial court, therefore, abused its discretion in granting maternal grandparents temporary managing conservatorship.

**Editor's Comment:** *There is no discussion in this case about the relaxed standards of pleadings in cases where the best interest of the child is at stake and the COA simply followed strict black letter law, refusing to allow the maternal GP's relief which they otherwise had no standing to seek. How refreshing! S.S.S.*

**STANDING IN SUITS CHALLENGING A PARENT'S PARENTAL RIGHTS MUST BE ESTABLISHED BY PROVING PARENT FAILED TO ADEQUETLY CARE FOR THE CHILD.**

¶10-3-24. [In re C.T.H.S., \\_\\_\\_ S.W.3d \\_\\_\\_, 2009 WL 6387300](#) (Tex. App.—Beaumont 2010, no pet. h.) (4/29/10).

**Facts:** Appellant petitioned trial court to be appointed as sole managing conservator of mother's two children. Prior to the suit, appellant lived with mother and assisted with the care of mother's children. Trial court found no evidence that mother failed to exercise some care and control over the children or that mother totally abdicated her parental responsibilities over to appellant. Because no evidence indicated that appellant exercised exclusive control over the children during the relevant time period, trial court found appellant lacked standing to maintain a suit affecting the parent-child relationship (SAPCR). Trial court dismissed appellant's petition for lack of subject matter jurisdiction. Appellant appealed trial court's dismissal of her petition arguing that because she lived with mother and children, [TFC 102.003\(a\)\(9\)](#) permitted the court to consider the best interest of the children.

**Held:** Trial court's dismissal of appellant's sole conservator petition affirmed.

**Opinion:** As long a parent adequately cares for his or her children, the State has no business interfering with the parent's constitutional right to rear the children as he or she sees fit. [Troxel v. Granville, 530 U.S. 57 \(2000\)](#). Standing in SAPCR cases, therefore, should be construed consistently with the Supreme Court's constitutional principles in [Troxel](#). In SAPCR cases, [TFC 102.003\(a\)\(9\)](#) confers standing on a person other

than a foster parent who maintains “actual care” of the child for at least six months and ending no more than 90 days prior to filing the petition. Consistent with the principle in *Troxel*, when someone other than a parent claims standing under the “actual care” requirement of [TFC 102.003\(a\)\(9\)](#), a court must consider whether a parent is adequately caring for the child. A court is not required to make a decision regarding the best interest of the child. Here, appellant lived with mother and participated with the care of mother’s children. The record, however, does not indicate that mother failed to adequately care for her children or that she abdicated her parental responsibilities. Appellant, therefore, failed to establish standing to maintain her suit challenging mother’s parental rights.

**Editor’s Comment:** *This opinion adds an entirely new component to standing challenges between parents and non-parents, ie. Troxel. In the recent decision of In re M.K.S.-V, the Dallas COA found standing for a non-bio mom who exercised visitation rights to the child for a 2-year period after separation. In comparison, the Beaumont COA has denied standing to a non-bio mom who co-parented the children for six years. Petition for Review has been filed in M.K.S.-V. [on May 28, 2010 the petition was denied—G.L.S.] and non-bio mom plans to pursue her challenge in this case to the Texas Supreme Court. Both cases are set up to invite significant rulings from the Supreme Court so keep any eye on them. S.S.S.*

**Editor’s Comment:** *Another in the recent flurry of cases involving non-parent standing in custody cases. This one splits hairs in the “actual care and control” language of TFC 102.003(a)(9), requiring a total abdication of parental responsibilities before standing is permitted. My opinion, for what it is worth, this case goes way beyond the language of the statutory meaning of “actual care and control”. Nothing in the statute requires such an overreaching definition of the term. The Beaumont Court in this and other recent opinions (see In re K.K.C.) has gone way out on a limb that is unsupported by the other courts of appeals. Maybe the Beaumont Court is begging the Texas Supreme Court for a ruling on this issue? Maybe with the addition of two outstanding family law jurists on the Texas Supreme Court, we’ll get some definitive guidance on non-parent standing soon! This case could have been decided much more easily on waiver grounds based on the non-parent’s alleged failure to submit competent evidence in support of her standing. That point is made at the tail-end of the case. It could have just been a short memorandum opinion on the failure to present competent evidence to carry the burden of proof. The Beaumont Court did not need to go this far except that the just seem to want to write on this issue. M.M.O.*

#### **TRIAL COURT’S PARENT-CHILD DETERMINATION REVERSED BECAUSE CITATION SERVICE NOT ON FILE WITH COUNTY CLERK FOR TEN DAYS PRIOR TO HEARING**

¶10-3-25. [In re E.E.F., No. 13-09-00620-CV, 2010 WL 1731654 \(Tex. App.—Corpus Christi 2010, no pet. h.\)](#) (mem. op.) (4/29/10).

**Facts:** On March 10, 2009, AOG filed petition to establish parent-child relationship with respect to father. Trial court set hearing date for May, 26, 2009. The Calhoun County Clerk’s record indicates that on March 30, 2008, AOG served father with the citation and that a constable signed the service citation. The Clerk’s record, however, indicates that the citation was not file-stamped until June, 26 2009. Father failed to appear at the May 26, 2009 hearing. Because father failed to appear, trial court entered a default judgment against him, determining him to be EEF’s biological father and ordering father to pay child support. Father filed restricted appeal, arguing that return of citation was not on file ten days prior to the grant of default judgment.

**Holding:** Default judgment reversed and remanded.

**Opinion:** [TRCP 107](#) requires that no default judgment can be granted until the citation along with proof of service has been on file with the court clerk for ten days exclusive of the day of filing and the day of judgment. Strict compliance with service of citation rules must affirmatively appear on the face of the record.

Failure to strictly comply with [TRCP 107](#) renders citation service invalid. Here, the clerks record indicates a constable served and signed the citation service. However, the citation was not affirmatively on file for 10 days prior to the May 26, 2009 hearing because the citation was not file stamped until June 26, 2009. Because the executed citation was not on file for ten days prior to the May 26, 2009 hearing, the citation service was invalid.

**DIVORCE DECREE REVERSED DUE TO TRIAL COURT’S FAILURE TO MAKE A RECORD OF HEARING DETERMINING FATHER’S PARENT-CHILD RELATIONSHIP ISSUES.**

¶10-3-26. [Baker v. Baker](#), No. 03-09-00455-CV, 2010 WL 2010817 (Tex. App.—Austin 2010, no pet. h.) (mem. op.) (5/18/10).

**Facts:** During divorce proceedings, father failed to appear at trial. Trial court entered default divorce decree on all issues including issues related to father’s parent-child relationship. Father initiated a restricted appeal arguing that trial court failed to make a record of the hearing.

**Holding:** Trial court’s determinations related to parent-child relationship reversed and remanded

**Opinion:** Under [TFC 105.003\(c\)](#), a trial court is required to make a record of any hearings involving the parent-child relationship unless waived by the parties with the consent of the court. The record requirement under [TFC 105.003\(c\)](#) is mandatory and is not subject to harmless error review. Here, trial court failed to make a record of the hearing. The hearing involved issues related to father’s conservatorship, possession, and child-support obligations. Accordingly, those portions of the trial court’s divorce decree are reversed and remanded.

**Editor’s Comment:** *This is a trap for the unwary especially in courts that do not have court reporters but rely on tape recorders to record the testimony. If the tape recording is inaudible, even by no fault of the attorney or spouse, the “defaulted spouse” receives a new trial on the parent child issues. J.A.V.*

**SAPCR**  
**ALTERNATIVE DISPUTE RESOLUTION**

**TRIAL COURT REFUSED TO ENFORCE A RULE 11 AGREEMENT BECAUSE MOTHER FAILED TO PROPERLY FILE A PLEADING FOR THE COURT TO ENFORCE.**

¶10-3-27. [Sampson v. Ayala](#), No. 14-08-01002-CV, 2010 WL 1438932 (Tex. App.—Houston [14 Dist.] 2010, no pet. h.) (mem. op.) (4/13/10).

**Facts:** Mother and father filed separate petitions with trial court seeking to modify parent-child relationship. Both parties participated in mediation and reached partial agreement on four issues. The parties left the remaining issues for trial. Pursuant to the mediation, the parties signed a written agreement and intended to file the written agreement with trial court according to TRCP 11 (Rule 11). The day before the trial, father faxed document to mother’s counsel withdrawing his consent to several of the mediation provisions. Nevertheless, mother filed the agreement with the court on the day of the trial. At trial, father expressly withdrew consent to three of the mediation provisions and stipulated to the fourth. Mother vigorously objected arguing that she did not receive notice of father’s withdrawal of consent. The trial continued in

spite of mother's objections. Following trial, trial court entered order granting joint managing conservatorship of the child and specifying visitation pick-up and drop-off locations.

Mother appealed, arguing that because she filed the Rule 11 agreement prior to trial, father's withdrawal of his consent does not render the settlement unenforceable. Mother additionally argued that trial court abused its discretion in refusing to grant her a continuance so she could properly prepare a motion to enforce the Rule 11 agreement.

**Holding:** Trial decision affirmed.

**Opinion:** A Rule 11 agreement must be filed with the court before a party can seek enforcement of the agreement. A party can withdraw consent to a Rule 11 agreement at any time before a trial court renders judgment on the agreement. A trial court cannot render judgment on a Rule 11 agreement absent a parties consent unless a claim to enforce the agreement is raised through an amended pleading, by a counter claim asserting a breach-of-contract, or through and independent suit. A trial court cannot determine the validity of the Rule 11 agreement without properly filed pleadings. Here, mother properly filed the Rule 11 agreement with the court pursuant to her petition for parent-child modification. Mother, however, did not seek to enforce the agreement by an amended pleading, a counterclaim asserting breach-of-contract claim, or through an independent suit. Mother's petition to modify parent-child relationship is not equivalent to seeking enforcement of the Rule 11 agreement. Because mother failed to file pleadings seeking enforcement of the agreement, trial court could not enforce the agreement.

[TRCP 245](#) provides that upon written request, the court must reset the "first" trial date with not less than forty-five days notice, or if the first trial date has already been reset, then the court may reset the trial date on any reasonable notice or agreement by the parties. Here, the record evidence indicates that trial court already reset original trial date upon father's written request. Because trial court previously reset the initial trial date, trial court had full discretion to grant or deny mother's continuance. Moreover, mother failed to request her continuance in writing as required under [TRCP 245](#).

## *SAPCR* PARENTAGE

**TRIAL COURT'S FINDING THAT FATHER HAD NOT BONDED WITH CHILD WAS NOT A PROPER FINDING UNDER A TFC 160.607 DETERMINATION THAT FATHER WAS NOT CHILD'S PRESUMED FATHER.**

¶10-3-28. [Gomez v. Gomez, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 2099184 \(Tex. App.— San Antonio 2010, no pet. h.\) \(5/26/10\).](#)

**Facts:** Mother filed for divorce. During trial, mother alleged father converted \$50,000 in community property. Father contended that he was not the father of the thirteen-year-old child. Trial court found that mother and father did not engage in sexual intercourse during the probable time of child's conception, and that father and child had not bonded. Consequently, trial court determined that father was not the presumed father of thirteen-year-old child. In dividing the couple's property, trial court offset the amount father had paid in "back child support" in raising the child against the \$50,000 in community property mother alleged father converted. Mother appealed, arguing trial court erred in determining father was not the presumed father of child and that trial court improperly divided the couple's property.

**Holding:** Trial court’s decision reversed and remanded

**Opinion:** Under [TFC 160.607\(a\)-\(b\)](#), a presumed father of a child must contest parentage within four years of the birth of the child. A presumed father may contest his parentage after the four-year limitations bar if 1) the presumed father and the mother of the child did not live together or engage in sexual intercourse with each other during the probable time of conception; **and** 2) the presumed father never represented to others that the child was his own.

Here, trial court found that father did not engage in sexual intercourse with mother during the probable time of child’s birth but did not find that father never represented to others that child was his own. A finding that no bond existed between father and child does not equate to such a finding. Moreover, the evidence established that father was listed as child’s father on child’s birth certificate, in school records and on tax returns. The DNA evidence presented at trial was not relevant to the disposition of the appeal. Accordingly, trial court erred in determining father was not a child of the marriage. As a result, trial court also erred in offsetting father’s alleged conversion of community property against “back child support” for raising child.

## *SAPCR* CONSERVATORSHIP

### **PARENT DOES NOT BENEFIT FROM THE “PARENTAL PRESUMPTION” IN MODIFICATION SUITS AFFECTING A PARENT-CHILD RELATIONSHIP**

¶10-3-29. [In re C.D.W., No. 2-09-113-CV, 2010 WL 1565294 \(Tex. App.—Fort Worth 2010, no pet. h.\)](#) (mem. op.) (4/15/10).

**Facts:** Father filed original suit affecting parent-child relationship in 2003. Trial court appointed mother and father as joint managing conservators in 2005 giving father exclusive right to designate CDW’s primary residence. In 2006, mother filed modification petition requesting trial court to appoint her as conservator with exclusive right to designate CDW’s primary residence. Meanwhile, CDW’s paternal grandparents filed an intervention petition in 2007 seeking to be designated as CDW’s sole managing conservators. In January 2009, trial court designated grandparents as joint managing conservators with exclusive right to designate CDW’s primary residence. Trial court additionally designated mother and father as joint managing conservators and ordered both to pay child support to grandparents.

Mother appealed arguing trial court failed to give proper weight to her “parental presumption” when it designated grandparents as joint managing conservators with exclusive right to designate CDW’s primary residence.

**Holding:** Trial court decision affirmed

**Opinion:** [TFC 153.131\(a\)](#) provides that in original suits affecting a parent-child relationship, unless a court finds the best interest of a child would not be served by awarding custody to a parent or parents, the parent or parents must be appointed as sole or joint managing conservators of the child. [TFC 156](#) provides the statutory scheme for subsequent modification determinations. TFC 153 and TFC 156 are distinct statutory schemes involving different time frames in suits affecting a parent-child relationship. Under TFC 153, a parent has the benefit of the parental presumption in an original proceeding. A parent does not benefit from the parental presumption in a subsequent modification under TFC 156. Here, mother petitioned trial court to modify her parent-child relationship. Because her action is a modification rather than an original proceeding, her parental presumption does not apply.

**TEXAS TRIAL COURT HAS SUBJECT-MATTER JURISDICTION TO MODIFY ANOTHER STATE'S CUSTODY DETERMINATION WHEN THAT STATE'S TRIAL COURT FINDS TEXAS TO BE A MORE CONVENIENT FORUM.**

¶10-3-30. [In re J.W.H., No. 14-09-00143-CV., 2010 WL 1541679 \(Tex. App.—Houston \[14 Dist.\] 2010, no pet. h.\)](#) (mem. op.) (4/20/10).

**Facts:** Mother and father divorced in 2003 in Maryland. Maryland trial court designated mother as primary custodial parent of the couple's two children with right to designate the residence of the children. In 2006, Maryland trial court issued modification order awarding mother primary residential custody and permitting mother to move to Texas with the two children. Maryland trial court issued additional order detailing father's visitation rights.

In 2007, father petitioned Texas trial court to modify Maryland trial court's custody order. Mother filed plea to the jurisdiction and a general denial. In the alternative, mother requested trial court to stay proceedings while she filed custody action in Maryland. In response to mother's modification petition, in March 2008, Maryland trial court dismissed mother's proceeding, finding that Texas was the more convenient forum. Texas trial court heard modification hearing in December 2008. Mother and father offered conflicting testimony regarding each other's conduct and each other's handling of the children during actual and telephone visitations. Following the trial, trial court appointed father as the sole managing conservator of the two children. Mother appealed on several grounds including a challenge to trial court's jurisdiction.

**Holding:** Trial court's decision affirmed.

**Opinion:** Under [TFC 152.203](#), a Texas court cannot modify another state court's custody determination unless the other state's court determines it no longer has exclusive jurisdiction or that a Texas court would be a more convenient forum. Here, before Texas trial court modified Maryland's custody determination, Maryland trial court, in its March 2008 dismissal of Mother's modification petition, found that a Texas court would be a more appropriate forum. Thus, Texas trial court had subject-matter jurisdiction to modify Maryland's custody determination.

**TRIAL COURT DID NOT ERR BY APPOINTING NON-PARENT CARETAKER JMC WITH PRIMARY RIGHT OF POSSESSION.**

¶10-3-31. [In re J.M.W., \\_\\_\\_\\_\\_ S.W.3d \\_\\_\\_\\_\\_, 2009 WL 6031287 \(Tex. App.—Beaumont 2010, no pet. h.\)](#) (mem. op.) (3/11/10).

**Facts:** Child began staying at caretakers' house in 2005 on weekends. Caretaker or her husband occasionally had to stay home from work when mother did not pick child up. Caretaker and mother decided child would live with caretaker, and child did so for 2 years. Caretaker enrolled the child in daycare for which she paid. Child attended daycare from 08/06 to 06/07. During that time, mother provided no support to caretaker. Child began attending a public elementary school in 08/07. Caretaker filed a SAPCR on 09/14/07. After a hearing, trial court appointed caretaker JMC of Child along with Child's parents and awarded caretaker the exclusive right to determine Child's primary residence. Mother appealed.

**Held:** Affirmed.

**Opinion:** Mother claimed that the former TFC Chapter 14 in effect at time of trial limited a non-parent to rights of a PC. These former statutes, however, did allow trial court to appoint a non-parent JMC with the right to establish the legal domicile of child based on a best interest of child test. The former statute was therefore not more restrictive than the current statute in [TFC Chapter 153](#).

Mother claimed that caretaker failed to rebut the presumption in [TFC 153.131](#) that mother should be appointed SMC. While the El Paso Court of Appeals has held that trial court can only award primary possession to a non-parent JMC when the evidence showed that awarding primary possession to parent would result in serious physical or emotional harm, other courts had declined to follow that standard.

The U.S. Supreme Court's holding in [Troxel v. Granville, 530 U.S. 57, 68-60 \(2000\)](#) that a State should not intrude on the private realm of the family to question the ability of a parent to care for a child as long as a parent adequately cared for his or her child. Even if *Troxel* requires trial court to apply the parental presumption in [TFC 153.131](#), trial court had sufficient evidence to find that caretaker rebutted the presumption. [TFC 153.373](#) allows the parental presumption to be rebutted if mother voluntarily relinquishes care and control of child for a period of 1 year or more and if the appointment of a non-parent is in the best interest of the child. The evidence was sufficient to support a finding that mother had voluntarily relinquished actual care and control of child to caretaker. Furthermore, trial court also heard evidence that child bonded with caretaker and her family and that mother did not provide a stable environment for child. Trial court, therefore, did not abuse its discretion in ruling that caretaker rebutted the parental presumption.

Mother claimed that trial court violated her due process rights, arguing that the constitutional right of a parent to direct her child's upbringing prohibits trial court from awarding the right to determine child's primary residence to caretaker. The intrusion on parental rights, however, is justified because mother voluntarily relinquished her rights to child for a considerable period of time. Since the test in [TFC 153.373](#) rebuts the presumption found in [TFC 153.131](#), trial court did not violate mother's due process rights by appointing caretaker as JMC.

Mother claimed that trial court entered contradictory findings by both finding that child's current environment with mother would significantly impair child's physical health or emotional development and appointing mother JMC. The former finding, however, is not in fact inconsistent with appointing mother as JMC. [TFC 153.372\(a\)](#) expressly permits such an arrangement.

Mother claimed that trial court erred by dividing the custody of child from his siblings of her marriage without clear and compelling reasons. While it is true that keeping siblings in the same household is a factor in determining the best interests of child, none of mother's other children shared the same father as child, and the policy of keeping the children of a marriage together does not apply to half-siblings. Additionally, the public policy encouraging keeping siblings together is not implicated when parents voluntarily separate children.

**Editor's Comment:** *Another Beaumont Court opinion on non-parent standing, but thankfully they got this one right where the parent actually relinquished the child to live with the non-parent for 2 years. M.M.O.*

#### **PARENT MAY NOT USE INEFFECTIVE ASSISTANCE OF COUNSEL AS GROUNDS TO APPEAL TRIAL COURT'S CONSERVATORSHIP OR CUSTODY DETERMINATION.**

¶10-3-32. [In re G.J.P., S.W.3d , 2010 WL 1780045 \(Tex. App.—Texarkana 2010, no pet. h.\) \(5/05/10\).](#)

**Facts:** At the time of the custody proceeding, father stood accused of murdering his wife and stepson. Initially, the state sought termination of father's parental rights to his two children, or in the alternative, conservatorship. The state eventually nonsuited the termination petition and pursued only the conservatorship issues. Following trial, trial court appointed the children's maternal grandparents as joint managing conservators. Father filed appeal on several grounds including ineffective assistance of his court-appointed counsel.

**Holding:** Trial decision affirmed.

**Opinion:** Ineffective assistance of counsel is a very narrow constitutional claim limited primarily to criminal cases (where loss of freedom is at stake) and parental termination cases. The right to effective counsel extends to parental-termination cases because a trial court's termination of a parent-child relationship results in the permanent severance of a parent's constitutional right to maintain a relationship with the child. A trial court's conservatorship or custody determination does not reach this level. A trial court's decision may restrict or severely limit a parent's custody of the child. A trial court's custody determination, however, does not permanently sever the parent-child relationship.

Here, the state brought this suit under portions of the TFC related to parental-rights termination, and the court issued orders under those portions of the TFC. However, it does not follow that father is entitled to an ineffective assistance of counsel argument because the court did not terminate father's parental rights. The state nonsuited the termination portion of its petition and accordingly, the court only considered and ruled on the conservatorship portion of the petition. All of father's arguments related to ineffective assistance of counsel are overruled.

The Texas Constitution's Separation of Powers clause is violated when one governmental branch improperly assumes or interferes with another branch's power. An appellate court should not delve into an appellant's constitutional challenge to a statute if it can dispose of the case on other grounds. An appellate court should not address separation of powers issues where the appellant fails to prove the challenged statute caused harm.

Here, father challenges the requirement of a statement of appellate points under [TFC 263.405\(i\)](#) as a violation of the Texas Constitution's Separation of Powers clause. Father contends trial court failed to find that extraordinary circumstances necessitated his children to remain in the temporary managing conservatorship of the state as required under [TFC 263.401\(b\)](#)'s statutory timetable. Father claims that the statement of appellate points' requirement under [TFC 263.405\(i\)](#) in combination with the ineffective assistance of his counsel to preserve the issue interferes with the appellate court's power to review his issues on appeal. The record, however, clearly shows trial court found extraordinary circumstances necessitating that the children remain in the temporary managing conservatorship of the state. Father, therefore cannot show he was harmed by the operation of [TFC 263.405\(i\)](#). Thus, the appellate court need not address father's separation of powers constitutional challenge.

**MOTHER'S KNOWLEDGE, AT THE TIME OF ORIGINAL CUSTODY AGREEMENT, THAT CHILD WOULD BE GETTING OLDER AND ATTENDING SCHOOL WAS AN ANTICIPATED CIRCUMSTANCE RATHER THAN A MATERIAL AND SUBSTANTIAL CHANGE OF CIRCUMSTANCES THAT WOULD WARRANT A CUSTODY MODIFICATION.**

¶10-3-33. [In re M.A.F., No. 12-08-00231-CV, 2010 WL 2178541 \(Tex. App.—Tyler 2010, no pet. h.\)](#) (mem. op.) (5/28/10).

**Facts:** Mother and father divorced in 2003. Trial court issued a divorce decree designating mother and father and as joint managing conservators. Trial court granted mother exclusive right to designate child's primary residence. Both parents shared possession of the child on alternating weekends and weekdays pursuant to the divorce decree. In 2004, trial court signed a modification order extending father's weekend possession pursuant to a mediated settlement agreement. In June 2006, in response to father's petition to modify, mother filed a cross-petition to modify the parent child relationship alleging changed circumstances since the 2004 order. Father ultimately nonsuited his petition.

At trial mother testified that the 2004 custody agreement forced the child to change homes from one day to the next. Mother stated that she did not want child to be a "suitcase kid." Mother testified further, that she and husband lived in separate towns and that husband's home was located forty-five minutes from child's

school. Mother stated that she did not like the child being on the road every other day and that for her, it was a safety concern. Mother admitted, however, that, at the time of the 2004 order, she knew child was going to get older, that child would be going to school, and that the child would be living with divorced parents. Additionally, mother testified that father allowed child to ride a four-wheeler without a helmet and that he allowed the child to shoot a machine gun. Following trial, trial court modified the parent-child relationship reducing father's possession to a standard possession order. Father appealed arguing the evidence was legally and factually insufficient to support mother's allegations of a material and substantial change since the 2004 custody agreement.

**Holding:** Reversed and modified in part, affirmed in part

**Opinion:** Whether there has been a material and substantial change of circumstances affecting the child is normally to be determined by an examination of the evidence of changed circumstances occurring between the date of the order or judgment sought to be modified and the date of the filing of the motion to modify. The moving party must show what material changes have occurred in the intervening period and the record must contain both historical and current evidence of the relevant circumstances. If a circumstance was contemplated at the time of an original agreement, its eventuality is not a changed circumstance, but instead an anticipated circumstance that cannot be evidence of a material or substantial change of circumstances.

Here, based on mother's testimony, trial court modified the 2004 custody agreement by reducing father's possession of child to a standard possession. Mother knew, however, that the travel issue existed at the time of the 2004 order. Because the travel issue existed at the time of the 2004 order, the travel schedule is not a changed circumstance. Instead, it is an anticipated circumstance that cannot be evidence of a material and substantial change of circumstances. Furthermore, although troubling, that father allows child to ride a four wheeler without a helmet and to shoot a machine gun does not rise to the level necessary to show a material and substantial change of circumstances. Accordingly, trial court abused its discretion in reducing father's possession of the child.

**Editor's Comment:** *The result in this case might have been different if the child had not already had to travel between households before she enrolled in school. J.V.*

**Editor's Comment:** *This case focuses on a very important part of modification litigation that sometimes gets lost – the requirement of a finding of material and substantial change of circumstances. Trial lawyers sometimes forget that they must offer evidence on this comparative standard to get a modification. This case points out, clearly, that the change of circumstances standard means something and if a party has no or insignificant evidence of such a change, the modification will not stand up on appeal. This case also points out that, where the party could have anticipated the change – child starting school, getting older, etc – then it is not a change. I do wonder, though, whether this could be extended to make the statute meaningless? M.M.O.*

**SAPCR**  
**POSSESSION AND ACCESS**

**TRIAL COURT ABUSED ITS DISCRETION BY LIMITING FATHER'S VISITATION TO ONCE PER MONTH.**

¶10-3-34. [\*In re K.T.W.\*, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 716417 \(Tex. App.—Dallas 2010, no pet. h.\)](#) (mem. op.) (3/3/10)

**Facts:** Child born on 01/04/02. After father was adjudicated the father of child, trial court awarded him possession of and access to child according to a standard possession order. On 06/05/06, father filed a motion to enforce his right of access to child after mother denied him access to child on multiple occasions. After a hearing, trial court issued an enforcement order on 08/10/06, which provided for child to be exchanged at a midway point between father's Houston residence and mother's Dallas residence. On 11/06/07, mother filed a motion to modify alleging a substantial and material change in circumstances. At a 05/09/08 hearing at which mother and father testified, mother claimed that the visitation conflicted with child's Taekwondo classes. Mother also admitted that there had been no change in circumstances since the 08/10/06 order. On 07/24/08 trial court issued a modification order that reduced the frequency of visitation, and required father to pick up and drop off child at mother's house. Father appealed.

**Held:** Reversed and remanded.

**Opinion:** The Texas Legislature has specifically stated that it is the public policy of the state to encourage frequent contact between a child and each parent. There was insufficient evidence to support a finding that it was in child's best interest to limit visitation to once per month. Trial court, therefore abused its discretion by modifying its previous order.

**Editor's Comment:** *This opinion underscores the presumption that the standard possession order is presumed in the best interest of the child and absent rebuttal of that presumption, lesser contact is not in the child's best interest. Mother here tried to argue that the child's karate classes should take precedence over the father's relationship. Not a good argument based on the state public policy. M.M.O.*

**TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO IMPOSE A GEOGRAPHIC RESTRICTION ON MOTHER WHEN FATHER HAD ASSAULTED MOTHER.**

¶10-3-35. [\*In re M.M.M.\*, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 744805 \(Tex. App.—Fort Worth 2010, no pet. h.\)](#) (3/4/10)

**Facts:** Child was born 08/02/08. 2 days later TDFPS filed a petition for protection and conservatorship alleging that mother had erratic behavior at the hospital and that father did not have stable housing or a well-paying job. In 09/08, TDFPS filed a Family Service Plan that required parents to comply with mental health and medication requirements. Trial court returned child to parent's care. In 01/09, TDFPS filed a second Family Service Plan. In 02/09, TDFPS requested that father be removed as temporary possessory conservator due to father assaulting mother. Trial court granted the motion and limited father's contact with child to visits arranged by TDFPS while mother resided in Texas. After trial, trial court appointed mother SMC and father PC and limited father to supervised visitation. Trial court did not place a geographic restriction on mother. Father appealed.

**Held:** Affirmed.

**Opinion:** Although there is no statute regarding residency restrictions in custody cases, public policy requires trial court to try to ensure that child will have frequent and continuing contact with father if he has shown the ability to act in child's best interest. The desire of a SMC to move away from Texas may adversely affect the statutory goal of continuing child's contact with non-custodial parent, but as a child's best interest is closely intertwined with the well-being of the custodial parent allowing the custodial parent to move may still be in child's best interest. Although courts have given factors to consider when evaluating imposing a geographic restriction on SMC, there are no formulaic, bright-line tests in those cases. Based on father's history of assaulting mother and the testimony in mother's favor at trial, trial court did not abuse its discretion by declining to impose a geographic restriction on mother.

Although trial court did only grant father visitation rights while mother resided in Texas, mother has not yet moved away from Texas. If she does so, father would then be able to seek to modify trial court's visitation order.

*SAPCR*  
CHILD SUPPORT

**TRIAL COURT DID NOT ERR BY INCREASING FATHER'S CHILD SUPPORT OBLIGATION EVEN THOUGH HUSBAND WAS INCARCERATED.**

¶10-3-36. [\*Koenig v. DeBerry\*, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1009170 \(Tex. App.—Austin 2010, no pet. h.\) \(mem. op.\) \(3/17/10\).](#)

**Facts:** Father and mother divorced in 2003. Trial court ordered father to pay mother \$500 per month in child support and to provide medical insurance for the children. In 02/08, father was arrested for felony DWI. That same month, mother petitioned to increase father's child support obligation and to modify the parent-child relationship. Mother then moved to transfer the proceeding to a different county where she now resided with children. Trial court granted the transfer motion. On 04/25, father filed a counter-petition seeking a reduction in child support due to the increased travel expenses he was incurring due to mother's move. Father also requested trial court to restrict children's residence to within 250 miles of his own residence. While these petitions were pending, father was convicted of felony DWI and sentence to 4 years on 08/12/08. On 09/12/08, father petitioned to suspend his obligations since his prison sentence prevented him from fulfilling these obligations.

At a 11/06/08 hearing at which father appeared through counsel, trial court took judicial notice of father's conviction. Father introduced into evidence the fact that he had withdrawn \$34,391.59 from his retirement plan, and then rested. Mother introduced evidence that father and his new wife had an adjusted gross income of \$78,402 in 2007, and the father's gross pay was \$56,501.71 for 2007. Mother also introduced evidence that father's monthly gross income was \$4,275 per month. Mother then testified that her gross income is \$1,600 per month, \$400 of which goes towards her children's health insurance.

On 11/18/08, trial court found that father was capable of earning \$4,275/month and that the child support guidelines establish child support at \$842.49/per month. Trial court increased the child support obligation to \$842.59 per month retroactive to 03/01/08. Trial court also held that father's incarceration did not excuse from paying him child support. Father appealed.

**Held:** Affirmed.

**Opinion:** Father argued that trial court abused its discretion by increasing his child support because father was incarcerated and because father's retirement account was community property of him and his current wife. [TFC 154.069](#) prohibits adding any portion of the net resources of a spouse to the net resources of an obligor or obligee to calculate the amount of child support to be ordered. [TFC 154.069](#) is intended to prevent income generated by father's spouse from being used to calculate child support even though it is community property. In this case, however, father's retirement account was part of his employment compensation. So even though the retirement funds were community property, trial court was correct to use the funds when calculating father's resources. Since trial court could use the retirement funds when calculating husband's resources, it was reasonable to conclude that husband was able to continue making child support payments.

**FATHER WAIVED HIS RIGHT TO APPEAL AGREED CHILD SUPPORT REVIEW ORDER WHEN HE DID NOT FILE A TIMELY MOTION FOR NEW TRIAL**

¶10-3-37. [Ellis v. Eadie, No. 14-09-00560-CV, 2010 WL 1077676](#) (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (mem. op.) (3/25/10).

**Facts:** On 05/06/09, mother and father appeared at a negotiation conference administered by AG. Mother and father agreed that father would pay \$900 per month in child support for their three children until the obligation for one child terminated. At that time, father agreed to pay \$783 per month until the second obligation terminated and \$627 per month until the obligation for the youngest child terminated. Trial court entered an agreed order that recites that parties have agreed to vary from the guideline amount of \$940 per month and set support at \$900 per month. The agreed order also contained a waiver of service, hearing and other rights set forth in the language required in [TFC 233.018](#). Father did not request a hearing on the agreed order, nor did he file a motion for a new trial. Father appealed.

**Held:** Affirmed.

**Opinion:** The purpose of Chapter 233 of the TFC is to enable agencies like the AG to take expedited administrative actions. TFC requires a party requesting reconsideration of an agreed child support review order to file a motion for new trial before the 30th day of the confirmation of the agreed order by the trial court. Since father filed no motion for new trial, father waived his complaint about the child support to which he agreed.

***Editor's Comment:** I respectfully disagree with the court of appeals. TFC § 233.018 does not state that if a party does not file a motion for new trial, that party loses the option of an appeal. TRCP 324(b) lists the complaints that must be raised in a motion for new trial as a prerequisite to appeal, and an order under chapter 233 is not one of them. J.C.M.*

**FATHER'S "INABILITY TO PAY" AFFIRMATIVE DEFENSE IS NOT AN APPROPRIATE BASIS FOR REDUCTION OF A PREVIOUSLY CONFIRMED ARREARAGE**

¶10-3-38. [In re J.S.H., No. 06-09-00101-CV, 2010 WL 1568463](#) (Tex. App.—Texarkana 2010, no pet. h.) (mem. op.) (4/21/10).

**Facts:** In 2003, trial court adjudicated father as parent of JSH and ordered father to pay child support and cash medical support. In 2007, OAG filed motion to enforce father's child and cash medical support obligations. Trial court found father in contempt, confirmed arrearages and ordered him confined to jail for 180 days. Trial court additionally held father in coercive contempt pending payment of arrearages. Trial court suspended father's confinement and placed father on community supervision until he satisfied all arrearages. Father failed to comply with community supervision causing OAG to file a second motion in 2007 seeking revocation of community supervision. Trial court confirmed arrearages and reinstated father's community

supervision. Father again failed to comply with community supervision causing OAG to once again motion trial court to revoke father's community service.

Father subsequently applied for disability benefits related to a brain injury he sustained in a physical altercation. In April 2009, trial court issued order in response to father's pending disability claim directing father to notify the court of any important developments in the disability claim and prohibiting father from cashing any disability payment. In violation of the order, father cashed a disability check he received in response to his disability claim. In a 2009 final hearing, trial court affirmed child support and cash medical support arrearages, but based on father's permanent disability, the court retroactively released the portion of arrearages from the date father's disability commenced to the date of trial. Additionally, based on father's dire financial circumstances, trial court terminated father's ongoing cash medical support obligation.

OAG appealed arguing trial court abused its discretion in: 1) reducing child support and medical support arrearages; and 2) terminating current cash medical support.

**Holding:** Reversed in part, affirmed in part, remanded to determine appropriate child and cash medical support

**Opinion:** [TFC 157.263](#) requires a trial court, upon a motion for enforcement requesting money damages, to confirm arrearages and render a cumulative money judgment. Arrearages may be subject to counter claim and offset, but a trial court cannot reduce or modify the amount rendered. [TFC 157.008\(c\)\(1\)](#) provides a child support obligor's inability to pay as an affirmative defense to an allegation of contempt. An "inability to pay" affirmative defense, however, is not a proper basis to reduce or offset adjudicated arrearages stemming from a motion to enforce. Here, in 2008, OAG filed a motion to revoke father's community supervision. Father was free to use an "inability to pay" affirmative defense under [TFC 157.008\(c\)\(1\)](#) to that charge. Trial court, however, abused its discretion by utilizing father's "inability to pay" to reduce the amount of father's previously adjudicated arrearage.

[TFC 154.181\(a\)](#) requires that any child subject to child support to receive medical support. [TFC 154.182\(b\)\(3\)](#) mandates obligor to pay cash medical support and that the only reason a court may terminate cash medical support is when the "obligor provides private health insurance for the child." Here, based on father's dire financial circumstances, trial court terminated father's ongoing medical support obligation. The record, however, contains not evidence that father provides private health insurance to JSH. Accordingly, trial court abused its discretion in terminating father's cash medical support obligation.

### **INADMISSIBLE HEARSAY TESTIMONY WAS NOT UNFAIRLY PREJUDICIAL AGAINST FATHER BECAUSE ADDITIONAL EVIDENCE SUPPORTED TRIAL COURT'S DECISION**

¶10-3-39. [In re J.A.J., No. 09-09-00334-CV, 2010 WL 1611034 \(Tex. App.—Beaumont 2010, no pet. h.\)](#) (mem. op.) (4/22/10).

**Facts:** This is father's second appeal from trial court's order retroactively increasing father's child support obligation. During remand trial, child support officer testified that she subpoenaed father's employer to determine father's income for years 2004-2007. Based on employer's information, child support officer determined father earned more than \$100,000 per year and that his monthly income exceeded the \$6,000 per month cap OAG uses to calculate a parent's child support obligation. Additionally, father testified that he earned more than \$100,000 every year since 2004. Based on child support officer's testimony, trial court ordered father pay \$23,000 in retroactive child support. Father appealed arguing that, by relying on information employer provided, trial court considered inadmissible hearsay evidence.

**Holding:** Trial order affirmed.

**Opinion:** Generally, where parties have properly complied with their discovery obligations, an expert's testimony may rely on hearsay evidence. Here, child support officer's expert testimony properly relied on subpoenaed employer's information regarding father's income. The underlying records child support officer relied on, however, were not properly proven up. Thus, child support officer's testimony regarding father's 2004-2007 income was inadmissible hearsay. Father, however, testified he earned more than \$100,000 per year during 2004-2007. Appellate court took judicial notice of OAG tax charts OAG used to calculate parental child support obligations. In light of father's testimony, the evidence supported trial court's reliance on a \$6,000 per month income. Therefore, admission of child support officer's testimony was not unfairly prejudicial against father.

**Editor's Comment:** *The court incorrectly states the "expert hearsay" rule, TRE 705. It is irrelevant whether the underlying records were "properly proven up." The question is whether the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject." If so, "the facts or data need not be admissible in evidence." TRE 703. J.V.*

**MOTHER DID NOT NEED TO PROVE A CHANGE IN MOTHER'S OR FATHER'S FINANCIAL CONDITION IN ORDER TO MODIFY A PREVIOUS CHILD SUPPORT ORDER UNDER TFC 156.401, THE CHILD'S EMANCIPATION WAS SUFFICIENT FOR TRIAL COURT TO MODIFY THE ORDER.**

¶10-3-40. [In re A.M.W.](#), \_\_\_ S.W.3d \_\_\_, 2010 WL 2044894 (Tex. App.— Dallas 2010, no pet. h.) (5/25/10).

**Facts:** Mother and father divorced in 1992. Trial court named mother as sole managing conservator of the couple's three children (AMW, CEW and BMW) and ordered father to pay child support. In 2002, one of the couple's children (AMW) became pregnant and began living with father. Father then obtained a waiver of citation from mother and filed suit affecting parent-child relationship. Mother did not appear. Trial court issued an order designating father as joint managing conservator of AMW and an order reducing his child support obligation from \$635 to \$300 per month. In 2004, when AMW turned eighteen, mother filed suit to modify father's child support obligation.

Trial court determined that at the time the modification suit was tried, AMW and CEW, were emancipated. Accordingly, trial court ordered father to pay mother \$635 per month in child support retroactive to the date the motion to modify was filed to the date CEW was emancipated. After that date, father was ordered to pay mother \$529 per month in child support until father was no longer obligated to support BMW. Furthermore, trial court awarded \$20,000 in attorney's fees to Mother as "in the nature of child support."

Father appealed arguing that trial court erred by granting mother's motion to modify because mother failed to prove a material and substantial change in father's or mother's financial condition since the 2002 modification order. Father also argued trial court erred by awarding attorney's fees in the nature of additional child support.

**Holding:** Affirmed as modified

**Opinion:** Under [TFC 156.401](#), a trial court may modify a previous child support order if "the circumstances of the child or a person affected by the order have materially and substantially changed" since the date of the order's rendition. A material and substantial change is not necessarily a change in the financial condition of one of the parties. A change in custody of a child is, in and of itself, a material and substantial change. Here, father testified the amount of child support he was required to pay was reduced because he took custody of AMW. Mother filed this motion to modify in December 2004, the month in which AMW turned eighteen. Father was potentially no longer obligated to support AMW once she was emancipated. Trial court could

have found AMW's emancipation was a material and substantial change of circumstances since the 2002 order. Accordingly, trial court did not err in finding a material change of circumstances occurred since 2002.

The TFC, under [Sections 157.167](#) and [106.002](#), distinguishes between the award of attorney's fees in child support enforcement actions and in modification suits because of the potentially serious consequences that stem from an award of attorney's fees as child support. The trial court has the discretion to render judgment for reasonable attorney's fees in a suit affecting the parent-child relationship. Therefore, the fees may be collected by any means available for the enforcement of a judgment for debt. However, attorney's fees awarded in a suit involving child support enforcement are not viewed as debt and may be enforced by contempt; thus, they may be awarded as additional child support. Here, trial court awarded attorney's fees on a motion to modify, not on a motion to enforce delinquent child support obligations. Accordingly, trial court erred in characterizing the award of attorney's fees as in the nature of additional child support.

**TRIAL COURT'S ORDER AWARDING MOTHER RETROACTIVE CHILD SUPPORT EXCEEDING WHAT FATHER WOULD HAVE OWED THE PVIOUS FOUR YEARS DID NOT TRIGGER THE REBUTTABLE PRESUMPTION, UNDER TFC 154.131(C), THAT THE AWARD IS REASONABLE AND IN THE BEST INTEREST OF THE CHILD.**

¶10-3-41. [In re B.R.](#), \_\_\_ S.W.3d \_\_\_, 2010 WL 2105346 (Tex. App.—San Antonio 2010, no pet. h.) (5/26/10).

**Facts:** Child was born in May 1994. Mother and father never married. Father visited child sporadically over the years and provided minimal support. In 2007, mother filed suit seeking to terminate father's parental rights. Father sought a determination of his parental rights and duties as child's father. In response, mother requested retroactive child support. Trial court determined mother was entitled to \$67,944 in retroactive child support going back to the child's birth.

Father appealed on several grounds including that the trial court abused its discretion in awarding retroactive child support covering a thirteen year period because mother did not present evidence rebutting the presumption, pursuant to [TFC 154.131\(c\)](#), that an award of four years of retroactive child support is reasonable and in the best interest of the child.

**Holding:** Affirmed in part, reversed in part, and remanded in part

**Opinion:** Under [TFC 154.131\(c\)](#), it is presumed that a court order limiting the amount of retroactive child support to an amount that does not exceed the total amount of support that would have been due for the four years preceding the date the petition was filed is reasonable and in the best interest of the child. Under [TFC 154.131\(d\)](#), this presumption may be rebutted by evidence that the obligor, 1) knew or should have known that the obligor was the father of the child for whom support is sought; and 2) sought to avoid the establishment of a support obligation to the child.

According to a literal reading of the statute's text, if a trial court limits the retroactive child support to the four year amount, the parent seeking more than that amount must rebut the presumption provided by [TFC 154.131\(c\)](#) by proving that the obligor knew or should have known he was the father of the child and that the obligor sought to avoid the establishment of a support obligation to the child. Here, the trial court's order did not limit the retroactive child support to an amount representing four years of child support; therefore, subsection 154.131(c)'s presumption was not triggered and does not apply to this case. Accordingly trial court did not abuse its discretion in ordering retroactive child support back to the child's birth.

**Dissent:** [TFC 154.131\(c\)](#) creates a presumption that retroactive child support representing an amount that would have been due for the four years preceding the date the petition was filed is reasonable and in the best

interest of the child. Thus, if the trial court orders an amount that is more than what would have been due for the preceding four years, the order is not reasonable and not in the child's best interest. The legislative history of the statute indicates that the purpose of the bill is to limit an award of retroactive child support to no more than what would have been due for the preceding four years unless the presumption created by the statute is rebutted. In passing the bill, the legislature relied on a study that found men who are saddled with a large amount of retroactive child support are less likely to meet current child support obligations. In effect, [TFC 154.131\(c\)](#) creates an estoppel by laches defense with the burden of refutation under [TFC 154.131\(d\)](#) falling upon the obligee or the state, as the case may be. Accordingly, the majority failed to properly interpret [TFC 154.131\(c\)](#).

**Editor's Comment:** *The majority's interpretation of the statute is that the presumption only comes into play if the trial court limits the order to the four years preceding the filing of the petition. According to this interpretation, subsection (d) only comes into play if the obligee challenges that four-year limit on appeal—i.e., the trial court erred by limiting the order to four years because there was evidence that the obligor knew or should have known that the obligor was the father of the child for whom support is sought and that the obligor sought to avoid the establishment of a support obligation to the child. The problem with this interpretation is that the statute does not say the presumption is overcome by this evidence, but only that it “may be” rebutted by such evidence. Good luck appealing an order limited to four years under such a permissive and deferential standard. The only way the statute really makes sense is to say—as the dissent does—that the statute creates a presumption that the four year limit is reasonable and in the child's best interest and limits the grounds to rebut that presumption to subsection (d). Just like the presumption created under TFC 154.122 and its interplay with .123. J.C.M.*

**Editor's Comment:** *The majority's holding that judgments for more than four years of back child support do not require the mother to show that the father knew or should have known that he was the child's father and sought to avoid the establishment of a child support obligation is technically correct, but the dissent's view is doubtless what the legislature intended. The dissent should serve as a roadmap for amending TFC 154.131 in 2011. J.V.*

**FATHER'S INTEREST IN FAMILY PARTNERSHIP THAT DID NOT DISTRIBUTE PROFITS CONSIDERED “DEEMED INCOME ATTRIBUTABLE TO ASSETS THAT DO NOT CURRENTLY PRODUCE INCOME” FOR PURPOSES OF DETERMINING CHILD SUPPORT OBLIGATION.**

¶10-3-42. [Matthews v. Northrup](#), \_\_\_ S.W.3d \_\_\_, 2010 WL 2133910 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (5/27/10).

**Facts:** Father filed suit against mother seeking joint managing conservatorship of child and a determination of his child support obligation. Previously, father's mother (grandmother) created a family partnership for the purpose of preserving family assets and named father as a partner with a 48.33% interest. The partnership provided and grandmother testified that the partnership would not distribute any profits until grandmother's death or until the year 2052.

Grandmother also created a family partnership trust and named the trust as the general partner of the partnership. Any distributions of the trust were within grandmother's sole power. The trust provided that if any trust property becomes distributable to a beneficiary when the beneficiary is under 21 years of age, the trustee shall distribute the property when the beneficiary turns 21 years of age. In 2005 and 2006, father's income tax returns reflected he was allocated income from the partnership. However, neither the trust nor the partnership made any actual distributions. Based on this evidence, the trial court found that father's net resources available from the trust was \$2,500 per month. In determining father's child support obligation, trial court considered this “phantom income” as part of father's total net resources. Father appealed arguing that trial court erred in including income from the trust as part of his net resources because he cannot be a beneficiary of the trust until after his mother's death.

**Holding:** Trial decision affirmed as modified.

**Opinion:** Under [TFC 154.062](#), in determining net resources, income includes “all wage and salary income and other compensation for personal services” and “all other income actually being received ... including gifts and prizes.” Additionally, under [TFC 154.067\(a\)](#), a court may, when appropriate, “assign a reasonable amount of deemed income attributable to assets that do not currently produce income.”

Here, the issue is whether the gift of an interest in the partnership, which had not and will not distribute any profits to its partners, including father, until after the death of the general partner or the year 2052, is an “asset that [does] not currently produce income such that the trial court could “assign a reasonable amount of deemed income” to the asset. The trust provides that the beneficiaries of the trust include “not only the beneficiaries of the general partnership interest but all of the limited partners of the partnership.” However, grandmother is the sole beneficiary of the trust during her lifetime with the limited partners as beneficiaries after her death. Thus, father is correct in that he is not a beneficiary in the trust, but is only a remainder beneficiary by virtue of being a limited partner in the partnership.

However, it appears that trial court merely mislabeled the source of the deemed income. Although there is no evidence in the record of the value of father’s interest in the trust, there is evidence of the value of his interest in the partnership. The partnership agreement provides that “[a]llocations to the partner of partnership income and gain” increase a partner’s capital account. Allocations to father’s partnership interest in 2005 increased the value in his capital account. Additionally, upon dissolution of the partnership, distribution of the reserves and property of the partnership are to be made to partners according to the percentage of their partnership interest. Therefore, if the partnership dissolves, father will receive the value of his capital account. In a sense, father’s Partnership interest is like a retirement account which has value but that value is not accessible to the recipient until retirement. Father owns the partnership interest, but it is not accessible to him until grandmother passes or until 2052.

Once it is established that an obligor owns property, he must entirely negate its value in order to preclude the court from considering it for purposes of his support obligation. Father did not negate the value of his partnership interest, he merely asserts it has no value because he has no current income from the partnership. The fact that the partnership has distributed profits to the partners does not mean that the father’s partnership interest is not an asset. Rather, it is an asset that does not currently produce income. Accordingly, trial court did not abuse its discretion in assigning a reasonable amount of deemed income to father’s partnership interest.

**Editor’s Comment:** *“Phantom” income - in other words, income allocated to a limited partner for tax purposes but not actually received by the limited partner - can be income for child support purposes. J.V.*

**Editor’s Comment:** *Here is a reminder that the courts can look to other assets to calculate child support beyond just monthly income. M.M.O.*

**SAPCR**  
**CHILD SUPPORT ENFORCEMENT**

**AG NOT BENEFICIARY OF CHILD SUPPORT ORDER. THEREFORE, AG MAY PROSECUTE AN ENFORCEMENT OF COURT ORDER. RELATOR MAY NOT CHALLENGE COERCIVE-CONTEMPT MEASURES UNTIL PUNITIVE-CONTEMPT MEASURES SATISFIED.**

¶ 10-3-43. *In re Luebe*, \_\_\_ S.W.3d \_\_\_, 2010 WL 1546961 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (4/02/10).

**Facts:** In 1996, trial court issued temporary child support orders against Father. Trial court subsequently confined Father for violating temporary orders and Father petitioned for habeas relief and trial court granted relief in 1999. In 2000, trial court signed final divorce decree and ordered Father to pay child support. In March 2009, AG filed motion of enforcement of previous child support orders and requested punitive-contempt and coercive-contempt measures including fines and commitment to county jail. On August 10, 2009, trial court signed the order holding Father in contempt on four separate counts for failure to pay child support, granted judgment for arrearages, and ordered Father confined to jail for 180 days for each count of contempt to be served concurrently. Additionally, as a civil-coercive measure trial court ordered Father confined until he paid \$5000 in child support arrearage, attorneys fees and court costs. Father began confinement on August 11, 2009, and subsequently petitioned for habeas corpus.

In his habeas corpus petition, Father challenged the punitive-contempt measures on four grounds: 1) the show cause failed to properly notify Father of charges against him, and AG's request for financial documents (tax returns) indicated the enforcement hearing was merely a discovery hearing; 2) the enforcement orders were too vague to hold him in contempt; 3) trial court denied him a right to jury trial; and 4) AG improperly acted as prosecutor and beneficiary of the enforcement order. Father additionally challenged the coercive-contempt portion of the order on grounds that: 1) the divorce decree lacked clarity; 2) AG's enforcement action subjected Father to double jeopardy; and 3) the enforcement order was illegal due to his inability to pay.

**Held:** Habeas denied.

**Opinion: (Issue 1 Punitive-Contempt Challenges)** [TFC 157.002](#) requires a motion for child support enforcement to clearly identify the enforcement order provision violated and the dates of each alleged contempt. [TFC 157.002](#) additionally requires the motion include the amounts the realtor owes, the amount the realtor has paid and amounts in arrearages. A motion for contempt and a show cause order sufficiently notify realtor when the documents clearly show that the realtor is accused of failing to pay child support and the amount of arrearage. Here, the AG's motion of enforcement clearly indicated which provision of the orders Father violated. The AG additionally attached the previous enforcement orders and a Financial Activity Report provided by Child Support Enforcement Division. Collectively, these documents satisfied [TFC 157.002](#) requirements. Father's argument that the motion's request for financial documents led him to believe he was merely facing a discovery proceeding lacked merit because the motion plainly notified Father of his failure to pay child support.

An enforcement order must include in ordinary language which provision of the child support order a realtor violates. A contempt order is insufficient if it requires inferences or conclusions about which reasonable persons might differ. Here, although the enforcement order did not expressly indicate the specific provisions of the child support orders AG sought to enforce, the order expressly included the amounts Father owed and the dates of contempt, which correlated with previous child support orders and the divorce decree. This information was sufficiently clear to hold Father in contempt.

Criminal-contempt charges having incarceration sentences that do not exceed six months are exempt from the jury trial requirement. Father's 180 day sentence did not exceed six months, therefore he was not entitled to a jury trial.

In general, counsel for a beneficiary party of a court order may not serve as prosecutor of a contempt action alleging violation of the same order. The AG, however, is not a beneficiary of a child support enforcement order. The Social Security Act requires states to enforce parental child support obligations. Furthermore, the Texas Family Code designates the AG as the agency responsible for child support enforcement under the Social Security Act. Moreover, the Code expressly provides that the AG represents the interest of the state only. Here, because AG is not the beneficiary of the enforcement order, AG's prosecution of Father's contempt action creates no conflict of interest.

**(Issue 2 Coercive-Contempt)** When a trial court provides for both punitive-contempt and coercive-contempt confinement in a child support enforcement order, a contemnor's habeas petition on the coercive-contempt portion of the order will be premature if filed prior to completion of punitive-contempt confinement. Here, because Father filed petition prior to completion of punitive-contempt confinement, his petition with respect to the coercive-contempt portion of the order are dismissed as premature.

**TRIAL COURT MAY OFFSET A PARTY'S CHILD SUPPORT ARREARAGE AGAINST THE OTHER PARTY'S ORDER TO PAY ATTORNEY'S FEES SO LONG AS THE ATTORNEY'S FEES AWARD IS UNRELATED TO THE CHILD SUPPORT OBLIGATION.**

¶10-3-44. [In re H.C.W., No. 13-09-00398-CV, 2010 WL 1838614 \(Tex. App.—Corpus Christi 2010, no pet. h.\)](#) (mem. op.) (5/06/10).

**Facts:** Mother and father divorced in 1997. Divorce decree granted mother managing conservatorship and required father to pay child support. In February 2005, father lost employment, therefore, the parties agreed to a temporary order reducing father's child support obligation until such time as he regained employment. Ultimately, father regained employment but failed to increase his child support obligation pursuant to the temporary order. Mother motioned trial court to enforce father's child support obligation and requested an order of contempt. Father subsequently filed a motion for possession or access alleging mother denied father access to child during a scheduled visitation. In April 2007, trial court found mother in contempt and ordered her to pay father \$1,500 in attorney's fees. Trial court granted continuance to father regarding mother's motion of enforcement.

Following multiple continuances, in April 2009, mother testified that father never increased his child support payments after regaining employment and that she thus far had not paid father \$1,500 in attorney's fees because he "owes me \$27,000 in back child support." Trial court reset father's child support payments at \$782.00 per month, required retroactive payments to January 1, 2009 and offset the amount father owed against the \$1,500 mother owed father for attorney's fees. Mother appealed claiming trial court erred by offsetting the attorney's fees she owed father against the retroactive child support awarded.

**Holding:** Trial court's decision affirmed

**Opinion:** Under [TFC 157.268](#), recovery of attorney's fees in child support enforcement actions may only be recovered by the child support obligee, not the obligor. Here, mother complains trial court erred by offsetting father's child support obligation against attorney's fees trial court awarded father, the child support obligor. The \$1,500 in attorney's fees mother owes father, however, are not related to a child support enforcement action. Rather, the attorney's fees occurred in the context of father's enforcement action alleging mother denied father access to child. Having found the allegation to be true, trial court was required under [TFC 157.167\(b\)](#), to award reasonable attorney's fees. Accordingly, the trial court did not err by offsetting father's retroactive child support against amount mother owed in attorney's fees.

**TFC DID NOT PROVIDE DEFINITION OF “INVASIVE PROCEDURE”, AND MOTHER FAILED TO OBJECT TO FATHER’S DEFINITION OF “INVASIVE PROCEDURE”; THEREFORE, TRIAL COURT BOUND BY FATHER’S DEFINITION.**

¶10-3-45. [Brennan v. Cedeno, No. 2-09-020-CV., 2010 WL 2089979 \(Tex. App.—Fort Worth 2010, no pet. h.\)](#) (mem. op.) (5/20/10).

**Facts:** Mother and father divorced in March 2002. The divorce decree appointed mother and father as joint managing conservators. Additionally, the divorce decree granted each parent the right to consent for the children to medical and dental care not involving invasive procedures. However, for treatment involving “invasive procedures” the divorce decree granted each parent the “joint right with the other parent to consent.” The decree also required both parents to pay fifty percent of all reasonable and necessary medical expenses including orthodontic charges. In April 2007, father unilaterally consented to have both children receive braces. Mother refused to pay her portion of the expenses related to the children’s braces.

Father filed motion of enforcement. Trial court held because the application of braces required actual entry into the oral cavity, it was an “invasive procedure” which, per the divorce decree, required the consent of both parents to trigger mother’s obligation to pay. Father appealed arguing trial court abused its discretion in determining that the application of braces to the children was an invasive procedure.

**Holding:** Reversed and remanded

**Opinion:** To determine whether a trial court abuses its discretion, a reviewing court must determine whether the trial court had sufficient evidence upon which to exercise its discretion. When a party submits a definition at trial, the proposed definition can govern an appellate court’s legal sufficiency review if the opposing party failed to object to the submission.

Here, the TFC does not define “invasive procedure.” Trial court, therefore, defined “invasive procedure” as simply an “actual entry into the oral cavity.” According to trial court’s definition, even teeth cleaning or flossing by a dental hygienist could be considered an “invasive procedure.” At trial, father proposed the Texas Health and Safety Code’s definition of “invasive procedure.” THSC’s definition of “invasive procedure” requires “surgical entry into tissues” rather than merely “entry into the oral cavity.” Mother did not object to father’s proposed definition. Trial court should have determined whether application of children’s braces was an invasive procedure based on father’s submitted definition. Thus, trial court abused its discretion in finding that children’s treatment with braces was an “invasive procedure” based on its own definition.

**Editor’s Comment:** *In a case involving braces, and removing a tooth to fit them, the Fort Worth court found the evidence “legally insufficient to support the trial court’s finding that the braces in this case are an invasive procedure because of ‘actual entry into the oral cavity.’” Instead the court concluded that an “invasive procedure” must be not simply an “actual entry into the oral cavity” but “a surgical entry,” citing THSC 85.202(3)’s definition. J.V.*

**Editor’s Comment:** *What is an invasive procedure under the family code? This case adopts the Texas Health and Safety Code’s definition requiring “surgical entry into tissues” such that braces were not invasive. Now we know... M.M.O.*

**SAPCR**  
**TERMINATION OF PARENTAL RIGHTS**

**TRIAL COURT ABUSED ITS DISCRETION BY RENDERING DEFAULT JUDGMENT AGAINST FATHER FOR NOT PERSONALLY APPEARING WHEN HE APPEARED BY COUNSEL BUT THE ERROR WAS HARMLESS.**

¶10-3-46. [\*In re M.V.G.\*, \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 730366 \(Tex. App.—Waco 2010, no pet. h.\) \(3/3/10\)](#)

**Facts:** Mother had child while incarcerated for a state jail felony. After child was born, mother gave father's contact information to TDFPS caseworker. Two day later, caseworker advised father that TDFPS was taking emergency custody of child and that there would be an emergency removal hearing. Father told caseworker that he and mother wanted custody and planned to move to Puerto Rico. Father regularly visited child during first 8 months, but he completed any of the tasks required by the family service plan. 10 months after child's birth, mother was released from custody and returned home. After release, mother visited child fourteen times but did not complete any tasks required by her family service plan. Trial court extended the statutory dismissal date for ninety days. Father did not appear for trial, and mother waived her right to a jury trial. Trial court ruled that father waived his right to jury trial by failing to appear and rendered a post-answer default judgment against him. After a three-day bench trial, trial court terminated mother's parental rights. Mother and father appealed.

**Held:** Affirmed.

**Opinion:** Mother's sole issue for appeal was that the evidence was insufficient to support termination. Trial court found four predicate grounds for termination. While imprisonment does not constitute constructive abandonment per se, mother was still required to find a safe environment for child through relatives or otherwise. Although mother made arrangements for father to take custody of child, father failed to actually take custody. Based on the evidence, trial court could reasonably conclude that mother constructively abandoned child.

Father argued that trial court abused its discretion by denying his request for a jury trial. [TRCP 220](#) provides that a party's failure to appear for trial shall be deemed a waiver of the right to trial by jury; however, for purposes of rule 220 a party may appear through their attorney. Thus trial court abused its discretion by removing father's case from the jury docket. This abuse of discretion requires reversal if the case contains material fact questions. Since father failed to challenge trial court's finding that he allowed child to remain in dangerous conditions or surroundings, he cannot contend that a material fact question exists on a predicate grounds for termination.

Trial court also abused its discretion by rendering a post-answer default judgment against father when his counsel appeared on his behalf. This abuse of discretion was similarly harmless because father did not identify any witnesses that he would have called. Father's counsel was also allowed to make arguments and objections during the trial.

**TRIAL COURT DID NOT ERR BY REFUSING TO APPOINT FATHER COUNSEL IN TERMINATION SUIT BROUGHT BY MOTHER.**

¶10-3-47. *In re R.J.C.*, \_\_\_ S.W.3d \_\_\_, 2010 WL 816188 (Tex. App.—San Antonio 2010, no pet. h.) (3/10/10)

**Facts:** Father and mother married in 2004. On 04/06/06, father pleaded guilty to aggravated sexual assault of mother’s 6-year-old daughter. On 08/16/06, mother gave birth to child. Mother filed for divorce and petitioned to terminate father’s parental rights to child. At trial, mother testified father had sexually abused her daughter and the daughter of his previous wife. Trial court entered father’s confession from his criminal trial. After trial, trial court terminated father’s parental rights. Father appealed.

**Held:** Affirmed.

**Opinion:** Father argued that trial court had insufficient evidence to terminate his parental rights. [TFC 161.001\(1\)\(L\)\(viii\)](#) allows trial court to terminate father’s parental rights if he has been convicted of aggravated sexual assault of a child and termination is in the best interest of child. Since father does not contest his conviction, undisputed evidence establishes the first prong. Trial court, based on father’s conviction and mother’s testimony, had sufficient evidence to terminate the parent-child relationship between father and child.

Father argued that he was entitled to a court-appointed attorney in the termination suit under [TFC 107.013\(a\)](#). That requirement, however, only applies to termination suits brought by the government, not by the other parent. While the US Constitution does not require appointment of counsel in every termination proceeding, due process may require the appointment of counsel in some cases. This termination proceeding does not allege that father abused child, thus father is not subject to criminal charges relating to his relationship with child. Furthermore, there were no expert witnesses or difficult points of law in this case. There is also no indication that evidence of father’s conviction was inadmissible. Finally, there is no reason to believe that appointed counsel could have changed the result of the proceeding through more thorough argument. Based on these circumstances, trial court did not abuse its discretion or abuse its discretion by refusing to appoint father counsel.

**FATHER HAD A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN TERMINATION HEARING EVEN IF HE DID NOT HAVE A STATUTORY RIGHT TO APPOINTED COUNSEL.**

¶10-3-48. *Valencia v. TDFPS*, \_\_\_ S.W.3d \_\_\_, 2010 WL 1240988 (Tex. App.—Houston[1st Dist.] 2010, no pet. h.) (substitute op.) (3/25/10)

**Facts:** Child born on 11/07/06. At time of birth, mother and child both tested positive for opiates while father was in quarantine at Harris County Jail. TDFPS filed a petition to terminate parental rights in which it alleged that one man was child’s father, that father was child’s alleged father, and that an unknown man was child’s “alleged father.” On 11/16/06, TDFPS served father with citation in jail but did not obtain a bench warrant to secure his presence at the adversary hearing that day. On 05/08/07, trial court appointed an attorney ad litem for the unknown father of child. On 09/06/07, mother executed an affidavit of voluntary relinquishment. Also on 09/06/07, attorney ad litem, acting as father’s trial counsel, filed a motion for continuance in order to obtain a bench warrant to bring father to trial court. On 01/03/08, father’s trial counsel filed an answer on behalf of father, and father offered to take a paternity test. Before a bench trial on 04/09/08, father’s trial counsel asked for a continuance “for a couple of weeks” because father was in county jail but trial court denied the motion. Trial court took judicial notice of TDFPS’s case file without father’s trial counsel objecting. After a bench trial, trial court granted TDFPS’s petition and terminated father’s parental rights under [TFC 161.001\(1\)\(E\)](#). On 04/24/08, father’s trial counsel filed a motion for new trial and a statement of

appellate points. While trial counsel did file a request for findings of fact and conclusions of law, trial court never issues such findings and trial counsel never filed a notice of past due findings. On 05/06/08, trial court denied father's motion for new trial and found the appeal frivolous. Trial court appointed father's trial counsel as his appellate counsel. Appellate counsel filed an appellate brief arguing, as his only issue, that trial court had erred in determining father's appeal to be frivolous. Appellate court concluded that trial court did err in doing so. Appellate court struck the brief of father's appellate counsel, abated the appeal and remanded the case to trial court for the appointment of new appellate counsel. Father's new appellate counsel argued constructive denial of counsel and insufficient evidence and challenged trial court's best interest finding.

**Held:** Reversed and rendered.

**Opinion:** The Texas Supreme Court has held that an ineffective assistance of counsel claim can be raised on appeal despite the failure to include it a statement of points. TFC requires the appointment of counsel to represent an indigent parent contesting a termination suit. The right to counsel is the right to effective counsel. Although a defendant is required to establish prejudice if a counsel's performance was ineffective, ineffectiveness that rises to the level of constructive denial of counsel is legally presumed to result in prejudice. In support of the argument that father received no meaningful assistance of counsel, father pointed out that the transcript of the hearing was only six pages and that trial counsel repeatedly failed to challenge to the state's case. Moreover, trial counsel repeatedly failed to secure father's presence in the courtroom or even convey to the court the father's location. Trial counsel's performance was passive at best and simple acquiescence at worst. This case reaches the narrow exception to the standard requirement of prejudice in ineffective assistance of counsel cases.

TDFPS argued that father did not have a right to effective assistance of counsel because he did not have a right to statutorily appointed counsel. Regardless of whether father had a statutory right to appointed counsel, however, he had a constitutional right to counsel. Implicit in the Legislature's granting of the right to appointed counsel to indigent parents in a State-initiated termination proceeding is the recognition of a parent's right to counsel in those proceedings. A parent who had the ability to retain their own counsel should not be deprived of the right to effective counsel merely because they can afford to hire a lawyer. A claim for ineffective assistance of counsel is the only meaningful redress for a parent whose parental rights have been terminated in a proceeding where counsel, whether appointed or retained, failed to render effective assistance.

**PARTY APPEALING A PARENTAL RIGHTS TERMINATION ORDER ON GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT RELY EXCLUSIVELY ON AN ASSERTION THAT COUNSEL FAILED TO FILE TFC 263.405 STATEMENT OF POINTS, PARTY MUST CHALLENGE LEGAL AND FACTUAL SUFFICIENCY OF EVIDENCE.**

¶10-3-49. *Robinson v. TDFPS*, \_\_\_ S.W.3d \_\_\_, No. 01-08-00480-CV (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (4/08/10).

**Facts:** Trial court terminated mother's parental rights in her two children. Following trial court's termination orders, mother's trial counsel did not file a statement of appellate points with the trial court in accordance with [TFC 263.405\(b\)\(2\)](#). On appeal, mother argued that her court-appointed attorney provided ineffective service because he failed to file appellate points with the trial court pursuant to [TFC 263.405\(b\)\(2\)](#).

**Holding:** Trial court's termination of parental rights affirmed

**Opinion:** In order to determine whether court-appointed counsel provided ineffective service in a parental termination proceeding, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. To determine whether a counsel's decision not to file appellate points in accordance to [TFC 263.405\(b\)\(2\)](#) was deficient, appellant must not only show that counsel failed to

file a statement of appellate points, but also that counsel rendered deficient service in failing to file the statement and that appellant was harmed by counsel's deficient performance. Here, mother failed to show that she was harmed by her counsel's decision not to file appellate points. Mother offered no substantive argument in her appellate brief challenging the legal or factual sufficiency of the evidence supporting termination of her parental rights. Without evidence to the contrary, the appellate court must presume that mother's court-appointed counsel, in his professional judgment, could have believed the evidence legally and factually sufficient and that a statement of appellate points was not necessary. Mother's assertion that her court-appointed counsel provided deficient service, without a challenge to the legal or factual sufficiency of the evidence fails to prove that her attorney's alleged deficient service caused her harm. Because mother cannot prove harm, the appellate court must affirm trial court's termination of her parental rights.

**PARTY WHO FAILS TO FILE TFC 263.405(B)(2) STATEMENT OF POINTS IN TRIAL COURT MAY ONLY APPEAL ON GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL OR THAT STATUTE IS UNCONSTITUTIONAL AS APPLIED TO PARTY.**

¶10-3-50. [In re P.P.M.I., \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1609246 \(Tex. App.—San Antonio 2010, no pet. h.\) \(4/21/10\).](#)

**Facts:** Trial court terminated parental rights of mother and father. Afterward, mother failed to file in the trial court a statement of points she intended to raise on appeal in accordance with TFC 263.405(b)(2). Following mother's petition for appeal, appellate court ordered mother to file a statement advising the court of the points mother intended to raise on appeal. Mother filed document per court's order.

**Holding:** Termination of parental rights affirmed

**Opinion:** [TFC 263.405\(b\)\(2\)](#) requires appellant of a parental termination order to file in the trial court a statement of points the party intends to raise on appeal. Additionally, [TFC 263.405\(i\)](#) forbids an appellate court to consider any issue not specifically presented to a trial court in a statement of points the party intends to appeal. However, in *J.O.A.*, the supreme court held that on appeal, an appellate court may consider issues of ineffective assistance of counsel and/or that [TFC 263.405\(b\)\(2\)](#) is unconstitutional as applied to appellant even if appellant failed to raise these issues in a statement of appellate points to the trial court. [In re J.O.A., 283 S.W.3d 336, 339 \(Tex. 2009\).](#) Here, following her trial, mother failed to file a statement of appellate points with the trial court in accordance with [TFC 263.405\(b\)\(2\)](#). In order to determine whether Mother intended to raise either of the points that did not require the requisite statement of points on appeal, the appellate court ordered mother to file a statement of points. In her statement of appellate points, mother stated that she intended to contest the sufficiency of the evidence in support of trial court's order and to contest the court's choice of permanent managing conservator. Mother did not assert that she was deprived of effective counsel or that [TFC 263.405\(b\)\(2\)](#) is unconstitutional as applied to her. Under the *J.O.A.* rule, therefore, appellate court is required to affirm trial court's order terminating her parental rights.

**ALTHOUGH DFPS FAILED TO ADEQUATELY RESPOND TO TRCP 194 REQUESTS FOR DISCLOSURE REGARDING EXPERT'S MENTAL IMPRESSIONS OR OPINIONS, MOTHER FAILED TO SHOW HARM.**

¶10-3-51. [In re M.H., \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 1797261 \(Tex. App.—Waco 2010, no pet. h.\) \(5/05/10\).](#)

**Facts:** Evidence presented at trial revealed mother was diagnosed on several occasions as suffering from Munchausen Syndrome by Proxy. Amid concerns for the safety of mother's three children, DFPS removed the children from mother's care and placed them in foster care. DFPS subsequently initiated this action to terminate mother's parental rights. At trial mother (and maternal grandparents) served DFPS with a request

for disclosure under [TRCP 194](#) with respect to eight proposed medical expert witnesses. In response to the disclosure request, DFPS stated that these experts “may have knowledge of relevant facts concerning” the care of the children or information regarding mother’s condition. Mother then objected to the admission of the expert testimony on the ground that DFPS failed to disclose the mental impressions or opinions of the experts as required under [TRCP 194.2\(f\)\(3\)](#). Trial court overruled mother’s objection finding that permitting the experts to testify would not cause unfair surprise or prejudice “as the discovery responses themselves (documents, medical records, reports, etc.), and the available testimony of many of the individual non-retained experts” provided adequate notice “of the non-retained experts’ impressions.”

Following a jury trial, trial court terminated mother’s parental rights in her three children. Mother appealed arguing trial court erred in failing to exclude the testimony of eight of DFPS’s medical experts.

**Holding:** Trial decision affirmed.

**Opinion:** Under [TRCP 194.2\(f\)\(3\)](#), upon request, a party must disclose for any testifying expert “the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, *documents reflecting* such information. Under, [TRCP 193.6\(b\)](#), a party failing to comply with a TRCP provision bears the burden of establishing a lack of unfair surprise or unfair prejudice to the other party.

Here, DFPS presented eight expert witnesses. Trial court referred to all of the experts as non-retained experts. One physician expert, however, testified that although he did not work directly for DFPS, his responsibility as a state-employed physician was to provide medical advice and court appearances as needed for DFPS. Accordingly, trial court abused its discretion to the extent it referred to this physician as a non-retained expert. Furthermore, DFPS’s minimal response to mother’s disclosure request fails to identify or disclose the general substance of the experts’ mental impressions, a brief summary for the basis of them and/or documents reflecting such summary with respect to non-retained experts.

Although DFPS failed to satisfy the requirements of [TRCP 194.2\(f\)\(3\)](#), the trial record reveals that this failure did not unfairly surprise or prejudice mother. Three of the eight experts testified consistently with previous statements regarding mother’s mental health that trial court had admitted in hearings or elsewhere in the proceedings. One expert’s testimony, although opposed to his previous testimony during a hearing, was only cumulative of other experts’ testimony. As to the remaining four experts, mother failed to present any argument or authority specific to testimony of these doctors and the appellate court refused to make the argument for mother. Additionally, mother failed to show harm. Accordingly, because DFPS’s failure to disclose the mental impressions of the experts did not unfairly surprised or prejudice mother, trial court did not abuse its discretion in admitting the experts’ testimony.

**Editor’s Comments:** *It appears that DFPS is not held to the same standard for responding to discovery requests as everyone else. The burden of establishing a lack of unfair surprise or unfair prejudice to the mother was on DFPS and the Court of Appeals seemed to bend over backward in favor of DFPS when it determined that DFPS’s failure to disclose the mental impressions of the experts did not unfairly surprise or prejudice mother. J.A.V.*

**U.S. SUPREME COURT'S *ANDERS* REQUIREMENTS EXTENDED TO PARENTAL TERMINATION APPEALS IN THE TEXARKANA COURT OF APPEALS**

¶10-3-52. [In re P.M.H., No. 06-10-00008-CV, 2010 WL 1794390 \(Tex. App.—Texarkana 2010, no pet. h.\)](#) (mem. op.) (5/06/10).

**Facts:** Trial court terminated mother's parental rights to PMH. In accordance with [TFC 263.405\(e\)](#), mother obtained court-appointed counsel for her appeal. Pursuant to the U.S. Supreme Court's decision in [Anders v. California, 386 U.S. 738, 741-44 \(1967\)](#), mother's court-appointed counsel filed a brief (*Anders* brief) with appellate court stating that any appeal by mother would be frivolous. Mother's counsel additionally motioned to withdraw. Neither the Texas Supreme Court nor the Texarkana Court of appeals has held that *Anders* applies to parental termination appeals. (Several of Texarkana's sister Texas jurisdictions have extended *Anders* to parental termination appeals.)

**Holding:** Mother's parental-rights termination affirmed and court-appointed counsel's motion to withdraw granted.

**Opinion:** In *Anders*, the Supreme Court held that a court-appointed appellate counsel for a criminal defendant has no duty to pursue a frivolous matter on appeal. The procedures set forth in *Anders* will now apply to parental termination appeals in the Sixth Appellate District at Texarkana. Here, counsel's *Anders* brief establishes a professional opinion why there are no arguable grounds for reversal. Counsel's *Anders* brief additionally advances a contention of error that might plausible support the appeal. Counsel established he provided mother with *Anders* brief and notified her of her right to file a pro se response. Mother has failed to exercise her right to file a pro se response. Accordingly, trial court's termination of mother's parental rights affirmed and court-appointed counsel's motion to withdraw granted.

**SUBSTANTIAL TRIAL EVIDENCE OF MOTHER'S PHYSICAL HEALTH, MENTAL HEALTH, AND FAILURE TO SUPPORT OR CARE FOR THE CHILD SUPPORTED TRIAL COURT'S DECISION TO TERMINATE MOTHER'S PARENTAL RIGHTS.**

¶10-3-53. [Jordan v. Dossey, S.W.3d, 2010 WL 1948280](#) (Tex. App.—Houston [1st. Dist.] 2010, no pet. h.) (5/13/10).

**Facts:** Mother appealed from trial court's termination of her parental rights in her male child R.A. Mother maintained custody of R.A. for the first three weeks of the child's life. Mother then gave up custody of R.A. to father, who maintained custody until R.A. was one year of age. Afterward, appellants maintained custody of R.A. for the next two years leading up to trial. Medical records presented at trial revealed that, prior to the birth of R.A., mother attempted suicide 10 to 15 times, suffered from severe depression, and suffered from "psychiatric substance abuse." Medical records additionally revealed that Mother was diagnosed with a seizure disorder and mother failed to maintain a drug regimen to treat the disorder.

Mother met father, a convicted sex offender, in a homeless shelter and became pregnant with R.A. shortly thereafter. During the first five months of pregnancy, mother and father lived a transient lifestyle often in "crack houses." Evidence at trial revealed father frequently became violent with mother and struck her on at least 10 occasions. Mother eventually lived in a shelter for the remainder of the pregnancy. However, when mother was eight months pregnant with R.A., she attempted suicide, which required hospitalization.

Three weeks after mother gave birth to R.A., mother relinquished custody of R.A. to father. Mother offered conflicting testimony at trial that father "kidnapped" R.A. or otherwise took R.A. without her consent. Other witnesses at trial indicated that mother voluntarily relinquished custody of R.A. to father. Shelter employee testified she offered to assist mother to retrieve R.A. from father but that mother refused assistance.

Shelter employee additionally testified mother appeared to “want [father] to have R.A.” Ultimately, father requested appellants to “adopt” R.A. and subsequently abandoned R.A. in a “crack house.”

When appellants went to retrieve R.A. from the “crack house,” R.A. showed signs of severe neglect and malnourishment. Evidence presented at trial revealed that, once appellants gained custody of R.A., they provided him a safe, stable and loving environment. Following trial, trial court found that termination of mother’s parental rights in R.A. was in the best interest of the child and that mother’s conduct constituted three grounds for termination under [TFC 161.001\(1\)](#). Mother appealed arguing the evidence was legally and factually insufficient to support trial court’s findings.

**Holding:** Trial court’s termination of mother’s parental rights affirmed.

**Opinion:** Here, although appellants need only prove one of the three alleged grounds, the evidence supports that mother violated all three. Mother knew that father was violent that he was a convicted sexual offender. Mother voluntarily left child in the possession of father in conditions likely to harm the child’s physical and emotional well-being. Appellant’s found R.A. in a crack house covered in his own feces and infested with scabies. R.A. was so malnourished that upon adequate feeding, R.A. would nonetheless store food in his cheeks. Mother additionally engaged in conduct likely to harm R.A. During her pregnancy, mother refused to stay away from father who was abusive to mother. Mother failed to maintain adequate prenatal care and attempted to end R.A.’s life through her own suicide attempt. Additionally, the evidence at trial revealed mother failed to support R.A. for more than six months of R.A.’s life. Mother knew of R.A.’s location for at least six months after she relinquished control of R.A. Mother failed during this period or anytime thereafter to provide support, goods, or money for R.A.

**MOTHER FAILED TO PROVIDE EVIDENCE RELATED TO FRAUD, DURESS, OR COERCION IN HER DIRECT ATTACK ON TRIAL COURT’S TERMINATION OF HER PARENTAL RIGHTS PURSUANT TO HER VOLUNTARY RELINQUISHMENT AFFIDAVIT.**

¶10-3-54. [In re Gladney Center, No. 2-10-107-CV, 2010 WL 2105872](#) (Tex. App.—Fort Worth 2010, orig. proceeding) (mem. op.) (5/20/10).

**Facts:** Mother signed an irrevocable affidavit voluntarily relinquishing her parental rights and designating adoption center as managing conservator of her child. Mother’s relinquishment affidavit contained language clearly waiving her right to service of process in the termination suit. Trial court subsequently terminated mother’s parental rights. Afterward, mother motioned trial court for a new trial arguing that she did not receive proper notice of the termination proceeding and that she signed the relinquishment affidavit under conditions of fraud, duress, and coercion. Trial court granted new trial. Adoption center petitioned appellate court for mandamus relief.

**Holding:** Mandamus relief granted, trial court ordered to set aside new trial

**Opinion:** Under [TFC 161.103\(e\)](#), a parent’s relinquishment affidavit designating an adoption agency as managing conservator is irrevocable. A parent may waive service of process of the termination proceeding in the affidavit. Under [TFC 161.211\(c\)](#), a direct or collateral attack on an order terminating parental rights based on an affidavit of relinquishment of parental rights is limited to issues related to fraud, duress, or coercion in the execution of the affidavit.

Here, mother signed an irrevocable relinquishment affidavit under [TFC 161.103\(e\)](#). The provision in mother’s relinquishment affidavit waiving her right to service of process is expressly authorized under [TFC 161.211\(c\)](#). Furthermore, during the hearings on mother’s motion for new trial, mother offered no evidence that she signed the relinquishment affidavit under conditions of fraud, duress, or coercion. Consequently, trial court abused its discretion in granting a new trial based on mother’s lack of notice of the termination proceeding.

**ON REMAND, APPELLATE COURT FOUND TRIAL EVIDENCE SUFFICIENT TO SUPPORT THAT TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS IN THE BEST INTEREST OF THE CHILD.**

¶10-3-55. [In re J.H.G., \\_\\_\\_ S.W.3d \\_\\_\\_, 2010 WL 2044874 \(Tex. App.— Dallas 2010, no pet. h.\)](#) (op. on remand) (5/25/10).

**Facts:** This parental termination case is on remand from the Supreme Court of Texas. In appellate court's original opinion the court concluded the trial court erred by not dismissing the proceeding on the dismissal date. Consequently, the trial court lacked subject-matter jurisdiction. The Supreme Court of Texas disagreed and reversed appellate court's decision with instructions on remand to consider appellant's issues on the merits.

In 2007, twenty-year-old mother went to an emergency room complaining of abdominal pain and vaginal bleeding. Doctors determined mother was in labor. Mother claimed she was unaware of her pregnancy. After the birth of the child, mother stated that she did not want the child and acted in a manner indicating she did not want the child. Mother later stated that she wanted to keep the child. CPS become involved and eventually took custody of the child. CPS's original goal was family reunification. Accordingly, it created a service plan to assist mother in regaining custody of the child. Mother ultimately failed to comply with the service plan. CPS's goal then changed to termination of mother's parental rights. Following trial, jury determined mother failed to comply with the provisions of a court order that established the actions necessary for her to obtain return of the child and that termination of parental rights was in the child's best interest. On appeal, mother challenged the sufficiency of the evidence supporting the jury's finding that termination of mother's parental rights was in best interest of the child.

**Holding:** Parental-rights termination affirmed

**Opinion:** Under [TFC 161.001](#), before parental rights can be involuntarily terminated, the fact finder must find by clear and convincing evidence that: 1) the parent has committed one of the enumerated statutory grounds, and 2) termination is in the best interest of the child. The Texas Supreme court established a non-exhaustive list of "*Holley*" factors courts may use in ascertaining the best interest of the child.

Here, evidence presented at trial showed that after child's birth, mother stated she did not want the child. Mother's actions in the months after the child's birth indicated she did not want the child or was uninterested in raising the child. Evidence also showed that mother and child never bonded. During visitations, child refused to interact with mother, and mother was hesitant to interact with child. Mother missed multiple visitations with the child especially during the month leading up to trial when the location was moved to accommodate her. This indicates mother was not making every effort to show return of child to her was in the child's best interest. Additionally, mother lived in three different places during the investigation, which showed instability. She failed to notify CPS of these moves. Mother also had a pattern of getting involved with men for short periods of time. In fact, evidence showed her interest in the child declined near the time she got involved in a relationship with a boyfriend. This seemed to indicate her relationship with boyfriend was more important than her relationship with the child. At trial, mother was repeatedly asked about her plans for the child but gave little more detail than a vague desire to raise him and teach him her native language. Throughout the trial, the jury heard evidence that Mother would likely fail to provide a stable environment for JHG. Additionally, Evidence showed that child was far more stable in his foster home. After reviewing the evidence under the *Holley* factors and applying the appropriate standards of review, a the jury could find by clear and convincing evidence that termination of mother's parental rights was in the best interest of the child. Accordingly, the evidence was legally and factually sufficient to support termination of mother's parental rights.

## ***FAMILY VIOLENCE***

### **TRIAL COURT DID NOT ERR BY ISSUING PROTECTIVE ORDER AGAINST FATHER'S CHILD FROM ANOTHER CHILD TO PROTECT CHILD.**

¶10-3-56. *K.D. v. D.D.*, \_\_\_ S.W.3d \_\_\_, 2010 WL 7224373 (Tex. App.—San Antonio 2010, no pet. h.) (3/3/10)

**Facts:** Mother and father divorced in 2007. Trial court awarded mother primary possession of child and granted father standard visitation rights. In 2008, mother sought a protective order against father, alleging that father's thirteen-year-old child from another marriage engaged in family violence against Child, including sexual abuse. Trial court granted an ex parte temporary order and set the matter for hearing. At the hearing, mother testified based on information given to her by Child. Child also independently testified. After the hearing, trial court found that father's child had committed family violence and that family violence was likely to occur in the future, and therefore granted a final protective order. Father's child appealed.

**Held:** Affirmed.

**Opinion:** Father's child argued that trial court erred by admitting mother's testimony about Child's report of sexual abuse. Although father's child objected at trial to one portion of mother's testimony, he failed to object to similar and more inculpatory parts of her testimony. Father's child therefore failed to preserve the issue for review.

Father's child also challenged the sufficiency of the evidence to support the findings that family violence had occurred and was likely to occur. [TFC 71.004](#) defines family violence to include (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, or assault, or sexual assault and (2) abuse, as that term is defined by Sections 261.001 by a member of a family or household toward a child of the family or household. [TFC 261.001\(1\)\(E\)](#) defines abuse as sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of indecency with a child. Trial court found that father's child committed acts constituting indecency with a child. Father's child failed to provide any evidence to counter mother and Child's evidence.

**Editor's Comment:** *Father's first hearsay objection to child's statements to mother came only after mother had previously testified, without objection, to the child's complaints about sexual abuse. Because "most of the testimony on this subject was admitted without objection," the father "did not properly preserve the hearsay issue for our review." J.V.*

**TRIAL COURT CORRECTLY ISSUED A NEW FAMILY VIOLENCE PROTECTIVE ORDER AGAINST HUSBAND WHEN HE ADMITTED HE VIOLATED A PREVIOUS PROTECTIVE ORDER BY APPROACHING WIFE**

¶10-3-57. [Sharpe v. McDole](#), No. 03-09-00139-CV, 2010 WL 2010849 (Tex. App.— Austin 2010, no pet. h.) (mem. op.) (5/19/10).

**Facts:** Husband and wife divorced in 2003 but maintained a relationship for several years following the divorce. In 2006, wife obtained a family violence protective order against husband that was set to expire in 2008. In 2008, wife applied for a new two-year protective order based on a “continuing threat of family violence in the future.” At the hearing both husband and wife testified that husband violated the previous protective order by approaching wife within 200 yards. Trial court issued a new two-year protective order against husband. At hearing on husband’s motion for a new trial, husband argued that he chose to violate the protective order to “tape her to reveal her lies” and that wife was lying [about husband and his conduct] to gain an advantage in a custody proceeding related to their child. Trial court denied the motion for a new trial. Husband appealed with several arguments on legal sufficiency grounds including that wife’s hands were unclean because she also violated the protective order.

**Holding:** Trial decision affirmed.

**Opinion:** Under [TFC 85.002](#), a court shall issue a new protective order if it finds that 1) there was a valid previous protective order now expired, and 2) the respondent violated the previous protective order. A court need not make any further findings as required under [TFC 85.001](#). Here, trial court observed that by his own admission, husband violated the previous protective order by approaching wife within 200 yards. The evidence presented clearly indicated that husband violated the protective order while the previous order was in effect. Accordingly, trial court appropriately issued a new protective order. Trial court need not have made any further findings. [TFC 85.002](#) is predicated on a respondent’s violation of an existing protective order. The relevant issue is whether the respondent violated the order—not the applicant. Here, husband’s conduct is at issue, not wife’s conduct.

**Editor’s Comment:** *Don't be surprised if the court grants a new Protective Order when the old one is about to expire but the respondent admits he violated the old order “because his ex-spouse was lying and he was trying to tape her to reveal her lies.” J.V.*

**MISCELLANEOUS**

★★★ UNITED STATES SUPREME COURT ★★★

**WIFE’S REMOVAL OF CHILD FROM CHILEAN HOME, IN VIOLATION OF FATHER’S *NE EXEAT* RIGHTS, REQUIRES APPLICATION OF A RETURN REMEDY UNDER THE HAGUE CONVENTION.**

¶10-3-58. [Abbott v. Abbott](#) S.Ct. , No. 08-645, 2010 WL 1946730 (5/17/10).

**Facts:** Husband (British citizen) and wife (U.S. citizen) moved from England to Hawaii where child was born. Afterward, parents and child moved to Chile. In Chile, husband and wife separated. Chilean court awarded mother daily care and control over the child and awarded father visitation rights. Chilean court additionally granted father a *ne exeat* right, the right for father or the Chilean court to consent before mother could

remove child from Chile. Afterward, without father's or Chilean court's consent, mother removed child from Chile to Texas. Mother then filed for divorce in Texas court and sought a modification of her rights to exclusively determine child's residence. Father filed separate suit in Texas court requesting return of the child to Chile. Texas court denied father's request but granted liberal visitation and possession provided father remained in Texas.

Afterward, father filed suit in District Court seeking an order, under the Hague Convention, to return the child to Chile. District Court denied father's request holding that father's "*ne exeat* right did not constitute a 'right of custody' under the Convention and, thus, the return remedy was not authorized." Relying on a Second Circuit case in which Justice Sotomayor sharply dissented, the Fifth Circuit affirmed, holding that father's *ne exeat* right was only a veto right over child's removal from Chile. Father appealed.

**Holding:** Reversed and remanded

**Opinion:** Under the Hague Convention on the Civil Aspects of International Child Abduction (Convention), implemented by International Child Abduction Remedies Act (ICARA), a child abducted in violation of "**rights of custody**" must be returned to the child's country of habitual residence. ICARA authorizes a person who seeks a child's return to file a petition in state or federal court and instructs that the court "shall" decide the case in accordance with the Convention.

The issue here is whether father has a "right of custody" over child by way of his *ne exeat* right to consent to child's removal from Chile. The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. The Convention recognizes that a court can grant custody rights jointly to both parents or alone to a single parent. Under Chilean law, a *ne exeat* right means that neither parent can unilaterally establish the child's "place of residence." The phrase "place of residence" encompasses the child's country of residence, especially in light of the Convention's explicit purpose to prevent wrongful removal across international borders. Accordingly, under the Convention, a *ne exeat* right is a "right of custody."

This holding is in accordance with the U.S. Department of State's understanding that *ne exeat* rights are rights of custody. Further, decisions of other member states including England, Israel, Austria, South Africa, and Germany are in accordance. (The Court noted disagreement in Canadian and French courts.) Moreover, a return remedy for violation of *ne exeat* rights is in accord with the purpose of the Convention, to deter abductions, and that the best interests of the child are served when decisions regarding custody rights are made in the country of habitual residence. The return remedy does not alter existing custody rights, but allows the courts of the home country to decide what is in the child's best interest.

Here, both the U.S. and Chile are members of the Convention. The Chilean court granted father a *ne exeat* right to consent or to have the court consent to child's removal from Chile. Under this opinion, father's *ne exeat* right is a right of custody. Neither father nor Chilean court consented to mother's removal of child from Chile. Thus, under ICARA, the Convention applies and the issue must be decided in accordance with the Convention. Reversed and remanded.

**Dissent: (Stevens, J.; Thomas, J. and Breyer, J.)**

In 1980, the drafters of the Convention determined that when a *noncustodial* parent abducts a child across international borders, the best remedy is return of that child to his or her country of habitual residence or, in other words, the best remedy is return of the child to his or her custodial parent. However, the drafters determined a return remedy was not appropriate when a custodial parent takes a child from his or her country of habitual residence in breach of the other parent's visitation rights, or "rights of access." A *ne exeat* right is not a right of custody. A *ne exeat* right is no more than a travel restriction i.e. a "right of access." Accordingly, the Court incorrectly concludes that a return remedy is available to a parent having merely a *ne exeat* right.

**Editor's Comment:** *In light of this decision, if you represent the parent who may likely end up as the non-custodial parent, perhaps it would be wise to specifically plead for the right to consent to the child's removal from the United States. By obtaining this right, which is expressly included in a final order, you will perhaps secure greater protection for your client in other countries that either now or in the future may interpret the Hague Convention in a manner similar to the United States, England, Israel, Austria, South Africa and Germany. S.S.S.*

**Editor's Comment:** *Pay attention to this case. Here, a father with visitation rights could block the child's move outside the country, subject to court intervention in Chile, simply by withholding his consent. International abduction is a terrifying thought for any parent and the Hague Convention offers some comfort in nations that have accepted the convention. But, with the Supreme Court's broad definition of "rights of custody" and the requirements of consent for international travel so often included in our decrees, it will be interesting to see how far this definition goes. As a practical matter, this case underscores the importance of the provisions for possession of the child's passport and consent to international travel – we should not neglect these issues in our decrees. M.M.O.*

### **HAGUE CONVENTION DOES NOT APPLY TO CHILDREN REMOVED FROM NON-SIGNATORY COUNTY.**

¶10-3-59. [\*In re Kamstra\*, No. 12-09-00017-CV, 2010 WL 708857 \(Tex. App.—Tyler 2010, orig. proceeding\) \(mem. op.\) \(3/2/10\).](#)

**Facts:** Father, a Dutch citizen, and mother, an American citizen, were married 05/10/95. While living in Tanzania, wife travelled to Holland for the birth of two children. In 08/07, family moved to Burundi. In 08/08, mother and children visited her parents in Longview, TX. Shortly before they were scheduled to return, mother told father that she was not returning to Burundi and intended to enroll the children in school in Longview. She told husband she would stay in Longview until Christmas and then return to Burundi.

On 10/17/08, mother informed father that she and children would stay in Longview indefinitely. One week later, mother, without informing father, filed for divorce and sought custody of children, alleging that she had been domiciled in Texas for the preceding 6 months and a resident of the county for 90 days. On 11/03/08, husband arrived in Longview seeking to reconcile with wife. After he arrived, husband was served with divorce petition and a temporary restraining order. Father filed a special appearance and a plea to the jurisdiction, alleging that Burundi was children's home state and that mother had engaged in parental kidnapping. In a later pleading, father sought relief under the Hague Convention. Although Burundi is not a signatory to the Hague Convention, mother's counsel eventually stipulated that the Hague Convention applied. Father also started a divorce and child custody action in Burundi.

After a hearing, trial court signed a written order on 12/22/08 dismissing mother's divorce action since she had not been domiciled in Texas for 6 months when she filed the action. Trial court also issued emergency orders ordering father to deposit \$50,000 for mother to withdraw by order of trial court for the purpose of her travel to and attorney's fees in Burundi and for father to directly pay \$15,000 toward mother's attorney's fees. Father petitioned for a writ of mandamus to overturn the emergency orders.

**Held:** Mandamus granted in part and denied in part.

**Opinion:** Father argued that Dutch law applied since he and children were Dutch citizens, even though they resided in Burundi. The Hague Convention, however, applies based on residency in a signatory country, not on citizenship. Trial court implicitly found that Burundi was the child's habitual residence, and the Hague Convention therefore does not apply. Trial court therefore lacked subject jurisdiction to enter the emergency orders, which are therefore void.

**Editor's Comment:** *The opinion makes no mention of any argument regarding a lack of subject-matter jurisdiction based on "home state." Under the facts the W came to Texas in August only for a visit and filed for divorce and SAPCR in October. Clearly Texas was not their home state at the time the suit was filed. Nevertheless, the Texas court declined "jurisdiction" because of an inconvenient forum argument. In a footnote within the opinion the COA assumed that the hearing scheduled in Burundi proceeded and that the issues concerning the children had been resolved. S.S.S.*

**Editor's Comment:** *This case could have been taken care of with one simple plea to the jurisdiction and a correct ruling by the trial court. Trial courts – this case stands for one thing – if you don't have jurisdiction you can't enter orders. Period. M.M.O.*

### **TRIAL COURT ABUSED ITS DISCRETION DENYING A MOTION TO COMPEL ARBITRATION IN AN ATTORNEY-CLIENT AGREEMENT.**

¶10-3-60. *In re Pham*, \_\_\_\_\_ S.W.3d \_\_\_\_\_, 2010 WL 2106670 (Tex. App.—Houston[14th Dist.] 2010, orig. proceeding) (3/4/10)

**Facts:** Client suffered personal injuries in an automobile accident, and hired law firm. The attorney-client agreement that client signed contained an arbitration agreement that provided for binding arbitration in the event of a dispute arising under the agreement. Client sued law firm along with a partner and associate for malpractice. Law firm filed a motion to compel arbitration. Trial court denied the motion to compel. All of the defendants filed a joint notice of appeal in trial court, but law firm and partner moved to have their appeals dismissed. Associate filed a petition for a writ of mandamus.

**Held:** Mandamus granted.

**Opinion:** Client argued the arbitration was unconscionable. While T.C.P.R.C 171.002 does preclude arbitration agreements in certain contexts and imposes restrictions in others, it does not address attorney-client contracts. Client further argued that the arbitration agreement was unconscionable because a fiduciary relationship existed between law firm and client even before the signing of the agreement. Client did not, however, present evidence that this occurred in this case. Client acknowledged that no one from law firm advised her or told her about the arbitration provision. Client did not identify any negotiations, discussion or counseling that occurred prior to her signing the contract. The only contact between law firm and client before the signing of the contract was client's reading of law firm's website. The reading of statements on a website is not by itself evidence of the development of a special relationship. Consequently, client failed to meet her burden of proving the defense of unconscionability.

Client cited a Texas Ethics Commission opinion that suggested arbitration clauses are only permissible in contracts if client is made of aware of the costs and benefits of arbitration and had sufficient information to make an informed decision. This opinion does not, however, impose any restrictions on attorney-client arbitration. Client also cited Texas Disciplinary Rule of Professional Conduct 1.08(g) for the proposition that law firm may not make an agreement prospectively limiting liability. Arbitration agreements do not, in fact, limit law firm's liability, these agreements merely denominate a procedure for determining liability.

Since associate met the requirements for compelling arbitration and client did not establish a defense, trial court abused its discretion by denying the motion to compel arbitration.

**Dissent (J. Seymore):** Special public-policy considerations are implicated when an attorney imposes an arbitration provision on his or her client. The majority should have imposed a requirement that attorneys must fully inform prospective clients regarding implications of an arbitration clause in an attorney-client contract. Attorneys should offer prospective clients an opportunity to seek advice from another source before signing

an attorney-client agreement that contains language potentially detrimental to the client's interest. When the legislature and rule-making authority in the legal profession fail to protect consumers of legal services, courts have an obligation to act because public perception of the legal profession's ability to self-police is not favorable. I would hold trial court did not abuse its discretion.

**Editor's Comment:** *The dissent echoes Chief Justice Hardberger's dissent in Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App. - San Antonio 2000, pet. dismiss'd), but the dissent's suggestion that the attorney "should offer the prospective client an opportunity to seek advice from another source before signing an attorney-client agreement" seems cumbersome and impractical. How often would a prospective client actually retain one attorney to examine another attorney's fee contract before deciding to retain the second attorney? J.V.*

**Editor's Comment:** *I agree with the majority on this one. The associate met the burden for compelling arbitration and the client did not establish a defense. The arbitration clause should have been enforced. Arbitration agreements are serious stuff. If you do not want to resolve your potential claims by arbitration, then don't sign an arbitration clause. If the client did not understand the implications, they had the opportunity to ask questions about the contract before signing, to seek a second opinion, or to not hire the law firm. A client is not forced to sign an agreement with a law firm – as consumers of legal services, a client can take their business elsewhere. M.M.O.*

#### **APPELLATE COURT COULD NOT GRANT RELIEF BASED ON ALLEGED FACTUAL INSUFFICIENCY WHEN GRANDPARENTS DID NOT ASK FOR NEW TRIAL**

¶10-3-61. [In re S.K.H.](#), \_\_\_ S.W.3d \_\_\_, 2010 WL 960363 (Tex. App.—El Paso 2010, no pet. h.) (3/17/10)

**Facts:** Mother filed a petition for a Permanent Restraining Order in October 2003 against grandparents. Trial court entered a temporary restraining order to restrain grandparents from removing child from mother. In 06/04, mother filed a Petition for Interference with Possessory Interest in Child, Interference with Child Custody and Intentional Infliction of Emotional Distress. Mother alleged that grandparents had taken possession of child and concealed child's whereabouts from mother on a number of occasions. In 09/07, trial court entered judgment in favor of mother holding that 1) grandparents had violated [chapter 42 of the T.F.C](#); 2) grandparents had interfered with lawful child custody; and 3) grandparents committed intentional infliction of emotional distress. Trial court awarded mother exemplary damages, actual damages and attorney's fees. Grandparents appealed.

**Held:** Affirmed.

**Opinion:** Grandparents argued the evidence was factually insufficient to support trial court's rulings. The only relief appellate court may grant an appellant who argues factual insufficiency is a new trial. As grandparents only asked appellate court to reverse and render judgment against mother, appellate court cannot grant them any relief.

**Editor's Comment:** *Prayers are important: The El Paso court could not reverse and remand because appellants asked the court only to reverse and render. J.V.*

**TRIAL COURT ABUSED ITS DISCRETION BY FINDING A PREVIOUS ORDER VOID.**

¶10-3-62. [In re Fry, No. 2-09-00195-CV, 2010 WL 1006398](#) (Tex. App.—Fort Worth 2010, orig. proceeding) (mem. op.) (3/17/10).

**Facts:** Husband and wife divorced 12/06/90. Trial court entered a support order for children. On 07/26/99, trial court dismissed the Motion for Enforcement of Child Support Order for want of prosecution. Despite this dismissal, trial court signed and entered the Order of Enforcement of Contempt, For Suspension of Commitment, and Modification of Child Support on 07/28/99. On 11/06/07, associate judge held a hearing on the validity of the 07/28/99 order and ruled that it was void. Husband appealed the ruling to trial court. Trial court entered a default judgment against husband because he failed to appear at the 01/02/08 hearing.

On 03/03/08, AG filed an amended motion to confirm arrearage. On 05/28/08, trial court entered an order finding that 07/28/99 order was void as a matter of law and directed the parties to proceed on the order in effect prior to the 07/28/99. On 06/02/08, husband filed a motion for new trial arguing that his failure to appear at the 01/02/08 was due to accident and mistake. Father appealed, but the appeal was dismissed for want of jurisdiction.

AG sent a notice to withhold for healthcare coverage for child and an administrative writ of withholding on 05/12/09 to husband's employer ordering the employer to deduct \$1,060 per month from husband's pay for past due child support. Father filed a petition for writ of mandamus attacking the 05/28/08 order.

**Held:** Mandamus granted.

**Opinion:** Husband argued that trial court had no authority to set aside the 07/28/99 order after plenary power had expired. He further argued that since wife did not timely file a bill of review arguing that the 07/28/99 order was void, trial court abused its discretion by entering the 05/28/08 judgment. Wife responded that the 07/28/99 order was not a final judgment because it did not dispose of all parties – namely the AG's claims. AG agreed that the 07/28/99 order is a valid modified or corrected judgment, and that it vacated the 07/26/99 dismissal order. AG disagreed with wife that the 07/28/99 order was final because it actually did acknowledge that AG was a party.

Trial court's 07/28/99 order did vacate the 07/26/99 dismissal and reinstated the case while trial court retained plenary power. Trial court, therefore, abused its discretion by signing and entering the 05/28/08 order that found the 07/28/99 order void. Trial court must vacate its 05/28/08 order.

**TRIAL COURT ABUSED ITS DISCRETION BY AWARDING INTERIM ATTORNEY'S FEES TO MOTHER WHEN SHE FAILED TO ESTABLISH THE FEES WERE NECESSARY TO SAFETY AND WELFARE OF CHILDREN.**

¶10-3-63. [In re Flanagan, No. 09-10-00019-CV, 2010 WL 974577](#) (Tex. App.—Beaumont 2010, no pet. h.) (mem. op.) (3/18/10).

**Facts:** Father filed a SAPCR in 05/09. On 12/21/09, trial court issued temporary orders for the safety and welfare of the children that transferred primary custody from mother to father because the children's present circumstances endangered children's health and emotional development. Mother filed a motion in response requesting husband be ordered to pay \$100,000 to wife's attorneys "to level the playing field." At a hearing on mother's motion, father argued that mother is not entitled to interim attorney's fees because she had not raised an issue regarding the safety and welfare of children. Trial court awarded mother interim attorney fees in order for mother to maintain the lawsuit on a level playing field. Father petitioned for a writ of mandamus.

**Held:** Mandamus granted.

**Opinion:** Mother did not show that the payment of interim attorney’s fees was necessary for the safety and welfare of children. Mother offered no evidence that she had been unable to pay for the legal services incurred to this point. Mother did not testify regarding her ability to pay future attorney’s fees. At the hearing, mother’s counsel attempted to rely on [TFC 106.002](#) for the interim attorney’s fees, but that section does not justify awarding attorney’s fees before judgment. [TFC 105.001](#) sets out the only grounds for interim attorney’s fees – the safety and welfare of children. Since mother did not offer evidence that interim attorney’s fees were necessary to the safety and welfare of children, trial court abused its discretion by awarding interim attorney’s fees.

**Editor’s Comment:** “We need to level the playing field,” without more, is insufficient to obtain interim attorney’s fees. J.V.

**APPELLATE COURT WILL PRESUME ANY OMITTED PORTION OF A REPORTER’S RECORD SUPPORTS TRIAL COURT’S RULLING WHEN APPELLANT FAILS TO PRESENT A STATEMENT OF APPELLATE POINTS WITH A PARTIAL REPORTER’S RECORD**

¶10-3-64. [Vandemark v. Jimenez, No. 01-09-00168-CV, 2010 WL 1241287](#) (Tex. App.—Houston [1<sup>st</sup> Dist.] 2010, no pet. h.) (mem. op.) (4/01/10).

**Facts:** After mother and father divorced in 2001, trial court awarded custody of two children to mother. On June 17, 2008, OAG filed suit on mother’s behalf seeking to increase father’s child support obligation from \$750 to \$1090 per month for the support and care of the couple’s mentally and physically disabled adult children. The clerk’s record indicated a citation order issued but did not contain a return of service. On September 11, 2008, mother and father appeared before IV-D (trial court) and requested trial court to reset modification hearing so that father could obtain counsel. Afterward, father failed to attend the November 13, 2008 modification hearing. Because father failed to attend the modification hearing, trial court entered a default judgment against father.

On appeal, father argued 1) that trial court did not properly serve him citation notice; 2) the OAG failed to file an affidavit of non-military service as required by the federal Servicemember’s Civil Relief Act (SRCA); and 3) in awarding child support for children over eighteen years old, the default order fails to indicate whether the trial court considered the statutory factors under [TFC 154.306](#).

**Holding:** Trial court default judgment affirmed.

**Opinion:** [TFC 156.003](#) requires that a defendant receive notice by service of citation when the defendant’s rights and duties may be affected by a modification suit. [TFC 156.004](#), however, provides that the TRCP apply to modification suits. Under [TRCP 120](#), a defendant waives service by making a general appearance before the court. By appearing before the court and participating in proceedings, the defendant submits to the court’s jurisdiction. Here, the record indicates father did not receive citation notice of OAG’s modification action. Father, however, appeared before trial court on September 11, 2008 to request additional time to obtain counsel. Trial court and father signed the order resetting the modification rehearing date. By appearing before trial court and signing reset order, father impliedly recognized trial court’s jurisdiction over the modification proceeding.

Before a court can render a modification judgment against a military service person, SRCA 521(b) requires a plaintiff to file an affidavit stating whether the defendant is engaged in military service. However, SRCA 521(b) only applies in proceedings in which the defendant “does not make an appearance.” Here, father appeared before trial court on September 11, 2008 to request a reset of the modification hearing. Thus, because SCRA 521(b) does not apply, the OAG was not required to file an affidavit stating whether father was engaged in military service.

Generally, an appellant bears the burden to bring forward a sufficient record to establish the trial court's error. A defendant need not present a complete reporter's record to preserve a legal or factual sufficiency challenge. [TRAP 34.6\(c\)](#) allows a defendant to present a partial reporter's record on appeal. In such a case, [TRAP 34.6\(c\)\(1\)](#) requires appellant to include a statement of appellate points the appellant intends to raise on appeal. When an appellant fails to include a statement of appellate points with a partial reporter's record, the appellate court will presume the omitted portions of the trial record support the trial court's findings. Here, father presented a partial reporter's record but failed to present a statement of appellate points. Without a statement of appellate points, the appellate court presumed the omitted portions of the reporter's record supported trial court's findings with respect the statutory factors under [TFC 154.306](#). Appellate court could not conclude trial court abused its discretion in modifying father's child support obligation.

**Editor's Comment:** *A party who appears in court and signs an agreed reset order has generally appeared such that no affidavit under the Servicemember's Civil Relief Act is required to support a default judgment. J.V.*

**A TRIAL COURT ON REMAND WILL NOT AWARD APPELLATE ATTORNEY'S FEES WHEN A PLAINTIFF SEEKING PARENT-CHILD MODIFICATION FAILS TO ALLEGE A BREACH-OF-CONTRACT IN THE ORIGINAL MODIFICATION ACTION.**

¶10-3-65. [Kurtz v. Kurtz, No. 14-08-00351-CV, 2010 WL 1293769](#) (Tex. App.—Houston [14th Dist] 2010, no pet. h.) (mem. op.) (4/06/10).

**Facts:** This is mother's second appeal stemming from original 2001 petition to modify parent-child relationship. The divorce decree ordered father to pay mother's attorney's fees in any subsequent petition to modify child support. Following original modification action, trial court refused to award mother attorney's fees. In mother's first appeal, appellate court reversed and remanded trial court's refusal to award attorney's fees and mandated trial court to segregate mother's attorney's fees related to parent-child modification from fees related to her defense of father's counterclaims.

On remand, mother requested \$42,466 in attorney's fees related to parent-child relationship modification. The computation methodology mother used to segregate her attorney's fees related to modification from those related to other issues entailed counting individual pages from the case record, calculating the percentage of recoverable issues from those pages, and then applying those percentages to the legal fees she incurred. Relying exclusively on testimony from mother's attorneys during the first trial, trial court awarded mother \$15,768 in attorney's fees rather than mother's requested amount.

Mother appealed trial court's award arguing that: 1) her segregation methodology was not contradicted on remand; 2) she was entitled to appellate attorney's fees under a breach-of-contract theory; and 3) trial court failed to award equitable prejudgment interest.

**Held:** Trial court's award of attorney's fees affirmed.

**Opinion:** Generally, a trial court should rule in favor of a party when that party's evidence is not contradicted by any other witnesses and is sufficiently clear and free from contradiction. If uncontradicted trial evidence is unreasonable or questionable, however, then this evidence raises a question of fact for the trial court to determine. Moreover, a trial court is entitled to weigh the strength of the evidence and the credibility of witnesses when considering segregation issues. Here, father highlighted discrepancies between the testimonial evidence related to segregation issues mother offered at trial versus evidence she offered on remand. Furthermore, the burden to offer segregation evidence belonged to mother; father was not required to offer alternative segregation methodology. Trial court could have concluded that mother's segregation methodology was unreasonable or questionable. Even if uncontradicted, trial court was not required to accept mother's segregation methodology.

A party cannot recover attorney's fees unless a contract or statute expressly provides for this recovery. [TCPR 38.001](#) provides that past and future appellate attorney's fees are mandatory on breach-of-contract claims. If a plaintiff seeking to modify a parent-child relationship fails to allege a breach-of-contract or to request fees under the statute during the modification trial, plaintiff will not be entitled to appellate attorney's fees under [TCPR 38.001](#). Here, the divorce decree orders husband to pay attorney's fees incurred by mother in subsequent modification motions. The decree does not order father to pay appellate fees subsequent to modification motions. Furthermore, during her motion to modify, mother failed to plead any facts supporting a breach-of-contract claim or to request attorney's fees under [TCPR 38.001](#). Mother, therefore, is not entitled to appellate attorney's fees.

A trial court has discretion to award equitable prejudgment interest related to attorney's fees. Here, over an extended period of time, the parties vigorously disputed the amount of attorney's fees father was required to pay. Appellate court cannot determine, based on the record, that trial court abused its discretion in refusing to award equitable prejudgment interest.

***Editor's Comment:** The appellant could not obtain an award of attorney's fees under TCPRC ch. 38 because she pleaded only for child-support modification and attorney's fees. She did not "plead facts supporting a breach-of-contract claim, she did not request attorney's fees under chapter 38, and she was not awarded damages for breach of contract." J.V.*

**APPELLANT MUST DIRECT THE APPELLATE COURT'S ATTENTION TO THE TRIAL COURT'S ERROR RATHER THAN AN OPPOSING PARTIES ERROR.**

¶10-3-66. [Dawson v. Dawson, No. 03-08-00553-CV, 2010 WL 1730019 \(Tex. App.—Austin 2010, no pet. h.\)](#) (mem. op.) (4/30/10).

**Facts:** Mother and father filed for divorce in March 2005. At trial, the parties agreed that the jury would decide issues related to conservatorship and geographic restrictions of the couple's two children, and that the court would decide all property issues. Additionally, the parties discussed, but never ultimately determined whether the jury should decide issues related to attorney's fees. The court's jury charge only contained four questions related to conservatorship. During the charge conference, neither party objected to the jury charge. Furthermore, during trial, father offered testimony regarding his attorney's fees totaling \$38,000. Mother failed to object to father's testimony regarding attorney fees. Following trial, trial court issued final divorce decree awarding father \$38,000 in attorney's fees. Mother appealed.

On appeal, mother argued that 1) father failed to present issues related to attorney's fees to the jury and 2) trial court erred in granting attorney's fees to father because the court was aware of her request to have the jury decide attorney's fees.

**Holding:** Trial court decision affirmed

**Opinion:** Under [TRAP 38.1](#), an appellant's brief must be clear and concise, and must direct the appellate court's attention to issues or points presented for review. An appellate point is sufficiently clear when it directs the appellate court's attention to a trial court's error. Here, mother's argument that father failed to present attorney's fees issues to the jury fails because it accuses father of error rather than the trial court.

To support an argument on appeal, [TRAP 33.1\(a\)\(2\)](#) requires that the record must show that the trial court's error actually occurred. Furthermore, parties intending to raise issues on appeal must properly preserve the trial court's error. Here, mother's second argument fails because the record clearly indicates that the parties discussed but never decided whether the jury would decide attorney's fees. The record does not show that trial court ruled on the attorney's fees issue. Moreover, mother failed to object to the jury charge, which

included no questions regarding attorney's fees. Mother also failed to object during father's testimony regarding father's attorney's fees. Mother, therefore, failed to preserve any error related to apportionment of attorney's fees.

**Editor's Comment:** *If you want the jury to decide an issue, then you must submit a proposed charge to the court. J.V.*

**TRIAL COURT ERRED IN APPLYING TFC 156, RATHER THAN TFC 153, TO MOTHER'S 329B MOTION TO MODIFY, CORRECT OR REFORM THE JUDGMENT.**

¶10-3-67. [Pearson v. Stewart](#), \_\_\_ S.W.3d \_\_\_, 2010 WL 1854130 (Tex. App.—Fort Worth 2010, no pet. h.) (5/06/10).

**Facts:** Mother and Father entered into an agreed divorce decree and trial court signed the decree. Afterward, mother motioned trial court under [TRCP 329\(b\)\(g\)](#), to correct her calculations of father's child support obligation. In her motion, mother argued that she relied on father's 2008 W2, which contained incomplete information regarding father's projected 2009 income. Trial court denied mother's motion, holding that mother could not bring a [TRCP 329\(b\)\(g\)](#) motion to correct unless she fulfilled the more specific requirements to modify a child support order under [TFC 156.401](#). Mother appealed, arguing trial court erred in its application of [TFC 156.401](#) and that trial court should have granted her motion because she proved both parties were mistaken in the child support calculations.

**Holding:** Trial court erred in applying [TFC 156.401](#), but affirmed on alternative grounds.

**Opinion:** Under [TFC 156.401](#), a party may modify a child support order if the child's circumstances have substantially changed since the court signed the order, or it has been three years since the order and the obligor's obligation differs by 20 percent or \$100. Here, mother did not satisfy the requirements under [TFC 156.401](#) to modify father's child support obligation. However, because [TFC 156](#) does not apply to original child custody determinations, it likewise cannot apply to post-trial 329b motions in such suits. Therefore [TFC 156.401](#) does not prohibit a party from filing, nor a trial court from considering, a rule 329b motion brought timely within the trial court's plenary power. Accordingly, trial court erred in applying [TFC 156](#) to the original child custody determination.

A divorce decree may be modified based on the parties' mutual mistake. To be entitled to modify based on mutual mistake, a party must prove a mistake, common to both parties, was memorialized in the written agreement. Here, mother argues that she relied exclusively on father's 2008 W2 to project father's 2009 income. Father, however, argues that not only did the parties rely on his 2008 W2, but also his pay stub and bonus information from January 2009. Thus, mother has failed to prove the divorce decree agreement is based on a mutual mistake. Accordingly, trial court did not err in overruling her [TRCP 329\(b\)\(g\)](#) motion to modify the agreement.

**TRIAL COURT MAY NOT REFUSE TO SET A TRIAL DATE TO COMPEL FATHER TO PAY INTERIM ATTORNEY'S FEES.**

¶10-3-68. [In re Montalvo](#), No. 01-10-00233-CV, 2010 WL 1839845 (Tex. App.—Houston [1st Dist.] 2010, original proceeding) (mem. op.) (5/06/10).

**Facts:** In 2006, trial court rendered decree ordering father to pay child support. The decree included findings that father engaged in a continuing pattern of frivolous and abusive litigation that was intended to and actually resulted in financial damage to mother. The decree struck father's pleadings and prohibited him from presenting evidence in support.

In August 2009, father moved trial court to modify child custody and child support provisions of the 2006 decree. During the proceeding, mother moved court for interim attorney's fees pursuant to [TFC 105.001\(a\)\(5\)](#). In support, mother presented evidence that this was the fourth custody suit father had instigated and that she had little money to defend against father's "frivolous suits." Noting its adverse findings against father in the 2006 decree, trial court awarded mother \$20,000 in interim attorney's fees. The court's order stated: "It is further ordered that no affirmative relief requested by [father] will be entertained by this court until said fees are paid."

Father filed mandamus petition arguing that trial court's order withholding affirmative relief denied his access to the courts under due course of law.

**Holding:** Mandamus petition granted

**Opinion:** A trial court may not refuse to set a case for trial because of a party's refusal to pay interim attorney's fees awarded. Here, trial court expressly refused to entertain father's request for affirmative relief until he paid interim attorney's fees. Trial court cannot compel father to comply with its order of interim attorney's fees by denying father access to the courts under due course of law. Thus, father's request for mandamus relief granted.

**Note:** Appellate court expressly stated it held no opinion whether trial court could pursue contempt or other remedies against father.

**Editor's Comment:** *Here the trial court ordered Father to pay interim fees. When he failed to do so, the trial court refused to set a trial on the merits of a case. This violates due course of law provisions. No kidding.... M.M.O.*

**WIFE'S SUMMARY JUDGMENT EVIDENCE FAILED TO ESTABLISH WHETHER DIVORCE DECREE CONTEMPLATED THAT HUSBAND MUST INDEMNIFY WIFE FOR DECLARATORY ACTION SHE BROUGHT AGAINST HUSBAND'S EX-WIFE.**

¶10-3-69. [Fernander v. Fernander, No. 03-08-00222-CV, 2010 WL 1814672 \(Tex. App.—Austin 2010, no pet. h.\)](#) (mem. op.) (5/07/10).

**Facts:** Husband and wife married in December 2000. Before his marriage to wife, husband was married to ex-wife. During the marriage of husband and wife, ex-wife obtained a child support judgment against husband. Subsequently, husband and wife divorced in October 2006. Divorce decree awarded house to wife. The divorce decree recited that the parties warranted that they had no other debts or obligations other than provided in the decree. The decree additionally provided that "if any claim, action, or proceeding is hereafter initiated seeking to hold the other party liable for any liability, act, or omission of the party, that party is ORDERED, at his or her sole expense, to defend the other party against any such claim ... and will indemnify ... the other party from all damages resulting therefrom."

Approximately six months after the divorce, wife petitioned trial court complaining that husband never discharged ex-wife's judgment against him. Wife complained that this judgment created a cloud on her title in the home and required her to initiate a declaratory judgment against ex-wife to clear the title. Wife alleged that she incurred attorney's fees related to her declaratory judgment action and that the clouded title on the house ultimately caused an \$11,000 depreciation in the house's value. At trial wife sought all attorney's fees incurred and the depreciation value of the house from husband. Father answered, but failed to respond to mother's summary judgment motion. Trial court entered default judgment against husband. Husband initiated restricted appeal arguing that, on the face of the record, the evidence supporting trial court's damages award was legally insufficient.

**Holding:** Trial court's damages award to wife reversed and remanded.

**Opinion:** In restricted appeals, among other elements, the appellant must show the trial court's error is apparent on the face of the record. Here, wife attached two pages of the divorce decree to her summary judgment evidence that included the language ordering indemnification for liabilities incurred by the other party. The decree additionally contained language stating, "any community liability not expressly assumed by a party *under this decree* is to be paid by the party incurring the liability, and the party incurring the liability shall indemnify and hold the other party and his or her property harmless from any failure to so discharge the liability." This minimal evidence fails to show whether wife's declaratory judgment action, or defense of ex-wife's subsequent turnover action, events taking place after the decree, are ones that would trigger the indemnification paragraph. Additionally, the summary judgment evidence fails to show whether the decree addressed husband's liability to ex-wife or whether his failure to satisfy the judgment triggered the indemnification paragraph. Because the evidence is factually and legally insufficient to establish husband's liability to wife, trial court erred in granting wife summary judgment.

**Editor's Comment:** *When moving for summary judgment based on a divorce decree, you should attach the entire decree, not just two pages of it. J.V.*

**TRIAL COURT'S PLENARY POWER TO ACT ON A MOTION FOR DE NOVO REVIEW OF A FINAL JUDGMENT EXPIRES IF THE COURT ACTS MORE THAN THIRTY DAYS AFTER ENTERING FINAL JUDGMENT.**

¶10-3-70. [In re A.J.F., S.W.3d , 2010 WL 1910521 \(Tex. App.—Dallas 2010, no pet. h.\)](#) (5/13/10).

**Facts:** On petition from OAG, trial court signed default judgment establishing parent-child relationship with respect to father and ordering father to pay child support and cash medical support. In July 2006, OAG filed motion of enforcement seeking unpaid child support and an order of contempt. In response father answered arguing he was not served and that he lacked ability to pay. On February 12, 2007, associate judge signed order assessing child support arrearages and holding father in contempt. That same day, without a hearing, trial court adopted associate judge's order. The same day, father motioned trial court for a de novo review of associate judge's order. Over the course of several months, trial court held three hearings. After the final hearing on October 8, 2007, trial court granted father's motion to dismiss and vacated the February 12, 2007 enforcement order. OAG appealed arguing that on October 8, 2007, trial court lacked jurisdiction to vacate the enforcement order.

**Holding:** Reversed, trial court's October 8, 2007 order voiding its February 12, 2007 enforcement order vacated.

**Opinion:** Under [TRCP 329\(b\)\(d\)](#), a trial court's order purporting to dispose of all issues and parties becomes final and appealable. The trial court loses plenary power to alter final judgment thirty days after entering a final order. Here, on February 12, 2007, trial court adopted the associate judge's enforcement order without a hearing. Trial court should have conducted a hearing, but its failure to do so did not render the court without jurisdiction to adopt the order. Father properly appealed to the trial court, under [TFC 201.015](#), requesting a de novo review of the associate judges February 12, 2007 enforcement order. However, father failed to file a motion to extend trial court's plenary power, petition trial court to vacate the order, or file a timely appeal. Trial court's plenary power expired thirty days after entering its final order on February 12, 2007. Thus, on October 8, 2007, trial court lacked jurisdiction to vacate the February 12, 2007 order. Consequently, the February 12, 2007 order assessing arrearages and holding father in contempt remains valid.

**Editor's Comment:** *The key sentence is that "the referring court should have held a hearing on [the] appeal before signing an order adopting the associate judge's report." Ordinarily, that's correct. But the court's*

*analysis is incomplete: The opinion states that the AJ held the respondent in contempt and included a jail sentence. Under TFC 201.013(c), an AJ's order of incarceration must be presented to the referring court for approval on the same day the party is incarcerated. Did the AJ stay respondent's incarceration pending de novo review? The opinion doesn't say. J.V.*

**TRIAL COURT MAY AWARD ATTORNEY'S FEES AND COSTS AGAINST A PARTY EVEN WHEN THERE IS NO PREVAILING PARTY.**

¶10-3-71. [In re B.L.M., No. 07-08-00346-CV, 2010 WL 2103919 \(Tex. App.— Amarillo 2010, no pet. h.\)](#) (mem. op.) (5/26/10).

**Facts:** Mother and father divorced in 1998. The divorce decree appointed mother and father joint managing conservators of the couple's two children with mother receiving the right to designate the children's primary residence. The decree also ordered father to pay child support and pay health insurance. In February 2006, mother filed a motion to modify the divorce decree. The resulting order required mother to pay health insurance and father to pay mother for medical support for the children. In April 2006, mother filed another motion to modify seeking clarification of the prior orders. Additionally, mother filed a separate motion requesting court to hold father in contempt. Father answered and filed a modification motion seeking appointment as sole managing conservator. Mother filed an amended motion to enforce father's child support. Following a hearing, trial court signed an order granting father primary custody of one child and mother primary custody of the other child. Trial court additionally awarded mother attorney's fees and taxed court costs against father.

Father appealed on multiple grounds including an argument that the evidence did not support taxing him with costs of court and adjudging him responsible for payment of a portion of Mother's attorney's fees. Father argued that neither party was completely successful after the final hearing, therefore, fairness and equity dictate that each party should be responsible for their own attorney fees and court costs.

**Holding:** Trial decision affirmed.

**Opinion:** Under [TFC 106.001](#) – [106.002](#), a trial court has broad discretion to award attorney's fees and costs. In family law cases, it is not always so easy to determine who the prevailing party is. But a trial court's determination of the "prevailing party" is unnecessary as attorney's fees may be awarded even against the successful party in a family law case if based on the best interest of the child. The best interest of the child is paramount in family law cases so that an award of attorney's fees and costs to the prevailing party is not always appropriate. Here, the number and diversity of issues mother and father presented to trial court with their concomitant differences in breadth and scope rendered it impossible to declare either party as the "prevailing party" at the final hearing. Trial court in its findings of fact and conclusions of law found mother's attorney's fees were incurred "in relation to the children." Consequently, the trial court did not abuse its discretion in taxing attorney's fees and costs against father.

**Editor's Comment:** *"Prevailing party" is a phrase commonly used in civil law attorney's fees statutes. The Family Code does not use the phrase except in the UCCJEA and for IV-D cases. J.V.*

**Editor's Comment:** *Best interest of the child is the standard for awarding attorney's fees in family law cases with children. The standard is not prevailing party. Thus, it doesn't matter who "wins" or "loses", but who the judge thinks ought to pay, as long as the fees are in relation to the children. Do we really have "winners" anyway? M.M.O.*