Family Law Update - 2013

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CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Certified: Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present);
    Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law
    Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines
    (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

Listed in Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009, 2010 - [3rd Top Point Getter], 2012)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in Continuing Legal Education (2009)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2012)
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal
    education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2013); Appellate Law (2007-2013)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011 & 2013)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses

- 1987 Advanced Family Law Course.
- Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); *Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code* (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Property Puzzles: 30 Characterization Rules, Explanations & Examples (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeals and Mandamus) (2012)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991); Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); Texas Supreme Court Historical Assn: 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013)

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012)

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Family Law Update - 2013

by

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Texas Board of Legal Specialization

I. LEGISLATIVE CHANGES.

The 83rd Texas Legislative session did not yield a bumper crop of Family Code amendments but some legislation of consequence did surmount all of the obstacles and manage to become law.

A. SPOUSAL MAINTENANCE ENFORCEMENT.

When the Legislature first adopted the post-divorce spousal maintenance statute in 1995, the law permitted a court to order spousal maintenance of up to $2,500.00 per month for a maximum of three years if the necessary conditions were met. However, spouses were permitted to agree to spousal maintenance in any amount for any length of time, and the parties could agree that the obligation could be enforced by contempt. This ability of the parties to create a contempt enforcement remedy added flexibility to settlement discussions, since a spouse could more easily be induced to accept a promise of future payments when the promise to pay would be enforceable by incarceration. In 2011, the Legislature limited contempt enforcement to the maximum period of time that a court could have ordered spousal maintenance in the absence of an agreement. Thus, if the court could order spousal maintenance for up to three years, then three years of spousal maintenance payments could, if the parties agreed, be enforced by contempt. In HB 389, the 83rd Legislature further limited the parties' ability to contract by capping contempt enforcement at the maximum amount of periodic support that the court could have ordered absent an agreement. The new provision is set out at Texas Family Code §8.059(a-1). It applies to all agreements and orders for maintenance, whenever they occurred. HB 389 also amended Family Code Section 8.101(a-1 & a--2) to permit wage withholding to enforce spousal maintenance, but limited wage withholding orders to the amount and period that the court could order under law absent agreement. At this time, the limitations on duration and amount are:

Duration of Marriage	Max. Amount[1]	Max. Duration
under 10 yrs[2]	$0.00	0 yrs
10 to 20 yrs	$5,000	5 yrs
20 to 30 yrs	$5,000	7 yrs
30 or more yrs	$5,000	10 yrs

See Tex. Fam. Code §§ 8.054 (duration) & 8.055 (amount).

B. PROTECTING HOUSEHOLD PETS.

In SB 555, the 83rd Legislature expanded the potential scope of family violence protective orders from pets, companion animals, and assistance animals in the possession of person to pets, etc. in the "actual or constructive care" of a person. The provision is set out at Texas Family Code Section 85.021. SB 555 amended Penal Code Section 25.07 to the same effect.

C. THE STANDARD POSSESSION ORDER.

HB 845 included in the general terms and conditions of the Standard Possession Order a provision that "written notice" includes "notice provided by electronic mail or fascimile." The provision is set out at Texas Family Code Section 53.316(8). Texting is far more popular in the family context than either email or fax. Maybe next session.

D. ATTORNEY'S FEES.

Under In HB 1366, the 83rd Legislature amended Texas Family Code Section 6.708(c) to provide that in a suit for dissolution of marriage, the court may award reasonable attorney's fees and expenses, and that the court can order that the fees and expenses and postjudgment interest be paid directly to the attorney, who may enforce the judgment in the attorney's own name. The change applies to cases filed on or after September

[1] Maintenance is limited to the lesser of $5,000 or 20% of average monthly gross income. Tex. Fam. Code § 8.055(a).

[2] Under Texas Family Code § 8.051(1), post-divorce spousal maintenance can be awarded for a marriage under ten years' duration if the payor was convicted or received deferred adjudication for family violence against the other spouse.

1, 2013. HB 847 added a provision to the Family Code that a court can award courts costs and reasonable attorney's fees even if the court finds that the respondent is not in contempt. The provision is set out at Texas Family Code §157.162(b), and applies only to hearings held on or after June 14, 2013. HB 847 also repealed subsection (d) of Section 157.162, which prohibited a court from holding a person in contempt if they paid their child support arrearages current prior the hearing.

E. ENFORCING AGREED PROPERTY DIVISION. HB 389 amended Family Code Section 9.001 to provide that a proceeding to enforce a property division can include enforcement of "any contractual provisions under the terms of an agreement incident to divorce . . . that was approved by the court." Before this change, it could have been argued that an agreement incident to divorce was enforceable only in a contract enforcement action, although some case law exists to the contrary. This amendment eliminates that concern. Family Code Section 9.002 was amended to state that the court's power to enforce the property division extends to agreements incident to divorce that were approved by the court. The two provisions are retroactive.

F. DIGITIZED SIGNATURES. SB 1422 included in the definitions for SAPCRs the definition of a "digitized signature," which means "a graphic image of a handwritten signature having the same legal force and effect for all purposes as a handwritten signature." The amendment applies to SAPCRs filed on and after September 1, 2013.

F. TRANSFERS BETWEEN COURTS IN ONE COUNTY. Texas Government Code Section 24.003 authorizes the district judges in one county to sit for each other in hearing cases. It also permits the transfer of civil and criminal cases to the docket of another court in the same county. Newly-enacted HB 1875 introduces a prohibition against such transfers where the court has continuing, exclusive jurisdiction of a child under Texas Family Code ch. 155. HB 1875 also introduced a new restriction against such an intra-county transfer without the consent of the judge of the court to which the case is transferred. The change is effective September 1, 2013.

G. APPEAL FROM ASSOCIATE JUDGE'S RULING. HB 1366 shortens the time from seven days to three working days for making a request for a de novo hearing after an Associate Judge's ruling. Other parties can give notice of their request within three days after receiving the first notice. The provision is set out at Texas Family Code §201.015(a) & (c), and applies only to requests for de novo hearings made on or after September 1, 2013. A similar change was made for Title IV-D cases, under Family Code Section 201.1042(b).

II. CHILD SUPPORT GUIDELINE CAP. When the Texas Legislature first adopted child support guidelines in 1987, the "cap" (maximum level of income to which the guidelines applied) was $4,000. In 1993, the cap was raised to $6,000. In 2007, the cap was raised to $7,500.00 per month. Tex. Fam. Code § 154.125. Family Code Section 154. 125(a-1) requires the Attorney General Child Support Division to adjust that cap every six years to reflect inflation. The AG's office says that it will raise the cap on net resources to $8,550.00 effective September 1, 2013, based on inflation as measured by the Consumer Price Index

III. ELECTRONIC FILING. The future is getting nearer. On December 11, 2012, the Texas Supreme Court issued an order requiring electronic filing in the Supreme Court and all courts of appeals by January 1, 2014.[1] The Supreme Court also adopted the following timetable for electronic filing in state courts (district courts, statutory county courts, constitutional county courts, and statutory probate courts) based on population of the county:

Date	Population
January 1, 2014	500,000+
July 1, 2014	200,000 to 499,999
January 1,2015	100,000 to 199,999
July 1, 2015	50,000 to 99,999
January 1,2016	20,000 to 49,999
July 1, 2016	fewer than 20,000.

Once the deadline is reached, attorneys must e-file all documents in civil cases, except documents exempted by Court rules. See Order Requesting Electronic Filing in Certain Courts, Misc. Docket No. 12-9206 (Dec. 11, 2012).[2]

IV. HUSBAND-WIFE ISSUES. The following recent cases involving husband-wife issues are noteworthy.

A. ARBITRATION. In *Jacobs v. Jacobs*, 2013 WL 396846 (Tex. App.–Houston [14th Dist.] Aug. 1, 2013, n.p.h.) (mem. op.), the parties signed a mediated settlement agreement (MSA) containing an arbitration clause, that required arbitration of "issues regarding the interpretation (but not enforcement)" of the MSA. When a drafting dispute erupted, the Trial Court referred the matter to arbitration. After arbitration, the Court signed an agreed decree of divorce, which became final. Ex-wife later filed a post-divorce action to enforce the property division contained in the MSA, and sought a temporary injunction to prohibit ex-husband from secreting assets. The Trial Court issued such orders, and the husband filed an accelerated appeal, arguing that the matter should have been referred to arbitration. The Court of Appeals assessed the ex-wife's claims and concluded that the dispute was an enforcement proceeding which was expressly excluded from arbitration. The appellate court did not address some important questions. Did the MSA merge into the decree of divorce, so that the enforcement proceeding should be based on the divorce decree (which contained no arbitration clause) and not the MSA? Did the decree constitute res judicata of the parties' rights? Did the arbitration clause regarding the interpretation of the MSA survive the signing of the decree of divorce, and force arbitration of disputes over the interpretation of the decree?

B. ATTORNEYS' FEES. One of the most newsworthy developments during the past year was the Texas Supreme Court's decision in *Tedder v. Gardner, Aldrich, LLP*, and the Family Law Bar's reaction and the Legislature's response.

The case was *Tedder v. Gardner, Aldrich, LLP*, 11-0767 (Tex. May 17, 2013, m. reh. pending).[3] Justice Lehrmann did not participate. The Opinion was written by Justice Hecht (by a vote of 8-to-0). Justice Hecht characterized the decision in this way: "The principal question in this case is whether legal services provided to one spouse in a divorce proceeding are necessaries for which the other spouse is statutorily liable to pay the attorney. We answer no . . . ." The Opinion also states that the wife's lawyers should not have intervened in the divorce, and that the wife's lawyers could not use the sworn account procedure against the husband because the husband was a "stranger to the account."

In the Trial Court. According to Justice Hecht's Opinion, the Gardner, Aldrich firm agreed to represent Wife in the divorce. Their employment agreement said that the firm would seek to have the court order Husband to pay Wife's fees, but such a recovery was discretionary and in any event Wife would be directly liable for her fees. *Id.* at 2. After the jury verdict but before the judgment, Wife's lawyers withdrew from representing her and intervened in the divorce case to recover their unpaid fees. Both spouses contested the law firm's claim. The Trial Court would not grant Wife's former lawyers a judgment against Husband, but did hold Wife liable for her own fees and then ordered Husband to pay Wife $190,000 for her attorneys' fees. The spouses settled their divorce, agreeing that the final decree would leave the fee award against Wife in place but would not require Husband to pay anything to Wife toward her fees. *Id.* at 2. Wife later filed for bankruptcy and was discharged.

In the Court of Appeals. The Court of Appeals ruled that Husband's failure to contest the law firm's sworn account pleading under oath did not entitle the wife's former law firm to judgment. However, the Court of Appeals said that Husband was personally liable for Wife's fees for two reasons: (1) the fee obligation was a "community debt" for which both spouses were liable; and (2) because the legal fees were necessaries of Wife for which Husband was liable under Family Code Section 2.501. *Id.* at 3. The Court of Appeals rendered judgment in favor of the law firm against Husband and Wife jointly.

In the Supreme Court. The Supreme Court reversed the judgment against Husband, zeroing out the law firm's claim against him.

The Sworn Account. The Court held that Husband was not precluded from defending the law firm's claim, despite his failure to deny the sworn account under oath, because Husband was a "stranger to the account" and the sworn account procedure did not apply to him. *Id.* at 3-5.

The Intervention. As to the intervention, the Supreme Court issued a puzzling comment in Footnote 2 to the Opinion:

> [2] The intervention was improper. A person may intervene in an action if (1) he could have brought the action himself, or it could have been brought against him; (2)"the intervention will not complicate the case by an excessive multiplication of the issues"; and (3) "intervention is almost essential to effectively protect the intervenor's interest." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).Gardner Aldrich

> certainly did not meet the first requirement. It probably did not meet the second, since the interjection of its claim added issues to the divorce proceeding and delayed its final resolution. And it did not meet the third, inasmuch a sit could have sued Michael and Stacy in a separate action. But Rule 60 of the Texas Rules of Civil Procedure provides that"[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party", and neither Michael nor Stacy moved to strike the intervention.

Footnote 2 may come as a great surprise, since it has been a common practice for many years for a lawyer who has been representing a spouse, and who withdraws for non-payment of a fee, to intervene in the divorce to have the liability for the fee adjudicated as part of the property division. The intervening law firm certainly could have brought the action itself, so the Court's statement, that the law firm failed to meet the first condition to intervention, is surprising. The Court's view that the intervention would complicate the case by an excessive multiplication of the issues is also surprising, since the liability for the attorney's fees is already one of the issues in the divorce, so the intervention does not complicate the divorce at all. The alternative, for the lawyer to bring a separate collection suit against both spouses after the divorce is concluded, is what would complicate the litigation and excessively multiply the issues. The third prong of the test for intervention--that intervention is almost essential to effectively protect the intervenor's interest–is probably the weakest element in support of an intervention in this situation, but intervention in these circumstances is a long-standing practice around the state, and the Supreme Court's overturning that practice based on the slender justification offered in the Opinion did not sit well with family lawyers.

The Community Debt Issue. On the "community debt" issue, the Supreme Court noted that the fact that credit contracted by one spouse during marriage is community credit does not of itself establish that the non-contracting spouse is personally liable for the debt. The Court revisited its decision in *Cockerham v. Cockerham,* 527 S.W.2d 162, 171 (Tex. 1975), where it had said that a community liability was not necessarily a joint liability of both spouses. The wording in *Cockerham* did not dispel the confusion of many lawyers and courts about the differences between personal liability and marital property liability. In *Tedder*, the Court attempted to make those distinctions clearer. When a spouse is personally liable for a debt, the creditor can collect that debt against all of that spouse's non-exempt property. However, even when a spouse is not personally liable for the other spouse's debt, the interest of one or both spouses in certain community property can be taken to satisfy the creditor's claim. This latter instance is controlled by the rules of marital property liability, which are set out in Section 3.202 of the Family Code. Attached to this article is a chart that depicts the rules of marital property liability, listing what categories of property can be reached for different types of claims.

Necessaries. The Supreme Court rejected the idea that Husband was personally liable for Wife's attorney's fees based on the doctrine of necessaries. Texas Family Code Section 2.501 provides that a spouse who fails to discharge a duty to support the other spouse is liable for necessaries provided to the other spouse. According to the Supreme Court, necessaries are things like food, clothing, and habitation, but not attorneys' fees in a divorce. The Supreme Court affirmed the power of the trial court to make Husband pay Wife's fees as part of the property division, but not based on the idea that Husband was personally liable for Wife's necessaries. *Id.* at 9. The Court did not say whether an award of the wife's attorney's fees against the husband as part of the property division in a divorce would make the Husband personally liable for such fees.

The governing Council of the State Bar of Texas' Family Law Section did not like several aspects of the *Tedder* decision. After the Opinion was issued, the Council filed an Amicus Curiae Brief, arguing against various parts of the Opinion.[4]

Family lawyers also went to the 83rd Texas Legislature, which was in session at the time that the *Tedder* opinion was issued. It so happened that House Bill 1366, a bill sponsored by State Representative Lucio from Cameron County (Harlingen), amending certain procedures under the Family Code, had passed the House and was awaiting placement on the Senate's local and uncontested calendar. The *Tedder* decision was announced on May 17. With the assistance of Senator Jose Rodriguez of El Paso, HB 1366 was amended on May 21 to include a provision that explicitly authorizes a divorce court to award attorney's fees and expenses as part of the property division, and to require the judgment to be paid directly to the attorney who can enforce the judgment in the attorney's own name.

The bill passed the Senate that same day and on May 24 the House concurred in the Senate's amendment. HB 1366 was signed in the House on May 26, 2013, signed in the Senate on May 27, 2013, and was signed by the Governor on June 14, 2013, all within one month of *Tedder* being announced. Senator Rodriguez received the Legislator of the Year award from the Family Law Section at the State Bar's Advanced Family Law Course in August of 2013. The new provision is set out at Texas Family Code §6.708.

While the amendment to the Family Code did not repudiate the Supreme Court's decision that divorce fees are not necessaries, that view of the Supreme Court raises a matter of policy that may not be finally settled. Any rule of law that makes it hard for the spouse without control of community assets to get legal representation in a divorce is subject to legitimate criticism. A wife who is fighting for a just and right division of a community estate that is largely under the control of her husband might quite reasonably consider legal representation to be necessary–since the property division may be all that that spouse has after the divorce to purchase food, clothing, and habitation. If the Supreme Court does not alter its position on necessaries on rehearing, the issue of whether divorce fees are necessary may be the focus of future legislation.

It should be noted that the Supreme Court has several options: it can rule as a matter of law that divorce fees are *never* necessaries, or are *always* necessaries, or it can rule that the question of necessaries is an issue of fact to be decided on a case-by-case basis. The last option seems to be the soundest, since it is hard to universalize a decision on what is necessary, given that families' circumstances vary so widely from case to case. The prevailing practice has been to let the fact finder decide whether a spouse's attorney's fees were both reasonable and necessary. See State Bar of Texas Pattern Jury Charges–Family & Probate (2012) PJC 250.1.

C. BILL OF REVIEW TO SET ASIDE PROPERTY DIVISION. Once a judgment becomes final, it can be set aside only by bill of review. Tex. R. Civ. P. 329b(f). The claim must be brought within four years. *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998). To prevail upon a bill of review, a party must prove three things: "(1) a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party, (3) unmixed with any fault or negligence of his own." *Alexander v. Hagedorn*, 148 Tex. 565, 568, 226 S.W.2d 996, 998 (1950). Fraud can be *extrinsic* or *intrinsic*. In *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex. 2003), the Supreme Court said that "[o]nly extrinsic fraud will support a bill of review." The Court described extrinsic fraud as "fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted." *Id.* The Court continued: "Intrinsic fraud, by contrast, relates to the merits of the issues that were presented and presumably were or should have been settled in the former action. . . . Within that term are included such matters as fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed." *Id.* The Court concluded: "Such fraud will not support a bill of review, because each party must guard against adverse findings on issues directly presented. . . . Issues underlying the judgment attacked by a bill of review are intrinsic and thus have no probative value on the fraud necessary to a bill of review." [Citations omitted.]

The concept of intrinsic fraud is applied somewhat differently by courts of appeal in divorce cases. In the case of *Rathmell v. Morrison*, , 732 S.W.2d 6, 14 (Tex. App.--Houston [14th Dist.] 1987, no writ), the appellate court acknowledged that merely misrepresenting the value of a community property business did not constituted extrinsic fraud. However, in *Rathmell*, the record contained evidence not only of "misrepresentation of the market value of the Rathmell companies but also threats by John that if Mary Ann obtained an interest in the companies or even if she merely insisted on having the companies appraised, John would dissolve the companies, close them down and walk across the street and start new companies." The appellate court found that the combination of misrepresenting value and threatening retribution if wife conducted discovery constituted extrinsic fraud. In the case of *In re Marriage of Stroud*, 376 S.W.3d 346 (Tex. App.–Dallas 2012, pet. denied), the ex-wife brought a bill of review to set aside an agreed decree of divorce based on a settlement agreement that she claimed had been procured by extrinsic fraud. She presented her case on summary judgment as an echo of the *Rathmell* case. The Trial Court granted summary judgment but the Court of Appeals reversed, on the ground that the ex-wife had brought herself within the scope of the *Rathmell* precedent, and that the combination of misrepresentation of value and threat that suppressed discovery made the fraud extrinsic.

D. FRAUD, CONSTRUCTIVE FRAUD, WASTE. A number of cases were recently decided involving fraud or waste.

1. Not a Tort. Where one spouse has dissipated community assets, the other spouse can assert a claim in the divorce. The claim is variously called a claim for waste, fraud, constructive fraud, breach of fiduciary duty, fraud on the community, or reimbursement. The Supreme Court has ruled that such a claim is not a tort claim and will not support exemplary damages. *Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008); *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

2. Reconstituted Estate. In 2011, the Legislature added Section 7.009 to the Family Code, prescribing how a claim for actual or constructive fraud on the community should be handled. If the fact-finder[3] finds that a spouse has committed actual or constructive fraud on the community, the trial court must calculate the depletion of the community estate due to the fraud and add that back in, so as to create a "reconstituted estate." Tex. Fam. Code § 7.009(b)(1). The reconstituted estate is to be divided in a manner that is just and right. *Id.* at § 7.009(b)(2). The court may grant the wronged spouse "an appropriate share of the community estate remaining after the actual or constructive fraud," or award a money judgment to the wronged spouse, or both. *Id.* at §7.009(c).

3. Waste Finding Upheld. The issue of waste of the community estate arose in *Puntarelli v. Peterson*, 2013 WL 561484 (Tex. App.–Houston [1st Dist.] 2013, no pet.), where, during a five year period while the divorce was pending, husband deposited his paycheck into an undisclosed account and failed to account for his expenditure of those funds. The appellate court noted that "[a] fiduciary duty exists between a husband and a wife as to the community property controlled by each spouse," citing *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.--Houston [14th Dist.] 1996, no pet.). *Id.* at *5. The court went on to say: "A presumption of 'constructive fraud,' i.e., waste, arises when one spouse disposes of the other spouse's interest in community property without the other's knowledge or consent." The court then explained: "No 'dishonesty of purpose or intent to deceive' must be established; such proof of subjective intent is 'only required for actual fraud on the community, as opposed to constructive fraud on the community.'" *Id.* at *5. The court said that "[o]nce the presumption arises, the burden of proof then shifts to the disposing spouse to prove the fairness of the disposition of the other spouse's one-half community ownership." *Id.* at *6. The court went on: "The three primary factors for determining the fairness of the dispositions are: (1) the size of the property disposed of in relation to the total size of the community estate; (2) the adequacy of the estate remaining to support the other spouse after the disposition; and (3) the relationship of the parties involved in the transaction or, in the case of a gift, of the donor to the donee." *Id.* at *6. The court concluded: "A claim for the improper depletion of the community estate may be resolved by the trial court with an unequal division of the community estate, or a money judgment in order to achieve an equitable division of the estate." *Id.* at *6. This is essentially the approach taken by the State Bar of Texas Pattern Jury Charges–Family & Probate (2012), PJC 206.1, 206.2, 206.3, 206.4, and 206.5. On appeal, husband argued that wife had failed to prove actual transfers of funds by husband. The court responded:

> While waste claims often are premised on specific transfers or gifts of community property to a third party, a waste judgment can be sustained by evidence of community funds unaccounted for by the spouse in control of those funds.

Id. at *7. The appellate court reiterated that the burden was on husband to show the fairness of his handling of the missing funds, and that he wholly failed to do so. *Id.* at *7.

4. Finding of No Fraud Upheld. In *Menchaca v. Menchaca*, 2013 WL 3518177 (Tex. App.--Corpus Christi 2013, n.p.h.), the Trial Court found that wife did not commit fraud when she transferred a one-half interest in her business to her son, at a time when court orders prohibited disposing of community property. The appellate court acknowledged that a fiduciary duty exists between spouses, and that a presumption of constructive fraud arises when one spouse unfairly disposes of community property without the other's knowledge or consent. The burden was on wife to prove fairness. The appellate court wrote:

> Nancy demonstrated that prior to the transfer: she was listed as the sole owner; the business was created while her husband was incarcerated; her son was her business partner; and her son kept the business afloat

[3] A jury's finding on fraud or constructive fraud is binding on the trial court. *Cockerham v. Cockerham*, 527 S.W.2d 162, 173 (Tex. 1975).

> during her absence due to illness. The evidence showed that Nancy and, later, her son were primarily responsible for the business, and that Martin contributed little to its operation and success.
>
> After considering all of the evidence, we conclude that a reasonable factfinder could have found that Nancy's transfer of one-half interest in the business to her son was reasonable and fair.

Id. at *3.

5. Actual vs. Constructive Fraud. In *Everitt v. Everitt*, 2012 WL 3776343 (Tex. App.–Houston [1st Dist.] 2012, no pet.) (mem. op.), the trial court found that husband has spent $249,970.56 in violation of temporary orders and a mediated settlement agreement and in violation of his fiduciary duty to wife, which constituted constructive fraud. Part of the claim resulted from husband's funding of college savings accounts for the parties' sons, which the Trial Court found was not fair to wife. The Trial Court awarded a disproportionate division of the community estate, including a money judgment against husband. Husband appealed, arguing that wife had not shown "malevolent intent." The appellate court held that "dishonesty of purpose or intent to deceive" was necessary only to actual fraud on the community, while the award in this case was based on constructive fraud on the community. *Id at* *5. Husband also argued that (i) the trial court improperly awarded a "waste claim" greater than what wife had requested, (ii) improperly used the division of the community estate as a means to punish him, and (iii) made a division that left husband with a lesser share of the community estate than the trial court actually intended. Because these complaints were not raised in the trial court, the appellate court refused to address them. *Id.* at *6.

6. A Miscue. The case of *West v. West*, 2012 WL 403912 (Tex. App.–Houston [1st Dist.] 2012, no pet.) (memo. op.), discussed the long-established division of fraud into actual fraud and constructive fraud. Citing two non-family law cases, the Court portrayed actual fraud in terms of a claim for fraudulent misrepresentation. *Id.* at *2. Constructive fraud, in contrast, the Court said, is established by showing that one spouse unfairly deprived the other spouse of the benefit of community property. *Id.* at 2. The appellate court departed from the standard view when it equated actual fraud to a claim of fraudulent inducement. The mainstream view is reflected in the State Bar of Texas' Pattern Jury Charges–Family & Probate (2012) PJC 206.1, 206.2, 206.3, 206.4, and 206.5. As the PJCs make clear, the difference between actual fraud and constructive fraud in this context has to do with scienter. Under PJC 206.2, actual fraud "involves dishonesty of purpose or intent to deceive." In contrast, constructive fraud is behavior that the law deems fraudulent without regard to purpose or intent. The fraud is "constructive" because it is attributed by law to the actor based upon the circumstances, regardless of actual motive. The cases measure constructive fraud by a standard of "fairness." Excessive gifts or transfers of community property give rise to a presumption of fraud, and the burden is on the wrongdoer to prove that the transaction was fair to the other spouse. See PJC 106.4A. The PJC approach conforms better to the cases in the family law area than does the *West* court's correlation of actual fraud on the community to fraudulent inducement.

D. HOMESTEAD LIENS. Under Tex. Const. Art. XVI, § 50, only certain liens in a homestead are enforceable against the property. These include a lien securing a purchase money mortgage, an ad valorem tax lien, a lien securing an owelty of partition, the refinance of a valid lien against a homestead, a written builder's and mechanic's lien for improvements to the property, a lien securing a qualifying home equity loan, a qualifying reverse mortgage, and a conversion of a lien on a manufactured home.

In the case of the *Marriage of Christodolou*, 383 S.W.3d 718 (Tex. App.–Amarillo 2012, no. pet.), husband's father loaned husband and wife money to purchase a homestead. Husband's father received no lien in the property to secure his loan. *Id.* at 721. Husband's father later died and the debt became an asset of his estate. When husband and wife divorced, the Trial Court ordered husband to give wife a promissory note for half of the equity in the homestead property, secured by an owelty lien in the property. The Trial Court recognized the unpaid debt owed to the father's estate as a claim against the community estate, and awarded husband a claim against wife's promissory note, secured by a lien in the promissory note and the payments thereunder. The Trial Court said both liens would be treated like purchase money liens, trumping homestead protection. On appeal, the Court of Appeals held that the Trial Court had effectively granted husband a lien in the proceeds from sale of the wife's interest in the homestead, in violation of the Constitutional prohibition. While the facts and judicial remedies in the case are convoluted, it appears that the lien could have been permitted as security for an owelty of partition under

Tex. Const. art. XVI, § 50(3) which allows liens against homesteads to secure "an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding."

In *Barras v. Barras*, 396 S.W.3d 154 (Tex. App.–Houston [14th Dist.] 2013, pet. filed), husband and wife were divorced, and in the divorce husband agreed to pay wife $150,000 for her interest in the home. Wife agreed to convey her interest in the house to husband upon full payment. Husband made only one payment of $25,000.00. Husband and wife remarried, and the first house was sold and the proceeds were used to buy a new home. Wife released her lien in connection with the sale. In the second divorce, the Trial Court awarded wife a judgment for $125,000 as her separate property, secured by a lien in the new home, which was awarded to husband. Husband appealed, arguing that the lien was to secure a property division and could not be affixed to his homestead. The Court of Appeals found that the claim was permitted as an implied purchase money lien, deriving from wife's original claim of $125,000 that was properly secured by a lien in the previous house.

E. PREMARITAL AGREEMENTS. The Texas Family Code recognizes two defenses to enforcement of a premarital agreement: (1) the spouse contesting the agreement did not sign the premarital agreement voluntarily, and (2) the premarital agreement was unconscionable when signed, and before signing the agreement the party contesting enforcement (i) was not provided a fair and reasonable disclosure of the property and financial obligations of the other party, (ii) did not voluntarily and expressly waive, in writing such right of disclosure, and (iii) did not have, or reasonably could not have had, adequate knowledge of the other party's property or financial obligations. Tex. Fam. Code §4.006. Neither "voluntary" nor "unconscionable" are defined in the Texas Family Code. In most Texas appellate cases involving premarital agreements, the Trial Court upheld the agreement and was affirmed from appeal. In *Moore v. Moore,* 383 S.W.3d 190 (Tex. App.–Dallas 2012, pet. denied), the Trial Court found that one of the spouses had not signed the premarital agreement voluntarily, and that decision was affirmed by the Court of Appeals. The Court of Appeals acknowledged that premarital agreements are presumptively valid. The Court of Appeal listed four factors that can be considered on the question of voluntariness: " (1) whether a party has had the advice of counsel, (2) misrepresentations made in procuring the agreement, (3) the amount of information provided and (4) whether information has been withheld. " *Id.* at 195. The evidence showed that husband falsely told wife that his motive for having a premarital agreement was to protect wife from husband's creditors, and that husband did not share the final draft of the premarital agreement with wife or her attorney, and that the final draft did not state the values of husband's assets. The recitals in the premarital agreement that wife's attorney had reviewed the final draft, and that wife had read and understand the agreement, did not overcome proof to the contrary. The appellate court found that the Trial Court's ruling, that the premarital agreement was not signed voluntarily, was supported by the evidence.

F. PROPERTY DIVISION. Under Texas Family Code Section 7.001, the court in a divorce must "order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." The Supreme Court has said: "The trial court has wide discretion in dividing the estate of the parties and that division should be corrected on appeal only when an abuse of discretion has been shown." *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981).

In *Hass v. Otto*, 392 S.W.3d 290 (Tex. App.–Eastland 2012, no pet.), the divorce decree divided the net proceeds from sale of the home, which was to occur after the divorce. Wife filed a post-divorce partition suit, claiming that the house had not been divided. The Trial Court dismissed her claim, thinking that the house had been divided. The Court of Appeals reversed, saying that the house had not been fully divided, since only the proceeds from sale had been divided but not other ownership rights, such as the right of possession, the duty to make repairs or pay the mortgage, and no provision was made if the house did not sell.

In *Motley v. Motley*, 390 S.W.3d 689 (Tex. App.--Dallas 2012, no pet.), the appellate court noted that while an asset that was 50/50 the separate property of each spouse could not be awarded to either spouse as part of the divorce property division, the court could in the divorce partition the property sold by ordering it and the proceeds divided.

G. SAME SEX MARRIAGE/CIVIL UNION. The issue of same-sex marriage recently saw a significant development, in the U.S. Supreme Court's decision in

U.S. v. Windsor, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013). Some background is offered. The first issue is whether the U.S. Constitution requires a state to permit same-sex marriages. The second issue is whether full faith and credit requires a second state to accept as valid for marriages that are valid under another state's law. The third issue is whether Federal statutes and regulations that recognize same-sex marriages and civil unions preempt contrary state law when the states are litigating rights to Federal benefits (like in a divorce). None of these questions were answered in *U.S. v. Windsor*, but they all are highlighted by the decision in that case.

1. The Defense of Marriage Act. In 1996, the U.S. Congress passed the Defense of Marriage Act ("DOMA"),[5] signed by President Clinton. Section 1 of the Act described the Bill as "the Defense of Marriage Act." Section 2 of the Act added 28 U.S.C. § 1738C to the full faith and credit statutes in the United States Code. Section 1738C provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Section 3 of DOMA added to the U.S. Code a definition of "marriage" and "spouse," appearing at 1 U.S. Code § 7, which says:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

2. The Texas Family Code. When Title 1 of the Family Code was first enacted in 1969, Section 1.91 provided that "the marriage of a man and woman may be proved" by evidence of an informal marriage. That provision is carried forward in current Family Code Section 2.401. When the Family Code was first enacted, Section 1.01 said that "[p]ersons desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state." The statute was amended in 1973 to say "A man and a woman desiring to enter into a ceremonial marriage . . . ." The statute is carried forward in current Family Code Section 2.001. In 2003, the Texas Legislature has enacted Section 6.204 of the Family Code, which reads:

> **§ 6.204. Recognition of Same-Sex Marriage or Civil Union.**
>
> (a) In this section, "civil union" means any relationship status other than marriage that:
> (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
> (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.
>
> (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.
>
> (c) The state or an agency or political subdivision of the state may not give effect to a:
> (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
> (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

Added by Acts 2003, 78th Leg., ch. 124, § 1, eff. Sept. 1, 2003.

3. The Texas Constitution. On November 8, 2005, Texas voters passes a constitutional amendment by a vote of 76% to 24% forbidding the creation or recognition of same-sex marriage. The provision reads:

> Sec. 32. MARRIAGE.
>
> (a) Marriage in this state shall consist only of the union of one man and one woman.
>
> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

With the amendment, it can no longer be argued that refusing to recognize same-sex marriage or civil unions

violates the Texas Constitution. The only recourse to proponents of same-sex marriage in Texas is preemption by Federal law.

4. **Texas Court Decisions.** In *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.–Houston [14th Dist.] 2006, (no pet.), the appellate court declined to recognize an equitable remedy in probate recognizing a "marriage-like relationship" doctrine. The court cited a Texas Legislative Resolution saying that "[t]his state recognizes that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage."

In the case of *Mireles v. Mireles*, 2009 WL 884815, at *2 (Tex. App.–Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.), the appellate court said that "[a] Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person."

In the case of *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 658-59 (Tex. App.–Dallas 2010, pet. filed), the Dallas Court of Appeals held that a Texas court does not have subject-matter jurisdiction over a divorce case arising from a same-sex marriage that occurred in Massachusetts. District Judge Tena Callahan had ruled that Tex. Const. Art. I, §32(a) and Tex. Fam. Code § 6.204 violated the Equal Protection Clause of the Fourteenth Amendment. The appellate court ruled that the State of Texas, through the Attorney General, had the right to intervene in the lawsuit to raise the trial court's lack of jurisdiction, and that mandamus would lie to overturn the Trial Court's dismissal of the AG's intervention. The appellate court also ruled that, because of Family Code Section 6.204, the Trial Court had no subject matter jurisdiction over the purported divorce proceeding involving a same-sex marriage. 326 S.W.3d at 667. The appellate court held that in Texas same-sex marriages are void, meaning that they have no legal effect. *Id.* at 665.

In *State v. Naylor*, 330 S.W.3d 434 (Tex. App.–Austin 2011, pet. granted), the Austin Court of Appeals ruled that the State of Texas did not have standing to appeal a divorce between two women who were legally married in Massachusetts, granted by Travis County District Judge Scott Jenkins based on an agreement between the parties. The Court also said that Texas law can be interpreted "in a manner that would allow the trial court to grant a divorce in this case." *Id.* at 441. On March 21, 2011, the State filed a petition for review[6] in the Texas Supreme Court. Briefs have been filed, including numerous amicus curiae briefs. On July 3, 2013, the Clerk of the Supreme Court asked the parties to submit briefs on the impact if any of the U.S. Supreme Court's decision in *U.S. v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013). Those briefs are discussed in paragraph 7 below. **On Friday, August 23, 2103, two years and five months after the case was filed, the Supreme Court granted review. The case is set for oral argument on November 5, 2013.**

5. **Texas Attorney General Opinions.** On December 16, 1999, Texas Attorney General John Cornyn (now a U.S. Senator) issued an AG's Opinion that county clerks were not required or permitted to accept for filing a "declaration of domestic partnership."[7] On October 27, 2005, Texas Attorney General Abbott sent a letter to a Texas Senator and a State Representative, on the subject of the then-proposed constitutional amendment relating to same-sex marriage. General Abbott said that the proposed amendment "would in fact safeguard traditional marriage in Texas."

On November 2, 2012, State Senator Dan Patrick sent a letter to Attorney General Abbott asking about the legality of certain government entities offering benefits to "domestic partners" of government employees. Senator Patrick listed El Paso County and Travis County, and the cities of Fort Worth, Austin, San Antonio, and El Paso. Several school districts had also had adopted similar policies. On April 29, 2013, Texas Attorney General Abbott issued Opinion GA-1003, which concluded that Texas cities, counties and school districts could not lawfully offer insurance benefits to domestic partners as part of their employee benefit programs. General Abbott noted that Tex. Const. Art. I § 32(b) was held to be "unambiguous, clear, and controlling" in *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.–Houston [14th Dist.] 2006, no pet.). He found that the entities in question had essentially created a "legal status" of same-sex domestic partnership in violation of the constitutional provision.[4]

6. **The 2013 Violence Against Women Act.** On March 7, 2013, President Obama signed the new amended

[4] The Texas ACLU submission in support of the practice is at <http://www.aclutx.org/download/119>.

Violence Against Women Act, which contained the following non-discrimination clause:

> No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in paragraph 249(c)(4) of title 18, United States Code), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994 (title IV of Public Law 103-322; 108 Stat. 1902), the Violence Against Women Act of 2000 (division B of Public Law 106-386; 114 Stat. 1491), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (title IX of Public Law 109-162; 119 Stat. 3080), the Violence Against Women Reauthorization Act of 2013, and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.

This portion of the Act was criticized in a March 6, 2013 statement by the chairmen of four committees and one subcommittee of the U.S. Conference of Catholic Bishops, which said:

> Unfortunately, we cannot support the version of the "Violence Against Women Reauthorization Act of 2013" passed by the House of Representatives and the Senate (S. 47) because of certain language it contains. Among our concerns are those provisions in S. 47 that refer to "sexual orientation" and "gender identity." All persons must be protected from violence, but codifying the classifications "sexual orientation" and "gender identity" as contained in S. 47 is problematic. These two classifications are unnecessary to establish the just protections due to all persons. They undermine the meaning and importance of sexual difference. They are unjustly exploited for purposes of marriage redefinition, and marriage is the only institution that unites a man and a woman with each other and with any children born from their union.[8]

The provision only prohibits discrimination against gays and lesbians and transgender persons in the delivery of services funded under the statute, but the Bishops are no doubt reacting to Congress's decision to associate disparate treatment of gays , lesbians and transgender persons with discrimination based on race, religion, national origin or gender, which is constitutionally prohibited.

7. *U.S. v. Windsor*. On June 26, 2013, in *U.S. v. Windsor*, No. 12-307, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013), the U.S. Supreme Court declared Section 3 of DOMA unconstitutional. The Majority Opinion was written by Justice Kennedy. The Court held that it was unconstitutional for the Federal government to refuse to recognize a marriage between persons of the same sex when that same-sex marriage was recognized under the law of the state where the parties reside. The Supreme Court did *not* rule that states are required to permit same-sex marriages or that states are required recognize same-sex marriages originating elsewhere. The Texas law that courts must ignore same sex marriages is still in force, except to the extent federal law preempts state law, primarily with regard to federal benefits.

In *State v. Naylor*, 11-0114, now pending in the Texas Supreme Court, the Texas Attorney General has filed a brief arguing that the decision in *U.S. v. Windsor* did not invalidate Texas law banning same-sex marriages.[9] The AG's Brief says:

> The U.S. Supreme Court's decision in *United States v. Windsor* reaffirms the sovereign authority of each State to define marriage and make laws concerning the marital status of its residents. While the Court's holding invalidates Congress's decision to use the traditional definition of marriage for all federal-law purposes, the Court's reasoning relies in large part on Section 3's interference with the States' ability to define and regulate marriage within their borders. Any attempt to use *Windsor*'s holding to attack state laws that limit marriage and its attendant rights—such as divorce—to the union of one man and one woman would contravene the principles of federalism enunciated in the Windsor decision.

The AG's Brief points out that "Section 2 of federal DOMA, which codifies the longstanding principle that States may refuse to recognize same-sex marriages performed in other States, was not at issue in *Windsor*. See 28 U.S.C. § 1738c." The Respondents filed a Brief saying: "In *United States v. Windsor* the Court held that a law that 'impose[s] inequality' on gays and lesbians, and that treats same-sex marriages as 'second class,' violates the constitutional principles of due process and equal protection. But neither Naylor nor Daly challenged

the constitutionality of any law in their divorce action—and neither the trial court nor the court of appeals addressed the constitutionality of any Texas law in its decision."[10]

There are some significant uncertainties after the *Windsor* decision. The Supreme Court relied in part upon the historical tradition that the validity of a marriage is a matter for state law, not federal law. Thus, the Court ruled that the Federal government was bound by a state's recognition of a same-sex marriage. Is the Federal government likewise bound by a state's refusal to recognize a same-sex marriage? Also, Federal law and many Federal regulations assess the validity of a marriage based on the law where the parties reside. For same-sex couples who married legally but now live in a state that does not recognize the validity of same-sex marriages, applying the law of the residence instead of the law of the place of celebration would lead to non-recognition of the marriage. Hovering in the background is the case of *Loving v. Virginia*, 388 U.S. 1 (1967), in which a unanimous Supreme Court invalidated a Virginia statute prohibiting the state from recognizing an interracial marriage celebrated elsewhere, on the ground that the right to marry is a fundamental right and abrogating that right based on race violated the Fourteenth Amendment's Due Process of Law clause and Equal Protection clause.

According to analysis of the 2010 U.S. Census, conducted by the Williams Institute on Sexual Orientation and Gender Identity Law of the UCLA School of Law, nearly 1.3 million Americans identify themselves as belonging to a same-sex couple. In Texas, 46,400 same-sex couples live in Texas, with the greatest percentages being in Dallas and Travis Counties, followed by El Paso, Bexar, and Harris Counties.

8. What About Sex Change Operations? In *Littleton v. Prang*, 9 S.W.3d 223 (Tex. App.–San Antonio 1999, pet. denied), the appellate court held that a person's gender was not changed by a sex change operation, and that the designation of gender on the birth certificate controlled over a sex-change operation. That view of the law was confirmed in *Mireles v. Mireles*, No. 01–08–00499–CV, 2009 WL 884815, at *1 (Tex. App.--Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.). However, in 2009, the Legislature amended Section 2.005(8) of the Family Code to provide that proof of identity for purposes of obtaining a marriage license could consist of "an original or certified copy of a court order relating to the applicant's name change or sex change . . . ." This impliedly says that a court can judicially recognize a change in gender for purposes of marrying. A case in the Corpus Christi Court of Appeals, 13-11-00490-CV, *In the Estate of Thomas Trevino Araguz III, Deceased*, involves a marriage between a man and a transgender woman who claimed to have been born with male genitalia but a female brain, and who was miss-typed on her birth certificate. District Judge Randy Clapp dismissed her claims in probate. The case has been pending in the Corpus Christi Court of Appeals since July 20, 2011 with no opinion yet. In yet another circumstance a man and a woman married, then the man had a sex-change operation and became a woman. If the gender switch is legally recognized, did the parties' marriage become void as a same-sex marriage?

9. What's Next? Many existing federal policies and regulations can no longer be enforced. Everyone, including the U. S. Attorney General's office and the IRS, are still digesting the *Windsor* decision. On August 13, 2013, Secretary of Defense Chuck Hagel issued a press release saying that all spousal and family benefits offered to the military will be made available to same-sex spouses no later than September 3, 2013.[11] More changes in Federal policies and procedures will be issuing from various Federal departments in the coming months.

The impact of *Windsor* on a Texas divorce can only be imagined. Here are some possible areas of impact:

(1) The Fourteenth Amendment due process and equal protection analysis might in a future case be extended to invalidate DOMA Section 2, and Texas might be bound under the Full Faith and Credit Clause to recognize the validity of a same-sex marriage validly contracted in another state or nation.

(2) If preemption is ultimately invoked, same-sex spouses could have marital property rights in Federal retirement benefits, but not in other types of non-federal retirement benefits.

(3) If preemption is ultimately invoked, same-sex spouses could have survivor benefits under Federal plans but not under private or state benefit plans.

(4) If preemption is ultimately invoked, same-sex spouses could have the right to extended group medical insurance coverage under COBRA, even where the plan does not recognize same-sex marriage.

(5) If preemption is ultimately invoked, same-sex spouses filing Federal tax returns may be able to file as "married/filing jointly" even if their marriage is not recognized under the law of the state where they reside.

(6) Where one same-sex spouse is domiciled in Texas and the other spouse is domiciled in a state that recognizes same-sex marriage, is there a marriage?

(7) If persons of the same sex lawfully married in another state, and later moved to Texas, does the law of marital domicile apply to property rights vested under the law of former domicile, or must Texas courts ignore the marriage at all points in time?

(8) If same-sex spouses obtain a declaratory judgment in another state saying that their marriage is valid, is that adjudication effective in Texas?

(9) If the court of another state grants a divorce to same-sex spouses, can or must Texas courts recognize the validity of that decree based on full faith and credit or comity?

H. SEPARATE PROPERTY. A spouse's separate property consists of (i) property owned or claimed prior to marriage; (ii) property acquired during marriage by gift, devise or descent; (iii) recovery for personal injuries (other than lost earning capacity during marriage and medical bills during marriage); (iv) property that is made separate by a partition agreement or spousal income agreement; and (v) mutations of separate property. See Tex. Const. art. XVI, § 15; Tex. Fam. Code § 3.001; *Love v. Robertson*, 7 Tex. 6 (1851) (establishing the rule of mutation). All property acquired during marriage other than separate property is community property. Tex. Fam. Code § 3.002. Under Family Code Section 3.003(a), all property *possessed* by a spouse during or on dissolution of marriage is presumed to be community property. A party claiming separate property must prove that claim by clear and convincing evidence. Tex. Fam. Code § 3.003(b).

In *In re Marriage of Brent*, 2013 WL 683333 (Tex. App.--Amarillo 2013, pet. denied) (mem. op.), the appellate court affirmed the trial court's granting of a summary judgment that a promissory note from husband to wife was wife's separate property. The promissory note contained a recital that "[Husband] acknowledges that the money being loaned to him by [wife] is the separate property of [wife] and is being loaned to him to pay debts which are the separate debts and obligations of [husband] and not community debts." *Id.* at *1. The appellate court said: "This recitation sufficiently rebuts the presumption of community property and creates a new presumption that the funds loaned by wife to husband were wife's separate property." *Id.* at *2. The court ruled that, when husband failed to come forward with controverting evidence, the prima facie presumption became conclusive, and sufficient to support a summary judgment. *Id.* at *2.

In *In re Marriage of Moncey*, 2013 WL 2127276 (Tex. App.--Texarkana 2013, n.p.h.), the appellate court noted that where one spouse deeds an interest in separate property to the other spouse, a presumption of gift arises that can be rebutted by showing that the deed was procured by fraud, accident or mistake. The court did not apply that rule to the case, because the deed in question was from wife's sisters. *Id.* at *4. The arising of an irrebuttable presumption is certainly the rule when the deed from one spouse to the other spouse recites that it was a gift or conveyed as separate property. But if there is no recital of gift or separate property, some precedent exists that the transferor spouse can rebut the presumption by showing that there was no donative intent. While there is ample case law saying that, when the deed recites gift or conveyance as his/her separate property that the presumption becomes irrebutable except for fraud, accident or mistake, an interspousal deed with no recital is different. The appellate court in *Powell v. Jackson*, 320 S.W.2d 20, 23 (Tex. Civ. App.--Amarillo 1958, writ ref'd n.r.e.), said:

> We believe the same rule would apply where the husband deeds his separate property to his wife, such a deed being subject to being impeached, as are similar conveyances between strangers. Speer's Law of Marital Rights, Sec. 133, pp. 181–182. The exceptions to the right to rebut the presumptions are when the deed contains separate property recitals or recitals of a contractual consideration.

The *Moncey* case also involved another presumption–that "[w]hen a spouse uses separate property to acquire land during marriage and takes title to the land in the names of both the husband and wife, it is presumed that the interest placed in the nonpurchasing spouse is that of a gift." *Moncey*, 2013 WL 2127276 at *5. The appellate court recognized that the presumption could be rebutted by evidence of no donative intent. *Id.* In this case, the wife used her separate property to buy land titled in both her name and husband's name. The appellate court said

that husband failed to meet his burden of proof to show gift to him. *Id.* at *6. But that is the effect of the presumption of gift; it shifted the burden of proof to the other party, in this case the wife. In any event, husband offered no evidence to contradict wife's testimony that she did not intend a gift, so the presumption was defeated. As the case demonstrates, the role of the presumption of community property, and counter-presumptions of separate property, and when they are triggered and how they are defeated and when they prevail, are tricky questions.

In *Roberts v. Roberts*, 402 S.W.3d 833 (Tex. App.--San Antonio 2013, no pet.) (en banc), the appellate court laid out what proof it thought was necessary to prove separate property by clear and convincing evidence:

> Margaret's testimony and documentary evidence in the form of a photocopy of the check and a letter from her father sufficiently traced the separate nature of the $9,000. These documents established the separate origin of the funds by showing the time and means by which Margaret originally obtained possession of them. *See Boyd*, 131 S.W.3d at 612. The statements of account for the two CDs reflected account balances during the marriage. Thus, the documents failed to establish the separate origin of the funds because they did not show the time and means by which Margaret originally obtained possession of them. *See id.* Although Margaret testified she came into the marriage with the CDs, her testimony was contradicted by Martin's testimony that the CDs were created by monies obtained during the marriage.[FN3] *See Graves*, 329 S.W.3d at 139. Because Margaret's testimony was contradicted and "unsupported by documentary evidence tracing the asserted separate nature of the property," it was insufficient to trace the separate origin of the CDs

Pursuant to the authority of Texas Constitution, art. XVI, Section 115, Texas Family Code Section 4.202 says that "[a]t any time, spouses may agree that all or part of the separate property owned by either or both spouses is converted to community property." In *Alonso v. Alvarez*, No. 04–12–00403–CV, 2013 WL 3722479 (Tex. App.--San Antonio July 17, 2013, n.p.h.), the appellate court affirmed the trial court's finding that a series of documents between spouses that "identif[ied] the Buena Vista Ranch as 'our' property and agree[d] to divide the ranch on a 50/50 basis" constituted an agreement to convert separate property to community property. The documents in question appear to have been somewhat informal, and yet still effective.

I. WATER RIGHTS. If the Nineteenth Century was about coal, and the Twentieth Century was about oil, then the Twenty-First Century will likely be about water. Competing demands for a shrinking supply of water in Texas has resulted in government regulation of water usage in various parts of the state. Regulation leads to permits, and permits represent the right to use a limited resource. If permits are assignable, they have a value in exchange (i.e., a fair market value). How water, water rights, water permits, and water sales interface with marital property is still to be worked out.

On February 24, 2012, the Texas Supreme Court decided a hugely important case on water rights. The case was *The Edwards Aquifer Authority and the State of Texas v. Burrell Day & Joel McDaniel*, 369 S.W.3d 814 (Tex. 2012). The Opinion was written by Justice Nathan Hecht, for a unanimous Court. In that case, the Supreme Court decided that land ownership includes an ownership interest in groundwater in place. In the Court's words:

> Whether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently.

Id. at 823. In a lengthy Opinion, the Court explains why the oil and gas model fits groundwater. The issue in the case was whether the State had the power to regulate groundwater usage, and if so, did the State have to compensate owners for a "taking." The Court held that the State did have the power to regulate groundwater usage, and that the State did have to compensate owners for "taking" that right from them. *Id.* at 838.

Now that water rights are being sold independently from the land, and people and companies and government entities are paying owners money for water and water rights, water law issues will start surfacing in divorces. If the marital property law developed for oil and gas is applied to groundwater rights, what does that mean? The old law is that if the mineral interest is a spouse's separate property, then the royalties derived from selling the minerals is also separate property. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676, 679 (1953) (this is so because a royalty payment is for the extraction or waste of the separate estate, as opposed to income from the

separate estate). Similarly, a bonus paid to a mineral owner for signing a mineral lease is separate property if the mineral interest is separate property. *Lessing v. Russek*, 234 S.W.2d 891, 894 (Tex. Civ. App.--Austin 1950, writ ref'd n.r.e.). However, delay rentals paid for the failure to drill by the deadline are considered to be community property income, even if the mineral interest is separate property. *McGarraugh v. McGarraugh*, 177 S.W.2d 296, 300-301 (Tex. Civ. App.--Amarillo 1943, writ dism'd). These are mighty old precedents.

If a spouse sells separate property groundwater rights, it seems to follow that the proceeds from sale would be separate property. What if a spouse pumps groundwater and sells it, as opposed to selling the groundwater *rights*? An argument can be made that the profits made when a spouse drills and pumps and sells groundwater is an economic activity, the fruits of which would be community property. This was the import of *Craxton, Wood & Co. v. Ryan*, 3 Willson 439, 1888 WL 1340 (Tex. Ct. App. 1888), where the proceeds from a wife's making and selling clay bricks from her separate property land were held to be community property. Likewise finished lumber sawed by wife's separate property slaves from wife's separate property timber was held to be community property in *White v. Hugh Lynch & Co.*, 26 Tex. 195 (1862). Likewise, the profits made from selling crops grown on separate property land were considered to be community property in *De Blane v. Hugh Lynch & Co.*, 23 Tex. 25 (1859). In *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676 (1953), the Supreme Court recognized that investing enough community cash or labor in developing a separate property gas well could impose a community character on the gas produced. The Court said: "It is petitioner's burden to prove an expenditure of community effort so as to impress community character upon the separate asset." *Id.* at 680. A question can be raised as to why selling the right to drill and pump groundwater should result in separate property cash while drilling and pumping the groundwater and then selling the water should result in community property cash. What if the well is drilled and the pipes laid before marriage, but the pumping and selling occurs during marriage? What if the contract with the purchaser is entered into before marriage–would the proceeds from the sale of the groundwater under a premarital contract be community property from the date of marriage to the date of divorce? What if the drilling occurred before marriage but the purchaser under the contract has the obligation to supervise and pay for the pumping? What if the contract is set up as a license for which royalty payments are made. These are questions that will have to be answered over time.

V. PARENT-CHILD ISSUES. This section of the Article discusses recent important cases involving the parent-child relationship.

A. PLEADINGS. In *Flowers v. Flowers*, No. 14–11–00894–CV, 2013 WL 3808156 (Tex. App.--Houston [14th Dist.] July 23, 2013, n.p.h.) , the appellate court reversed a trial court for removing a geographic restriction on the mother's right to determine the children's primary residence because the mother had not pled for that relief, and the issue was not tried by consent. The appellate court also reversed the trial court's reallocation of five specific parental rights for failure to plead for those changes.

This case is somewhat of a surprise, because for many years the case law has said that the rules of pleading are relaxed in custody cases. A leading case on point is *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex.1967), where the Supreme Court said:

> As we have previously noted, Petitioner in his pleadings sought a modification of the Arizona decree with respect to 'custody and control' of the child and specifically prayed:
>
> > 'WHEREFORE, premises considered, Plaintiff prays that Defendants Thyra Nichols Plass and Gilbert Norman Plass be cited to appear herein and upon final hearing hereof this Court grant the following relief:
> >
> > '1. That the aforesaid Judgment and Decree be modified so that Plaintif be given custody and control of Gordon Marc Leithold from June 15 to September 1 of each year hereafter commencing with the year 1965, and during such period of each year Plaintiff shall have the right to take said child to his home in Malibu, California . . . .
>
> Respondent would have us hold that such a pleading and prayer will not support a judgment for lesser relief in the nature of modified visitation rights with permanent custody as previously decreed remaining unaffected. To the contrary, we are of the view that a suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child

> vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child. The courts are given wide discretion in such proceedings. *Ex Parte Eaton*, 151 Tex. 581, 252 S.W.2d 557 (1952); *Furrer v. Furrer*, 267 S.W.2d 226, (Tex. Civ. App.--Austin 1954, no writ). Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children. *Conley v. St. Jacques*, 110 S.W.2d 1238, 1242 (Tex. Civ. App.--Amarillo 1937, writ dism'd); *Williams v. Guynes*, 97 S.W.2d 988 (Tex.Civ.App.--El Paso 1936, no writ). It is beside the point that in the instant proceeding the trial court, whether erroneously or not, construed the pleadings of petitioner as seeking only a modification of visitation rights; the point is that once the child is brought under its jurisdiction by suit and pleading cast in terms of custody and control, it becomes the duty of the court in the exercise of its equitable powers to make proper disposition of all matters comprehended thereby in a manner supported by the evidence.

A similar sentiment was expressed in *Brillhart v. Brillhart*, 176 S .W.2d 229, 230 (Tex. Civ. App.–Amarillo 1943, writ ref'd w.o.m.), where the court said:

> Appellant makes seven assignments of error as a result of his exceptions being overruled by the trial court, all of which are here overruled, since it appears to us that appellee's pleadings are sufficient, especially since the pleadings in child custody cases are usually considered of little importance. As a rule the trial judge in such cases should not permit technical rules of practice to have a controlling effect but he should exercise broad equitable powers in determining which custodian is the proper person to best serve the child's interest.

There are many other cases on point. For example, in *C. v. C.*, 534 S.W.2d 359 (Tex. Civ. App.–Dallas 1976, writ dism'd w.o.j.), the appellate court said that rules regarding a new trial for newly discovered evidence are relaxed in custody cases because "the court's duty to protect the children's interests should not be limited by technical rules."

The Amarillo Court of Appeals said this in *Kohutek v. Kohutek*, 2011 WL 4346313, *4-5 (Tex. App.–Amarillo 2011, no pet.) (memo. opinion):

> Here, James failed to object in writing or bring to the attention of the trial court any insufficiency in Sheri's pleadings when Sheri's counsel informed the trial court that Sheri was seeking to modify the decree's provisions related to geographic restrictions, Christmas possession, private school attendance in Alaska or provisions related to educational decisions. He also failed to object at trial when Sheri testified as to the modifications she sought or when the trial court gave its oral pronouncement addressing these issues at the trial's conclusion. Accordingly, James waived his complaints regarding Sheri's lack of adequate pleading. See *Horne v. Harwell*, 533 S.W.2d 450, 451-52 (Tex. Civ. App.–Austin 1976, writ ref'd n.r.e.) (issue waived where no special exception taken to appellee's failure to plead that the circumstances of the child had materially or substantially changed); *Gonzalez v. Gonzalez*, 484 S.W.2d 611, 612-13 (Tex. Civ. App.–El Paso 1972, no writ) (issue waived where no special exception or objection made to appellee's failure to plead the residence requirement in her divorce action).
>
> Furthermore, the jurisdiction of the trial court was properly invoked by Sheri's motion to modify the decree with respect to the custody, control, visitation and possession of the boys. As such, the trial court was "vest[ed] with decretal powers in all relevant custody, control, possession and visitation matters involving the child[ren]."*Eliason v. Eliason*, 162 S.W.3d 883, 887 (Tex. App.–Dallas 2005, no pet.) (quoting *Liehold v. Plass*, 413 S.W.2d 698, 701 (Tex.1967)). Moreover, although Rule 301 of the Texas Rules of Civil Procedure generally requires a judgment to conform to the pleadings. "Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children." *Liehold*, 413 S.W.2d at 701. (citing *Conley v. St. Jacques*, 110 S.W.2d 1238, 1242 (Tex. Civ. App.–Amarillo 1937)).
>
> After having heard the bases for Sheri's modification of the decree, James failed to object and participated fully in the trial through argument, testimony and cross-examination. Therefore, it is of no legal consequence whether Sheri pled that she be given all the rights that she ultimately received. *See Liehold*, 413 S.W.2d at 701. See also Tex.R. Civ. P. 67 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been

> raised by the pleadings.") *Mayo v. Hall*, 571 S.W.2d 213, 215 (Tex. Civ. App.–Waco 1978, no writ) (issues as to modification of visitation and support tried by both express and implied consent of the parties). Accordingly, under these circumstances, we cannot say that the trial court abused its discretion in granting Sheri the modifications she requested. Issues one, two, four and six are overruled.

In *Messier v. Messier*, 389 S.W.3d 904 (Tex. App.--Houston [14th Dist.] 2012, no pet.), the appellate court said that in child custody cases where best interests are paramount, technical pleading rules are of reduced significance, and the father's pleading for the court to "take such measures as are necessary to protect the children was sufficient to warrant an injunction prohibition the mother from traveling with the children outside of Texas without the father's consent. However, in the case of *In re A.B.H.*, 266 S.W.3d 596, 600-01 (Tex. App.–Fort Worth 2008, no pet.) (Opinion by Chief Justice Casey), a divided Fort Worth Court of Appeals reversed a trial court for appointing a parent a sole managing conservator when he had pled only to be appointed the joint managing conservator with the exclusive right to establish the child's primary residence, and the issue of sole managing conservator was not tried by consent. The dissent by Justice Livingston said: "Because Cheryll and Scott both put the workability of the existing conservatorship arrangement at issue in their pleadings, I would hold that those pleadings were sufficient to support the trial court's order designating Scott as the sole managing conservator of the children." *Id.* at 602.

So, the Supreme Court has announced a principle of relaxed rules of pleadings in parent-child cases, but the courts of appeals differ on the issue, some being very flexible and some being rigid in adhering to the requests in the pleading.

B. GRANDPARENT'S ACCESS. In *Troxel vs. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court ruled that the Fourteenth Amendment's due process clause invalidated a Washington state statute that allowed anyone with an interest in the child to seek court-ordered visitation. The Court was anything but united. It issued six Opinions: one plurality Opinion, two concurring Opinions, and three dissenting Opinions. Justice O'Connor wrote in the Plurality Opinion, saying that the Washington statute was "breathtakingly broad" for allowing any person to seek visitation rights. She believed that the trial court improperly placed the burden on the mother to defend her decision to cut off visitation with the parental grandparents. Justice O'Connor believed that the trial court "failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughter." Justice O'Connor's opinion has been treated by many inferior courts and legislatures as stare deceases even though the Opinion did not garner support from a majority of the Court. Constructing stare deceases out of a fractured court with multiple opinions is a difficult process; perhaps this is why Justice O'Connor's articulations were taken as law. Because they were taken as law, they became law.

Texas Family Code Section 153.433 allows a court to grant grandparents access to grandchildren if "the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being . . ." Additionally, both of the child's parents cannot have been terminated, and the grandparent's child must be in jail or prison during the three-month period preceding the filing of the petition; or must have been found by a court to be incompetent; must be dead; or must not have actual or court-ordered possession of or access to the child.

In the case of *In re Kelly*, 399 S.W.3d 282 (Tex. App.–San Antonio 2012, orig. proceeding), mandamus was issued to overturn an order granting grandparent access where the grandparents had failed to prove that denying grandparent access would impair the child's health or well-being.

C. POSSESSORY RIGHTS. Texas Family Code Section 153.010(a) authorizes a court to order a party to attend counseling with a mental health professional "if the court finds at the time of a hearing that the parties have a history of conflict in resolving an issue of conservatorship or possession, or access to the child. . . ." In *Acosta v. Soto*, 394 S.W.3d 665, (Tex. App.–El Paso 2012, no pet.), the appellate court ruled that a trial court properly conditioned a father's possessory right upon the father's completing a course of psychological counseling for a period of six months.

In *Roberts v. Roberts*, 402 S.W.3d 833 (Tex. App.--San Antonio 2013, no pet.) (en banc), the divorce court ordered that the mother could take the child to church on Sunday mornings during the father's weekend visitation period.

The appellate court held that the order did not violate the First Amendment's Establishment Clause because the court extended the father's periods of possession to make up for the lost time.

D. MODIFICATION PROCEEDINGS. Under Family Code Section 156.101, to modify custody or possessory rights to a child the requesting party must show a material and substantial change in the circumstances of the child, a conservator, or other party affected by the order, and that modification would be in the best interest of the child. Proof of change is not required if a child 12 years or older tells the judge in chambers that it wants the court to modify custody, or where the person with primary custody "voluntarily relinquished the primary care and possession of the child to another person for at least six months." *Id.* To change child support, it is necessary to show a material and substantial change or that three years have passed and the child support differs from the guideline amount by either 20% or $100. Tex. Fam. Code § 156.401(a). Some courts of appeals have said that, to show a material and substantial change, it is necessary to show the circumstances at the time the prior order was rendered, and the circumstances at the time of trial. *See Watts v. Watts*, 563 S.W.2d 314 (Tex.Civ.App.--Dallas 1978, writ ref'd n. r. e.). This approach was rejected in *In re J.A.R.*, 2005 WL 2839107 (Tex. App.--Fort Worth 2005, no pet.) (mem. op.), and in *T.A.B. v. W.L.B.*, 598 S.W.2d 936, 939 (Tex. App.--El Paso 1980, writ ref'd n.r.e.), *cert. denied*, 454 U.S. 828(1981). In the case of *In re L.C.L.*, 396 S.W3d 712 (Tex. App.--Dallas 2013, no pet.), the appellate court held that where both parents pled that a material and substantial change had occurred, each parent had made a judicial admission of changed circumstances, obviating the need for proof of that condition to modification. In *In re C.H.C.*, 392 S.W.3d 347, 352 (Tex. App.–Dallas 2013, no pet.), the appellate court reversed an order reducing child support because the father failed to adequately prove his income at the time the prior support order was rendered.

E. FAMILY VIOLENCE. Texas Family Code § 153.004(b) prohibits the court from appointing a person as a joint managing conservator if that person has a pattern or history of family violence. In *Watts v. Watts*, 396 S.W.3d 19, 22 (Tex. App.–San Antonio 2012, no pet.), the evidence showed that both spouses had engaged in family violence toward the other. The appellate court said that one or the other parent, but not both, had to be appointed sole managing conservator.

VI. JURISDICTION. Family law cases can involve several different types of jurisdiction.

<u>Subject Matter Jurisdiction.</u> Subject matter jurisdiction is the power of the court to adjudicate the type of claims involved. This jurisdiction is a matter of the particular court's statutory authority to adjudicate claims.

<u>Domicile/Residency for Divorce.</u> A court with subject matter jurisdiction to grant divorces may dissolve the marital bonds only if one or both parties have been *domiciled* in Texas for at least six months. Tex. Fam. Code § 6.301. And a court may entertain a divorce proceeding only if one or both spouses have been a *resident* of the county where the case is filed for at least 90 days prior to filing. Tex. Fam. Code § 6.301. Personal jurisdiction is *not* required to just dissolve the marital bonds.

<u>Personal Jurisdiction.</u> A court may divide property in a divorce only if the court has *personal jurisdiction* over both spouses. *Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1998), *cert. denied*, 525 U.S. 1067 (1999). A Texas court can exercise personal jurisdiction over a non-resident served with process outside the state "only if [the non-resident] has some minimum, purposeful contacts with the state, and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice." *CMMC v. Salinas*, 929 S.W.2d 435, 437 (Tex. 1996), cited in *Dawson-Austin*, 968 S.W.2d at 326. This articulation originated with *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<u>Divisible Divorce.</u> Under the concept of "divisible divorce," a court with domicile-based jurisdiction of one spouse, but no personal jurisdiction over the non-resident spouse, can dissolve the marital bonds even if it cannot divide property or award spousal support. *See Estin v. Estin*, 334 U.S. 541 (1948), cited approvingly in *Dawson-Austin*, 968 S.W.2d at 324. The principle of divisible divorce is now reflected in Texas Family Code § 6.308, "Exercising Partial Jurisdiction."

<u>Custody Jurisdiction.</u> A special jurisdictional scheme applies to suits affecting the parent-child relationship. A court can adjudicate the rights and responsibilities of parents and children only if the jurisdictional standards of the Uniform Child Custody Jurisdiction Enforcement Act are met. See Tex. Fam. Code Section 152.201 (home state, significant connection and substantial evidence, deference by other states, or by default).

Child Support Jurisdiction. And the court's ability to adjudicate child support and attorney's fees requires *personal jurisdiction* over both parents. See *Kulko v. Superior Court*, 436 U.S. 84 (1978).

A. DOMICILE/RESIDENCY. Under Texas Family Code Section 6.301, a spouse cannot maintain a divorce in Texas unless one of the spouses has been a domiciliary of Texas for at least six months, and a resident of the county in which the suit is filed for the preceding 90-day period. To establish a domicile, there must be an intent to establish a permanent domicile accompanied by some act done in execution of domiciliary intent. In *Reynolds v. Reynolds*, 86 S.W.3d 272, 276 (Tex. App.–Austin 2002, no pet.), the appellate court held that while Section 6.301 is not itself jurisdictional, it is akin to a jurisdictional provision in that it controls a party's right to maintain a suit for divorce and constitutes a mandatory requirement that cannot be waived. When the domicile or residency requirement has not been met, the opposing party should request abatement. *Oak v. Oak*, 814 S.W.2d 834, 838 (Tex. App.–Houston [14th Dist.] 1991, writ denied).

In *In re Green*, 385 S.W.3d 665 (Tex. App.–San Antonio 2012, orig. proceeding), the husband was active duty military, and both spouses lived in Germany, but wife filed for divorce in Texas. Wife claimed that husband was domiciled in Texas because husband had lived in Texas during military training in 1992 and again in 1995-1996, and listed Texas as his home of record on his military leave and earnings statement. Wife claimed that husband told her he intended to live in Texas when he left the military, which husband denied. Husband never actually lived in Texas except while temporarily stationed here. During marriage, husband had also been stationed in Korea, Virginia, and Germany. The trial court denied husband's motion to dismiss the divorce. The Court of Appeals had previously granted mandamus requiring the trial court to dismiss a Suit Affecting the Parent-Child Relationship regarding the parties' children. In this second mandamus proceeding, the Court of Appeals ordered the Trial Court to dismiss the divorce, as well.

There has been a debate whether foreign nationals with green cards (i.e., temporary residency) can be domiciliaries of Texas, since by Federal law they cannot have a permanent residence in the United States. The question is even more pointed for people who are in the United States illegally.

The domicile requirement for divorce was extensively discussed by Jackie Ammons, a graduating student from U.T. School of Law, in her article *Home Sweet Home: Divorce Denied Under Texas Domicile Laws?*, State Bar of Texas Family Law Section Report Vol. 2013-2 (Spring).

B. PERSONAL JURISDICTION OVER NONRESIDENT. Texas Family Code Section 6.305 provides for "long arm" personal jurisdiction over a non-resident spouse for purposes of divorce. The first statutory basis for long arm jurisdiction is that Texas is the last marital residence of the spouses and suit is filed within the years of when the marital residence ended. Texas Family Code §6.305(a)(i). The second statutory basis for long arm personal jurisdiction is "any basis consistent with the Constitution of this State and the United States for the exercise of personal jurisdiction. *Id.* at §6.305(a)(2). The U.S. Supreme Court has divided personal jurisdiction into two types: general jurisdiction and specific jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). "[G]eneral jurisdiction is present when a defendant's contacts in a forum are continuous and systematic so that the forum may exercise personal jurisdiction over the defendant even if the cause of action did not arise from or relate to activities conducted within the forum state." *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 796 (Tex. 2002). " Specific jurisdiction is established if the defendant's alleged liability arises from or is related to an activity conducted within the forum." *Id.* This general vs. specific jurisdiction analysis was applied to a divorce in *Griffith v. Griffith*, 341 S.W.3d 43, 51 (Tex. App.--San Antonio 2011, no pet.), where the exercise of personal jurisdiction over a non-resident spouse was upheld. Note: service of process, while the non-resident is in-state, itself establishes personal jurisdiction and satisfies due process of law requirements. *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 610–19 (1990); *Stallworth v. Stallworth*, 201 S.W.3d 338, 344 (Tex. App.--Dallas 2006, no pet.).

In *Aduli v. Aduli*, 368 S.W.3d 805 (Tex. App.–Houston [1st Dist.] 2012, no pet.), the question was whether the non-resident spouse had minimum contacts with the State of Texas. The husband, a citizen of Iran, and the wife, a citizen of France, were married in Louisiana. Five years into the marriage, the parties visited Houston and talked about moving there. Two years later, husband bought a condo in Houston, and furnished it, and wife moved in. Husband paid utility bills and mortgage payments on the condo for several months, gave wife money as support,

and visited at least once a month. Wife filed for divorce in Houston, and the parties entered into agreed temporary orders. After several violations of these orders, the trial court struck husband's pleadings, after which husband asserted a lack of personal jurisdiction. Shortly before trial, husband's visa expired and he was forced to leave the country. Husband's request for continuance was denied, and wife was granted a default judgment. The Court of Appeals affirmed, saying that the parties' separation was a "work separation" not a "marital separation," and that Houston was the parties' last marital residence. The Court noted that the Husband purchased the Houston condo in his own name, paid the mortgage and utility bills, and visited wife in Houston. These actions constituted purposeful and regular contacts, not random or fortuitous contacts, and due process of law standards for personal jurisdiction over a non-resident had been satisfied.

C. JURISDICTION OVER FOREIGN CORPORATION. The case of *In re Knight Corp.*, 367 S.W.3d 715 (Tex. App.–Houston [14th Dist.] 2012, no pet.), the husband filed for divorce in Texas. Wife, a resident of Texas, counterclaimed, naming as a third-party-defendant a Pennsylvania corporation. Husband was a vice-president of the Pennsylvania corporation, and president of a Texas subsidiary. Wife alleged that both corporations were alter egos of Husband, and that both corporations participated in a fraudulent effort to hide community property. The Pennsylvania corporation's special appearance challenging personal jurisdiction was overruled by the trial court. The Pennsylvania corporation appealed and later filed a mandamus proceeding. The Court of Appeals ruled that the denial of the special appearance was not appealable given, but that mandamus review was available. The appellate court determined that neither *general jurisdiction* nor *special jurisdiction* over the Pennsylvania corporation had been established, so mandamus was granted as to the Pennsylvania corporation.

D. JURISDICTION FOR INITIAL CUSTODY DETERMINATION. Under the uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a state has initial custody jurisdiction to a child custody order only if (i) it is the child's "home state," or no state has home state jurisdiction, or a court with home state jurisdiction has declined to exercise jurisdiction based on inconvenient forum or unjustifiable conduct. Tex. Fam. Code § 152.201.

In *In re Dean*, 393 S.W.3d 741, 747 (Tex. 2012), a New Mexico court with home state jurisdiction dismissed a custody case because the Texas parent had filed first in Texas. The New Mexico court did not base its decision on inconvenient forum or unjustifiable conduct. Finding that the New Mexico court had improperly dismissed the New Mexico proceeding, the Texas Supreme Court granted mandamus directing the Texas court to dismiss the Texas custody case, because the Texas court did not have jurisdiction under the UCCJEA.

E. JURISDICTION TO MODIFY CUSTODY ORDER. Texas has an intrastate scheme where a court that issues a final order regarding child custody or visitation has continuing, exclusive jurisdiction over further modifications of the order. Tex. Fam. Code § 155.01(a) & 155.002. Subsequent requests to modify the order must be filed in the court of continuing jurisdiction, and if at the time the child resides in another county, either party may request that continuing jurisdiction be transferred to the county of the child's residence. Tex. Fam. Code § 155.201. Transfer is discretionary unless the child has resided in the new county for six months or more, in which case the transfer is mandatory. Tex. Fam. Code § 155.201(b).

Where parents or children live in different states, the continuing jurisdiction scheme under the UCCJEA applies. See Tex. Fam. Code § 152.202. Under that scheme, a state that issues a final custody or visitation decree has continuing, exclusive jurisdiction to modify that decree, for so long as at least one party or the child continues to reside in state. Tex. Fam. Code § 152.203. A Texas court cannot exercise its continuing, exclusive jurisdiction to modify custody when the child has obtained a new home state. Tex Fam. Code. § 155.003(b)(1).

F. THE HAGUE CONVENTION. In 1981, the United States subscribed to the Hague Convention on the Civil Aspects of International Child Abduction, a multilateral treaty designed to return children who had been abducted by a parent across international boundaries. Enabling legislation was not passed until 1988. Under the Hague Convention, a child should be allowed to remain in, or must be returned to, its country of "habitual residence." In *In re A.S.C.H.*, 380 S.W.3d 346 (Tex. App.–Dallas Oct. 4, 2012), the British High Court had ruled that the United Kingdom, where wife lived, was the habitual residence of the parties' child. Mother sought to have the court dismiss the SAPCR that father had filed in Texas. The Trial Court dismissed the suit, but the appellate court reversed. The appellate court said that a finding of habitual residence under the Hague Convention was not a custody

determination and did not establish continuing exclusive jurisdiction in the United Kingdom. Since a fact issue existed as to when the child left Texas, it was error to dismiss the Texas case as a matter of law.

G. RESTRICTING TRAVEL. Texas Family Code Section 153.503, "Abduction Prevention Measures," authorizes a court to require supervised visitation, prohibit removing the child from Texas or the United States, enjoin a parent from removing the child from school, require a parent to surrender a passport, and other measures. In *Arredondo v. Betancourt*, 383 S.W.3d 730 (Tex. App.--Houston [14th Dist.] 2012, no pet.), after a jury awarded primary joint managing conservatorship to father, the Trial Court issued an injunction prohibiting mother from taking the child outside the United States without father's consent. Mother was a resident of Mexico. The appellate court reversed the injunction, among other reasons saying that the order was overly broad, unreasonably restrictive, and unrelated to the child's best interest or the prevention of international child abduction.

In *Messier v. Messier*, 389 S.W.3d 904 (Tex. App.–Houston [14th Dist.] 2012, no pet), involved a mother from Hong Kong and a father from Canada, who had lived in Houston for several years. A jury awarded custody to the father , and the Trial Court issued an injunction prohibiting the mother from removing the children from Texas, requiring the mother to surrender the passports she had for the children, and to notify the U.S. State department and the Hong Kong embassy or consulate of the travel restrictions. The appellate court affirmed the travel restrictions, but reversed the requirement that the mother notify the governments, saying that the requirement went beyond providing the father with control over the children's international travel and put a greater burden on the mother's rights than was warranted.

H. INTERSTATE SUPPORT LITIGATION. Interstate litigation of child support and alimony is governed by the Uniform Interstate Family Support Act (UIFSA), adopted in all fifty states. See Tex. Fam. Code ch. 159. If no support order has been issued, a proceeding may be initiated in one state (typically by a Title IV-D agency) for the issuance of a support order by a court of another state. This bifurcated proceeding allows evidence to be taken in the state where the petitioner resides, which is then forwarded to the state where the respondent resides for final adjudication, eliminating any complaint when the issuing state has no personal jurisdiction over the respondent. Under UIFSA, a court that issues a support order has continuing, exclusive jurisdiction to modify the support obligation for a s long as one person affected by the order resides in the issuing state. Tex. Fam. Code § 159.205.

In *Office of the Attorney General v. Long*, 401 S.W.3d 911 (Tex. App.–Houston [14th Dist.] 2013, no pet.), the appellate court determined that North Carolina did not have continuing, exclusive jurisdiction when the court issued a judgment dissolving the marital bonds but did not divide property or adjudicate child custody, visitation, or child support.

VII. OTHER SIGNIFICANT ISSUES. Several other important developments in recent case law is discussed in this Section of the Article.

A. MEDIATED SETTLEMENT AGREEMENTS. A significant area of litigation in the past year has involved the enforceability of mediated settlement agreements.

1. Title 1 MSAs (Divorce). In the "old days," a mediated settlement (MSA) agreement in a family law case was treated like any other contract. If either party backed out of the settlement agreement before judgment was rendered, the court could not render a consent judgment. Instead, the party seeking enforcement had to amend pleadings and seek specific performance, then file a motion for summary judgment on the contract. *See Padilla v. La France*, 907 S.W.2d 454, 462 (Tex. 1995). That still is the law outside of the Family Code. See Tex. Civ. Prac. & Rem. Code § 154.071(a) (" If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract"). The Legislature was not satisfied with this process in divorce cases, where parties were notorious about suffering "buyers' remorse" and wanting to get out of MSAs they had signed.

The Legislature desired to create a streamlined process for the rendition of judgment based on mediated settlement agreements. So the Legislature enacted Family Code Section 6.602, which now provides:

> § 6.602. Mediation Procedures
>
> (a) On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.

(b) A mediated settlement agreement is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;

(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(d) A party may at any time prior to the final mediation order file a written objection to the referral of a suit for dissolution of a marriage to mediation on the basis of family violence having been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation.

The appellate court in *Toler v. Sanders*, 371 S.W.3d 477, 480 (Tex. App.--Houston [1st Dist.] 2012, no pet.), said of MSAs in a divorce: "When the agreement complies with these three requirements, it 'is binding on the parties' as soon as it is executed, and a party is 'entitled to judgment on the agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.'" The appellate court continued: "The Family Code does not authorize a court to modify an MSA, to resolve ambiguities or otherwise, before incorporating it into a decree." *Id.* And the court then said: "A mediated settlement agreement under section 6.602 is 'more binding than a basic written contract' because, except when a party has procured the settlement through fraud or coercion, nothing either party does will modify or void the agreement 'once everyone has signed it.'" *Id.*

However, exceptions to the rule have been recognized. In *Boyd v. Boyd*, 67 S.W.3d 398, 404–05 (Tex. App.--Fort Worth 2002, no pet.), the appellate court said that a trial court could refuse to enforce an MSA for "intentional failure to disclose substantial marital assets" when the agreement included a representation that "[e]ach party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them"). In the case of *In re Joyner*, 196 S.W.3d 883, 889 (Tex. App.--Texarkana 2006, pet. denied), the appellate court said that a trial court is not required to enforce a mediated settlement agreement "if it is illegal in nature or was procured by fraud, duress, coercion, or other dishonest means." In *Morse v. Morse*, 349 S.W.3d 55, 56 (Tex. App.--El Paso 2010, no pet.), the appellate court noted that the appellant had cited "no authority that an MSA can be revoked due to a party's alleged intentional breach." However, the appellate court did not actually hold that intentional breach was not a ground for defeating an MSA. In *In re Marriage of Fannette*, 2013 WL 3533238, *5 (Tex. App.--Waco 2013, n.p.h.), the appellate court recognized that an MSA could be defeated where is was "illegal in nature or procured by fraud, duress, coercion, or other dishonest means," but ruled that the grounds had not been proven in that case.

In *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012), the parties disagreed about the way their mediated settlement agreement treated the division of husband's interest in a partnership. Under the Texas Business Organizations Code, a divorcing spouse can receive only an "transferee's interest" in the partnership. Tex. Bus. Org. Code § 152.406(a)(1).[5] The divorce court does not have the power to award a full partnership interest to the non-partner spouse. Tex. Bus. Org. Code § 152.406(a)(1). The MSA in *Milner* said: "Jack agrees to transfer to Vicki all of his beneficial interest and record title in and to the 44.055% community property interest in Thelin Recycling Company, LP, and the 44.5% community property interest in Thelin Management Company, LLC, subject to all liabilities thereon, (except a portion of the mineral interests, as set out herein) and all provisions of the existing Partnership Agreement." *Id.* at 620. Attached to the MSA was an exhibit for the partners to sign,

[5] The transferee's interest has the right to receive partnership distributions, but no right to management, Tex. Bus. Org. Code § 152.402(3), nor is the assignee subject to any liability as a partner, *Id.* at 152.402(c), this includes no duty to meet capital calls. *Id.* at § 152.403.

allowing Wife to become a limited partner and not just hold a transferee's interest. Later it turned out that one of husband's partners would not sign the exhibit. Wife sought to vitiate the MSA on the grounds that her status as a partner could not be achieved. The MSA contained an arbitration clause, but the parties took the issue to the Trial Court, which rejected wife's arguments and signed a decree of divorce. Wife appealed. The Court of Appeals reversed, saying that no "meeting of the minds" had occurred, so that the MSA was not a binding contract. The Supreme Court reversed the Court of Appeals, saying that the MSA was binding, but concluding that it was ambiguous. The Supreme Court remanded the case to the trial court to refer the case to arbitration to determine the meaning of the MSA regarding Wife's partnership interest. A three-Justice minority dissented from the majority Opinion, saying that the MSA was not ambiguous and clearly stated that the award of Husband's interest to Wife was subject to the provisions of the partnership agreement. In essence the Supreme Court *sub silencio* overturned the Court of Appeals ruling that the MSA did not constitute a binding contract, thereby avoiding a precedent that could have had troubling consequences for the streamlined rendition of divorces based on non-revocable mediated settlement agreements. In *Milner*, the Court made the statement: "Unlike other settlement agreements in family law, the trial court is not required to determine if the property division is 'just and right' before approving an MSA." *Id.* at 618. This is a clear indication that a trial court cannot refuse to approve an MSA because the Court does not think the property division is just and right.

The "meeting of the minds" view of contract formation, dating back to the famous "Peerless case" of *Raffles v. Wichelhaus*, [1864] EWHC Exch. J19, held that a contract arose only when the subjective intents of the contracting parties was identical. Since subjective intent was in the mind of each contracting party, a party seeking to avoid a contract after-the-fact had wide latitude to claim a misunderstanding as to the meanings of terms in the contract. The Parol Evidence Rule was developed to curtail evidence of intent that varied from the written words of the contract. In the late 1800s, Harvard law professor Christopher Columbus Langdell, followed by Massachusetts legal scholar and judge, Oliver Wendall Holmes, Jr., advocated the "objective view" of contract formation, in which the question of whether a contract arose was decided according to what a reasonable person would conclude, based on the language of the offer and acceptance in the context of surrounding circumstances. The objective theory of contract formation was adopted by Harvard law professor Samuel Williamson, who molded it into his famous Treatise on the Law of Contracts (1920) and later into the American Law Institute's Restatement of the Law of Contracts (1933), from whence it became bedrock contract law in the United States. While the equitable remedies of rescission or reformation are available to rectify injustices arising from flaws in reaching and drafting of agreements, equitable rescission rests upon fraud in the inducement or mutual mistake of fact, neither of which appear to have been established in the *Milner* case.

The troubling aspect of a pure "meeting of the minds" approach to divorce-related nonrevocable mediated settlement agreements is the fact that a post-mediation inquiry into the parties' subjective intents could lead to hearings or trials (even possibly jury trials) regarding intent, which would thwart the Legislature's intent to require courts to render judgment upon a simple motion, as prescribed by Family Code Section 6.602(c). Such hearings or trials would be complicated by the cloak of secrecy imposed on the mediation process by Texas Civil Practice and Remedies Code Sections 154.053 and 154.073, and the practical problem that in most mediations the parties do not negotiate directly with each other but rather communicate through the mediator. The mediator, by necessity, would be the central witness as to expressions of intent in the separate "caucus rooms." Such a deconstruction of the stages of the mediation process would be messy and is not likely to lead to a better resolution than just holding the parties to the mediated settlement agreement that they signed. Even worse, the main selling point of mediation – complete privacy and achieving final resolution--would be jeopardized, causing a loss of confidence in mediation as an alternate dispute resolution process. As the Fourteenth Court of Appeals said in *Cayan v. Cayan*, 38 S.W.3d 161, 165, 166 (Tex. App.--Houston [14th Dist.] 2000, no pet.), "the purpose of alternative dispute measures is to keep parties out of the courtroom." Any approach that opens up wide vistas for litigating the enforceability of MSAs defeats that purpose.

In *Bracamontes v. Bracamontes*, 2013 WL 3895361 (Tex. App.--Corpus Christi 2013, n.p.h.) (mem. op.), the Trial Court encountered a post-mediation dispute over the meaning of three provisions in a MSA. The first provision said that husband's debt to wife "shall be secured by all community assets including DHR stock." Husband argued that he should only have to put up collateral equal in value to the debt. The Trial Court agreed. The Court of Appeals

reversed, holding that the Trial Court improperly deviated from the unambiguous language of the MSA. *Id.* at *2. The second provision of the MSA said that the provisions of the temporary orders pertaining to child support would be included in the decree. The temporary orders required husband to pay 100% of the children's health insurance premiums. Husband argued that he would pay 100% only if he could take the children as deductions on his tax return; otherwise he wanted to pay only half. The Trial Court ordered that husband would pay half. The Court of Appeals reversed, since the MSA unambiguously required that the decree include a provision that husband would pay 100%. *Id.* at *4. The third issue was a provision in the MSA saying that money from a "tax account" would be used to pay both parties' tax liabilities on income distributions from a certain business. Husband argued that he had saved this money to pay his own part of the tax liability on the income from the business, and he should have the sole benefit of that saving. The Trial Court ruled that wife had no right to funds from the tax account. The Court of Appeals reversed, saying that the MSA unambiguously required that the money be used to pay both parties' tax liabilities for that income. *Id.* at *5.

2. Title 5 MSAs (SAPCRs). The statute that governs the enforcement of mediated settlement agreements in SAPCRs is Texas Family Code Section 153.0071. That statute provides:

> (d) A mediated settlement agreement is binding on the parties if the agreement:
>
> > (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
> >
> > (2) is signed by each party to the agreement; and
> >
> > (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
>
> (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:
>
> > (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
> >
> > (2) the agreement is not in the child's best interest.

In the case of *In re Kasschau*, 11 S.W.3d 305, 310–11 (Tex. App.--Houston [14th Dist.] 2000, orig. proceeding), the appellate court affirmed the trial court's decision to refuse to enforce a mediated settlement agreement that required the destruction of illegally-recorded tape recordings, on the ground that the MSA required an illegal act (i.e., the destruction of evidence of a crime).

In *In re C.H.C.*, 396 S.W.3d 33 (Tex. App.--Dallas 2013, no pet.), the appellate court asked whether the defenses of lack of consideration and failure of consideration apply to non-revocable mediated settlement agreements, but did not answer that question because the defenses had not been established in that case.

A serious inroad on the automatic approval of MSAs in SAPCRs arose in *In re Lee*, 2011 WL 4036610 (Tex. App.--Houston [14th Dist.] 2011, orig. proceeding) (mandamus review granted). There the Associate Judge refused to render judgment on a MSA when the court believed that the MSA was not in the child's best interest. The Court of Appeals affirmed. The Supreme Court granted review, and the case is under submission. The governing Council of the Family Law Section of the State Bar of Texas filed an amicus curiae brief in support of enforcing the MSA on the ground that the Family Code did not recognize a "best interest" exception to the enforceability of MSAs and that courts should not invent common law defenses that go beyond the statute.[12]

3. Ambiguity. Apart from the question of rescission based on misrepresentation, fraud, and illegality, many late-night, last-gasp, hand-written MSAs present the issue of ambiguity as to the meaning of the MSA. In *Bracamontes v. Bracamontes*, 2013 WL 3895361 (Tex. App.--Corpus Christi 2013, no pet.) (mem. op.), the appellate court applied ordinary rules for interpreting contracts to a claim of ambiguity in an MSA. So, too, did the Supreme Court in *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012).

4. Agreement to Enter Into a Future Contract. In many instances, the parties will agree at the time of mediation to enter into a later contract such as an agreement incident to divorce. The Texas Supreme Court recently ruled that an agreement that includes all the terms necessary for the contract's enforcement is an enforceable contract as a matter of law, even if some of its terms seem to imply that the parties contemplate forming an additional contract in the future. *See McCalla v. Baker's Campground, Inc.*, 12-0907 (Tex. August 23, 2013).[13]

B. SANCTIONS.[14] In *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991), the Supreme Court held that due process of law requires that such a discovery sanction be "just." The Court expressed the "justness" requirement in several ways, including: (i) there must be a direct relationship between the offensive conduct and the sanction imposed; (ii) "the sanction should be visited upon the offender"; (iii) the punishment imposed must not be excessive; (iv) lesser sanctions must first be tested to see whether they secure compliance, deterrence, and punishment of the offender. *Id.*; *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992) (as the category (iv)). The *Transamerican* justness test has subsequently been applied to sanctions under Texas Rule of Civil Procedure 13 and Chapter 10 of the Civil Practice and Remedies Code.

A number of family law cases on judicially-imposed sanctions have been decided in the past year. In *In re M.J.M.*, 2013 WL 3198434 (Tex. App.–San Antonio 2013, n.p.h.), a trial court was reversed for striking a father's pleadings, and prohibiting him from offering witnesses or documents during trial, as a discovery sanction in a custody modification proceeding. The trial court was reversed for not imposing less stringent sanctions prior to imposing death penalty sanctions.

In *O'Carolan v. Hopper*, 2013 WL 3186388 (Tex. App.–Austin 2013, n.p.h.), the appellate court affirmed the trial court's imposition of a $2,000.00 attorney fee sanction for failure to timely respond to discovery.

In *Jordan v. Jordan*, No. 14–12–00114–CV, 2013 WL 2489577 (Tex. App.–Houston [14th Dist.] June 11, 2013, n.p.h.) (mem. op.), the trial court was reversed for excluding husband's sole exhibit–his sworn inventory and appraisement–as punishment for failing to pre-mark and exchange exhibits prior to trial, as required by a local rule of court. The appellate court treated the sanction as a death penalty sanction, and noted that the inventory had been served on the opposing party prior to trial so there was no prejudice to the opposing party. Also, the sanction was excessive. The appellate court also noted that it was not shown that the local rule had been approved by the Texas Supreme Court as required by Texas Rule of Civil Procedure 3a, but the case did not turn on that issue.

C. PRO SE LITIGANTS AND APPROVED FAMILY LAW FORMS. A controversial development during the past year involved the Texas Supreme Court's decision to officially approve forms for pro se litigants to use in divorces.

The adoption of Supreme Court-approved forms was instigated by the Texas Equal Access to Justice Commission. The Texas Supreme Court appointed a Uniform Forms Task Force on March 15, 2011, to develop statewide standardized forms for use by pro se litigants in divorce. The Task Force forwarded a set of forms to the Supreme Court on January 11, 2012. The Supreme Court referred the forms to the Supreme Court Advisory Committee (SCAC). A subcommittee of the SCAC did a comprehensive analysis of the forms, and submitted a report to the full SCAC. The matter was taken up at the SCAC's April 13-14, 2013 meeting. At that meeting, presentations were made by the Texas Access to Justice Commission (favoring officially-approved forms), the State Bar Family Law Section leadership (opposing the forms), and an ad hoc committee appointed by the President of the State Bar of Texas (opposing the forms). Comments were also received from members of the public. By the end of the SCAC meeting, it was evident from the discussion that the Supreme Court Advisory Committee was divided on the advisability of Supreme Court-approved divorce forms, but the Committee Chair did not call for a vote, so the forms were forwarded to the Court based on the written submissions and discussions.

On November 13, 2012, by a vote of five-to-three, the Supreme Court adopted a set of forms it called "Divorce Set One." See Misc. Docket No. 12-9192. Justice Deborah Lehrmann, who was a family law District Judge in Tarrant County for 22 years, dissented from the adoption of the forms, first because they might cause persons who should obtain legal counsel to mistakenly believe that they could handle their divorce without legal representation, and second because the form Decree of Divorce awards retirement benefits to the employed spouse. Justice Lehrmann thought that this default provision could result in spouses giving up valuable rights without realizing they were doing so. Justice Johnson joined Justice

Lehrmann's dissent, but also issued his own concurrence and dissent, joined by Justice Willett. Justice Johnson concurred in the forms except in two respects. He said the forms should contain a provision for the court to divide retirement benefits in a just and right manner. And Justice Johnson did not want the forms to be labeled as being approved by the Supreme Court. He suggested instead that the forms be approved by the Uniform Forms Task Force of the Supreme Court of Texas. Justice Johnson felt that the Supreme Court was not adequately staffed to keep the forms updated to reflect changes in the law. After a comment period and some revisions (particularly removing language awarding real estate and including a warning about claiming an interest in the other spouse's retirement benefits), on June 17, 2013, the full Court issued its unanimous Order Approving Revised Uniform Forms-Divorce Set One, Miscellaneous Docket No. 13-9085.[15]

Paragraph 2 of the Order provides:

> 2. The following set of uniform forms, Divorce Set One, is approved for use in uncontested divorces that do not involve children or real property. Use of the approved forms is not required. However, a trial court must not refuse to accept any of the approved forms simply because the applicant used forms or is not represented by counsel. If the approved forms are used, the court should attempt to rule on the case without regard to non-substantive defects.

The Divorce Set 1 forms are available on-line at:

> http://texaslawhelp.org/files/685E99A9-A3EB-6584-CA74-137E0474AE2C/attachments/86B81691-B8BA-42F7-BE1F-D27A5CF692B7/texas-supreme-cour-approved-divorce-forms-revised-6.17.pdf

The Instructions to the forms state that they are *not* designed for use: if the parties disagree about any issue, if someone wants a fault-based divorce, if there is a minor child of the marriage, if the wife gave birth to child not fathered by the husband, if the wife is pregnant, if there is a disabled child, if a spouse want spousal maintenance, if a spouse wants part of the other spouse's retirement, if either spouse owns real property, or if there is an ongoing bankruptcy case. If the forms are being used in an instance for which they are not designed (the spouses have minor children or real estate), is the Trial Court free to reject the forms? The Supreme Court's order says that "a trial court must not refuse to accept any of the approved forms simply because the applicant used forms." The Trial Court's ability to reject misused forms is an important question, since a pro se litigant could inadvertently impair the rights of a spouse or children by using these forms for a purpose they are not designed to meet.

An information booklet, entitled *Legal Information vs. Legal Advice, Guidelines and Instructions for Clerks and Court Personnel Who Work with Self-Represented Litigants in Texas State Courts* is available from the Supreme Court's web site:

http://www.txcourts.gov/pubs/LegalInformationVSLegalAdviceGuidelines.pdf

In the 2013 legislative session, Senate Bill 355 was passed requiring the Title IV-D Agency to promulgate forms "for an order or judicial writ of income withholding under this chapter . . . ." The bill changes Family Code Section 158.203, and is effective September 1, 2013.

Marital Property Liability Chart

	Husband's Separate Property	Husband's Sole Management Community Property	Joint Management Community Property	Wife's Sole Management Community Property	Wife's Separate Property
Husband's Separate Debt					
Husband's Pre-Marital Liabilities					
Husband's Non-Tortious Liabilities During Marriage					
Husband's Tortious Liabilities During Marriage					
Wife's Tortious Liabilities During Marriage					
Wife's Non-Tortious Liabilities During Marriage					
Wife's Pre-Marital Liabilities					
Wife's Separate Debt					
Joint Liabilities of the Spouses					

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ENDNOTES

The following endnotes are web-enabled links in the electronic version of this Article, available at <http://www.orsinger.com/PDFFiles/family-law-update-2013.pdf>.

1. The Supreme Court's Order mandating e-filing is at <http://www.supreme.courts.state.tx.us/miscdocket/12/12920600.pdf.>.

2. *Order Requiring Electronic Filing in Certain Courts* <http://www.supreme.courts.state.tx.us/miscdocket/12/12920600.pdf>.

3. *Tedder v. Gardner, Aldrich, LLP*, 11-0767 (Tex. Sup. Ct. May 17, 2013) <http://www.supreme.courts.state.tx.us/historical/2013/may/110767.pdf>.

4. The State Bar of Texas' Family Law Section's amicus brief is at <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=6603bfed-97fc-48c1-8218-4607b0d964e4&coa=cossup&DT=BRIEFS&MediaID=62a774da-7bc8-4a24-ad3d-778a736056ca>.

5. The Defense of Marriage Act can be found at <http://www.gpo.gov/fdsys/pkg/BILLS-104hr3396enr/pdf/BILLS-104hr3396enr.pdf>.

6. Petition for Review of the State of Texas <http://www.supreme.courts.state.tx.us/ebriefs/11/11011401.pdf>.

7. Opinion No. JC-0156, Re: Whether a county clerk must accept for filing a "declaration of domestic partnership" <https://www.oag.state.tx.us/opinions/opinions/49cornyn/op/1999/htm/jc0156.htm>.

8. USCCB Committees Express Concerns Over Domestic Violence Legislation <http://www.usccb.org/news/2013/13-046.cfm>.

9. *State v. Naylor*, No. 11-0114, Petitioner's Supplemental Brief Addressing Recent U.S. Supreme Court Decisions <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=b463d8eb-2586-41e5-8f72-943bf4e43828&coa=cossup&DT=BRIEFS&MediaID=c225882a-381e-429c-a5e8-0152bfb5a2ca>.

10. *State v. Naylor*, No. 11-0114, Respondents' Joint Supplemental Response on Windsor and Perry p. 3 <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=93226dab-75b3-4b80-bbae-b1b7ba51420e&coa=cossup&DT=BRIEFS&MediaID=99ea6ca3-cc8e-4f3c-8316-0b9ba9c99cfe>.

11. Secretary of Defense press release relating to same-sex marriage <http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf>.

12. Brief of the State Bar of Texas Family Law Council as Amicus Curiae <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=5e8be424-4745-4522-be3e-28d1cda2f58f&coa=cossup&DT=BRIEFS&MediaID=bd111012-48da-4cc9-a9c9-b779402bcd67>.

13. *McCalla v. Baker's Campground, Inc.*, 12-0907 (Tex. August 23, 2013) <http://www.supreme.courts.state.tx.us/historical/2013/aug/120907.pdf>.

14. A comprehensive assessment of judicial sanctions is contained in Orsinger, *Court Ordered Sanctions*, at <http://www.orsinger.com/PDFFiles/court-ordered-sanctions.pdf>.

15. *Order Approving Revised Uniform Forms- Divorce Set One* <http://www.supreme.courts.state.tx.us/miscdocket/13/13908500.pdf>.