CURRENT EVENTS IN FAMILY LAW

Author:

RICHARD R. ORSINGER
ATTORNEY AT LAW
310 S. St. Mary's St., Ste. 1616
San Antonio, Texas 78205
(210) 225-5567 (Telephone)
(210) 267-7777 (Telefax)
Email: richard@orsinger.com

McCurley, Kinser,
McCurley, Nelson & Orsinger, LLP
5950 Sherry Lane, Ste. 800
Dallas, Texas 75225
(214) 273-2400 (Telephone)
(214) 273-2470 (Telefax)
Email: richard@mkmn.com

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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)

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 1994-2001) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, 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)
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:

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
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (2002 & 2003)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002)
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94) and Advanced Civil Trial Course (1990-91)
Course Director, State Bar of Texas 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:

---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)
---*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)
---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's 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); Choice-of-Law Rules Affecting Marital Property Rights (2002); Proof of Foreign Law and Foreign Evidence (2002).

State Bar's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

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)

State Bar'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)

State Bar'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)

State Bar's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997); If You Don't Know Where You Are Going, It Doesn't Matter How You Get There: Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

Various CLE Providers: State Bar of Texas Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991);State Bar of Texas Advanced Civil Trial Course: 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); 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); State Bar of Texas In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Association: Proving It Up and Getting It In: Foreign Law and Foreign Evidence (2001)

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CURRENT EVENTS IN FAMILY LAW
by
Richard R. Orsinger

Board Certified in Family Law
and Civil Appellate Law
Texas Board of Legal Specialization

I. FRAUD ON THE COMMUNITY ESTATE. "Fraud on the community" occurs when (1) a spouse transfers community property for the primary purpose of depriving the other spouse of the use and enjoyment of the assets involved; (2) a spouse makes a gift, transfer, or expenditure of community property that is capricious, excessive or arbitrary. See PATTERN JURY CHARGES (FAMILY) ch. 206 (2002). The first type of fraud is called "actual fraud"; the second type of fraud is called "constructive fraud."

A. CONSTRUCTIVE TRUST. The remedy for fraud on the community is estate is to recover to the complaining spouse one-half of the community assets transferred or lost. The Supreme Court reiterated this recently in the case of *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001). There, a husband deleted his wife as beneficiary of a community property life insurance policy and instead designated his mother as beneficiary. When the husband died, the policy proceeds were paid to the mother. The widow sued the mother for fraud on the community. The Supreme Court said this about the remedy available to wife:

> Under Texas law, Marleen Barnett has a cause of action for fraud on the community. Neither Dora nor any of the other defendants challenged the court of appeals' holding that a fraud on the community occurred in this case. Marleen's state-law remedy is to impose a constructive trust on one half of the proceeds of the Prudential policy that insured the life of her estranged husband.

B. NO TORT; NO EXEMPLARY DAMAGES. In *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998), the Texas Supreme Court held that a spouse's claims against the other spouse for fraud on the community are not to be compensated as tort claims, but rather are to be taken into account in the division of the community estate. The Court held:

> Because a wronged spouse has an adequate remedy for fraud on the community through the "just and right" property division upon divorce, we hold that there is no independent tort cause of action between spouses for damages to the community estate.

Id. at 585. The Supreme Court went on to say that:

> [A] claim of fraud on the community is a means to an end, either to recover specific

> property wrongfully conveyed, ... or ... to obtain a greater share of the community estate upon divorce, in order to compensate the wronged spouse for his or her lost interest in the community estate.

Id. at 588. The Supreme Court distinguished community property fraud claims from tort claims, saying:

> Just as in the present case, Belz involved alleged intentional deprivation of the wife's share of community assets. Nevertheless, despite the intentional nature of the claim, because the fraud was perpetrated on the community, the court correctly distinguished it from cases involving personal injuries for which recovery belongs to the separate estate.
>
> *Id.* at 588.

As to punitive damages, the Court said:

> Because of our holding in the present case that there is no independent tort cause of action for wrongful disposition by a spouse of community assets, the wronged spouse may not recover punitive damages from the other spouse.
>
> *Id.* at 589.

In *Schlueter*, the Supreme Court didn't reach the question of whether a separate and independent tort claim exists against third-parties who act in concert with a spouse in committing fraud on the community. *Id.* at 590. However, the Fort Worth Court of Appeals expressly ruled that a spouse cannot sue third parties in tort for fraud on the community. In *Harper v. Harper*, 8 S.W.3d 782 (Tex. App.–Fort Worth 2000, pet. denied), the husband (Dan) invested community money in real estate, but he took title in the name of his girlfriend (Ruth). When wife died, her heir filed suit against husband and the girlfriend for breach of fiduciary duty, fraud, and conspiracy to commit fraud on the community estate. The jury found a breach of fiduciary duty by fraud, as well as conspiracy, and awarded actual and punitive damages. The Fort Worth Court of Appeals reversed the judgment for damages. *Id.* at 784. The Court said:

> . . . [F]raud on the community exists outside the realm of tort law and cannot be brought as an independent cause of action. . . . Therefore, punitive damages based on this cause of action are also not recoverable.
>
> * * *
>
> Because there is no independent tort cause of action for fraud on the community, any damages against Dan or Ruth on that basis were erroneous.

Id. at 784.

II. NEW PATERNITY PROCEDURES FOR WHEN THE WIFE STRAYS.

III. ALIMONY (Texas Style). - no expert testimony required

IV. INTERIM FEES. A recurrent issue in family law cases is the ability to obtain and enforce an award of interim fees.

A. AUTHORITY TO AWARD INTERIM FEES. Texas Family Code §_______ provides for the award of interim fees in a parent-child suit. [What about H-W suits?]

B. ENFORCING INTERIM FEE AWARD BY SANCTIONS. In *Baluch v. O'Donnell*, 763 S.W.2d 8, 10 (Tex. App.--Dallas 1988, orig. proceeding), the trial court ordered the alleged husband in a divorce proceeding to pay $25,000 interim attorney's fees to the wife's lawyers. When the husband failed to do so, the trial court struck his pleadings. The court of appeal granted mandamus, saying that the sanction could not be justified as a discovery sanction because it did not further one of the purposes that discovery sanctions were intended to further, and there was no other basis to support the trial court's order. However, in *Shirley v. Montgomery*, 768 S.W.2d 430, 432-33 (Tex. App.--Houston [14th Dist.] 1989, orig. proceeding), the trial court artfully framed the sanction for failure to pay interim fees to an attorney ad litem as a discovery issue because the funds were to be used for discovery expenses–and mandamus was denied. The Fourteenth Court of Appeals came down against sanctions as a remedy in the case of *In re N.R.C.*, 2002 WL 31718530 (Tex. App.--Hous. [14th Dist.] Dec. 5, 2002). In a suit to terminate parental rights, the trial court appointed an attorney ad litem for the child. The trial court ordered each party to deposit $2,500 with the ad litem as security, but the mother failed to do so. The trial court granted the ad litem a judgment for attorney's fees, and further prohibited the mother from presenting at trial witnesses on her behalf other than herself. The Court of Appeals reversed, saying the ruling barring witnesses was tantamount to a death penalty sanction which did not meet the constitutional requirements of *TransAmerican Natural Gas v. Powell*, 811 S.W.2d 913 (Tex.1991).

C. ENFORCING INTERIM FEES BY CONTEMPT. In *Ex parte Hightower*, 877 S.W.2d 17, 21 (Tex. App.--Dallas, writ dism'd w.o.j.), the court of appeals held that collecting ad litem fees in contempt actions would be unconstitutional. However, in *Ex Parte Kinsey*, 915 S.W.2d 523, 526 n. 1 (Tex. App.--El Paso 1995, no writ), the court of appeals held that interim ad litem fees, which were assessed for the safety and welfare of children, may be collected, as child support, through contempt proceedings. A possible distinction is that in *Hightower* the fees were awarded by final judgment, while in *Kinsey* the fees were awarded as interim fees. Despite that distinction, the cases appear to fundamentally conflict.

V. EMPLOYEES BENEFITS. Employee benefits are a frequent point of dispute in divorce cases.

A. DEFINED BENEFIT PLANS. In *Taggart v. Taggart*, 552 S.W.2d 422, 424 (Tex. 1977), the Texas Supreme Court explained how to allocate defined benefit retirement benefits between the separate and community estates, where the benefits are not fully-vested at the time of divorce. The Court said to use a time-related formula, with the numerator being the number of months of employment during marriage, and the denominator being the number of months of employment required to entitle the employee to retirement benefits. The community estate owns that fraction of the total retirement.

Sixteen years later, in *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983), the Texas Supreme Court recognized that a straight time-related allocation of retirement benefits improperly invades the separate estate of the spouse who continues to work after divorce. *Berry* holds that the increase in value of pension benefits accruing as compensation for services rendered after a divorce is not a part of the community estate subject to division on divorce. *Accord, Bloomer v. Bloomer*, 927 S.W.2d 118, 121 (Tex. App.-- Houston [1st Dist.] 1996, writ denied) ("Pension benefits accruing as compensation for services rendered after a divorce are not part of the parties' community estate subject to a just-and-right division"); *Head v. Head*, 739 S.W.2d 635, 636 (Tex. App.--Beaumont 1987, writ denied) (employee's interest in retirement plans is community property only up to the date of divorce, and the non-employee spouse is entitled only to a share of the value of the retirement benefits as of the date of divorce). To avoid an unconstitutional divestiture of the increased value of retirement benefits attributable to employment after divorce, the community estate's interest in on-going retirement benefits is to be calculated *based on the value* of the community's interest *at the time of divorce*. *Berry*, 647 S.W.2d at ____. *See Grier v. Grier*, 731 S.W.2d 931, 932 (Tex. 1987).

B. DEFINED CONTRIBUTION PLANS. Defined contribution plans are handled differently. *Pelzig v. Berkebile*, 931 S.W.2d 398, 402 (Tex. App.--Corpus Christi 1996, no writ), states current Texas law on the division of a defined contribution plan upon divorce:

> In this case, Berkebile's benefits were not controlled by the employee's length of service, but by the amount of money Berkebile put into the retirement plans. In contrast to a "defined benefit" plan, Berkebile had a "defined contribution plan." Two appellate courts that have considered defined contribution plans have held the Berry formula inapplicable. Hatteberg v. Hatteberg, 933 S.W.2d 522, 531-532 (Tex. App.--Houston [1st Dist.] no writ); see Iglinsky v. Iglinsky, 735 S.W.2d 536, 538 (Tex. App.-- Tyler 1987, no writ). In both of those cases, the appellate courts simply subtracted the pre-marriage sum from the sum at divorce to determine the portion that was added during marriage and therefore is community property. In this case, the portion of community funds can be determined by taking the figure the trial court found to be the value of the funds at the time of divorce, $356,072.45, and subtracting the amount already in place at the time of marriage, $31,912. The $31,912 is the only amount that represents separate property.

Accord, *Baw v. Baw*, 949 S.W.2d 764, 767 (Tex. App.--Dallas 1997, no writ) (___); *Smith v. Smith*,

22 S.W.3d 140, 143-44 (Tex. App.--Houston [14th Dist.] 2000, no pet) ("[I]n order to determine the community interest in a defined contribution plan, courts subtract the value of the plan at the time of marriage from the value of the plan at the time of divorce").

This approach was more recently confirmed in *McClary v. Thompson*, 65 S.W.3d 829, 834-35 (Tex. App.--Fort Worth 2002, pet. denied):

> To determine the portion as well as the value of a defined contribution plan that is community property, courts subtract the amount contained in the plan at the time of the marriage from the total contained in the account at divorce. [FN2] See, e.g., Smith, 22 S.W.3d at 149; Baw, 949 S.W.2d at 767-68; Pelzig v. Berkebile, 931 S.W.2d 398, 402 (Tex. App.-Corpus Christi 1996, no writ); Hatteberg, 933 S.W.2d at 531; Iglinsky v. Iglinsky, 735 S.W.2d 536, 538 (Tex. App.-Tyler 1987, no writ).

Notwithstanding this type of sweeping language, many family lawyers believe that you can trace separate property assets held in a defined contribution plan. If a separate property asset held in a retirement trust grows in value during marriage, is the increase in value separate property or community property? These lawyers argue that the inception of title rule suggests that tracing is permissible, even inside a defined contribution plan.

C. EMPLOYEE STOCK OPTIONS.

1. Character as Separate or Community. In *Bodin v. Bodin*, 955 S.W.2d 380, 381 (Tex. App.--San Antonio 1997, no pet.), the husband contended that employee stock options granted during marriage were his separate property because the options were not vested by the time of divorce. The appellate court rejected this position, saying that the fact that the options had not vested by the time of divorce did not make the options entirely separate property. The court analogized the options to non-vested military retirement benefits, which were declared to be divisible upon divorce in *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976). Mr. Bodin did not argue that a Taggart-line pro-rata allocation rule should apply to the stock options. Therefore *Bodin* does not address pro-rata allocation.

The case of *Farish v. Farish*, 982 S.W.2d 623, 625 28 (Tex. App.--Houston [1st Dist.] 1998, no pet.), addressed stock options granted as an incentive for future employment. *Farish* cites cases holding that options granted for work done outside of marriage requires an allocation between compensation for past work and incentives for future service. This important part of the *Farish* opinion is designated "not for publication."

The court in *Charriere v. Charriere*, 7 S.W.3d 217 (Tex. App.--Dallas 1999, no pet.), rejected an argument that employee stock options were governed by a time-allocation rule. There the employee stock options were both received and had become exercisable during the parties' marriage, so they were deemed to be community property divisible upon divorce.

Kline v. Kline, 17 S.W.3d 445 (Tex. App.--Houston [1st Dist.] 2000, pet. denied), dealt with non-vested stock options. The husband argued that if the options were awarded for past services, they would be community property. If they were awarded to induce future employment after the divorce, they should be entirely his separate property. The options themselves recited that they were granted for services during marriage, so the appellate court rejected the husband's contention, citing among its supporting authorities the retirement benefits case of *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976). The husband did not argue a pro-rata allocation, so the argument was not ruled on by the appellate court.

2. Value of Employee Stock Options. There is much controversy over how to value employee stock options. The topic has recently boiled over in the American financial press, because of the move for large corporations to show the liability of stock option obligations given by corporations to their high-level employees.

> There are many different ways to value options. All we know is that none of them are right -- they are all guesses.

John Kanas, CEO of North Fork Bancorp Inc., quoted in Deepa Babington, *How to Value Stock Options*, Reuters News Service story (8-18-2002), on the WWW at <http://www.bayarea.com/mld/bayarea/business/personal_finance/investing/stock_options/3891502.htm>. The article continues:

> [H]anging a price tag on stock options is a complicated issue. Adding to the confusion is that companies can choose from a number of methods such as the popular Black-Scholes model or the binomial model to value stock options, making it hard to compare earnings, analysts say.
>
> For example, soft drink company Coca-Cola Co. (KO.N), which kicked off the trend toward expensing options last month, surprised veteran valuation experts by saying it would hand the task of valuing options to its investment bankers. But rival PepsiCo Inc. (PEP.N) uses the Black-Scholes model to arrive at the stock option expense it discloses in its footnotes.
>
> * * *
>
> In addition, each model itself relies on a number of subjective assumptions, such as stock price volatility, or their tendency to rise or fall in a time period. Volatility is particularly hard to predict and is often based on the past.
>
> In fact, companies in the same sector use wildly different assumptions for expected volatility, further clouding the picture. Within the applications software sector, for

> example, Manhattan Associates Inc. assumes volatility of 122 percent, while Oracle Corp. assumes 57 percent volatility, according to a research report by Credit Suisse First Boston.
>
> "The problem is that valuation is an imperfect science, it's not subject to a cookbook calculation," said Anthony Aaron, a partner at accounting firm Ernst & Young's valuation services group. "If it's garbage in, it'll be garbage out."
>
> In particular, the Black-Scholes model, the most popular method of valuing options, has come under blistering attack from companies.
>
> For starters, the model was never designed for employee stock options. It tends to overstate option costs because it assumes that options can be freely traded, although employee options cannot.
>
> In addition, the model is meant for options that have a three- to nine-month timeframe even though most stock options vest over several years, said Aaron. Procter & Gamble Co. (PG.N), for example, last week said it would be prepared to expense stock options but complained that the Black-Scholes model wasn't applicable to longer-term employee stock options.

The view that employee stock options cannot be reliably valued is widespread. Take for instance the following quotation from a letter sent by TechNet, a lobbying organization made up of executives at 200 top technology companies, to the Financial Accounting Standards Board:

> While there is virtually uniform agreement that an employee stock option represents something of value to an employee, there is absolutely no agreement among accounting experts that the issuance of employee stock options represents a corporate expense. We believe that requiring employee stock options to be treated as an expense would lead to misleading financial statements because no accurate, reliable and tested method of valuing stock options currently exists. [Emphasis added]

Quoted in Gretchen Morgenson & Jonathan D. Glater, *Ernst & Young Changes Mind on Options*, New York Times Newspaper (2-14-2003) <http://www.nytimes.com/2003/02/14/business/14OPTI.html>. See Annot., *Valuation of Stock Options for Purposes of Divorce Court's Property Distribution*, 46 A.L.R.4th 689 (1986).

VI. ERISA PRE-EMPTION. In *Boggs v. Boggs*, 520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997), the U.S. Supreme Court held that ERISA pre-empts a state community property law permitting the testamentary transfer of an interest in a spouse's pension plan benefits. In *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001), the Supreme Court held that ERISA pre-empted a Washington state statute providing for automatic revocation upon divorce of

the designation of a former spouse as beneficiary of a non-probate asset. See *Egelhoff*, 532 U.S. at 143, 121 S.Ct. 1322. In the eyes of the Court, the Washington statute "directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents."

In *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001), _______________.

VII. TRUSTS AND MARITAL PROPERTY. Assets held by a trustee in a discretionary distribution spendthrift trust, for the benefit of a married person, are not legally owned by a spouse, so the assets are neither separate nor community property–they are trust assets. *In re Marriage of Burns,* 573 S.W.2d 555, 557 (Tex. Civ. App.–Texarkana 1978,writ dism'd); *Currie v. Currie*, 518 S.W.2d 386, 389 (Tex. Civ. App.–San Antonio 1975, writ dism'd); *Buckler v. Buckler*, 424 S.W.2d 514 (Tex. Civ. App.–Fort Worth 1967, writ dism'd). As stated in *Lemke v. Lemke*, 929 S.W.2d 662, 664 (Tex. App.--Fort Worth 1996, writ denied), where the trust contains a spendthrift clause, which prevents the beneficiary from alienating, anticipating, assigning, encumbering, or hypothecating his interest in the principal or income of the trust, and the trustee has the absolute discretion to distribute as much of the corpus and income of the trust as she deemed appropriate for the beneficiary's health, education, maintenance, and welfare needs, then undistributed trust income that accrues during the beneficiary's marriage is part of the trust estate and is not subject to division by the court, because it is not community property.

However, once the beneficiary's right to trust assets has matured, and the beneficiary becomes entitled to immediate possession, then the assets are constructively owned by the spouse and income earned on the assets is properly characterized in the same manner as other income of the spouse would be. *Cleaver v. Cleaver*, 935 S.W.2d 491, 494 (Tex. App.--Tyler 1996, no writ); *In the Matter of the Marriage of Long*, 542 S.W.2d at 712, 717 (Tex. Civ. App.--Texarkana 1976, no writ).

A large controversy exists, in connection with trusts established by gift or bequest, whether trust income distributed to a beneficiary during marriage is community property income or whether it is received by the married beneficiary as part of the gift or part of the inheritance. Several cases support the idea that the income, once distributed, becomes the married beneficiary's community property. For example, *Commissioner of Internal Revenue v. Porter*, 148 F.2d 566 (5th Cir. 1945), held that under Texas law trust income held by the trustees became community property of the beneficiary when it was distributed. *Accord*, *McFaddin v. Commissioner*, 148 F.2d 570 (5th Cir. 1945); *Commissioner of Internal Revenue v. Wilson*, 76 F.2d 766 (5th Cir. 1935). The Dallas Court of Civil Appeals also said that income earned on trust corpus during marriage was community property, in *Mercantile Nat. Bank at Dallas v. Wilson*, 279 S.W.2d 650, 654 (Tex. Civ. App.–Dallas 1955, writ ref'd n.r.e.). And in *Ridgell v. Ridgell*, 960 S.W.2d 144, 148-49 (Tex. App.–Corpus Christi 1997, no pet.), the Corpus Christi Court of Appeals ruled that income distributed from a gift and a testamentary trust was received by the married beneficiary as community property. (It may have been important to the court in *Ridgell* that under the trust instruments the corpus would eventually be distributed to the beneficiary.)

In contrast, the U.S. Claims Court, in *Wilmington Trust Co. v. United States*, 83-2 USTC (1983), *aff'd*, 753 F.2d 1055 (Fed. Cir. 1985), debunked the pro-community cases discussed above and concluded that under Texas law "income to a married person as the beneficiary of a trust established by someone else as a gift, either *inter vivos* or testamentary, is the separate property of the married beneficiary." *Id.* at 11.

As far as self-settled trusts are concerned, the Fort Worth case of *Lipsey v. Lipsey*, 983 S.W.2d 345, 350 (Tex. App.--Fort Worth 1998, no writ), raised another challenging issue. There the husband, prior to marriage, put his separate property retirement assets into a trust, providing that the assets would be held by the trustee for his benefit, but not be distributed to him until a later time. None of the trust assets or trust income was distributed to the husband during marriage. The trial court found all increase in value of the trust to be community property. The court of appeals reversed, saying that all income earned during marriage on the trust assets was the husband's separate property, because it was income on property held in trust, which the husband had no right to possess. The Court said:

> Absent fraud, a spouse may create a trust from separate property, and so long as the income remains undistributed during marriage and there is no right to compel distribution, the income is not acquired during marriage and remains separate trust property.

VIII. CLAIMS FOR ECONOMIC CONTRIBUTION.

A. GENERAL CONSIDERATIONS. In 2001, the Legislature amended the Family Code by adding new Sections 3.401 through 3.410, eliminating "equitable interests" and creating in their stead a "claim for economic contribution" against a spouse's estate. The Legislature also added Family Code § 7.007, which requires the court in a divorce to determine claims for economic contribution, and then to divide community property claims in a manner that is just and right, and order a claim for economic contribution in favor of a separate estate to be awarded to the owner of that estate. It would be unconstitutional under *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977), for the Legislature to purport to empower a trial court to take separate property of one spouse and give it to the other upon divorce. The economic contribution statute attempts to circumvent this prohibition by reaffirming the inception of title rule on the one hand while on the other hand making inroads in the rule by creating a claim for economic contribution that is tantamount to an ownership interest in the property which the trial court must award, *Eggemeyer* notwithstanding. Whether the distinction between a legal "taking" and an "equitable" taking has sufficient substance to withstand constitutional attack remains to be seen.

The scheme of economic contribution claims replaces the cost or enhancement model of equitable reimbursement, and instead substitutes a monetary claim, to be secured by a lien upon dissolution of marriage, for what amounts to prorata "ownership" of the benefitted asset. This new approach is radical departure from marital property reimbursement concepts, and it requires close attention.

Some of the highlights of the new statutory provisions relating to claims for economic contribution are as follows.

1. Economic contribution claims exist only as to debts secured by liens in property of another marital estate, not unsecured debts of another estate. TFC § 3.402. Economic contribution claims also apply to property receiving capital improvements paid by another marital estate. *Id.* Economic contribution claims, when available, supplant reimbursement claims for reimbursement. TFC §3.408(a).

2. The economic contribution claim is calculated as fraction of the equity in the property on the date of divorce, or date of disposition. Thus, the economic contribution concept makes the contributing estate a sort of "partner" in ownership of the property. TFC § 3.403(b)(1).

3. Economic contribution claims for paying debt includes only reduction in principal and not payment of interest. Economic contribution claims also do not include payment of property taxes or insurance. TFC § 3.402(b).

4. Making "capital improvements" can give rise to a claim for economic contribution, but the term "capital improvements" is not defined. TFC § 3.402(a)(6). Also, the measure of the economic contribution claim for making capital improvements is based on the cost of the improvements, and not any enhancement in value resulting from the improvements. TFC § 3.402(a)(6). However, if capital improvements are financed during marriage by a loan secured by lien in the property, only the reduction in principal of the improvement loan is included in the claim for economic contribution. TFC § 3.402(3). There appears to be a "gap" for capital improvements made to property by incurring debt that is not secured by lien in the property being improved. Those capital improvements do not fall under either TFC § 3.402(3) or (6). Presumably a traditional reimbursement claim could be made, based on enhancement.

5. "Use and enjoyment" of property is not an offsetting benefit to a claim for economic contribution. TFC § 3.403(e).

6. If the property giving rise to a claim for economic contribution is disposed of during marriage, the amount of the claim for economic contribution is fixed at the time the property is disposed of. TFC § 3.403(b)(1).

7. A divorce court is required to impose a lien on property of the benefitted estate to secure a claim for economic contribution. This is not discretionary with the court. TFC § 3.406(a). The lien is not restricted to the specific property benefitted, but can instead be placed on any other property of the benefitted estate, subject only to homestead protection of such assets. TFC § 3.406(c). This suggests that other exemption statutes in the Texas Property Code will not protect exempt property from such a lien.

8. The trial court must offset claims for economic contribution running between estates. TFC § 3.407.

9. Marital property reimbursement principles still apply to payment of unsecured debt, and whenever someone fails to prove up an economic contribution claim. TFC § 3.408(a). Economic contribution claims also do not apply to *Jensen* claims for undercompensation from a separate property corporation. TFC § 3.408(b)(2). *See* TFC § 3.402(b)(2) (economic contribution does not include time, toil, talent or effort).

10. The statute does not say who must plead and prove offsetting benefits.

11. Reimbursement is not available for: (a) child support or alimony; (b) paying living expenses of a spouse or step-child; (c) contributing property of nominal value; (d) paying liabilities of nominal value; (e) paying student loans of a spouse. TFC § 3.409.

B. TEXAS FAMILY CODE PROVISIONS.

§ 3.401. Definitions

In this subchapter:

(1) "Claim for economic contribution" means a claim made under this subchapter.
(2) "Economic contribution" means the contribution to a marital estate described by Section 3.402.
(3) "Equity" means, with respect to specific property owned by one or more marital estates, the amount computed by subtracting from the fair market value of the property as of a specific date the amount of a lawful lien specific to the property on that same date.
(4) "Marital estate" means one of three estates:
(A) the community property owned by the spouses together and referred to as the community marital estate;
(B) the separate property owned individually by the husband and referred to as a separate marital estate; or
(C) the separate property owned individually by the wife, also referred to as a separate marital estate.
(5) "Spouse" means a husband, who is a man, or a wife, who is a woman. A member of a civil union or similar relationship entered into in another state between persons of the same sex is not a spouse.

§ 3.402. Economic Contribution

(a) For purposes of this subchapter, "economic contribution" is the dollar amount of:

(1) the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;
(2) the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;
(3) the reduction of the principal amount of that part of a debt, including a home equity loan:
(A) incurred during a marriage;
(B) secured by a lien on property; and
(C) incurred for the acquisition of, or for capital improvements to, property;
(4) the reduction of the principal amount of that part of a debt:
(A) incurred during a marriage;
(B) secured by a lien on property owned by a spouse;
(C) for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and
(D) incurred for the acquisition of, or for capital improvements to, property;
(5) the refinancing of the principal amount described by Subdivisions (1)-(4), to the extent the refinancing reduces that principal amount in a manner described by the appropriate subdivision; and
(6) capital improvements to property other than by incurring debt.

(b) "Economic contribution" does not include the dollar amount of:

(1) expenditures for ordinary maintenance and repair or for taxes, interest, or insurance; or
(2) the contribution by a spouse of time, toil, talent, or effort during the marriage.

§ 3.403. Claim Based on Economic Contribution

(a) A marital estate that makes an economic contribution to property owned by another marital estate has a claim for economic contribution with respect to the benefited estate.

(b) The amount of the claim under this section is equal to the product of:

(1) the equity in the benefited property on the date of dissolution of the marriage, the death of a spouse, or disposition of the property; multiplied by

(2) a fraction of which:

(A) the numerator is the economic contribution to the property by the contributing estate; and
(B) the denominator is an amount equal to the sum of:
(i) the economic contribution to the property by the contributing estate;
(ii) the equity in the property as of the date of the marriage or, if later, the date of the first economic contribution by the contributing estate; and
(iii) the economic contribution to the property by the benefited estate during the marriage.

(c) The amount of a claim under this section may be less than the total of the economic contributions made by the contributing estate, but may not cause the contributing estate to owe funds to the benefited estate.

(d) The amount of a claim under this section may not exceed the equity in the property on the date of dissolution of the marriage, the death of a spouse, or disposition of the property.

(e) The use and enjoyment of property during a marriage for which a claim for economic contribution to the property exists does not create a claim of an offsetting benefit against the claim.

§ 3.404. Application of Inception of Title Rule; Ownership Interest Not Created

(a) This subchapter does not affect the rule of inception of title under which the character of property is determined at the time the right to own or claim the property arises.

(b) The claim for economic contribution created under this subchapter does not create an ownership interest in property, but does create a claim against the property of the benefited estate by the contributing estate. The claim matures on dissolution of the marriage or the death of either spouse.

§ 3.405. Management Rights

This subchapter does not affect the right to manage, control, or dispose of marital property as provided by this chapter.

§ 3.406. Equitable Lien

(a) On dissolution of a marriage, the court shall impose an equitable lien on property of a

marital estate to secure a claim for economic contribution in that property by another marital estate.

(b) On the death of a spouse, a court shall, on application for a claim of economic contribution brought by the surviving spouse, the personal representative of the estate of the deceased spouse, or any other person interested in the estate, as defined by Section 3, Texas Probate Code, impose an equitable lien on the property of a benefited marital estate to secure a claim for economic contribution by a contributing marital estate.

(c) Subject to homestead restrictions, an equitable lien under this section may be imposed on the entirety of a spouse's property in the marital estate and is not limited to the item of property that benefited from an economic contribution.

§ 3.407. Offsetting Claims

The court shall offset a claim for one marital estate's economic contribution in a specific asset of a second marital estate against the second marital estate's claim for economic contribution in a specific asset of the first marital estate.

§ 3.408. Claim for Reimbursement

(a) A claim for economic contribution does not abrogate another claim for reimbursement in a factual circumstance not covered by this subchapter. In the case of a conflict between a claim for economic contribution under this subchapter and a claim for reimbursement, the claim for economic contribution, if proven, prevails.

(b) A claim for reimbursement includes:

> (1) payment by one marital estate of the unsecured liabilities of another marital estate; and
> (2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse.

(c) The court shall resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate.

(d) Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate on property that does not involve a claim for economic contribution to the property.

§ 3.409. Nonreimbursable Claims

The court may not recognize a marital estate's claim for reimbursement for:

(1) the payment of child support, alimony, or spousal maintenance;
(2) the living expenses of a spouse or child of a spouse;
(3) contributions of property of a nominal value;
(4) the payment of a liability of a nominal amount; or
(5) a student loan owed by a spouse.

§ 3.410. Effect of Marital Property Agreements

A premarital or marital property agreement, whether executed before, on, or after September 1, 1999, that satisfies the requirements of Chapter 4 is effective to waive, release, assign, or partition a claim for economic contribution under this subchapter to the same extent the agreement would have been effective to waive, release, assign, or partition a claim for reimbursement under the law as it existed immediately before September 1, 1999, unless the agreement provides otherwise.

§ 7.007. Disposition of Claim for Economic Contribution or Claim for Reimbursement

(a) In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for economic contribution as provided by Subchapter E, Chapter 3, and in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage, shall:

> (1) order a division of a claim for economic contribution of the community marital estate to the separate marital estate of one of the spouses;
>
> (2) order that a claim for an economic contribution by one separate marital estate of a spouse to the community marital estate of the spouses be awarded to the owner of the contributing separate marital estate; and
>
> (3) order that a claim for economic contribution of one separate marital estate in the separate marital estate of the other spouse be awarded to the owner of the contributing marital estate.

(b) In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for reimbursement as provided by Subchapter E, Chapter 3, and shall apply equitable principles to:

> (1) determine whether to recognize the claim after taking into account all the relative circumstances of the spouses; and

(2) order a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage.

C. PATTERN JURY CHARGES 2002. Here is the latest version of the instructions and questions that are included in the 2002 PATTERN JURY CHARGES (FAMILY LAW), relating to claims for economic contribution.

PJC 204.1 Economic Contribution

PJC 204.1A Economic Contribution--Instructions

Texas law recognizes three marital estates: the community property owned by the spouses together, the separate property owned individually by the husband, and the separate property owned individually by the wife.

A spouse must prove by clear and convincing evidence that funds expended were the separate property of that spouse. "Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

"Fair market value" means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

In answering Questions *3* through *10*, do not consider expenditures for ordinary maintenance and repair, expenditures for taxes, interest, or insurance, or the contribution by a spouse of time, toil, talent, or effort during the marriage.

The principal amount of a debt referred to in Questions *3, 4*, *6*, and *9* may be reduced by payment on the principal of the debt and by refinancing, to the extent the refinancing reduces the principal amount in the manner described in the question.

PJC 204.1B Economic Contribution—Equity at Date of Dissolution of Marriage or Disposition of Property

QUESTION 1

With respect to *PROPERTY ITEM OF PARTY A*, state in dollars the amount of each of the following on *CURRENT DATE OR DATE OF PROPERTY DISPOSITION*:

1. the fair market value

Answer: $_________

2. the principal amount of *LIENS ON CURRENT DATE OR DATE OF PROPERTY DISPOSITION*

Answer: $_________

If in answer to Question 1 you have found that the fair market value is less than or equal to the principal amount of debt, do not answer the following questions; otherwise, answer the following questions.

PJC 204.1C Economic Contribution—Equity at Date of Marriage or First Economic Contribution by Contributing Estate

QUESTION 2

With respect to *PROPERTY ITEM OF PARTY A*, state in dollars the amount of each of the following on *DATE OF MARRIAGE OR FIRST ECONOMIC CONTRIBUTION*:

1. the fair market value

Answer: $_________

2. the principal amount of *LIENS ON DATE OF MARRIAGE OR FIRST ECONOMIC CONTRIBUTION*

Answer: $________

PJC 204.1D Economic Contribution—Reduction of Debt Secured by Property Owned before Marriage

QUESTION 3

With respect to *PROPERTY ITEM OF PARTY A*, state in dollars the amount, if any, of the reduction of the principal amount of *DEBT W*, to the extent the debt existed at the time of marriage--

1. by the community estate Answer: $______

2. by *PARTY B's separate estate,* as proved by clear and convincing evidence Answer: $______

3. during the marriage by *PARTY A's separate estate,* as proved by clear and convincing evidence Answer: $______

PJC 204.1E Economic Contribution—Reduction of Debt Secured by Property Received by Spouse after Marriage by Gift, Devise, or Descent

QUESTION 4

With respect to *PROPERTY ITEM OF PARTY A*, state in dollars the amount, if any, of the reduction of the principal amount of *DEBT X*, to the extent the debt existed at the time the property was received--

1. by *the community estate* Answer: $______

2. by *PARTY B's separate estate,* as proved by clear and convincing evidence Answer: $______

3. during the marriage by *PARTY A's separate estate,* as proved by clear and convincing evidence Answer: $______

PJC 204.1F Economic Contribution—Reduction of Debt Incurred during Marriage to Acquire or Improve Property

QUESTION 5

Was *DEBT Y* incurred during the marriage *for capital improvements to PROPERTY ITEM OF PARTY A?*

Answer: __________________

If you have answered Question 5 "Yes," then answer Question 6; otherwise, do not answer Question 6.

QUESTION 6

State in dollars the amount, if any, of the reduction of the principal amount of *DEBT Y* --

1. by *the community estate* Answer: $______

2. by *PARTY B's separate estate,* as proved by clear and convincing evidence Answer: $______

3. during the marriage by *PARTY A's separate estate,* as proved by clear and convincing evidence Answer: $______

PJC 204.1G Economic Contribution—Reduction of Debt Incurred during Marriage to Acquire or Improve Separate Property—Separate-Estate Debt

QUESTION 7

Did *CREDITOR FOR DEBT Z* agree to look for repayment solely to the separate estate of *PARTY A*?

Answer: __________________

If you have answered Question 7 "Yes," then answer Question 8; otherwise, do not answer Question 8.

QUESTION 8

Was *DEBT Z* incurred during the marriage *to acquire PROPERTY ITEM OF PARTY A?*

Answer: __________________

If you have answered Question 8 "Yes," then answer Question 9; otherwise, do not answer Question 9.

QUESTION 9

State in dollars the amount, if any, of the reduction of the principal amount of *DEBT Z*--

1. by *the community estate* Answer: $______

2. by *PARTY B's separate estate,* as proved by clear and convincing evidence Answer: $______

3. during the marriage by *PARTY A's separate estate,* as proved by clear and convincing evidence Answer: $______

PJC 204.1H Economic Contribution—Capital Improvements—Other Than by Incurring Debt

QUESTION 10

State in dollars the amount, if any, expended for capital improvements to *PROPERTY ITEM OF PARTY A* other than by incurring debt—

1. by *the community estate* Answer: $______

2. by *PARTY B's separate estate,* as proved by clear and convincing evidence Answer: $______

3. during the marriage by *PARTY A's separate estate,* as proved by clear and convincing evidence Answer: $______

COMMENT

When to use. The foregoing instructions and questions may be used to submit a claim for economic contribution by a contributing marital estate against a benefited marital estate. Only the portions of the instruction that are relevant in the particular case should be given. Likewise, only those of the questions in PJC 204.1D through PJC 204.1H that are relevant in the particular case should be given.

A separate series of relevant questions should be presented to the jury for each item of property in which a claim of economic contribution is made. The jury's answers are to be considered by the court in calculating the economic contribution of each estate in assets of another estate, as well as the effect of any offsets.

Characterization of property. Any instructions and questions necessary for establishing the characterization of relevant property should be given to the jury before these instructions and questions concerning economic contribution are given. See PJC 202.1 through PJC 202.15 regarding characterization of property.

Rewording for specific claims. The questions in PJC 204.1B through 204.1H should be reworded as appropriate to submit the particular claims that are in issue in the case. In each series, descriptions of the specific item of property and of the particular debt or debts should be included where indicated.

Burden of proof. Section 3.003(b) of the Texas Family Code provides that the degree of proof necessary to establish that property is separate property is clear and convincing evidence. Tex. Fam. Code Ann. § 3.003(b) (Vernon Supp. 2002). No other rule of law relevant to marital property appears to require a degree of proof greater than preponderance of the evidence, which is generally required for fact issues in civil litigation.

In the context of reimbursement other than economic contribution, the Committee has concluded that a spouse seeking reimbursement must prove each element of the claim by a preponderance of the evidence, but that a spouse seeking reimbursement to a separate estate must prove by clear and convincing evidence that the funds expended were separate property. See PJC 204.2 (reimbursement other than economic contribution). In the context of a separate estate's making a claim for economic contribution, it is less certain what degree of proof is required for elements of the claim other than

the extent of separate funds expended.

The Committee has considered whether the establishment of a claim for economic contribution might be considered the establishment of property and, thus, be encompassed as to all elements of the claim by Code section 3.003(b). The Committee notes that Code section 3.404(b) provides that a claim for economic contribution does not create an ownership interest in property but instead creates a claim (which matures on dissolution of the marriage or the death of either spouse) against the property of the benefited estate by the contributing estate. *See* TFC § 3.404(b).

The Committee has concluded that, in a claim for economic contribution by either a separate or a community estate, the burden of proving that funds expended were separate property must be met by clear and convincing evidence; other elements of the claim must be proved by a preponderance of the evidence.

PJC 204.1A. The instruction on the three marital estates is based on Tex. Fam. Code Ann. § 3.401(4) (Supp. 2002). The instruction on burden of proof by clear and convincing evidence is based on TFC § 3.003 (Vernon 1998). (See comment entitled "Burden of proof" above.) The definition of "clear and convincing evidence" is based on TFC § 101.007 (1996). The definition of "fair market value" is based on *City of Pearland v. Alexander*, 483 S.W.2d 244 (Tex. 1972), and *Wendlandt v. Wendlandt*, 596 S.W.2d 323, 325 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). The instruction regarding expenditures and contributions that are not to be considered is based on TFC § 3.402(b) (Supp. 2002). The instruction regarding debt reduction through refinancing is based on TFC § 3.402(a)(5).

PJC 204.1B. The question in PJC 204.1B is based on TFC §§ 3.401(3), 3.403(b)(1), (d). The current date or the date of disposition of the item of property should be substituted for *CURRENT DATE OR DATE OF PROPERTY DISPOSITION*. A description of all lawful liens specific to the property on that date should be substituted for *LIENS ON CURRENT DATE OR DATE OF PROPERTY DISPOSITION*. Determination of the existence of a "lawful lien specific to the property" is a question of law for court determination.

PJC 204.1C. The question in PJC 204.1C is based on TFC §§ 3.401(3), 3.403(b)(2)(B)(ii). The date of the marriage or, if later, the date of the first economic contribution by the contributing estate should be substituted for *DATE OF MARRIAGE OR FIRST ECONOMIC CONTRIBUTION*. A description of all lawful liens specific to the property on that date should be substituted for *LIENS ON DATE OF MARRIAGE OR FIRST ECONOMIC CONTRIBUTION*. Determination of the existence of a "lawful lien specific to the property" is a question of law for court determination.

PJC 204.1D. The question in PJC 204.1D is based on TFC § 3.402(a)(1). A description of a debt secured by a lien on property owned before marriage should be substituted for *DEBT W*.

In Question 3, only the estate or estates alleged to have contributed should be listed in the answer portion.

PJC 204.1E. The question in PJC 204.1E is based on TFC § 3.402(a)(2). A description of a debt secured by a lien on property received by a spouse by gift, devise, or descent during marriage should be substituted for *DEBT X.*

In Question 4, only the estate or estates alleged to have contributed should be listed in the answer portion.

PJC 204.1F. The questions in PJC 204.1F are based on TFC § 3.402(a)(3). A description of that part of a debt secured by a lien on property, including a home equity loan, alleged to have been incurred during the marriage to acquire the property or make capital improvements to it should be substituted for *DEBT Y*.

In an appropriate case, the words *for capital improvements to* should be replaced with the words *to acquire*. (This substitution is not appropriate in the case of separate property. See PJC 202.5 (property acquired on credit).)

If it is uncontested that the debt was incurred during the marriage to acquire the property or make capital improvements to it, Question 5 and the instruction following it should be omitted. In Question 6, only the estate or estates alleged to have contributed should be listed in the answer portion.

PJC 204.1G. The questions in PJC 204.1G are based on TFC § 3.402(a)(4). A description of that part of a debt secured by a lien on property alleged to have been incurred during the marriage to acquire the property or make capital improvements to it, and for which the creditor agreed to look for repayment solely to the separate estate of the spouse on whose property the lien attached, should be substituted for *DEBT Z.*

In an appropriate case, the words *to acquire* should be replaced with the words *for capital improvements to*.

If it is uncontested that the creditor agreed to look for repayment solely to the benefited estate, Question 7 and the instruction following it should be omitted. If it is uncontested that the debt was incurred during the marriage to acquire the property or make capital improvements to it, Question 8 and the instruction following it should be omitted. In Question 9, only the estate or estates alleged to have contributed should be listed in the answer portion.

PJC 204.1H The question in PJC 204.1H is based on TFC § 3.402(a)(6).

IX. RELOCATION OF CHILDREN AFTER DIVORCE. – Lenz and El Paso decision

X. GRANDPARENTS RIGHTS (*Troxel v. Granville*). In *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000), the U.S. Supreme Court astounded many family lawyers by invoking the doctrine of "substantive due process of law" to strike down a state statute permitting non-family members to petition a court for visitation with minor children. The U.S. Supreme Court was not sufficiently unified in its views to generate a majority opinion. As a result, to understand the import of the case it is necessary to compare the court's plurality opinion to various concurring opinions and dissenting opinions to "triangulate" the precedential import of the decision.

A. JUSTICE O'CONNOR'S PLURALITY OPINION. "The Due Process Clause does not permit a State to infringe on the fundamental rights of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 2064, 147 L.Ed.2d 49 (2000). That statement is the crux of the plurality opinion of Justice Sandra Day O'Connor supporting a decision to declare unconstitutional "as applied" a Washington state statute permitting trial courts to grant non-relatives access to children. Justice O'Connor's Opinion was joined by C.J. Rehnquist, Justice Ginsberg, and Justice Breyer. Because a majority of the Court did not join in the Opinion, the Opinion does not constitute stare decisis.

B. JUSTICE SOUTER'S CONCURRING OPINION. Justice Souter wrote a concurring opinion in which he noted that the Washington Supreme Court had invalidated the statute in question as "facially invalid," and that it was not necessary for the U.S. Supreme Court to consider the precise scope of a parent's rights, and whether harm must be shown as a prerequisite for non-parent access. Justice Souter agreed with the Washington Supreme Court's ruling that the statute was facially invalid, because it permitted "any person" at "any time" to see court-ordered access to children.

C. JUSTICE THOMAS'S CONCURRING OPINION. Justice Thomas wrote a concurring opinion in which he said that no one had argued that substantive due process analysis is not viable, and so his opinion on that score was not brought to bear. He said likewise the plurality opinion did not address that underlying issue. Justice Thomas indicated that "strict scrutiny" should be applied to all fundamental rights, and that the Washington statute lacks even a legitimate governmental interest, much less a compelling interest that would be required by strict scrutiny analysis.

D. JUSTICE STEVENS' DISSENTING OPINION. Justice Stevens wrote a dissenting opinion in which he stated his opinion that the Washington state statute was not "facially invalid." Justice Stevens further rejected the Washington Supreme Court's idea that a non-parent must show harm in denying access before access can be ordered. Justice Stevens also raised the issue of what rights the children have in such a fight.

E. JUSTICE SCALIA'S DISSENTING OPINION. Justice Scalia wrote a dissenting opinion in which he rejected the whole idea of substantive due process, which draws support from three prior cases, as a basis for invalidating legislation. Justice Scalia also said that the "sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce

such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance."

F. JUSTICE KENNEDY'S DISSENTING OPINION. Justice Kennedy wrote a dissenting opinion in which he disagreed with the Washington Supreme Court's view that best interest of the child is never the appropriate standard for court-ordered non-parent access, and that harm must be shown to warrant court intervention.

G. TEXAS COURT DECISIONS REGARDING *TROXEL* AND NON-PARENT RIGHTS.

1. In re T.J.K. In the case of *In re T.J.K.*, 62 S.W.3d 830 (Tex. App.--Texarkana, Nov. 15, 2001), a custodial father filed a motion to modify a prior agreed order whereby the maternal grandmother was given grandparent access to a child. One ground for the motion to modify was the U.S. Supreme Court's decision in *Troxel v. Granville*. The trial court rejected the constitutional attack on the grounds that by entering into the agreed order the father waived any constitutional complaint he may have had. The Texarkana Court of Appeals rejected this view, and said that the father was not precluded by his earlier agreement from seeking to modify by elimination the earlier order. The appellate court also held that a finding that the Texas statute is unconstitutional would be a material change that could support the requested modification. The case was remanded to the trial court to consider the constitutional challenge.

2. Lilley v. Lilley. In the case of *Lilley v. Lilley*, 43 S.W.3d 703, 710- 713 (Tex. App.--Austin April 12, 2001, no pet.), the Austin Court of Appeals considered the substantive due process invalidity of Texas Family Code § 153.433, providing for grandparent access. The Court upheld the Texas statute, noting the following:

a. the Washington statute [in *Troxel v. Granville*] did not require a trial court to give any validity to the parent's decision, placing the best-interest determination solely in the hands of the trial judge, who "gave no special weight at all to Granville's determination of her daughters' best interests" and "placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters." In the *Lilley* case, the appellate court noted that "[t]here is no indication that the district court here made any such presumptions or required Wendy [the mother] to show S.M.L. [the child] would be harmed by visitation with Ray [the paternal grandfather]. *Lilley*, 43 S.W.3d at 712.

b. Section 153.433 of the Texas Family Code is not "breathtakingly broad," as was the Washington statute in *Troxel*. Section 153.433 allows only grandparents, under particular circumstances, to petition for access to a child, provided it is in the child's best interest. *Lilley*, 43 S.W.3d at 712.

c. The Texas grandparent access statute has already been examined and held to be constitutional. *Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex. Civ. App.--Houston [14th

Dist.] 1975, writ ref'd n.r.e.), overruled on other grounds by *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex.1989) ("The state has sufficient interest in the family relationship to permit legislation in this area."). *Lilley*, 43 S.W.3d at 712.

d. "[I]n Troxel the parents were never married and the State had not been invited to intervene in the family relationship; the Troxels had enjoyed regular visitation with their grandchildren for two and a half years before their son's suicide and petitioned for access about seven months later. Troxel, 120 S.Ct. at 2057. In our cause, Wendy and Clay sought the State's intervention into their family's relationships when they filed to dissolve their marriage. When Clay committed suicide in the midst of an unpleasant divorce with parental access issues, the State was already involved in making visitation arrangements for S.M.L. Ray filed his petition during an emotionally charged situation with the daughter-in-law he partially blamed for his son's recent suicide." *Lilley*, 43 S.W.3d at 712.

e. "Perhaps the most important distinction between Troxel and this cause is that Granville never sought to deny visitation to the grandparents as Wendy does on this appeal; Granville's consistent position was that she wanted shorter and fewer visits than those requested by the Troxels. Id. at 2062-63. Wendy, on the other hand, has taken inconsistent positions about Ray's access to S.M.L. She stated multiple times that she believed it would be in S.M.L.'s best interest to have a relationship with her grandfather. . . . On appeal, she now takes the position that Ray should be allowed no visitation because he poses "a serious threat to [S.M.L.'s] safety and well being," and is not fit to have authority over her. Given her earlier agreements and the eighteen months of successful visitation, Wendy's argument on appeal that visitation with Ray is suddenly not in S.M.L.'s best interest appears disingenuous." *Lilley*, 43 S.W.3d at 712-13.

The Austin Court of Appeals later made the following comment about its holding in *Lilley v. Lilley*:

> Sailor contends by her first issue that the visitation order and the statute authorizing it, Family Code section 153.433, violate her due process right to autonomy in child-rearing decisions. Considering a similar argument shortly after Sailor filed her brief, this Court held that neither section 153.433 nor an order requiring grandparent visitation violated the parents' due-process rights under the Fourteenth Amendment. Lilley v. Lilley, 43 S.W.3d 703, 710-713 (Tex. App.--Austin 2001, no pet.). We find no reason to alter our decision regarding the facial constitutionality of the statute.

Although the Austin Court of Appeals sees the *Lilley* case as a "facial invalidity" case, the court's analysis suggests both a "facial invalidity" analysis and an "as applied" analysis.

3. Sailor v. Phillips. In the case of *Sailor v. Phillips*, 2001 WL 1379923, *2 (Tex. App.--Austin Nov. 8, 2001) (not for publication), the Austin Court of Appeals again rejected a "facial

invalidity” attack on the grandparent access statute, Tex. Fam. Code § 53.433, and then proceeded to consider and reject an “as applied” attack, based on substantive due process of law. The Court mentioned *Troxel*, then discussed the wide discretion given to trial judges in visitation decisions, and meshed the two together in this way:

> A trial court has broad discretion in determining the best interest of a child in visitation decisions. Gillespie v. Gillespie, 644 S.W.2d 449, 451 (Tex. 1982); G.K. v. K.A., 936 S .W.2d 70, 72 (Tex. App.--Austin 1996, writ denied); see Dennis v. Smith, 962 S.W.2d 67, 68 (Tex. App.--Houston [1st Dist.] 1997, pet. denied). We will reverse a trial court's order only if the trial court abused its discretion--i.e., acted unreasonably, arbitrarily, or without reference to any guiding principles. G.K., 936 S.W.2d at 72. There is no abuse of discretion if the decision is supported by sufficient, competent evidence. Gillespie, 644 S.W .2d at 451; Dennis, 962 S.W.2d at 68. A trial court does not necessarily abuse its discretion by deciding an issue differently than an appellate court would. Wright v. Wright, 867 S.W.2d 807, 816 (Tex. App.--El Paso 1993, writ denied). The trial court, as fact finder, resolves conflicts in the evidence and determines the weight and credibility to give to witness testimony. Schneider v. Schneider, 5 S.W.3d 925, 931 (Tex. App.--Austin 1999, no pet.). A fact finder's decision on conflicts in the evidence is generally conclusive. Id. These standards apply to orders for grandparent visitation. Lilley, 43 S.W.3d at 705-06. *In applying these principles to grandparent access, the trial court must accord some special weight to the parent's determination of what access is reasonable*. *See Troxel v. Granville*, 530 U.S. 57, 70 (2000) (4-2-3 decision, O'Connor, J. writing for the four-member plurality). However, when the parent denies all grandparent access in circumstances governed by section 153.433, the trial court must determine what access is reasonable. *See Lilley*, 43 S.W.3d at 712-713; *see also Troxel*, 530 U.S. at 71. [Emphasis added]

4. In re Aubin. In the case of *In re Aubin*, 29 S.W.3d 199, 203-4 (Tex. App.--Beaumont 2000, no pet.), the appellate court considered a mandamus challenge to an order from an ex parte Texas writ of attachment directing sister-state officials to take custody of children from their temporary-managing-conservator mother (Aubin) and deliver the children into the possession of non-parents (the Burks) who were designated under temporary orders as possessory conservators of the children. The Court noted:

> Absent a finding, supported by evidence, *that the safety and welfare of the children is significantly impaired by the denial of the Burks' visitation*, Aubin's decision regarding whether the children will have any contact with the Burks is an exercise of her fundamental right as a parent. That right is shielded from judicial interference by the Due Process clause of the United States Constitution. Texas Family Code Section 105.001, is unconstitutional as applied to Aubin in the trial court's June 15, 1998, and June 29, 1998, temporary restraining orders [FN5] and the trial court's

> November 2, 1998, temporary order. The trial court clearly abused its discretion in appointing the Burks as temporary possessory conservators. We direct the Honorable Chap Cain, Judge of the 253rd District Court of Liberty County, Texas, to vacate the November 2, 1998, temporary orders. [Emphasis added]

5. Clark v. Funk. In *Clark v. Funk*, 2000 WL 1203942 (Tex. App.--El Paso Aug. 24, 2000, no pet.) (not for publication), the El Paso Court of Appeals upheld the appointment of a mother, a father, and two paternal grandparents, as joint managing conservators of children. When the mother and father disagreed about management of the children, the paternal grandparents had the final say-so. The El Paso Court of Appeals rejected the mother's *Troxel* attack, saying:

> The Texas statute upon which Clark bases her claim is, unlike the Washington visitation statute in Troxel, very limited in its application and does not simply depend upon a best interest of the child finding. Moreover, and again unlike the situation in Troxel, the record before us clearly reflects that the trial court's order was based, not merely on its singular determination of the best-interest question, but was firmly founded upon special factors that justify the imposition of a tie breaking role for the grandparents that imposes a limited restriction of both parent's fundamental right to make decisions concerning the raising of their children.
>
> A parent appointed conservator of a child has certain rights, privileges, duties, and powers, unless a written finding by the court determines it would not be in the best interest of the child. See Tex.Fam.Code Ann. § 14.02(b). [FN7] When a court appoints both parents conservators, the court shall specify the rights, privileges, duties, and powers that are to be retained by both parents, that are to be exercised jointly, and that are to be exercised exclusively by one parent. See Tex.Fam.Code Ann. § 14.02(a). [FN8] The court allocated the parental rights, privileges, duties, and powers between Clark and Glenn Funk and his parents, for the most part treating Glenn Funk and his parents as a unit. For example, no rights, privileges, duties, or powers are to be exercised exclusively by Glenn Funk but rather exclusively by Glenn Funk and his parents, John and Dorothy Funk.
>
> We do not view the court's actions as depriving Clark of her managing conservatorship powers. The court had the power to grant certain rights, privileges, duties, and powers exclusively to Glenn Funk but did not. Instead, the court attempted to allocate the rights, privileges, duties, and powers between Clark and the Funks and gave the grandparents controlling say only when Clark and Glenn Funk could not reach agreement if disputes arise. The court further found that such an arrangement was in the best interest of the boys. The trial court did not abuse its discretion. We overrule Clark's third appellate issue.

XI. MEDIATED SETTLEMENT AGREEMENTS. In family law cases, it sometimes happens that the parties enter into a mediated settlement agreement, sign the paperwork, and leave the mediation, only to find out that the next day someone wants out of the agreement. When this happens in ordinary civil litigation, and consent is withdrawn after a settlement but before judgment is rendered on the settlement, the party seeking judgment on the settlement agreement must amend his or her pleadings and seek specific performance of the agreement. *See Padilla v. La France*, 907 S.W.2d 454 (Tex.1995). This is not so under the Texas Family Code. Under the Family Code, a mediated settlement agreement (MSA) is binding when it recites that it is not revocable and it is signed by the parties and their lawyers, and either party may move for rendition of judgment based on the agreement, which the trial court is obliged to grant. *See In re Marriage of Ames*, 860 S.W.2d 590, 591-2 (Tex. App.–Amarillo 1993, no writ) (judgment rendered on motion); *Alvarez v. Reiser*, 958 S.W.2d 232, 234 (Tex. App.–Eastland 1997, writ denied) (separate suit for enforcement not necessary).

A. PUBLIC POLICY FAVORS MEDIATION.

CPRC § 154.002 Policy

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

B. FAMILY CODE MEDIATION PROVISIONS. Tex. Fam. Code § 6.602 provides that a MSA is binding on the spouses 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.

If an MSA meets the requirements of Section 6.602, then Section 6.602(c) says that "a party is entitled to judgment on the notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law."

Equivalent provisions are set out in Tex. Fam. Code § 153.0071, for MSAs in suits affecting the parent-child relationship.

C. CASE LAW. In the case of *In re Marriage of Ames*, 860 S.W.2d 590, 591-2 (Tex. App.--Amarillo 1993, no writ), when the husband sought to repudiate an MSA in a divorce, the trial court granted the wife's motion for entry of judgment based on the agreement. The court of appeals affirmed, saying:

> If voluntary agreements reached through mediation were non-binding, many positive efforts to amicably settle differences would be for naught. If parties were free to repudiate their agreements, disputes would not be finally resolved and traditional litigation would recur. In order to effect the purposes of mediation and other alternative dispute resolution mechanisms, settlement agreements must be treated with the same dignity and respect accorded other contracts reached after arm's length negotiations. Again, no party to a dispute can be forced to settle the conflict outside of court; but if a voluntary agreement that disposes of the dispute is reached, the parties should be required to honor the agreement.

In *In re Marriage of Banks*, 887 S.W.2d 160, 163 (Tex. App.--Texarkana 1994, no writ), the wife tried to revoke her consent to an MSA in a divorce and custody case. The trial court rendered judgment on the agreement, and the wife appealed. The court of appeals affirmed, saying:

> A party who has reached a settlement agreement disposing of a dispute through alternative dispute resolution procedures may not unilaterally repudiate the agreement.

In *Alvarez v. Reiser*, 958 S.W.2d 232, 234 (Tex. App.--Eastland 1997, writ denied), the wife tried to evade judgment based upon an MSA. Judgment was rendered on the agreement, and the judgment was affirmed on appeal. The Court said:

> Under the language of subsections d and e, mediated settlement agreements complying with Section 153.0071 are binding, and a party to such an agreement is entitled to a judgment. Unilateral withdrawal of consent does not negate the enforceability of the agreement, and a separate suit for enforcement of a contract is not necessary.

The appellate court, 958 S.W.2d at 233, indicated that the agreement was binding not only on the parties, but also on the trial court:

> The agreement met the requirements of Section 153.0071(d). . . . Therefore, under Section 153.0071(e), the trial court was required to enter judgment on the mediated settlement agreement.

In *Spinks v. Spinks*, 939 S.W.2d 229, 230 (Tex. App.--Houston [1st Dist.] 1997, no writ), the wife fought rendition of judgment based on an MSA. The appellate court said:

> In suits affecting the parent-child relationship, a mediated settlement agreement is binding on the parties and therefore not subject to revocation if the agreement (1) provides in a separate paragraph an underlined statement 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. Tex. Fam. Code Ann. § 153.0071(d) (Vernon 1996). In such event, a party cannot prevent rendition of a judgment based on the agreement by withdrawing his or her consent after the requirements of section 153.0071(d) have been fulfilled but before rendition.

In that particular case, the agreement was not irrevocable because it did not contain the statutory recital of non-revocability. The wife was allowed to repudiate, and judgment could not be rendered on the agreement.

In *Cayan v. Cayan*, 38 S.W.3d 161 (Tex. App.--Houston [14th Dist.] 2000, pet. denied), the court upheld a judgment rendered on a mediated settlement agreement, despite the fact that one of the parties to the divorce attempted to rescind consent to the agreement. The court also held that the court has no power to reject an MSA on the ground that it is not a just and right division of the parties' estate. The court said:

> [T]he language of section 6.602 reflects that when the Legislature enacted that section, it definitely and deliberately created a procedural shortcut for enforcement of mediated settlement agreements in divorce cases. Equally apparent is that section 6.602 does not conflict with, but is an exception to, section 7.006. We are similarly persuaded that section 6.602 is also an exception to sections 7.001 and 7.006 in allowing a judgment to be entered on a section 6.602 agreement without a determination by the trial court that the terms of the agreement are just and right.

In *Boyd v. Boyd*, 67 S.W.3d 398, 401 (Tex. App.--Fort Worth 2002, no pet.), the court refused to enforce an MSA in a divorce when "the parties to a mediated settlement agreement have represented to one another that they have each disclosed the marital property known to them," but it is later discovered that one party did not make a fair and reasonable disclosure of certain property.

XII. ARBITRATION IN FAMILY LAW MATTERS.

A. STATUTORY BASES FOR ARBITRATION. The ability of the parties to opt out of the civil litigation system is established by federal statutes 9 U.S.C. § 1-ff, by the Texas Civil Practice & Remedies Code § ch. 171, and by the Texas Family Code § 6.601 (husband and wife issue) and § 153.071 (parent-child issues). Additionally, Chapter 154 of the Civil Practice & Remedies Code[TCP&RC] permits Texas courts to refer a pending case to arbitration, and the parties then decide whether the arbitration will be binding or non-binding. Other statutes provide for arbitration in other areas of commerce.

B. HISTORY OF ARBITRATION IN TEXAS. A student author described the history of arbitration in Texas in this manner:

> The origins of Texas arbitration laws have been attributed to Roman law and to Spanish and Mexican law. [FN57] Nonetheless, it is established that the legal right to arbitration is originally found in the 1827 Constitution of the Mexican State of Coahuila and Texas under the Mexican Federacy. [FN58] The Republic of Texas Constitution of 1836 makes no specific mention of the 1827 arbitration provision, but it specifically adopted the common law of England, which includes arbitration. [FN59] Every constitution of the State of Texas, however, has had a provision that requires the legislature to pass the laws necessary to settle disputes by arbitration. [FN60] In 1846, the first statutory arbitration provision enacted enabled parties to arbitrate a dispute in any manner they elected. [FN61] This statute remained in effect until 1965, when Texas adopted its first modern arbitration statute. [FN62] [Footnotes omitted]

Peter F. Gazda, Comment, *Arbitration: Making Court-Annexed Arbitration an Attractive Alternative in Texas*, 16 ST. MARY'S L.J. 409, 422-23 (1985). *See Cox v. Giddings*, 9 Tex. 44 (1852) (interpreting arbitration statute); *Carpenter v. North River Insurance Company*, 436 S.W.2d 549, 551 (Tex. Civ. App.-- Houston [14th Dist.] 1969, writ ref'd n. r. e.) (discussing Texas' first arbitration statute).

C. TEXAS PUBLIC POLICY FAVORS ARBITRATION. The arbitration statutes are seen by Texas courts to reflect, as noted in *Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 950 S.W.2d 375, 378 (Tex. App.--Tyler 1996, writ dism'd w.o.j.), that:

> there is a strong presumption in Texas public policy favoring arbitration.

Accord, *Houston Lighting & Power Co. v. San Antonio*, 896 S.W.2d 366, 370 (Tex. App.-- Houston [1st Dist.] 1995, no writ).

D. ADR VS. MANDATORY ARBITRATION. The Civil Practice & Remedies Code has two types of arbitration: 1) as an alternate dispute resolution mechanism, and 2) as a mandatory requirement pursuant to an arbitration clause in an agreement.

1. Discretionary Referral to Arbitration. TCP&RC § 154.021 permits the court to refer a pending dispute to an alternate dispute resolution procedure, which includes arbitration. *See* TCP&RC 154.027 (Arbitration). The statute says that the court *may* refer the case to arbitration, on its own motion or the motion of a party. Once the case is referred to arbitration for ADR, the parties can elect whether the arbitration is binding or non-binding. TCP&RC § 154.027(b).

2. Mandatory Arbitration. Where the parties enter into a contract providing that a dispute will be resolved by arbitration, the court is required to stay any lawsuit filed on the subject and to refer the dispute to arbitration for resolution. The following Texas Civil Practice & Remedies Code section controls the court's discretion as far as referring such a case to arbitration:

> **§ 171.021. Proceeding to Compel Arbitration**
>
> (a) A court shall order the parties to arbitrate on application of a party showing:
> (1) an agreement to arbitrate; and
> (2) the opposing party's refusal to arbitrate.
>
> (b) If a party opposing an application made under Subsection (a) denies the existence of the agreement, the court shall summarily determine that issue. The court shall order the arbitration if it finds for the party that made the application. If the court does not find for that party, the court shall deny the application.
>
> (c) An order compelling arbitration must include a stay of any proceeding subject to Section 171.025.

The following Texas Civil Practice & Remedies Code section controls the court's discretion as far as staying litigation pending arbitration:

> **§ 171.025. Stay of Related Proceeding**
>
> (a) The court shall stay a proceeding that involves an issue subject to arbitration if an order for arbitration or an application for that order is made under this subchapter.
>
> (b) The stay applies only to the issue subject to arbitration if that issue is severable from the remainder of the proceeding.

An interlocutory appeal can be taken from a decision of the trial court refusing to refer a matter to arbitration or granting a stay of arbitration. Tex. Civ. Prac. & Rem. Code § 171.098(a)(1).

Certain defenses can be raised to enforcement of the arbitration clause. See Paragraph IX.D below.

E. ARBITRATION UNDER THE TEXAS FAMILY CODE. There are two Family Code provisions relating to arbitrating family law cases. Both refer to discretionary referral of a pending case to arbitration as an alternate dispute resolution mechanism. The statutory sections themselves do not say whether they apply to a pre-existing agreement to arbitrate, such as is contemplated in Texas Civil Practice & Remedies Code ch. 171, or only to an assignment to ADR after a lawsuit is filed. However, Section 6.601 is under Family Code Chapter 6, Subchapter G, "Alternative Dispute Resolution." Section 153.0071 is itself titled "Alternate Dispute Resolution Procedures." This

suggests that the Family Code provisions are akin to Chapter 154 of the Texas Civil Practice & Remedies Code, and reflect a post-filing referral of the case to an alternative dispute resolution process. Unless public policy precludes it, it appears that pre-litigation agreements containing arbitration clauses relating to family law matters would fall under the general arbitration provisions of Texas Civil Practice & Remedies Code ch. 171.

Here are the Texas Family Code provisions:

> **§ 6.601. Arbitration Procedures**
>
> (a) On written agreement of the parties, the court may refer a suit for dissolution of a marriage to arbitration. The agreement must state whether the arbitration is binding or nonbinding.
>
> (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award.
>
> **§ 153.0071. Alternate Dispute Resolution Procedures**
>
> (a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.
>
> (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non- jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.
>
> (c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.
>
> (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 notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a 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. This subsection does not apply to suits filed under Chapter 262.

F. ABILITY TO ARBITRATE FAMILY LAW MATTERS. It appears that almost all family law issues can be subject to binding arbitration. One area of doubt would be enforcement proceedings where incarceration may be imposed. Family Code §§ 6.601 & 153.0071 clearly permit both binding and non-binding arbitration of family law issues as an alternate dispute resolution procedure in family law cases. Since the public policy of this state favors arbitration, there is no basis to argue that family law matters cannot be arbitrated in ADR. In an unpublished opinion, the Austin Court of Appeals upheld an ADR arbitration award dividing the property upon divorce. *Longton v. Longton*, No. 03-01-00093-CV (Tex. App.–Austin Nov. 15, 2001, pet. denied) (not for publication) [2001 WL 1422344]. The Austin Court of Appeals had previously upheld an ADR-related arbitration in a suit to establish paternity and terminate the parent-child relationship. *See Cooper v. Bushong*, 10 S.W.3d 20 (Tex. App.–Austin 1999, pet. denied).

Mandatory binding arbitration based on a prior agreement does not have the express authority of the Texas Family Code, but the Texas Civil Practice and Remedies Code provisions by their terms would apply, and the Family Code clearly does not prohibit arbitration in such a circumstance. Again, the public policy of this state is to uphold arbitration agreements. Several Texas appellate cases uphold arbitration in such a situation.

The First Court of Appeals in Houston upheld nonbinding arbitration in a family law matter, in the case of *In re Cartwright*, No. 01-01-00948-C, (Tex. App.--Houston [1st Dist.] April 4, 2002, n.p.h.) (to be published) [2002 WL 501595]. The parties settled their divorce, and in the agreement incident to divorce they had agreed that any claim or controversy arising from the final decree of AID would first be mediated, and if not settled, then be submitted to arbitration. After the divorce, the former wife sued for breach of the AID and the former husband moved to modify possession and access of the child. The court of appeals upheld the arbitration agreement, based on the Texas Civil Practice & Remedies Code provisions for arbitration. In doing so, the Court examined an earlier

Austin Court of Appeals case involving arbitration of paternity and termination of the parent-child relationship. The court said this about the earlier case:

> In Cooper v. Bushong, 10 S.W.3d 20 (Tex. App.--Austin 1999, pet. denied), the parties agreed to submit a [pending] paternity dispute and termination of parental rights to binding arbitration. Id. at 22-23. After the arbitrator made an award, one of the parties challenged the validity of the award. Id. at 23. The court of appeals cited the TAA for the requirements for setting aside an arbitration award, modifying an award, and confirming an award. [FN5] Id. at 24-26. We agree with the Cooper court that if, in a family law case, an arbitration is binding, as it was in Cooper, it is appropriate to follow the TAA.
>
> The TAA does not exclude family law claims from its coverage. See Tex. Civ. Prac. & Rem. Code Ann. § 171.002(a) (Vernon Supp. 2002). Therefore, the TAA applies to Family Code arbitration if the arbitration agreement specifies that the arbitration is binding. However, the TAA, by its own terms, cannot apply to non-binding Family Code arbitration. See, e.g., Tex. Civ. Prac. & Rem. Code Ann. §§ 171.053-.054, 171.081, 171.087-.092 (Vernon Supp. 2002) (pertaining to the award and its modification or correction, vacation, confirmation, and enforcement). The TAA necessarily contemplates that the arbitration award be binding and makes no provision for a nonbinding arbitration procedure. Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 221 (Tex. App.--Houston [1st Dist.] 1996, no writ). At most, those provisions in the TAA that may be applied to non-binding arbitration should be used as guidelines for the arbitration, not as controlling law.

In re Cartwright, p. *4. The arbitration agreement in *Cooper v. Bushong* was signed during the pendency of the case and arbitration was conducted pursuant to Family Code § 153.0071. *Cooper v. Bushong*, 10 S.W.3d at 22.

In another unpublished opinion, the Austin Court of Appeals upheld mandatory binding arbitration pursuant to an arbitration clause contained in an agreed decree of divorce signed by the court. *Mitchell v. Mitchell*, No. 03-01-00361-CV (Tex. App.–Austin July 31, 2001, no pet.) (not for publication) [2001 WL 855583]. At the time of divorce the spouses agreed to joint managing conservatorship of the parties' child, and restricted the child's residency to Travis and Williamson Counties. The agreed decree provided that any attempt to alter the residency restriction would be resolved by binding arbitration. The agreed decree also provided that any disagreements relating to a jointly-shared right or duty, or periods of possession or access, would be resolved through binding arbitration. These were the only issues subject to binding arbitration. The father filed a motion to modify the JMC to sole custody, or alternatively to be allowed to determine the child's primary residence and for an alteration of possessory periods, further arguing that his change of custody request preempted arbitration of issues subsumed in the custody question. The trial court denied arbitration, and the Austin Court of Appeals ruled that while the joint-to-sole modification

could not be arbitrated, the questions of modifying possessory periods and modifying the primary residence were to be arbitrated. The appellate court did not specify the sequence of the litigation, but common sense suggests that the judge or jury will determine the custody question, and that any other issues that need to be resolved will be handled in arbitration.

In the case of *Koch v. Koch*, 27 S.W .3d 93, 95 (Tex. App.--San Antonio 2000, no pet.), the parties entered into a premarital agreement prior to marriage, renouncing claims in the other party's separate property and agreeing to a 50-50 split of community property. The premarital agreement also provided for arbitration. Upon divorce the parties did go to arbitration, but at the husband's request the trial court set aside the arbitrator's award, without explanation, and scheduled the case for trial. In an interlocutory appeal, the San Antonio Court of Appeals reversed the trial court, and remanded the matter back to the trial court for a determination of whether the award should be confirmed in a decree, or modified, or set aside and sent back to arbitration, pursuant to TCP&RC §§ 171.088 and 171.089. Setting the case for trial was not an option which the court of appeals gave to the trial court.

There is no statutory or case law basis to say that agreements to arbitrate family law disputes, whether husband-wife issues or parent-child issues, cannot be enforced on public policy grounds. The two published cases, *Cartright* and *Koch*, uphold binding arbitration agreements entered into before the dispute arises, confirm mandatory arbitration in both husband-wife and parent-child disputes.

An unanswered question is whether, in binding arbitration relating to a child and resulting from a pre-dispute binding arbitration clause, the arbitrator's award pertaining to a child is subject to review by the court of continuing jurisdiction to determine whether the award is in the child's best interest. Tex. Fam. Code § 153.007(b) provides that arbitration awards based on ADR referrals under that Section are subject to a post-arbitration non-jury hearing for the trial court to determine whether the award is *not* in the best interest of the child. The burden at that hearing is on the party seeking to avoid the award. No such provision for judicial "second guessing" applies to binding arbitration under TCP&RC §171.021, so such a procedure would have to be "read into the statute" or declared to be the case, despite the absence of statutory language, based on public policy. None of the Texas appellate cases on pre-dispute arbitration clauses have indicated a second post-arbitration phase such as the one described in Family Code § 153.007(b).

G. POSSIBLE ISSUES TO ARBITRATE.

1. Attorney-Client Disputes. The ABA Standing Committee on Ethics and Professional Responsibility, in April of 2002, issued Formal Opinion 02-425, in which it declared that "[i]t is permissible under the Model Rules to include in a retainer agreement . . . a provision that requires binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent." The proscription of Model Rule of Professional Conduct 1.8(h), against upfront

agreements to limit malpractice exposure, does not apply because mandatory arbitration clauses do not prospectively limit liability but merely "prescribe a procedure for resolving such claims."

In Texas, an arbitration provision in an attorney-client employment agreement may run afoul of TCP&RC § 171.002, Scope of Chapter, which provides that:

> **§ 171.002. Scope of Chapter**
>
> (a) This chapter does not apply to:
>
> > (1) . . . ;
> > (2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50,000, except as provided by Subsection (b);
> > (3) a claim for personal injury, except as provided by Subsection (c);
> > (4). . . ;
> > (5) . . . .
>
> (b) An agreement described by Subsection (a)(2) is subject to this chapter if:
> > (1) the parties to the agreement agree in writing to arbitrate; and
> > (2) the agreement is signed by each party and each party's attorney.
>
> (c) A claim described by Subsection (a)(3) is subject to this chapter if:
> > (1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and
> > (2) the agreement is signed by each party and each party's attorney. [Emphasis added]

It could be argued that a fee dispute may fall under § 171.002(a)(2), and a malpractice claim may fall under § 171.002(a)(3), and that the potential client would have to have a lawyer advise him or her regarding entering into the employment agreement containing an arbitration clause.

2. Premarital Agreement. The *Koch* case demonstrates that a binding arbitration clause in a premarital agreement can result in arbitrating any dispute under the premarital agreement (such as enforceability), as well as any dispute in following through with the terms of the premarital agreement (such as dividing the community assets). Since one of the benefits of a premarital agreement is to avoid the cost of protracted litigation, people may wish to provide that dispute resolution involving the enforceability of a premarital agreement must be through arbitration and not litigation. Even where there is no dispute over the enforceability of the premarital agreement, an agreement can provide that the property division and other issues will be resolved through arbitration and not

litigation. This possibility should be disclosed, along with the pros and cons of arbitration, when consulting with the client before the premarital agreement is signed.

3. Particular Issues of Character or Value of Property. Either before or during a divorce court proceeding, the parties may wish to provide that any dispute as to the character or value of assets must be resolved through arbitration and not litigation. Arbitration of important issues may facilitate divorce in a way that litigation cannot. For example, if the settlement of a divorce is thwarted by an unresolved characterization question (such as the character of stock options, the character of funds distributed from a testamentary trust, tracing of commingled separate property, etc.), the parties can arbitrate that issue and based on the result go back to negotiation. A trial court ordinarily cannot make piecemeal rule on disputes. If a trial judge can't or won't grant a motion for summary judgment, then the arbitrator can try the issue "on the merits" and remove that impediment to settlement.

Furthermore, an impartial third party can be hired to conduct a "mini-trial," as described in TCP&RC § 154.024, or a moderated settlement conference, as described in TCP&RC § 154.025, to render an advisory opinion which can then serve as a basis for further negotiation. Or the parties can make the arbitration non-binding, so that negotiations can proceed with an awareness of how various arguments might play out in the courtroom.

4. Property Division. The parties may prefer to resolve the ultimate property division in the private and more convenient forum of arbitration, as opposed to a trial at the courthouse. The parties can pick an arbitrator(s) well-suited to the type of property in dispute, perhaps giving the parties a greater sense that the right result will be reached. Additionally, in some courts it may be possible to complete an arbitration far in advance of when the court will be able to complete a trial.

5. Conservatorship Issues. The parties may wish to resolve conservatorship disputes in the private forum of arbitration. The arbitrator(s) could include or consist exclusively of mental health professionals. If evidentiary rules are relaxed, the parties may be able to "put on their case" at much less cost than in litigation, even after paying the arbitrator's fee. Arbitration may make some custody disputes affordable to parties of modest means. Also, if children are going to testify, the informal atmosphere of arbitration versus testifying in the courtroom may cause some parents to favor arbitration.

6. Terms and Conditions of Conservatorship. If the parties wish to preserve the right to a jury trial on issues of conservatorship, they can agree that jury questions binding under Texas Family Code § 105.00 2(d) are excluded from the scope of arbitration, but that all other issues pertaining to the parent-child relationship will be arbitrated. Often, issues of terms and conditions of conservatorship do not warrant the cost of litigation.

7. Collaborative Law Cases. Texas Family Code § 6.603, regarding collaborative law, prohibits the parties from resorting to "judicial intervention" and prohibits the collaborative lawyers from

serving as litigation counsel. If an impasse is reached in the collaborative law process, such as over discovery issues, the parties can turn to private arbitration of that dispute without "resorting to judicial intervention."

8. An "Appeal" From the District Court Ruling. After trial, and instead of conducting an ordinary appeal, the parties may instead decide to have an "appellate arbitration." This might give the parties more flexibility in how they present their arguments, and in the type of relief that can be fashioned if the trial court's ruling is to be "revised."

9. Post-Divorce Modification Relating to a Child. Arbitration may have its greatest value in resolving post-divorce disputes relating to children, such as sports, camp, trips, school issues, etc. Many of these problems arise on an unexpected basis, and need quick resolution. Additionally, some difficult problems are more susceptible to "tinkering" rather than having one definitive ruling from a court. An arbitrator can have some flexibility in trying out an arrangement, then trying another, then another, until the best solution is reached, at which point the arbitrator's award can be presented to the court of continuing jurisdiction as a basis on which to modify the decree.

H. FORCING ARBITRATION. Federal courts operating under the Federal Arbitration Act (FAA) describe their role in requiring arbitration as a limited one:

> Our role in determining whether a court should compel arbitration is limited. We must determine simply whether the parties have entered a valid agreement to arbitrate and, if so, whether the existing dispute falls under the coverage of the agreement. Larry's United Super, Inc., v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001); Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501, 504 (8th Cir. 1999). Once we conclude that the parties have reached such an agreement, the FAA compels judicial enforcement of the arbitration agreement.

Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 679 (8th Cir. 2001). The same approach is used to arbitration under the Texas Civil Practice & Remedies Code. *Dalton Contractors, Inc. v. Bryan Autumn Woods, Ltd.*, 60 S.W.3d 351 (Tex. App.--Houston [1st Dist.] 2001, no pet.) ("In determining whether to compel arbitration, the court must decide two issues: (1) whether a valid, enforceable arbitration agreement exists, and, if so, (2) whether the claims asserted fall within the scope of the agreement.").

This analysis is conducted with the knowledge that Texas public policy favors arbitration, and every reasonable presumption must be decided in favor of arbitration. *Dalton Contractors, Inc.*, 60 S.W.3d at 352.

1. Is There an Agreement to Arbitrate? Arbitration is a creature of contract and a clause requiring arbitration is interpreted under contract principles. *Tenet Healthcare Ltd. v. Cooper*, 960 S.W.2d 386, 388 (Tex. App.--Houston [14th Dist.] 1998, writ dism'd w.o.j.); *Belmont Constructors, Inc. v.*

Lyondell Petrochemical Co., 896 S.W.2d 352, 356-57 (Tex. App.--Houston [1st Dist.] 1995, no writ); *City of Alamo v. Garcia*, 878 S.W.2d 664, 665 (Tex. App.--Corpus Christi 1994, no writ). The Federal Arbitration Act and the Texas Arbitration Act both provide that a contract to submit to arbitration is valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000); TCP&RC §171.001; *Tenet Healthcare*, 960 S.W.2d at 387-88. According to some decisions, when the facts are undisputed, t he issue of whether there is an enforceable agreement to arbitrate is a question of law and is therefore reviewed de novo by the appellate court. *See J.M. Davidson, Inc. v. Webster*, 49 S.W.3d 507, 511 (Tex. App.-Corps Christi 2001, no pet.); *Tenet Healthcare Ltd. v. Cooper*, 960 S.W.2d 386, 388 (Tex. App.- Houston [14th Dist.] 1998, pet. dism'd w.o.j.).

2. Is the Dispute Covered by This Agreement? In determining whether the dispute is covered by the arbitration agreement, courts compared the terms of the arbitration clause to the assertions in the petition.

> To determine whether a claim falls within the scope of an arbitration agreement, we look at the terms of the agreement and the factual allegations in the petition. Id. Generally, if the facts alleged "touch matters," have a "significant relationship" to, are "inextricably enmeshed" with, or are "factually intertwined" with the contract that is subject to the arbitration agreement, the claim will be arbitrable. Id. However, if the facts alleged in support of the claim stand alone, are completely independent of the contract, and the claim could be maintained without reference to the contract, the claim is not subject to arbitration. Id. The FAA favors arbitration and any doubts as to whether a claim falls within the scope of an arbitration agreement must be resolved in favor of arbitration. Id. Thus, a court should not deny a motion to compel arbitration unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue. Id.

In re Medallion, Ltd., 70 S.W.3d 284, 28 (Tex. App.--San Antonio, orig. proceeding) (under the FAA).

The court looks at the complaint's factual allegations rather than the legal causes of action asserted. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001).

I. ABATEMENT AND REFERRAL TO ARBITRATION.

1. Plea in Abatement, Etc. When a lawsuit is initiated over a claim that should be referred to arbitration, the responding party typically files a plea in abatement or request for a stay, and a motion to refer the case to arbitration. This should lead to a summary proceeding in which the trial court determines whether there is an arbitration agreement and whether the claims raised in the lawsuit fall within the scope of the arbitration agreement. *See* TCP&RC §§ 171.043, 171.023(b).

If the answer is "yes" to both questions, then the court proceeding should be abated and the parties ordered to participate in arbitration.

2. Evidence. The trial court can consider affidavits, discovery, and stipulations in ruling on the issue. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269-70 (Tex. 1992). Presumably the court could allow oral testimony as well.

J. DEFENSES. Arbitration agreements are subject to the same defenses as any other contract. *See City of Alamo v. Garcia*, 878 S.W.2d 664, 665-66 (Tex. App.--Corpus Christi 1994, no writ). Also, a party can defeat an obligation to arbitrate if the court finds that the agreement was unconscionable at the time the agreement was made. TCP&RC § 171.022. The Texas Supreme Court described unconscionability in this context as follows:

> [T]he basic test for unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract. The principle is one of preventing oppression and unfair surprise and not of disturbing allocation of risks because of superior bargaining power. [Footnotes omitted]

In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001). Whether a contract as a whole is unconscionable is a question for the arbitrator to decide. See *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir.1996) (decided under the FAA).

Fraud in the inducement of an arbitration agreement is a defense to arbitration, but the issue of whether a party made misrepresentations in the inducement of the underlying contract relates to the contract's validity, and that issue is subject to arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 759 (Tex. 2001); *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App.--Houston [1st Dist.] 1996, no writ) ("Allegations of fraud in the inducement of the underlying contract are matters for the arbitrator to decide, whereas fraud concerning the inducement of an arbitration clause in a contract must be decided by the trial court."); *see Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 218-19 (5th Cir. 1997) (same rule under the FAA).

In deciding whether arbitration is required, the trial court may not consider the validity of the underlying claim. *See* TCP&RC § 171.026. "A dispute arising out of the parties' contract or a refusal to perform all or part of the contract does not affect the validity of the arbitration agreement." *Shearson Lehman Hutton, Inc. v. McKay*, 763 S.W.2d 934, 937 (Tex. App.--San Antonio 1989, orig. proceeding) (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 409-10 (2d Cir.1959), *cert. denied*, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960)).

K. INTERLOCUTORY REVIEW OF REFERRAL TO ARBITRATION. If the trial court refuses to abate the litigation and refer the case to arbitration, that decision is subject to immediate review by the court of appeals, either by mandamus or interlocutory appeal.

1. Under the Federal Act. When a Texas court is asked to become involved in a dispute covered by the Federal Arbitration Act (FAA), there is a right to seek mandamus regarding a refusal to refer the case to arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) ("When a trial court erroneously denies a party's motion to compel arbitration under the FAA, the movant has no adequate remedy at law and is entitled to a writ of mandamus."); *In re L & L Kemp-wood Assocs., L.P.*, 9 S.W.3d 125, 128 (Tex. 1999) (per curiam); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996).

2. Under TCP&RC. Texas Civil Practice & Remedies Code § 171.098 provides that an appeal is available from an order denying an application to compel arbitration under TCP&RC § 171.021, as well as from an order granting a stay of arbitration under TCP&RC § 171.023. The Texas Supreme Court does not have jurisdiction to review the court of appeals' decision unless there is a dissent in the court of appeals on a question of law material to the decision, or unless the court of appeals holds differently from a prior decision of another court of appeals or the Supreme Court on a question of law material to the decision. TCP&RC § 22.001(b).

3. When Federal and State Statutes Apply. When a party seeks to compel arbitration under both the Texas Arbitration Act and the Federal Arbitration Act, the party must pursue parallel proceedings: an interlocutory appeal of the order denying arbitration under the Texas act, and a request for a writ of mandamus from the denial under the federal act. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

L. NON-SIGNING PARTIES. Ordinarily, it is only parties who sign an arbitration agreement that are bound by that agreement to arbitrate their disputes. There are, however, circumstances in which an arbitration clause binds parties who did not sign the agreement. This occurs when the nonsignatory is asserting claims that require reliance on the terms of the written agreement containing the arbitration provision. *See ANCO Ins. Services of Houston, Inc. v. Romero*, 27 S.W.3d 1, 4 (Tex. App.--San Antonio 2000, pet. denied) ; *Valero Energy Corp. v. Teco Pipe-line Co.*, 2 S.W.3d 576, 591-93 (Tex. App.-- Houston [14th Dist.] 1999, no pet.); *Carlin v. 3V Inc.*, 928 S.W.2d 291, 296 (Tex. App.--Houston [14th Dist.] 1996, no writ); *Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874, 878-79 (Tex. App.--Waco 1992, writ denied). In *Southwest Texas Pathology Associates, L.L.P. v. Roosth*, 27 S.W.3d 204 (Tex. App.--San Antonio 2000, pet. dism'd w.o.j.,), the principle was held not to apply to a former wife suing her ex-husband and his former business partners where she was attacking the amended partnership agreement containing the arbitration clause, and was not seeking any benefits under that amended agreement).

M. JUDICIAL REVIEW OF ARBITRATION AWARDS. A trial court can vacate, enforce, or modify and enforce an arbitrator's award.

1. VACATING THE AWARD. The grounds for vacating the award are set out in TCP&RC § 171.088. A party can show that the award was obtained by corruption, fraud or other undue means. Or the party can show that his or her rights were prejudiced by evident partiality, corruption, or misconduct or wilful behavior of the arbitrator. An award also can be vacated when the arbitrator exceeded his or her powers, refused to postpone the arbitration hearing despite sufficient cause, refused to hear material evidence, or conducted the hearing in violation of the statute and substantially prejudiced the party. And an award can be set aside if there was no agreement to arbitrate, that issue has not already been litigated in court, and an objection on those grounds was made at or before the hearing. *See* TCP&RC 171.088. The complaining party must apply to vacate the award within 90 days of receiving it. If the award is vacated, the matter is not referred to litigation. It is either sent back to the same arbitrator, or a new arbitrator, depending on the circumstance. *See* TCP&RC § 171.089.

A mere mistake of fact or law is insufficient to set aside the arbitration award. *J.J. Gregory Gourmet Servs., Inc. v. Antone's Import Co.*, 927 S.W.2d 31, 33 (Tex. App.--Houston [1st Dist.] 1994, writ denied). Likewise, a claim that the evidence does not support the award is not a basis to set aside the award. *See J.J. Gregory Gourmet Servs., Inc.*, 927 S.W.2d at 33 ("Absent a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review other complaints, including the sufficiency of the evidence supporting the award").

2. MODIFYING THE AWARD. The court must modify or correct an award if there was an evident miscalculation of numbers, an evident mistake in describing a person, thing or property, or the award includes matters not subject arbitration and the deletion will not affect the merits of the decision as to matters properly in arbitration, and (3) the form of the award is imperfect in a manner that does not affect the merits of the award. *See* TCP&RC 171.091.

3. APPELLATE REVIEW OF THE AWARD.

a. Preserving Error. A+ party challenging an arbitration award on appeal must raise the grounds for modifying or vacating the award in the trial court in order to argue those grounds on appeal. *Kline v. O'Quinn*, 874 S.W.2d 776 (Tex. App.- Houston [14th Dist.] 1994, writ denied), *cert. denied*, 515 U.S. 1142, 115 S.Ct. 2579, 132 L.Ed.2d 829 (1995). Absent an allegation of a statutory or common law ground to vacate an arbitrator's award, a court of appeals is without jurisdiction to review it. *Powell v. Gulf Coast Carriers, Inc.*, 872 S.W.2d 22 (Tex. App.--Houston [14th Dist.] 1994, no writ).

b. Standard of Review. The court of appeals in *IPCO-G.& C. Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252, 255 (Tex. App.--Houston[1st Dist.] 2001, pet. denied), summarized the standard of appellate review of an arbitration award to be applied by the appellate court:

> Statutory arbitration is cumulative of the common law. J.J. Gregory Gourmet Servs. v. Antone's Import Co., 927 S.W.2d 31, 33 (Tex. App.--Houston [1st Dist.] 1995, no

writ). Our review of an arbitration award is extremely narrow. Common law allows a trial court to set aside an arbitration award "only if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment." Teleometrics Internat'l, Inc. v. Hall, 922 S.W.2d 189, 193 (Tex. App.--Houston [1st Dist.] 1995, writ denied). Because arbitration is favored as a means of dispute resolution, courts indulge every reasonable presumption in favor of upholding the award. Id.; Wetzel v. Sullivan, King & Sabom, P.C., 745 S.W.2d 78, 81 (Tex. App.--Houston [1st Dist.] 1988, no writ).

An arbitration award has the same effect as a judgment of a court of last resort, and a court reviewing the award may not substitute its judgment for the arbitrator's merely because the court would have reached a different decision. City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 518 (Tex. App.--Houston [1st Dist.] 1994, writ denied). Every reasonable presumption must be indulged to uphold the arbitrator's decision, and none is indulged against it. Id. A mere mistake of fact or law is insufficient to set aside an arbitration award. J.J. Gregory Gourmet Servs., 927 S.W.2d at 33. In the absence of a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review other complaints, including the sufficiency of the evidence to support the award. Id.