Family Case Law Update

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CURRICULUM VITAE OF RICHARD R. ORSINGER

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

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

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

Organizations and Committees:

Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-2015 and appointed through 2020);
Chair, Subcommittee on Rules 16-165a
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, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2004)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Honors Received:

Texas Center for the Judiciary, Exemplary Non-Judicial Faculty Award (2014)
Texas Bar Foundation *Dan Rugeley Price Award* for "an unreserved commitment to clients and to the practice of our profession" (2014)
Recipient of the College of the State Bar's Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2013)
State Bar of Texas Family Law Section Best Family Law CLE Article (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
State Bar of Texas *Certificate of Merit*, June 2004
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
Association for Continuing Legal Education's Award for Best Program (*Enron, The Legal Issues*) (Co-director, March, 2002)
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 *Certificate of Merit*, June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1996
State Bar of Texas *Certificate of Merit*, June 1995

Professional Recognition:

Listed as San Antonio Scene's Best Lawyers in San Antonio (2004 - 2019)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2010 - 2019)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2014)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2013)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2012)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2019)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2019); Appellate Law (2007-2019)

Books and Journal Articles:

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

Magazines:

A New Day: Same Sex Marriages: Emerging Gender Identity Issues; IN CHAMBERS Fall 2015; Texas Center for the Judiciary, p 10.

Error Preservation for Evidentiary Rulings; THE ADVOCATE Fall 2016; State Bar of Texas, p 19.

Continuing Legal Education Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013, 2015, and 2017)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director
- 1987 Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada

SELECTED CLE SPEECHES AND ARTICLES

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

Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014); Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code (2015); Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid (2016); Compensation, Return on Capital and Return of Capital (2017); Tracing and Characterization Techniques (2018); Attacking and Defending Trusts in a Divorce (2019)

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)

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

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeal and Mandamus) (2012); Sanctions in Texas Courts: Trial and Appeal (2018)

Texas Center for the Judiciary: Family Law Update (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013); Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements (2014); Same-Sex Marriage and Gender Identity Issues (2015); Same-Sex Marriage and Gender Identity Issues (2016); Dividing the Estate Upon Divorce (2017); 20 Rules for Characterizing Marital Property in Texas (2017); Current Issues Related to Child Custody (2019);

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers`in Marital Property - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); SBOT Advanced Personal Injury Course, Court-Ordered Sanctions (2014); History of Texas Supreme Court Jurisprudence, The Rise of Modern American Contract Law (2015); New Frontiers In Marital Property Law: Distributions from Business Entities: Six Possible Approaches to Characterization (2015); Selective Fiduciary Issues in Family Law, 10th Annual Fiduciary Litigation Course (2015); Evidence & Experts, SBOT Child Protection Law Section (2019); Current Issues of Interest to Financial Experts in a Texas Divorce, Texas CPA Course (2019)

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video

Table of Contents

Family Case Law Update

by

Richard R. Orsinger
Board Certified in Family Law
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I. INTRODUCTION. This Article discusses significant or interesting Texas family law cases decided since January 1, 2018. The cases are put in the context of applicable statutes & older case law.

II. MEDIATED SETTLEMENT AGREEMENTS. Mediation as an alternate dispute resolution method is recognized in Tex. Civ. Prac. & Rem. Code § 154.023, and Tex. Fam. Code Sections 6.602 (divorce) and 153.0071 (suits affecting the parent child relationship). A mediated settlement agreement (MSA) may be enforced as a contract and is binding on the parties. *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003). In *Milner v. Milner*, 361 S.W.3d 615, 618 n. 2 (Tex. 2012), the Supreme Court wrote: "As a general rule, a party may revoke its consent to a settlement agreement before the court renders judgment on the agreement. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). An agreed judgment may not be rendered thereafter, although the revoking party may be liable for breaching the settlement agreement. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009)." However, a different set of rules applies to MSAs that comply with Texas Family Code § 6.602 or § 153.007(a).

A. DIVORCE. Under Tex. Fam. Code § 6.602(a)–(b), an MSA reached in a divorce proceeding is binding on the parties if the agreement: (i) provides in a prominently displayed statement that is in boldfaced type, capital letters, or underlined, that the agreement "is not subject to revocation"; (ii) is signed by each party to the agreement; and (iii) is signed by the party's attorney, if any, who was present at the time the agreement was signed. Tex. Fam. Code § 6.602(c) says if the MSA meets the requirements of Section 6.602, " a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." Any time prior to being ordered to mediation, a party may file a written objection to mediation "on the basis of family violence having been committed against the objecting party by the other party." Tex. Fam. Code § 6.602(d). After this, the court cannot refer the case to mediation unless the court after a hearing finds that a preponderance of the evidence does not support the objection. *Id.* If the case is referred to mediation, the court must order precautions to ensure the physical and emotional safety of the party who filed the objection. *Id.* The order must provide that face-to-face contact may not be required and that the parties will be in separate rooms during mediation. *Id.*

B. SAPCR. Tex. Fam. Code § 153.0071(d) provides that an MSA is binding on the parties to a SAPCR if the agreement: (I) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; (ii) is signed by each party to the agreement; and (iii) is signed by the party's attorney, if any, who is present at the time the agreement is signed. Tex. Fam. Code § 153.0071(e) says that if these criteria are met, either party is entitled to have the court render judgment on the agreement.

In *In re Young*, No. 12-18-00341-CV, at *1 (Tex. App.--Tyler Jan. 9, 2019, orig. proceeding) (mem.

op.), mandamus was granted against a trial court that had granted a motion for new trial setting aside a divorce decree that was based on an MSA. The appellate court cited *Scruggs v. Linn*, 443 S.W.3d 373, 378 (Tex. App--Houston [14th Dist.] 2014, no pet.), for the proposition that a "trial court generally does not have discretion to decline to enter judgment on or deviate from an MSA." The trial court was ordered to vacate its order granting a new trial.

Noteworthy cases:

In re Marriage of Harrison, 557 S.W.3d 99 (Tex. App.--Houston [14th Dist.] June 12, 2018, (pet. denied), the parties entered into an MSA that was carried forward into an interim order, under which they shared custody of their children while the divorce was pending. After five months, the husband amended his petition and claimed that a material and substantial change had occurred and the interim orders were no longer in the children's best interest. At a subsequent temporary hearing, the court removed wife as a joint managing conservator, and then entered a decree to that effect. *Id*. at 138-39. The appellate court said that the trial court did not run afoul of the requirement that the decree match the MSA, because Tex. Fam. Code § 156.101 permits a court to modify an order that provides for the appointment of a conservator of a child if there is a material change in circumstances since the date of the signing of an MSA. *Id*.

In *In re Minix*, 543 S.W.3d 446 (Tex. App.--Houston [14th Dist.] 2018, orig. petition), a divided court of appeals held that the parties to a non-revocable MSA reached in a SAPCR cannot set aside the MSA by agreement. Mandamus was issued requiring the trial court to render judgment on the MSA. Chief Justice Kem Frost filed a Dissenting Opinion setting out equitable arguments for why mandamus should be denied. Justice Busby joined the Majority, but filed a Concurring Opinion responding to Chief Justice Frost's dissent. All three of the Justices seem to accept the proposition that Tex. Fam. Code § 153.0071 took away from parties the right to set aside a prior contract by agreement, where the prior contract is a non-revocable MSA. Of course, if no one objects, the substitution of a new MSA for an old MSA will never become an issue. [Author's note: Justice Busby now sits on the Texas Supreme Court.]

C. THE DECREE CANNOT MATERIALLY DEVIATE FROM THE MSA. The judgment rendered must be in strict compliance with the MSA. *Interest of A.E.*, No. 12-18-00123-CV, at *2 (Tex. App.--Tyler Mar. 29, 2019, pet. denied) (mem. op.). However, "[i]n entering judgment on an MSA, trial courts may include '[t]erms necessary to effectuate and implement the parties' agreement' so long as they do not substantively alter it." *In re Lee*, 411 S.W.3d 445, 458 n. 17 (Tex. 2013). In *Williams v. Finn*, No. 01-17-00476-CV (Tex. App.--Houston [1st Dist.] Oct. 18, 2018, pet. denied) (mem. op.), the Court wrote:

> This Court has held that determining whether a variation between a trial court's judgment and the terms of a mediated settlement agreement is material "is not a mechanical examination." *Davis v. Davis*, No. 01-12-00701-CV, 2014 WL 890899, at *9 (Tex. App.--Houston [1st Dist.] Mar. 6, 2014, no pet.) (mem. op.). Instead, "the inquiry is whether variances by the trial court significantly alter the parties' written agreement in a way that deviates from the parties' intent as manifested in that agreement. If the decree merely adopts mechanisms to enforce the parties' agreement while remaining consistent with their intent, it is enforceable." *Id.*

In *Briscoe v. Briscoe*, No. 04-18-00437-CV (Tex. App.--San Antonio Mar. 6, 2019, no pet.), husband was the biological father of only one of wife's two children. The parties signed an MSA saying that they would continue the adoption process for the child in question and that the mother "agrees to the adoption." The Court signed a decree reciting that the parties were parents of both children. The appellate court reversed because the decree varied from the MSA, but noted that wife agreed to the adoption and to continue the adoption process, and remanded the case for further proceedings.

In *Jonjak v. Griffith*, No. 03-18-00118-CV (Tex. App.--Austin Apr. 12, 2019, no pet.) (mem. op.), the MSA provided that wife would receive $962,000 from husband's 401k plan. The decree gave wife $962,000, together with her share of interest, dividends, gains, and losses since the date of the MSA. The court of appeals reversed, because the addition of interest, dividends, gains, and losses impermissibly deviated from the MSA.

In *In re K.A.M.*, No. 12-17-00402-CV (Tex. App.--Tyler Aug. 8, 2018, no pet.), the appellate court reversed a decree that awarded a parent the exclusive right to "consent" to medical, dental, surgical care, and psychiatric and psychological, while the MSA gave that parent the exclusive right to "designate" the medical care, including psychological care. *Id.* at *3. After comparing dictionary definitions of "designate" and "consent to," the appellate court determined that the terms were not equivalent, and remanded the case to the trial court to refer the case to the mediator-arbitrator to resolve this and other drafting disputes.

D. GROUNDS TO DISREGARD AN MSA. There are (or in some instances may be) exceptions to the requirement to render judgment on a non-revocable MSA.

1. Family Violence. Tex. Fam. Code § 153.0071(e-1) provides that a court *may* decline to enter a judgment on an MSA if the court finds that "a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions." The same Section also gives the court discretion to decline to enter judgment on an MSA where the agreement would permit a person who is subject to registration for sexual offenses to live in the residence with or have unsupervised access to a child victim–if the court finds that the MSA is not in the child's best interest.

2. Endangerment of Child. In *In re Lee*, 411 S.W.3d 445, 453 (Tex. 2013), a divided Supreme Court (4-1-4) considered whether a trial court could disregard a non-revocable MSA in a SAPCR based on the best interest of the child. A majority of the Court (the four Justices who joined in the plurality opinion plus Justice Guzman, concurring) held that a trial court could not reject an MSA based solely on a best interest determination. *Id.* at 457-58; *Id*. at 462 (Guzman, J., concurring). However, a different majority of the Court approved a trial court disregarding an MSA based on endangerment of the child. Since the different majorities depend on the concurrence of Justice Guzman, her language on the point may be considered to state the controlling law:

> In sum, I believe section 153.0071 of the Family Code precludes a broad best-interest inquiry. A trial court may, however, when presented with evidence that entering judgment on an MSA could endanger the safety and welfare of a child, refuse to enter judgment on the MSA.

Id. at 466 (Guzman, J., concurring).

3. Fraud, Duress, Coercion, Dishonest Means. "Several courts of appeals have concluded section 6.602 does not require the trial court to enforce an MSA procured by fraud, duress, coercion, or other dishonest means." *Gerhardt v. Gerhardt*, No. 05-17-01433-CV, at *2 (Tex. App.--Dallas Jan. 10, 2019, no pet.) (mem. op). "However, the Texas Supreme Court has not addressed the issue." *See Milner v. Milner*, 361 S.W.3d 615, 616, 619 (Tex. 2012) (involving a divorce property division).

In her Concurring Opinion in *In re Lee*, Justice Eva Guzman noted: "Though we have yet to decide the issue, our courts of appeals have observed that [mediated settlement agreements] are contracts and courts may not enforce them if they are illegal." *In re Lee*, 411 S.W.3d at 455, n.10 (Tex. 2013) (Majority Opinion); 411 S.W.3d at 464 n. 9 (Guzman, J., concurring). The following cases have held that a trial court is not required to enforce an MSA that is illegal in nature, procured by fraud, duress, coercion, or other dishonest means, or void against public policy: *In re Young*, No. 12-18-00341-CV (Tex. App.--Tyler Jan. 9, 2019, orig. petition) (mem.op.); *In Interest of C.C.E.*, 530 S.W.3d 314, 319 (Tex. App.--Houston [14th Dist.] 2017, no pet.) (mem. op.); *In re Hanson*, No. 12-14-00015-CV, at *3 (Tex. App.--Tyler Feb. 27, 2015, orig. proceeding) (mem. op.); *Davis v. Davis*, No. 01–12–00701–CV, at *9 (Tex. App.--Houston [1st Dist.] March 6, 2014, no pet.) (mem. op.); *In re Lovell-Osburn*, 448 S.W.3d 616, 622 (Tex. App.--Houston [14th Dist.] 2014, orig. proceeding); *Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237, 242 (Tex. App.--Austin 2007, pet. denied) (a non-family law case); *In re Marriage of Joyner*, 196 S.W.3d 883, 891 (Tex. App.--Texarkana 2006, pet. denied); *Garcia-Udall v. Udall*, 141 S.W.3d 323, 331-32 (Tex. App.--Dallas 2004, no pet.); *Boyd v. Boyd*, 67 S.W.3d 398, 403-05 (Tex. App.--Fort Worth 2002, no pet.); and *In re Kasschau*, 11 S.W.3d 305, 312 (Tex. App.--Houston [14th Dist.] 1999, orig. proceeding).

The party alleging fraud as a ground to set aside an MSA has the burden to prove fraud. *Gerhardt*, *supra* at *3; *Triesch v. Triesch*, No. 03-15-00102-CV, at *2 (Tex. App.--Austin Mar. 8, 2016, no pet.) (mem. op.) (saying that wife, who alleged husband fraudulently induced her to sign a mediated settlement agreement, had burden to prove all elements of fraudulent inducement claim).

4. MSA in Parental Termination Proceedings. In *Interest of L.B., A.B., and D.B.*, No. 06-19-00025-CV (Tex. App.-Texarkana July 11, 2019, orig. petition), the appellate court held that a mother who signed an MSA in a termination proceeding, that provided that relatives would be appointed joint managing conservators and that she would be a possessory conservator with supervised access to the children, was bound by the MSA. The mother argued that the MSA was not binding because the relatives given JMC status were not parties and did not sign the MSA. The appellate court declined to address that contention because it had not been raised in the trial court.

Three courts of appeals have been unwilling to permit an MSA in a parental termination proceeding to override the court's duty to conduct a best interest review. *In re Morris*, 498 S.W.3d 624 (Tex. App.--Houston [14th Dist.] 2016, orig. proceeding); *In re K.D.*, 471 S.W.3d 147 (Tex. App.--Texarkana 2015, no pet). In *In Interest of K.S.L.*, 499 S.W.3d 109, 113 (Tex. App.--San Antonio 2016), *aff'd in part, rev'd in part*, 538 S.W.3d 107 (Tex. 2017), the court said that the State is not relieved of its burden to prove best interest merely because a parent has executed a voluntary and irrevocable affidavit of relinquishment of parental rights.

In *Interest of G.V., III*, 543 S.W.3d 342, 349 (Tex. App.--Fort Worth 2017, pet. denied), the court of appeals said that the policy behind *In re Morris* and *In re K.D.* did not apply to a combined

termination/conservatorship case where the MSA placed the children with relatives and did not terminate the parents' rights.

E. INTERPRETING MEDIATED SETTLEMENT AGREEMENTS. The Texas Supreme Court addressed the interpretation of an MSA in a divorce in *Milner v. Milner*, 361 S.W.3d 615, 619 (Tex. 2012):

> Although the parties present conflicting interpretations of the MSA, neither party presently contends that the agreement is ambiguous.[3] Whether a contract is ambiguous, however, is a question of law, and thus the parties' failure to raise the issue is not determinative.... If the agreement's language can be given a certain and definite meaning, the agreement is not ambiguous, and the contract's construction is a matter for the court.... But if the agreement is susceptible to more than one reasonable interpretation, the agreement is ambiguous, creating a fact issue on the parties' intent.[Footnote and citations omitted.]

The appellate court in *Marriage of Atherton*, No. 14-17-00601-CV, at *5 (Tex. App.--Houston [14th Dist.] Nov. 29, 2018, pet. denied) (mem. op.), applied standard contract principles regarding ambiguity to an MSA and determined that the MSA dividing the parties' assets was not ambiguous.

F. "MEETING OF THE MINDS." The Dallas Court of Appeals said that, when an MSA is determined to be ambiguous, it is not proper to set aside the MSA. *In re Lauriette*, No. 05-15-00518-CV (Tex. App.--Dallas Aug. 20, 2015, orig. proceeding) (mem. op.) (involving non-revocable MSA under Tex. Fam. Code § 6.602). The proper response of a court faced with an ambiguous MSA is to convene a hearing and receive evidence on the question of the "true intent of the parties." In contrast, the Fort Worth Court of Appeals set aside an MSA on the grounds that uncertainty about a clause in the contract indicated that there was "no meeting of the minds." *Milner v. Milner*, 360 S.W.3d 519, 524 (Tex. App.--Fort Worth 2010), *aff'd on other grounds*, 361 S.W.3d 615, 619 (Tex. 2012). The Supreme Court disagreed with the Court of Appeals, and remanded the issue of the meaning of the contract to the trial court to refer to arbitration in accordance with the MSA. *Milner*, 361 S.W.3d at 623. Unfortunately, the Supreme Court did not take the opportunity to discuss the "no meeting of the minds" attack on the contract.

The meeting-of-the-minds concept highlights a major issue in contract law theory, dating at least as far back as the famous case of *Raffles v Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864), known in American law schools as the "Peerless" case. In *Raffles*, a contract was made to buy cotton that would be arriving in Liverpool on the ship "Peerless" from Bombay. Unbeknownst to the contracting parties, there were two ships named Peerless arriving from Bombay, one departing in October and another in December. The price of cotton changed and the buyer wanted out of the contract. The British court held that each contracting party had a different ship in mind, and that there was no "meeting of the minds" so there was no contract. Stated another way, the plaintiff's subjective intent was not the same as the defendant's subjective intent, so no contract arose. This conception of matching subjective intent has persisted into recent times in Texas. In *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam), the Court said that "[a] meeting of the minds is necessary to form a binding contract." The Court cited *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986) (Spears, J.), where the Court said "[a] modification must satisfy the elements of a contract: a meeting of the minds supported by consideration." The "meeting-of-the-minds" is

often raised when an offer was accepted by a writing that was worded differently from the offer, but it could just as easily arise in a *Raffles* situation, where the parties agreed on the words but (in hindsight) now disagree on what the words mean.

In the other corner of the ring, so to speak, is the objective theory of contract formation championed by Oliver Wendell Holmes, Jr., who advocated that the question of whether a contract was formed should be determined with reference to a reasonable person standard and not the actual mental processes of the individual. Stated differently, when someone is trying to avoid a contract based on a dispute over the meaning of some words in the contract, the parties should be held to what a reasonable person finds the words to mean. A contracting party should not be able to nullify a contract by contesting the meaning of a few words in the contract. Professor Samuel Williston also favored the objective approach, writing in his legendary treatise:

> Under this "reasonable person" standard, the law accords to individuals an intention that corresponds with the reasonable meaning of their words and conduct, and if their words and conduct manifest an intention to enter into a contract, their real but unexpressed intention is irrelevant.[FN5] The courts' inquiry, therefore, is not into the parties' actual, subjective intention, but rather into how the parties manifested their intention; not on whether there has been a subjective "meeting of the minds," but rather on whether the parties' outward expression of assent is sufficient to show an apparent intention to enter into a contract.[FN6] When making this determination, a court must consider the totality of the circumstances surrounding the parties at the time they manifest an intention to contract; all of the parties' words, phrases, expressions and acts should be viewed in light of the circumstances that existed at that time, including the situation of the parties, both individually and relative to one another, and the objectives they sought to attain.[FN7] [Footnotes not included.]

A subjective approach was taken in the American Law Institute's RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS, which in Section 20(1) said that "[t]here is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other; or (b) each party knows or each party has reason to know the meaning attached by the other." Section 20(2) provides that party A's view of the "manifestations" of intent will prevail if party A neither knew nor had reason to know that party B had a different view, and party B knew or had reason to know of party A's view. The Restatement (Second) adopted a fault-based approach to meeting-of-the minds. Thus, if neither party knew or should have known about the other party's view, then no contract was formed. An objective approach was taken in *Paciwest, Inc. v. Warner Alan Properties, LLC*, 266 S.W.3d 559, 568 (Tex. App.--Fort Worth 2008, pet. denied) ("A determination of whether a meeting of the minds has occurred is based on an objective standard; thus, evidence of Nguyen's subjective belief about what the contract says or about whether an amendment occurred is not relevant to whether there was a meeting of the minds sufficient to amend the contract").

An unrestrained meeting-of-the-minds concept can have a pernicious effect on the reliability contracts, since a purported misunderstanding over wording can be used as a pretext to permit a party to back out of a contract. In *Milner*, a problem in implementing one provision in the MSA was used at the court of appeals level to justify throwing out the entire contract. Since divorce-related and SAPCR-related MSAs often contain multiple terms that are briefly described, it is not hard to

generate a disagreement over the meaning of one word or clause with the intention of overturning the entire agreement.

CONCLUSION: It appears that the proper place to come to rest on this question is yet to be determined in Texas. A sound principle would be to first determine whether the general parameters of the parties' intent can be determined. If so, then both parties should be held to the reasonable meaning of the words in the contract, without regard to what either contracting party thought at the time, or later claims to have thought at the time, that the contract was written. This is similar to the gap-filling process recognized in The Restatement (Second) of Contracts § 204 (where the bargain is sufficiently defined to be a contract, but an essential term is missing, a term that is reasonable in the circumstances will be supplied by the court). While this approach allows judges and juries to impose reasonable terms that may not have been in the contemplation of one or both parties, that may be a lesser evil than allowing a contracting party to use a claimed dispute over meaning to avoid a contractual obligation. Tort law has successfully functioned with an objective standard for imposing liability for negligence for over a century. The objective approach could be applied to disputes over interpreting the words of a contract in situations where the essentials of the bargain are clear and the point of contention does not go to the core of the bargain.

G. TIMING OF WHEN THE MSA IS SIGNED. In *Highsmith v. Highsmith*, N. 07-15-00407-CV (Tex. App.--Amarillo Sept. 28, 2017, no pet.) (mem. op.), the appellate court held that a "mediated settlement agreement" signed before the divorce was filed did not come within the scope of Tex. Fam. Code § 6.602, because the subsection (a) began with the statement that "the court may refer a suit for dissolution of marriage to mediation." A contrary decision was reached in *Cojocar v. Cojocar*, No . 03-14-00422-CV (Tex. App.--Austin June 16, 2016, no pet.) (mem. op.), where the appellate court held that subsection (a) was discretionary and not a requirement to the application of the statute. The appellate court in *In re J.A.W.-N.*, 94 S.w.3d 119, 121 (Tex. App.--Corpus Christi 2002, no pet.), held that obtaining a court referral to mediation was not a precondition to the application of Tex. Fam. Code § 153.0071, which made MSAs with the required language non-revocable.

In *Williams v. Finn*, No. 01-17-00476-CV (Tex. App.--Houston [1st Dist.] Oct. 18, 2018, pet. denied) (mem. op.), the parties settled a SAPCR modification proceeding, and a judgment was rendered. Wife filed a motion for new trial, and while the motion was pending the parties signed a new non-revocable MSA (requiring arbitration of disputes). Notice of the new MSA was filed with the trial court, and a proposed judgment was filed. However, the trial court did not sign either the new order or an order granting a new trial, so plenary power expired on the judgment. The ex-wife then filed a petition to modify the recent judgment based on the MSA that post-dated the judgment. The trial court referred the dispute to arbitration, then rendered judgment on the arbitrator's award. On appeal, the ex-husband argued that the MSA lost its force when plenary power expired on the first judgment, and that ex-wife should have appealed the judgment and complained about deviating from the MSA, failing which she was foreclosed from enforcing the MSA now. The appellate court rejected that argument, saying that although the MSA had been filed during the period of plenary power in the former case, it was not included in a timely-filed motion for new trial so the ex-wife's contention was not ruled on by the trial court, and could not have been assigned as error on appeal. Thus, the judgment did not have a preclusive effect on the ex-wife's effort to have the MSA enforced. The ex-husband also argued that the MSA was not enforceable because it was signed before the current case was initiated, relying on the *Highsmith* case discussed above. Without accepting or rejecting

Highsmith, the appellate court rejected the analogy to *Highsmith*, saying that in *Highsmith* there was no case pending when the MSA was signed, whereas in the current situation the trial court had plenary power in the first case when the MSA was signed. The appellate court noted that both Section 6.602 and Section 153.0071 provide that the MSA is binding without any mention of how the lawsuit ended. The appellate court mentioned *In re S.K.D.*, No. 05-11-00253-CV (Tex. App.--Dallas July 8, 2014, no pet.) (mem. op.), which held that where a nonrevocable MSA was signed, and the case was the same day dismissed for want of prosecution, and the husband filed a later suit, the MSA was enforceable in the second suit.

H. APPELLATE REVIEW. When a court renders a judgment that deviates from a non-revocable MSA, the remedy is to appeal the judgment. Where a court refuses to render a judgment on a non-revocable MSA, whether by denying a motion to enter judgment, or by proceeding to trial, or granting a motion for new trial, the remedy is mandamus. *In re Young*, No. 12-18-00341-CV (Tex. App.--Tyler Jan. 9, 2019, orig. petition) (published) (mandamus issued to set aside order granting new trial when judgment should have been rendered on the MSA). Mandamus relief is also available when a trial court improperly sets aside a non-revocable MSA. *Id.* at *2. The standard of appellate review is abuse of discretion, but failing to enforce a non-revocable MSA is an abuse of discretion.

I. OTHER NOTEWORTHY CASES. The following noteworthy cases were not mentioned above.

1. Interest of A.C. In *Interest of A.C.*, 560 S.W.3d 624, 632 (Tex. 2018), the Supreme Court held that a trial court is permitted to give weight to stipulations contained in an MSA in a parental termination case, on the question of whether clear and convincing evidence shows that termination is in the child's best interest. In this case, the parent did not "renounce or controvert" her stipulations on the statutory grounds for termination. *Id.* The Court analogized to its holding in *In re K.S.L.*, 538 S.W.3d 107, 111-12 (Tex. 2017), where the court held that facts recited in a sworn affidavit of relinquishment could support a best interest determination.

2. In re Lechuga. In *In re Lechuga*, No. 07-15-00088-CV, at *2 (Tex. App.--Amarillo May 7, 2015, no pet.) (mem. op.), a trial court set aside a mediated settlement agreement because of duress. The wife claimed that she was "'rushed into' the [MSA] without a full understanding of what she was agreeing to." She also claimed that "she felt pressured to sign the MSA because she knew that her attorney had to leave early for an appointment." And she contended "that neither her attorney nor Mario's attorney reminded her that she did not have to sign the MSA on the day that she entered into it." The appellate court gave this definition of duress: "Duress occurs when, due to some kind of threat, a person is incapable of exercising her free agency and unable to withhold consent." The appellate court granted mandamus setting aside the trial court's order invalidating the MSA and directing the trial court to render judgment on the MSA.

3. Interest of E.C.D. In *In the Interest of E.C.D.*, No. 01-18-00886-CV (Tex. App,.--Houston [1st Dist.] Mar. 12, 2019, no pet.) (mem. op.), a parental termination case, the parents, the Department, and the maternal grandmother all entered into an MSA placing the four older children with their grandmother, but deferring a placement decision on the youngest child. A week before the case came up for disposition, the youngest child's foster parents filed an intervention seeking appointment as joint managing conservators of the youngest child. After the trial, the court rendered judgment on the MSA as to the four oldest children, and terminated the parents as to the youngest child and appointed

the foster parents as the child's joint managing conservators. On appeal, the father attacked the foster parents standing but standing was upheld. The enforcement of the MSA was not challenged on appeal, but it does raise the issue about what to do if a party with standing intervenes after an MSA has been signed by the other litigants. It would seem that the parties who signed the MSA should be free to repudiate the MSA if their expectations are frustrated by the entry in the lawsuit of a party who is not bound by the MSA.

III. ARBITRATION. Arbitration arises in family law matter in two contexts: agreements to arbitrate a pending dispute, and agreements to arbitrate future disputes. Generally speaking, agreements to arbitrate pending disputes are governed by the Family Code, while agreements to arbitrate future disputes are governed by the Texas Arbitration Act, sometimes the Federal Arbitration Act, and perhaps to some extent Texas' common law of arbitration. However, there is a degree of overlap.

A. UNDER TITLE 1 OF THE FAMILY CODE. Tex. Fam. Code § 6.601(a) provides that "[o]n 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." Section 6.601(b) provides: "If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award." In 2011, the Legislature added Section 6.6015 to the Family Code, which provides in subsection (a) that where a party challenges the enforceability of an arbitration provision the court must "try the issue promptly and may order arbitration only if the court determines that the contract containing the agreement to arbitrate is valid and enforceable against the party seeking to avoid arbitration." Subsection (b) says that a determination of enforceability "does not affect the court's authority to stay arbitration or refuse to compel arbitration on any other ground provided by law." Subsection (c) says that Section 6.6015 does not apply to a court order, an MSA, a collaborative law agreement under Section 6.603, or any other agreement of the parties that is approved by a court.

B. UNDER TITLE 5 OF THE FAMILY CODE. Tex. Fam. Code § 153.0071(a) provides that "[o]n 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 nonbinding." Section 153.0071(b) provides: "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 the hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award." In 2011, the Legislature added Section 153.00715 to the Family Code, which provides in subsection (a) that where a party challenges the enforceability of an arbitration provision the court must "try the issue promptly and may order arbitration only if the court determines that the contract containing the agreement to arbitrate is valid and enforceable against the party seeking to avoid arbitration." Subsection (b) says that a determination of enforceability "does not affect the court's authority to stay arbitration or refuse to compel arbitration on any other ground provided by law." Subsection (c) says that Section 153.00715 does not apply to a court order, an agreed parenting plan under Section 153.007, an MSA, a collaborative law agreement under Section 153.0072, or any other agreement of the parties that is approved by a court.

In *Williams v. Finn*, No. 01-17-00476-CV (Tex. App.--Houston [1st Dist.] Oct. 18, 2018, pet. denied) (mem. op.), the appellate court considered a challenge to an arbitration provision in an MSA. The court noted that Section 153.00715(a) requires such a challenge to be ruled on by the trial court.

However, Section 153.00715(b)(3) says that Section 153.00715 does not apply to "a mediated settlement agreement described by Section 153.0072." Using the rule of interpretation *noscitur a sociis* (it is known by its associates), the court noted that subsection (c)(3) on MSAs came between subsections (c)(1) regarding a court order and (c)(5) regarding "any other agreement between the parties that is approved by a court," and concluded that (c)(3) applied only to MSAs *that had been approved by a court*. Significantly, the appellate court expanded the statute to include MSAs not approved by a court.

C. THE FEDERAL ARBITRATION ACT. The Federal Arbitration Act (FAA) is set out at 9 U.S.C.A. §§ 1-16. The scope of the Act is set out in Section 2:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In *Verlander Family Ltd. P'ship v. Verlander*, No. 08-02-00135-CV, 2003 WL 304098, at *3 (Tex. App.--El Paso Feb. 13, 2003, no pet.) (mem. op.), the spouses created a limited partnership to hold community property assets. The husband was general partner and husband and wife were both limited partners. Wife filed for divorce, and joined the partnership on the ground that it was used to perpetrate a fraud on her. However, the partnership agreement contained an arbitration clause in it. The partnership agreement said that the relations between the parties would be governed by the applicable laws of the State of Texas. The court of appeals nonetheless applied the FAA, because partnership assets included some land in New Mexico.

D. THE TEXAS ARBITRATION ACT. The Texas Arbitration Act is set out in Tex. Civ. Prac. & Rem. Code ch. 171. Three cases have said that the Texas Arbitration Act applies to a family law arbitration if the arbitration is binding. *In re K.A.M.*, No. 12-17-00402-CV, at * 6 n. 14 (Tex. App.--Tyler Aug. 8, 2018, no pet.); *Kilroy v.* Kilroy, 137 S.W.3d 780, 786 (Tex. App.--Houston [1st Dist.] no pet.); *In re Cartwright*, 104 S.W.3d 706, 711 (Tex. App.--Houston [1st Dist.] 2003, orig. proceeding).

E. TEXAS COMMON LAW OF ARBITRATION. In *Lawson v. Archer*, 267 S.W.3d 376, 381 (Tex. App.--Houston [14th Dist.] 2008, no pet.), the court wrote:

> In Texas, statutory arbitration is cumulative of the common law. *Pheng Invs., Inc. v. Rodriquez*, 196 S.W.3d 322, 329 (Tex. App.--Fort Worth 2006, no pet.); see *Carpenter v. North River Ins. Co.*, 436 S.W.2d 549, 553 (Tex. Civ. App.--Houston [14th Dist.] 1969, writ ref'd n.r.e.) ("In the many other states having arbitration statutes similar to our 1965 statute, it is almost uniformly held that the statutory remedy is cumulative and that the common law remedy remains available to those who choose to use it.").

The reason most litigants would want to use the common law of arbitration is the fact that a recognized common law ground for vacating an arbitration award is manifest disregard of the law, which is not a basis for vacatur under the TAA. In *Hoskins v. Hoskins*, 497 S.W.3d 490, (Tex. 2016), the Supreme Court said that the TAA-listed grounds are the exclusive basis to vacate an arbitration award governed by the TAA, but that the parties could include manifest disregard of the law as a ground for vacatur specified in their arbitration agreement. *Id*. at 497.

F. SELECTING APPLICABLE ARBITRATION LAW. The parties can expressly elect the FAA, or the TAA, or the Texas common law of arbitration, or the law of another state, or the rules of a private organization. *Verlander Family Ltd. Partnership v. Verlander*, No. 08-02-00125-CV, at *2 (Tex. App.--El Paso February 13, 2003, no pet.) (mem. op.) ("Where the parties designate in the arbitration agreement which arbitration statute they wish to have control, the court should apply their choice"). However, in a family law case the Family Code provisions governing arbitration of family law matters apply. But arbitration-related rights under Family Code arbitration can be waived. *In re C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.--San Antonio 2004, pet. denied) (the right to a judicial review of the arbitration award based on best interest can be waived).

G. THE SCOPE OF ARBITRATION. It is a recognized ground to vacate an arbitration award where the arbitrator exceeded his/her powers (i.e., the scope of arbitration as described in the agreement). Tex. Civ. Prac. & Rem. Code § 171.008. In *Williams v. Finn*, No. 01-17-00476-CV (Tex. App.--Houston [1st Dist.] Oct. 18, 2018, pet. denied) (mem. op.), the father challenged an arbitration award on the ground that it *exceeded the scope of the order* compelling arbitration. The appellate court said it could find no case that states the standard of review for such a claim. *Id.* at *13. The appellate court rejected the complaint without deciding on the proper standard of review, because the agreement to arbitrate clearly applied to the claim raised by the father. *Id.* It is worth noting that the agreement to arbitrate in that case applied not only to the MSA that contained the arbitration provision, but also to "any and all issues between the parties in the future related to the Decree or any modification thereto." *Id.* This therefore constitutes a pre-suit agreement to arbitrate future disputes. Tex. Fam. Code § 153.00715 requires the court to decide contests to an arbitration provision promptly, but subsection (c)(3) says that the section does not apply to an MSA. However, the appellate court in *Williams v. Finn* limited the exclusion in subsection (c)(3) just to MSAs *approved by a court*. *Id.* at *4 n. 1.

H. THE REQUIREMENT TO REFER TO ARBITRATION. In *S.P. v. N.P.*, No. 02-16-00278-CV, *6 (Tex. App.--Fort Worth Aug. 31, 2017, no pet.) (mem. op.), the appellate court reversed a trial court for ignoring an arbitration provision in the MSA saying that the mediator would arbitrate "any disputes which may hereafter arise with regard to the meaning, effect or implementation of this agreement, including, but not limited to: the meaning of the terms and provisions contained herein; their legal effect; the form and applicability of any closing documents; the implementation of this agreement (such things as turn-over of property, inspections, execution and tender of closing documents, etc.); and, the language of the decree to be drawn and presented to the Court pursuant to this agreement." It didn't matter that the trial court's decree was consistent with the MSA (i.e., the error was harmless). The trial court was required to stay its proceedings.

I. COURT'S POWER TO REVIEW ARBITRATION AWARD. In *Stieren v. McBroom*, 103 S.W.3d 602, 605 (Tex. App.--San Antonio 2003, pet denied), the court wrote:

> Review of an arbitration award is "extraordinarily narrow," and we must indulge every reasonable presumption in favor of upholding the arbitration award.... "Review is so limited that an arbitration award may not be vacated even if there is a mistake of fact or law"…. In circumstances such as those presented here, a trial court may vacate an arbitrator's award under only two circumstances: (1) as allowed by the Family Code or (2) as allowed by the Texas Arbitration Act ('TAA').

In *Preston v. Dyer*, No. 09-11-00200-CV (Tex. App.–Beaumont Apr. 30, 2012, pet. denied), the parties signed a premarital agreement (PMA) that contained an arbitration provision. The appellate court acknowledged that parties could agree upon expanded judicial review of an arbitrator's award, but in this case the parties did not do so and were therefore limited to the statutory grounds. *Id.* at *3. The husband's complaints that the arbitrator improperly awarded alimony and sole custody to the wife were disallowed as not being grounds for vacatur under the TAA. *Id.* at *4.

Tex. Fam. Code Ann. § 153.0071(b) provides:

> (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.

The right to a post-arbitration review of the arbitration award based on best interest can be waived. *In re C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.--San Antonio 2004, pet. denied).

J. WAIVER OF RIGHT TO ARBITRATE. In *S.P. v. N.P.*, No. 02-16-00278-CV, *6 (Tex. App. --Fort Worth Aug. 31, 2017, no pet.) (mem. op.), a party challenged a request for arbitration filed less than three days prior to a hearing on a motion to enter set before the judge. The appellate court upheld the arbitration request, saying:

> A presumption exists against waiving a contractual right to arbitration. Merely delaying one's demand for arbitration is not a waiver of the right to make that demand; the inquiry is whether the delay resulted in prejudice to the other party.

IV. DIVORCE AND PROPERTY DIVISION.

A. JURISDICTION; VENUE; IMMIGRATION STATUS. In order to file a divorce in Texas, the petitioner or the respondent must have been a domiciliary of the state for at least six months and a resident of the county where the suit is filed for 90 days. Tex. Fam. Code § 6.301. The requirement is not jurisdictional, but is mandatory if raised. *Rust v. Rust*, No. 04-17-00674-CV, at *3 (Tex. App.--San Antonio Oct. 3, 2018, no pet.) (mem. op.); *accord*, *In re Milton*, 420 S.W.3d 245, 252 (Tex. App.--Houston [1st Dist.] 2013, orig. proceeding). Domicile and residency both require that the party intend to make Texas his/her legal home, and the residency must be manifested by some act. *In re Green*, 385 S.W.3d 665, 669 (Tex. App.--San Antonio 2012, orig. proceeding). A person can have more than one residence, and even residences in different states. *Griffith v. Griffith*, 341 S.W.3d 43, 53 (Tex. App.--San Antonio 2011, no pet.). "With regards to a soldier in the military, the 'soldier does not acquire a new domicile merely by being stationed at a particular place in the line of duty. Rather,

a soldier's domicile remains the same as when he or she entered the service, unless proof of clear and unequivocal intention to change domicile is shown.'" *Rust*, *supra* at *4. In the *Rust* case, the husband entered military service from Kendall County, and never manifested a "clear and unequivocal intention to change his domicile." *Id.* at *4. So he could bring a divorce proceeding in Kendall County. However, even though the Texas court had jurisdiction over the divorce, it did not have jurisdiction to make an initial custody determination relating to the parties' children, whose "home state" was North Carolina. Given the lack of custody jurisdiction, and the fact that the parties had not lived in Texas as a married couple for some years, and given that the most recent marital home was in North Carolina, and given that the wife had filed legal separation proceedings in North Carolina before the Texas divorce was filed, the appellate court in *Rust* held that it was not error for the trial court to refuse to exercise divorce jurisdiction.

The issue has arisen about the impact that immigration status can have on a non-citizen's ability to claim domicile or residency in Texas, and initiate a divorce here. In *In re Swart*, No. 05-19-00015-CV (Tex. App.--Dallas July 9, 2019, orig. proceeding), both spouses were citizens of other countries. The wife initiated a divorce proceeding in Texas. The wife was in the United States on a B1/B2 visa, a type of visa issued temporarily for business or pleasure. By Federal law, the wife is precluded from residing permanently to the USA, and she must leave the country at the end of her temporary stay. The U.S. Supreme Court has said that "Congress precluded the covered alien from establishing domicile in the United States." *Toll v. Moreno*, 458 U.S. 1 (1982). Considering that the definition of domiciliary is "[a] person who resides in a particular place with the intention of making it a principal place of abode," the court of appeals said that the wife could not establish the requisite intent to be a Texas domiciliary. While ordinarily the proper procedure is to abate the Texas divorce until the domicile or county residency requirement is met, here the mere passage of time will not remove the impediment, so the proper response was to dismiss the divorce. Mandamus was issued to the trial court to dismiss the divorce.

In *Nieto v. Nieto*, No. 04-11-00807-CV (Tex. App.--San Antonio May 1, 2013, pet. denied) (mem. op,), the husband and wife were Mexican citizens who lived in Texas in reliance upon the husband's "investment visa," which was valid for three years and subject to renewal. *Id.* at *6. The spouses were married in Mexico and had a house in Mexico but also had a house in Bexar County. The parties' son had attended private schools in San Antonio for six years and was enrolled in a San Antonio public school for the year preceding the divorce. Neither spouse had filed for permanent resident alien status. The husband claimed that the house in Mexico was the main house and the house in San Antonio was a vacation home, and the wife claimed the opposite. The court of appeals held that the trial court did not abuse its discretion in finding that the domicile and residency requirements of Family Code Section 6.301 had been met.

The Austin Court of Appeals rejected immigration status as a factor in *Palau v. Sanchez*, No. 03-08-00136-CV (Tex. App.--Austin Nov. 10, 2010, pet. denied). The appellate court affirmed a divorce filed by the wife who was a citizen of Mexico living in Texas on a "tourist visa." She testified that her intent was to live in Austin, even though it was not legal for her to do so. The Court of Appeals said that Section 6.301 only requires that one spouse be a domiciliary of Texas, meaning "[a] person who resides in a particular place with the intention of making it a principal place of abode," citing Black's Law Dictionary. The statute does not require that the person be a citizen of the United States or "carry a certain type of visa." *Id.* at *6.

B. SEPARATE AND COMMUNITY PROPERTY.

1. Burden to Prove Separate Property. Under Tex. Fam. Code § 3.003, there is a presumption that all property possessed by either spouse during or on dissolution of marriage is community property. The party claiming property to be separate has the burden of persuasion by clear and convincing evidence. If the claim is that the property is not marital property, the community presumption still applies, but the burden of persuasion to prove non-marital property is a preponderance of the evidence.

a. Marriage of Stegall. In *The Matter of the Marriage of Stegall*, 519 S.W.3d 668 (Tex. App.--Amarillo, 2017, no pet.), the husband had over 100 head of cattle at the time of marriage. The parties divorced 6 years later. The trial court held that all the cattle were husband's separate property. The appellate court noted that the husband didn't keep good records, and his herd had grown to 191 animals. The appellate court noted that cattle born during marriage are community property, and ruled that the cattle had become commingled and all were presumed to be community property. The husband argued that his herd never dropped below a certain number and that number should be deemed to be his separate property. Husband relied upon the "minimum balance" method of tracing used in commingled-cash-cases where separate property funds are deemed to "sink to the bottom" of the account, so that the separate funds make up the minimum balance in the account during marriage. The appellate court noted that the husband's testimony was uncorroborated, and also said that it is doubtful that the minimum balance rule applies to cattle. The trial court's finding of separate property was reversed.

b. Marriage of Tyeskie. In *Marriage of Tyeskie*, 558 S.W.3d 719 (Tex. App.--Texarkana 2018, pet. denied), wife claimed that her separate property cash was used to make the down payment on the purchase of a house during marriage. Although the husband admitted that the wife had funds in the account at the time of marriage, evidence showed that during marriage wife deposited over $90,000 in community funds into the account. Wife made no effort to show that the funds drawn from the account to make the down payment were her separate property. *Id*. at 723-34. The appellate court invoked the community-out-first rule and noted that, since community deposits exceeded the down payment, wife failed to prove that her separate property was used.

c. Marriage of Attaguile. In *Attaguile v. Attaguile*, No. 08-16-00222-CV, *6 (Tex. App.--El Paso Sept. 28, 2018, no pet.), the appellate court commented that, to satisfy the burden of tracing separate property, "courts typically require the party to present some form of documentary evidence to support his claim, and the party's mere testimony that separate property was used to purchase the property is insufficient without some form of corroboration."

d. Lee v. Lee. In *Lee v. Lee*, No. 02-18-00006-CV (Tex. App.–Fort Worth July 11, 2019, no pet.) (mem. op.), Husband testified that he inherited money from his grandparents and used that money to make a capital contribution to a company that was formed to hold land in California. Husband's partner testified in support of husband's position, and confirmed the capitalization and the use of inherited funds. *Id.* at *7. Another witness testified from Taiwan through sworn declaration and deposition on written questions that she was the conservator of the grandparents' estate in Taiwan, and that she made two wire transfers to husband, and she produced receipts. *Id.* The court also admitted a tax form in which husband had stated under penalty of perjury that he has received more

than $100,000 in gifts or bequests, detailing the dates and amounts. Id. at *9. The parties' joint expert testified that there were no inconsistencies in the documents, and that he was "firm in his mind" that husband had proved his separate property. *Id.* at *6-7. Wife testified that she believed that the money used to capitalize the company was community property, and that the business in question was community property. The appellate court reversed, saying that husband had conclusively proved that his interest in the business was separate property as a matter of law, in that his supporting evidence was clear, positive, direct, free from contradictions and inconsistencies, and could have been readily controverted. *Id.* at * 9, citing *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005). The trial court was not free to disregard the evidence.

e. Weed v. Frost Bank. In *Weed v. Frost Bank*, 565 S.W.2d 397 (Tex. App.--San Antonio 2018, pet. pending), an oil and gas transaction occurred so many years ago that there were no financial records. The deed granted oil and gas interests to Rees R. Oliver "as his sole and separate property and estate." *Id*. at 401. Reviewing decades of past court decisions, the appellate court concluded that a presumption of separate property arose from the recital in the deed. However, the appellate court *Id*. at 409. However, the appellate court held that evidence that the grantee expended community labor in acquiring the leases rebutted that presumption, reinstating the community presumption. Since there were no other records to prove separate property, the community presumption prevailed.

2. Inception of Title. In Texas, separate property is property owned or claimed by a spouse prior to marriage, and property acquired during marriage by gift, devise, or descent, or in exchange for other separate property, or by written partition of community into separate property, or by spousal income agreement. Article XVI, § 15; Tex. Fam. Code § 3.001, 3.002, 4.102 & 4.103. "Claimed before marriage" involves the inception of title rule. See Tex. Fam. Code § 3.006. The Pattern Jury Charges sets out the inception of title rule: "Property is 'claimed before marriage' if the right to acquire or own the property arises before marriage, even if title to the property is acquired during marriage." Texas Pattern Jury Charges PJC 202.2 (Family & Probate 2018). The inception of title rule was applied in *In re Marriage of Douthitt*, 573 S.W.3d 927 (Tex. App.--Amarillo 2019, no pet.). The husband acquired real property in exchange for 10 acres of land that he claimed to have owned prior to marriage. Both husband and wife were named as grantees in the deed to the new property. While husband did not produce a deed showing his ownership of the 10 acres before marriage, wife admitted in her testimony that husband acquired the new property in exchange for land he "had" before marriage. The appellate court considered wife's testimony to be a judicial admission. Husband's testimony, coupled with wife's judicial admission, supported the trial court's finding that the new property was husband's separate property. In a footnote, the appellate court mentioned a passing reference in wife's brief that husband intended to give a one-half interest in the new land to wife, but the issue was not briefed so it was deemed waived. The fact that the deed to the new property was in the name of both husband and wife gave rise to a presumption of gift of a one-half interest from husband to wife.

3. Personal Injury Recovery. When a spouse recovers damages during marriage for personal injury, a question arises as to how to allocate the separate property portion from the community property portion of the recovery. The general rule that applies was stated in *In Interest of L.M.*, No. 05-17-00601-CV, at *2 (Tex. App.--Dallas July 27, 2018, pet. denied) (mem. op.):

> When, as here, a spouse receives a personal-injury settlement from a lawsuit during marriage,

some of which could be separate property and some of which could be community property, it is that spouse's burden to demonstrate which portion of the settlement is his or her separate property. *Harrell*, 345 S.W.3d at 657; *Licata*, 11 S.W.3d at 273. Clear and convincing evidence showing the recovery is solely for the personal injury of a particular spouse is necessary to overcome the presumption that the settlement proceeds represent community property. *Harrell*, 345 S.W.3d at 657.

The record in this case shows Husband and Wife settled with an unknown third party for injuries Husband suffered in an automobile accident. Husband received $915,928 which he deposited into a separate account and Wife received $190,000, which she deposited into a separate account. However, the record does not contain a settlement agreement segregating the amounts awarded to them as individuals. Nor does the testimony at trial clearly characterize the amount of money that was awarded to Husband for disfigurement, past and future mental anguish, or past and future physical pain and suffering. Because Husband failed to show by clear and convincing evidence the amount of the settlement that was solely for his personal injury, he has failed to overcome the presumption that all property received during marriage is community property and the trial court erred in concluding otherwise.

C. PROPERTY DIVISION. Tex. Fam. Code § 7.002 requires the trial court to order a division of real and personal property "wherever situated" in a manner that the court deems just and right, including "property that was acquired by either spouse while domiciled in another state and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition."

1. Cannot Divest Separate Property. In a divorce, a trial court cannot divest a spouse of separate property. *Eggemeyer v. Eggemeyer*, 554 S.W.2d. 137, 139-141 (Tex. 1977).

2. Just and Right Division. In *Bradshaw v. Bradshaw*, 555 S.W.3d 539 (Tex. 2018), the Supreme Court reversed a trial court's award of 20% of a community property house to the husband and 80% to the wife. The evidence showed that the husband had abused his step-daughter in the house. The Court's three-justice Plurality opinion written by Chief Justice Hecht held that awarding any of the house to the perpetrator of the sex crimes was as a matter of law an abuse of discretion. Two more Justices concurred in reversal, but on the ground that the evidence did not support the property division, since there was no inventory filed and no way to determine whether the division was just and right. Four Justices dissented on the ground that the trial court has broad discretion in making the property division, and an abuse of discretion was not shown. As a consequence of the way the votes split, this case has no precedential weight and what importance is has is more with the four-justice Dissenting Opinion and not the three-justice Plurality Opinion. But it goes to show that in some instances the facts of a case can drive the outcome. Compare to *Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990), where the Supreme Court reversed a discretionary custody decision on the ground that a mother being a victim of family violence was no basis to award child custody to the child's grandparents, and the court rendered judgment of custody to the mother. Interestingly, then-Justice Hecht dissented.

In *Garcia v. Ruiz*, No. 01-17-00969-CV (Tex. App.–Houston [1st Dist.] June 11, 2019, no pet.) (mem. op.), the appellate court reversed divorce property division because the trial court erroneously found

that a ranch lease was not part of the community estate. The lease was acquired during marriage and thus was community property. The record did not include evidence of the value of the lease. The appellate court noted that the Fifth Court of Appeals had refused to reverse where a party did not provide valuation evidence. The First Court did not apply that rule in this case, "where community property remains undivided and there is no evidence of its value." *Id.* at *11.

In *Alcedo v. Alcedo*, No. 02-17-00451-CV (Tex. App.–Fort Worth May 30, 2019, pet. pending) (mem. op.), a trial court was reversed for ignoring the parties' stipulation that certain property was separate property, and dividing it as if it was community. A stipulation of fact is binding on the trial court, the parties, and the reviewing court. *Id.* at *8.

In *Marriage of Hardin*, 572 S.W.3d 310 (Tex. App.--Amarillo 2019, no pet.), involved a divorce property centered on the wife's teacher retirement. Her retirement benefit was a guaranteed payment for ten years followed by an annuity for the remainder of her life. The trial court found that the non-guaranteed portion had no value, but the appellate court said it had value and reversed and remanded.

3. Foreign Property. A Texas court has no jurisdiction to pass title to out-of-state realty by operation of its decree. *Trutec Oil & Gas, Inc. v. Western Atlas Int'l, Inc.*, 194 S.W.3d 580, 583 (Tex. App.--Houston [14th Dist.] 2006, no pet.) ("Texas courts may not adjudicate title to realty in another state or country; they do not have subject matter jurisdiction over property outside the state"). However, "[t]here is ample authority for the proposition that a trial court may require parties over whom it has in personam jurisdiction to execute a conveyance of real estate located in another state." *Dankowski v. Dankowski*, 922 S.W.2d 298, 303 (Tex. App.--Fort Worth 1996, writ denied); *accord*, *Griffith v. Griffith*, 341 S.W.3d 43, 56–57 (Tex. App.--San Antonio 2011, no pet.). The rule was applied to the award of a financial account in India in *Chatterjee v. Banerjea*, No. 05-18-01035-CV, at *6 (Tex. App.--Dallas Aug. 19, 2019, n.p.h.).

4. Future Changes in Tax Law. Tex. Fam. Code § 7.008 says that, in dividing the estate in a divorce, the court can consider whether a specific asset will be taxed, and when the tax will have to be paid. There is almost no case law authority on the question of proving future tax law. The one case the Author could find is *Oddi v. Ayco Corp.*, 947 F.2d 287, 261-63 (7th Cir. 1991), which involved negligent investment advice, where the damages were affected to the tax rate in effect at a future time. The Seventh Circuit Court of Appeals announced that it would apply a presumption that existing rates would continue, but would allow a party to convince the fact finder otherwise. The court gave as examples evidence that legislation is pending to change the tax law, or where the party offers "a probability analysis for a number of different tax rates from which a court could strike a statistically supportable middle ground, different from the status quo." *Oddi* has been cited in subsequent cases, but not for this proposition.

5. Reimbursement. Tex. Fam. Code §§ 3.402 & 7.007 recognize a claim for reimbursement when one marital estate pays the debts of another marital estate, or where community labor enhances the value of a spouse's separate property. In *In re Marriage of Douthitt*, 573 S.W.3d 927 (Tex. App.--Amarillo 2019, no pet.), wife claimed reimbursement to the community estate for improvements made during marriage to husband's separate property land. The evidence showed that the land was purchased for $10,000 in 1999, that the parties married in 2010, that husband spent 200 hours and $20,000 during marriage building a barn, and that the property may have been worth $50,000 at the

time of divorce. The trial court denied wife's claim for reimbursement, and the appellate court affirmed, saying that there was no evidence of the value of the property at the time of marriage, and no evidence of the increase in value attributable to the improvements.

D. POST-DIVORCE ENFORCEMENT OF PROPERTY DIVISION; DIVISION OF UNDIVIDED PROPERTY. Chapter 9 of the Texas Family Code give the divorce court jurisdiction to enforce its property division.

1. Cannot Modify Decree. In enforcing the divorce decree, the court cannot modify the decree in any material way. Tex. Fam. Code § 9/007(b). In *Burnett v. Burnett*, No. 08-15-00339-CV (Tex. App.–El Paso June 5, 2019, no pet.), the trial court was reversed for misinterpreting the cost of living provision in the decree of divorce and limiting the portion of the COLA that had been awarded to the ex-wife in the divorce.

2. Limitations Period. Section 9.003 imposes a two-year statute of limitations for seeking enforcement of the division of tangible personal property. In *Moore v. Moore*, 568 S.W.3d 725, 728 (Tex. App.--Eastland 2019, no pet.), the ex-wife filed a suit to enforce the division of mineral interests 8 years after the divorce. The appellate court held that the two-year statute of limitations for tangible personal property in Section 9.003 did not apply. The appellate court also rejected the ex-husband's claim of waiver, estoppel, and laches. *Id.* at 731-32. The ex-husband's claim that the mineral interests were his separate property was rejected based on *Pearson v. Fillingim*, 332 S.W.3d 361 (Tex. 2011), which held that a claim of separate property could not be used in a post-divorce enforcement proceeding to overturn the award of property in the divorce property division. In the *Moore* case, the divorce decree provided that "oil, gas or other minerals ... standing in the name of the parties or either party" were divided equally as part of "a just and right division of the parties' marital estate." In *Chakrabarty v. Ganguly*, 573 S.W.3d 413 (Tex. App.--Dallas 2019, no pet.), the appellate court en banc overturned its own prior precedent and held that an award of funds in a bank account is not an award of tangible personal property, so that the 2-year statute of limitations in Section 9.003 does not apply.

Chapter 9 also authorizes the divorce court to divide community property that was not divided at the time of divorce. Tex. Fam. Code § 9.201. Section 9.202 says such a suit must be commenced within two years of when the former spouse "unequivocally repudiates the existence of the ownership interest of the other former spouse and communicates that repudiation to the other former spouse."

In *Etheridge v. Opitz*, No. 12-18-00088-CV, at *5 (Tex. App.–Tyler June 28, 2019, n.p.h.), the ex-wife filed suit to divide six pieces of real estate she said were community property that were not divided in the divorce. She joined members of the ex-husband's family as perhaps having an interest in the properties. The defendants argued that the properties belonged to a partnership and therefore were not community property. The appellate court noted that property acquired with partnership funds is presumed to be partnership property. *Id.* at *5. However, there was uncertainty about whether the partnership was formed before or after some of the properties were acquired. *Id.* at *6-7. The appellate court concluded that there was no evidence showing that the partnership was formed before three of the tracts were acquired, so the jury verdict was overturned and the judgment was reversed as to those three tracts and the ex-wife was awarded a one-half interest. *Id.* at *8. As to three tracts acquired later, the jury's rejection of the ex-wife's claim was upheld because evidence supported the

conclusion that the partnership had been formed before those tracts were acquired using partnership funds.

V. SPOUSAL MAINTENANCE. Tex. Fam. Code Ch. 8 provides for spousal maintenance under certain conditions, and provides remedies to enforce the support obligation. In *Dalton v. Dalton*, 551 S.W.3d 126 (Tex. 2018), the spouses entered into a separation agreement in Oklahoma that provided for contractual alimony. The divorce was granted in Texas. The ex-husband defaulted, and the Texas court ordered wage withholding to enforce the alimony obligation. The Supreme Court reversed, holding that the Chapter 8 remedy of wage withholding applied only to spousal maintenance granted under Chapter 8. The Supreme Court also reversed the trial court's award of a substantial portion of ex-husband's retirement funds, saying that the remedy was not available for non-Chapter 8 alimony. The Supreme Court also said that full faith and credit did not require Texas to apply Oklahoma enforcement procedures.

VI. MANAGING AND POSSESSORY CONSERVATORSHIP.

A. Relaxed Rules of Pleadings in SAPCRs. The Texas Rules of Civil Procedure apply to SAPCRs. Tex. Fam. Code § 1015.003(a) ("Except as otherwise provided by this title, proceedings shall be as in civil cases generally"). However, it is sometimes said that "in matters concerning support and custody of children the paramount concern is the best interest of the children and the technical rules of pleading and practice are not of controlling importance." *See Barrow v. Durham*, 574 S.W.2d 857, 861 (Tex. Civ. App.--Corpus Christi 1978), *aff'd*, 600 S.W.2d 756 (Tex. 1980). The Supreme Court said, in *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967):

> [W]e are of the view that a suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child. The courts are given wide discretion in such proceedings.... Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children.

Nonetheless, in *Flowers v. Flowers*, 407 S.W.3d 452 (Tex. App.--Houston [14th Dist.] 2013, no. pet.), the appellate court reversed a trial court for removing a geographic restriction on the mother's right to determine the children's primary residence because the mother had not pled for that relief, and the issue was not tried by consent. The appellate court also reversed the trial court's reallocation of five specific parental rights for failure to plead for those changes.

In the case of *In re A.B.H.*, 266 S.W.3d 596, 600-01 (Tex. App.--Fort Worth 2008, no pet.), a divided court reversed a trial court for appointing a parent a sole managing conservator when he had pled only to be appointed the joint managing conservator with the exclusive right to establish the child's primary residence, and the issue of sole managing conservator was not tried by consent. The dissenting Justice said: "Because Cheryll and Scott both put the workability of the existing conservatorship arrangement at issue in their pleadings, I would hold that those pleadings were sufficient to support the trial court's order designating Scott as the sole managing conservator of the children." *Id.* at 602.

In the case of *King v. Lyons*, 457 S.W.3d 122, 126 (Tex. App.--Houston [1st Dist.] 2014, no pet.), the

trial court included an injunctive order in an order modifying a prior SAPCR order. The appellate court posed the following questions:

> 1. "[M]ay a court impose an injunction in the absence of pleadings requesting that relief?"
>
> 2. "[M]ay injunctive relief in such a case be based solely on the best interest of the child or must there be a showing of the usual elements needed to prove entitlement to a permanent injunction, i.e., a wrongful act, imminent harm, irreparable injury, and the absence of an adequate remedy at law?"

Id. at 127. After thoughtful analysis of cases discussing the importance of pleadings in SAPCRs, and in injunction cases, the appellate court ruled: "Considering the aforementioned authorities, we conclude that in suits affecting the parent-child relationship, a trial court may not grant injunctive relief against a party unless that party had notice by way of the pleadings or the issue was tried by consent." *Id.* at 130-31. [Author's note: The pleading requirement for injunctive orders may be more stringent than rulings on custody, visitation and the rights and duties of parents.]

B. Cannot Award Rights to Non-Party. A court cannot award visitation to a non-party. *Matter of Marriage of D.E.L. & J.J.P.*, No. 14-17-00216-CV, at *3 (Tex. App.--Houston [14th Dist.] Feb. 12, 2019, no pet.) (mem. op.) ("In the absence of a non-parent's intervention, the trial court has no authority to award any non-party visitation"); *accord In re H.R.L.*, 458 S.W.3d 23, 31 (Tex. App.--El Paso 2014, orig. proceeding) (trial court had no jurisdiction to award grandmother relief without first determining she had standing and granting her leave to intervene). To make a person eligible to receive court-ordered rights and responsibilities over children, the person must initiate or intervenein or be joined as a respondent in a SAPCR. The Legislature has adopted a statutory framework governing standing to initiate or intervene in a SAPCR. The statutes do not set limitations on the parties in a SAPCR agreeing to give court-ordered rights to a non-party. And the standing statutes do not regulate whether a party can join someone without standing as a respondent or third-party respondent. [Author's note: A court wishing to involve non-parties in a child's upbringing, could advise the parties of the court's receptiveness to the joinder of the non-party, or the court could appoint a guardian ad litem who could hire a lawyer to intervene on behalf of the children and join the non-party as a respondent in the proceeding. This theory has not yet been tested at the appellate level.]

VII. STANDING TO LITIGATE SAPCRs.

A. GENERAL STANDING TO FILE A SAPCR. The statute setting out the general conditions that give a party standing to bring a SAPCR is Tex. Fam. Code § 102.003. Section 102.003 sets out fourteen categories of persons who can file an original SAPCR:

(1) a parent of the child;
(2) the child, through a representative authorized by the court (like a guardian ad litem or attorney ad litem);
(3) a custodian or person with a right of possession of or access to the child under an order from court of another state or country;
(4) a court-appointed guardian of the person or of the estate of the child;

(5) a governmental entity;
(6) the DFPS;
(7) a licensed child placing agency;
(8) a man claiming to be the father of a child filing in accordance with Chapter 160 (the Uniform Parentage Act), subject to the limitations of that chapter, but not otherwise;
(9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
(10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162 (Termination of the Parent-Child Relationship);
(11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;
(12) a person who is the foster parent of a child placed by the DFPS in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;
(13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition; or
(14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035, regardless of whether the child has been born.

Several points should be noted regarding Tex. Fam. Code § 102.003:

1. Section 102.003 applies to a SAPCR relating to any issue, whether it be managing or possessory conservatorship, geographical restriction, parental rights and responsibilities, child support, possessory periods, court-ordered access to the child, establishing or terminating the parent-child relationship, or adoption. See the definition of a SAPCR in Tex. Fam. Code § 101.032.

2. Section 101.024 defines parent in this way: "Parent" means the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father. Except as provided by Subsection (b), the term does not include a parent as to whom the parent-child relationship has been terminated.... Under Tex. Fam. Code § 160.204(a)(1), a man is presumed to be the father of a child if he is married to the mother of the child and the child is born during the marriage. In *Marriage of Mitchell*, No. 06-18-00047-CV (Tex. App.–Texarkana Aug. 6, 2019, n.p.h.) (mem. op.), the appellate court held that the husband of a child born during marriage was a presumed parent, even if he was not the biological father, and thus had standing under Section 102.003 to bring a SAPCR as "a parent of the child. "

3. Section 102.003(9), (11), and (12) relate to standing based on practical day-to-day involvement with the child over a sufficient period of time, which entails difficulties in calculating time periods. To reduce uncertainty, the Legislature adopted Section 102.003(b) which says that "[i]n

computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit."

4. Section 102.003(11) applies to the spouse of a parent who dies, and suit is filed within 90 days of death or the end of residency, which ever is first.

5. In addition to this general standard of standing in Section 102.003, the Legislature has adopted a number of Code provisions stating other grounds for standing, as well as Code provisions establishing limitations on standing. Tex. Fam. Code § 156.002 governs standing to file a SAPCR to modify a prior SAPCR decree, and Tex. Fam. Code § 102.005 governs standing to seek termination and adoption.

6. The San Antonio Court of Appeals summarized the law regarding dismissal for lack of standing in SAPCRs *In re Y.B.*, 300 S.W.3d 1, 4 (Tex. App.--San Antonio 2009, pet. denied):

> Whether a court has subject matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The plaintiff has the burden to allege facts demonstrating jurisdiction and we construe the pleadings liberally in its favor. *Id*. When a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court reviews the relevant evidence to determine whether a fact issue exists. See *Id*. at 227. If the evidence raises a fact question on jurisdiction, the trial court cannot grant the plea and the issue must be resolved by the trier of fact. *Id*. at 227–28. If the evidence is undisputed or fails to raise a fact question, the trial court must rule on the plea as a matter of law. *Id*. at 228. We review the trial court's ruling de novo. *Id*. We take as true all evidence favorable to the nonmovant and indulge every reasonable inference in its favor. *Id*. When the trial court makes and files findings of fact and conclusions of law, as in this case, we review the trial court's findings under the sufficiency of the evidence standard, and the trial court's conclusions of law are reviewed de novo. *Lonza AG v. Blum*, 70 S.W.3d 184, 189 (Tex. App.--San Antonio 2001, pet. denied).

1. Actual Care, Control, and Possession for at Least Six Months. Tex. Fam. Code § 102.003(a)(9) grants standing to file a SAPCR to "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." Tex. Fam. Code § 102.003(b) provides that in computing the time under subsection (9), the trial court "may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit."

The Texas Supreme Court addressed Tex. Fam. Code § 102.003(a)(9) in the case of *In re H.S.*, 550 S.W.3d 151 (Tex. 2018). In that case, the Supreme Court divided 5-to-4 in holding that a child's maternal grandparents met the standing requirement of Tex. Fam. Code § 102.003(a)(9), when they acted in a parental capacity while the father visited only occasionally and the mother was in a full-time substance abuse treatment facility. The Majority Opinion, written by Justice Lehrmann, noted that Tex. Fam. Code § 102.003(a)(9) was available only to persons who "share a principal residence with the child" for the six-month period, regardless of how extensive their involvement with

the child might otherwise have been. Id. at 156. (Editorial note: co-residency is not explicitly required by Tex. Fam. Code § 102.003(a)(9), while it is explicitly required by Tex. Fam. Code § 102.003(a)(11) & (12)). Justice Lehrmann's Majority Opinion described two conflicting lines of authority among the courts of appeals, one holding that de facto control is what counts, and the other holding that de jure control (pursuant to court order) is what counts. *Id*. at 156-57. (The Opinion distinguishes "actual" from "legal" control.) *Id*. at 158. The Majority Opinion sided with the first line of authority, that actual control is what counts. Id. The Court held that "[t]he statute does not require the nonparent to have ultimate legal authority to control the child, nor does it require the parents to have wholly ceded or relinquished their own parental rights and responsibilities."

In *In the Interest of Y.Z.C.T.*, No. 05-17-00530-CV, *3 (Tex. App.--Dallas July 27, 2018, no pet.) (mem. op.), the court said that a determination of whether the requirements of Tex. Fam. Code § 102.003(a)(9) had been met was "necessarily fact specific and resolved on an ad hoc basis." The appellate court in that case applied a sufficiency of the evidence standard of appellate review.

Earlier on, several courts of appeals had concluded that Tex. Fam. Code § 102.003(a)(9) does not require that a party asserting standing to demonstrate exclusive control of the child. *In Interest of K.S.*, 492 S.W.3d 419, 424 (Tex. App.--Houston [14th Dist.] 2016, pet. denied); *In re Crumbley*, 404 S.W.3d 156, 160 (Tex. App.--Texarkana 2013, no pet.); *In re J.J.J.*, No. 14-08-1015-CV, *2 (Tex. App.--Houston [14th Dist.] Dec. 8, 2009, no pet.) (mem. op.); *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex. App.--Dallas 2008, no pet.). These cases were vindicated in *In re H.S.*

Points to be noted regarding Tex. Fam. Code § 102.003(a)(9):

1. It does not apply to foster parents. Standing for foster parents with a DPFS placement is governed by Tex. Fam. Code § 102.003(a)(12), based on the passage of 12 months, without regard to degree of control (but as a practical matter control by the foster parents is comprehensive).

2. The actual care, control, and possession need not be continuous; the courts must look at the child's primary residence during the relevant time period.

3. The proponent is not required to prove legal authority to control the child during the relevant time period;

4. The actual care, control, and possession by the person seeking standing need not be to the exclusion of parental care, control and possession.

5. Tex. Fam. Code § 102.003(a)(9)'s standard of "actual care, control, and possession" could apply to a step-parent or female spouse or unmarried partner of a biological mother.

B. STANDING FOR GRANDPARENT OR OTHER PERSON. The Legislature has enacted a special standing provision for a child's grandparents and other relatives within the third degree of consanguinity who file an original SAPCR. TFC § 102.004, Standing for Grandparent or Other Person, provides:

Sec. 102.004. STANDING FOR GRANDPARENT OR OTHER PERSON.

(a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:

(1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or

(2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

(b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person, subject to the requirements of Subsection (b-1) if applicable, deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this chapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

(b-1) A foster parent may only be granted leave to intervene under Subsection (b) if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12).

(c) Possession of or access to a child by a grandparent is governed by the standards established by Chapter 153.

Comments:

1. Section 102.004(a) exists apart from the general standing statute (Section 102.003), so it is an alternative basis for determining standing that applies to persons within the third degree of consanguinity. Relatives within the third degree of consanguinity can establish standing under either Section 102.003 or Section 102.004(a).

2. The term "grandparent" under TFC § 102.004 means a consanguinious grandparent (related by blood, not marriage), ruling out step-grandparents. *In re Derzapf*, 219 S.W.3d 327, 331-32 (Tex. 2007).

3. The terms "substantial past contact" used in TFC § 102.004(b) is not defined by statute or case law. The question is determined on a case-by-case basis. *In re L.S.B.*, No. 05-17-00929-CV, *1 (Tex. App.--Dallas July 27, 2018, no pet.) (mem. op.). In evaluating a grandparent intervention in a SAPCR, the appellate court in *In re Schick*, No. 04-18-00839-CV (Tex. App.--San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.), reverted to the dictionary definition of substantial as meaning "of ample or considerable amount, quantity, sized, etc." *Id.* at *4. (The same dictionary definition was used in *In re Tinker*, 549 S.W.3d 747, 751 (Tex. App.--Waco 2017, orig. proceeding)). The *Schick* court engaged in a "fact-intensive" inquiry focused on

the amount of actual contact the child had with the adult.

C. STANDING TO INTERVENE IN SAPCRs. The Texas Legislature has adopted statutory provisions for when a party intervene in a SAPCR. While intervention in a pending lawsuit is provided for in Tex. R. Civ. P. 60, the normal procedure is modified for intervention in pending SAPCRs.

1. TRCP 60. Tex. R. Civ. P. 60 provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." Ordinarily "[a]n intervenor is not required to secure the court's permission to intervene; the party who opposed the intervention has the burden to challenge it by a motion to strike." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). "[A] person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof." *Id.* at 657. However, in *In the Interest of A.T.*, No. 14-14-00071-CV, *8 (Tex. App. --Houston [14th Dist.] July 15, 2014, no pet.) (mem. op.), the court held that a person is required to ask the trial court for leave in order to intervene under Tex. Fam. Code § 102.004(b), notwithstanding the language in Tex. R. Civ. P. 60 suggesting that you file first, subject to being stricken later. *Accord, In the Interest of E.C.D.*, No. 01-18-00886-CV (Tex. App,.--Houston [1st Dist.] Mar. 12, 2019) (mem. op.) ("we apply the statute as opposed to the more general rule of procedure"); *L.J. v. Texas Dep't of Family & Protective Servs.*, No. 03-11-00435-CV, at *8 (Tex. App.--Austin Aug. 1, 2012, pet denied) (mem. op.) (intervention under Rule 60 is a matter of right but intervention under Section 102.004 is discretionary with the court).

2. Intervention by Grandparent or Other Person in a SAPCR. The Legislature has enacted Tex. Fam. Code § 102.004(b) which provides:

> (b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person, subject to the requirements of Subsection (b-1) if applicable, deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this chapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.
>
> (b-1) A foster parent may only be granted leave to intervene under Subsection (b) if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12).

Section 102.004(B-1) applies only to cases filed on or after September 1, 2017. *In the Interest of E.C.D.*, No. 01-18-00886-CV (Tex. App.--Houston [1st Dist.] Mar. 12, 2019) (mem. op.). While the language of Section 102.004(b) is a bit ambiguous, one court has interpreted the statute to say that grandparents have the standing to intervene, regardless of past contact, while non-grandparents can intervene in the discretion of the trial court only if they have had substantial past contact with the child. *In re Nelke*, 573 S.W.3d 917, 922 (Tex. App.--Dallas 2019, orig. proceeding). The opposite view was taken in *In re Clay*, 02-18-00404-CV, at *4-5 (Tex. App.--Fort Worth Feb. 12, 2019, orig. proceeding), *mandamus denied sub nom. In re Cheryl Jackson*, No. 19-0256 (April 5, 2019). The term

"grandparent" means a blood or adoptive parent of a parent of the child in question. Step-grandparents do not have standing under Section 102.004(b) to intervene. *In re Derzapf*, 219 S.W.3d 327, 331-32 (Tex. 2007). The parties seeking to intervene have the burden to show standing by a preponderance of the evidence. *In re Clay*, *supra* at *4.

3. Will General Standing Support Intervention? In *In re S.B.*, No. 02-11-00081-CV, *2–3 (Tex. App.--Fort Worth Mar. 11, 2011, orig. proceeding) (mem. op.), the court held that grandparents who satisfied Tex. Fam. Code § 102.004(a)'s requirements for filing an original SAPCR also have the right to intervene. But other cases hold the opposite. *In re Nelke*, 573 S.W.3d 917, 921 (Tex. App.--Dallas 2019, orig. pet.), (standing to file initial suit does not apply to an intervention; *In re A.G.*, No. 05-18-00725-CV, *3 (Tex. App.--Dallas Dec. 12, 2018 n.p.h.) (standing under Tex. Fam. Code § 102.004(a) is not relevant to standing under Tex. Fam. Code § 102.004(b)); *In Interest of E.C.*, No. 05-17-00723-CV,*4 (Tex. App.--Dallas Dec. 20, 2017, no pet.) (mem. op.) (analyzing cases pro and con and deciding that standing to intervene must be shown without regard to standing under Tex. Fam. Code § 102.003(a)). In *In re Schick*, No. 04-18-00839-CV (Tex. App.--San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.), the court confined its analysis of standing to the standing to intervene under Tex. Fam. Code § 102.004(b), and did not consider standing under § 102.004(a) for filing an original SAPCR. In *In the Interest of A.G.*, No. 05-18-00725-CV, *3-4 (Tex. App.--Dallas Dec. 12, 2018, n. p.h.), the court held that an intervenor must meet the standing requirements of Tex. Fam. Code § 102.004(b) even if she had standing to bring an original suit under Tex. Fam. Code § 102.004(a)(2). Apart from the foregoing, in *Shook v. Gray*, 381 S.W.3d 540 (Tex. 2012), the Supreme Court allowed a grandparent to intervene in a custody case based on standing under Tex. Fam. Code § 102.003(a)(9). This decision by the Supreme Court should be enough to settle the issue.

It should be noted that foster parents can intervene in a SAPCR only if the requirements of Section 102.004(b) are met *and* the foster parents "would have standing to file an original suit." Tex. Fam. Code § 102.004(b-1). In *In the Interest of A.T.G.*, No. 04-18-00208-CV (Tex. App.--San Antonio Sept. 26, 2018, no pet.) (mem. op.), the appellate court found that since the foster parents had standing to initiate a SAPCR under Tex. Fam. Code § 102.003(a)(12), it follows that the foster parents had standing to intervene in a pending SAPCR. *Id.* at *2. However, in *In the Interest of E.C.D.*, No. 01-18-00886-CV (Tex. App,.--Houston [1st Dist.] Mar. 12, 2019, no pet.) (mem. op.), the appellate court said that to intervene, foster parents must show substantial past contact, that the termination suit was filed by a party authorized to do so, and that appointing a parent as managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. *Id.* at *3.

4. Procedural Grounds for Denial of Intervention. The court in *In the Interest of E.C.*, No. 05-17-00723-CV, *4 (Tex. App.--Dallas Dec. 20, 2017, no pet.) (mem. op.), held that a trial court may deny leave to intervene under Tex. Fam. Code § 102.004(b) where the intervention occurs late in the case, or for other procedural reasons. "[T]rial courts [may] weigh the benefits of such interventions against the potential for disruption in a pending suit." *Id.* at *4. In *In the Interest of E.C.D.*, No. 01-18-00886-CV (Tex. App.--Houston [1st Dist.] Mar. 12, 2019) (mem. op.), a child's foster parents filed a petition to intervene in a termination case one week before trial. The trial court refused to strike the petition, and proceeded to trial. The lateness of the intervention was not put in issue in the appeal.

5. Substantial Past Contact. What constitutes "substantial past contact" under Section 102.004(b) is not defined in the Family Code, and it is determined on a case-by-case basis. *In re N.L.D.*, 412 S.W.3d 810, 815 (Tex. App.--Texarkana 2013, no pet.). No particular period of time is required by the statute. The circumstances of the cases vary greatly, and individual fact patterns are at best a basis for comparison, not a "rule" to follow.

6. Appellate Review. The standard of appellate review of the grant or denial of leave to intervene in a SAPCR is abuse of discretion. *See Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982) (a non-family law case). A dismissal of a plea in intervention is reviewable by appeal from the order dismissing the intervention (if the intervention is severed so that it becomes a final judgment). *See In re L.S.B.*, No. 05-17-00929-CV (Tex. App.--Dallas July 27, 2018, no pet.) (mem. op.) (involving a distant relative). The granting of leave to intervene is reviewable by mandamus, but the issue can also be raised on appeal from the final judgment. *Interest of A.R.*, No. 02-19-00031-CV, at *1 (Tex. App.--Fort Worth Apr. 11, 2019, no pet.) (appellate court dismissed a pre-judgment appeal from refusal to dismiss for lack of standing). An order denying a motion to dismiss for lack of standing in a SAPCR is not a final judgment or appealable interlocutory order.

D. THE EFFECT OF FAMILY VIOLENCE. The Texas Legislature has enacted a number of statutory provisions relating to the effect of family violence on custody, possession, and access.

TFC §153.004, entitled "History of Domestic Violence or Sexual Abuse," contains significant (if confusing) terms. Subsection (a) says: "In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit." It is doubtful that a court would not consider such evidence even without the statute. *See generally Lewelling v. Lewelling*, 796 S.W.2d 164, 167-169 (Tex. 1990).

Subsection (b) says that the court "may not" appoint a party as joint managing conservator if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent against the other parent, a spouse, or a child. How to implement this directive is somewhat unclear, because the prohibition appears to be triggered by a mere prima facie showing with credible evidence, which is a lower burden than actually convincing the fact finder that such behavior occurred. Does the language of the statute mean that instead of determining from a preponderance of the evidence whether violence or sexual crimes occurred, the court should instead determine whether the evidence presented was credible? If so, what does a court do if it finds that evidence credible but finds that contrary evidence outweighs it?

Subsection (b) also introduces a "rebuttable presumption" that it would not be in the best interest of a child for the court to appoint a parent as sole managing conservator or to give that parent the exclusive right to determine a child's primary residence, when "credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child." This language presents the same uncertainty regarding the difference between presenting credible evidence and convincing the finder of fact. Things are further complicated by providing a "rebuttable presumption," which is weaker than the outright

prohibition ("may not appoint") that is contained in the previous term of Subsection (b). Also, if the presumption falls away in the face of contrary evidence (as suggested first by Professor Thayer and later by Professors Wigmore and McCormick, sometimes called the "bursting bubble" view of presumptions), then the rebuttable presumption can vanish as easily as it arose, and in a swearing match there would be no presumption. So it remains to be determined whether the statutory presumption merely shifts the burden of producing evidence to the alleged perpetrator, or whether it shifts the burden of persuasion as well, so that the alleged perpetrator must prove by a preponderance of the evidence that s/he did not do those things.

Subsection (c) says that the court "shall consider the commission of family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator." There is no outright prohibition ("the court may not"), nor is there a rebuttable presumption. Instead, there is just a requirement to consider certain evidence (which courts would almost certainly do even without the statute).

Subsection (d) prohibits a court from ordering access by a parent to a child for whom a preponderance of the evidence shows a history of family violence within two years, or criminal sexual conduct toward the child. This is a prohibition triggered by a finding upon a preponderance of the evidence-a burden of persuasion consistent with the rest of civil litigation.

Having said all that, Subsection (d-1) creates an exception to subsection (d) when the courts finds that access would not endanger the child's physical health or emotional welfare and would be in the child's best interest, and the court renders an order the protects the child and others who were victims of violence. These protections include supervised access, exchanges of possession in protective circumstances, abstaining from drugs and alcohol, and attending violence preventions programs.

Subsection (e) gives us another rebuttable presumption that unsupervised visitation is not in the best interest if "credible evidence is presented" of a history or pattern of child neglect, abuse, or family violence. The court is directed to consider as possible "credible evidence" a protective order.

In *C.C. v. L.C.*, No. 02-18-00425-CV, at *1 (Tex. App.--Fort Worth July 3, 2019, pet. denied), the appellate court considered whether a single act of family violence removed the trial court's discretion to appoint the mother as a joint managing conservator. In this case, during an argument the mother drew a gun on the father, who grabbed for the gun, resulting in him being shot in the leg and her being grazed by a bullet. The appellate court waded into the confusion surrounding Section 153.004, saying:

> Section 153.004 gives trial courts specific direction in determining how abuse or violence impacts various conservatorship decisions. Id. § 153.004. In places, it instructs the trial court to consider evidence of specific types of conduct in making its decisions and in others, it prohibits actions if evidence is presented that meets certain standards. Compare id. § 153.004(a), with id. § 153.004(b). Some provisions of the section direct the trial court to consider isolated incidents of conduct, while others direct the trial court to make its decisions based on whether a history or pattern of conduct exists. Compare id. § 153.004(b), (d–1), (e), with id. § 153.004(c). The section is also not consistent in its description of the conduct that impacts the trial court's decisions, with various sections defining the conduct that the trial

> court must consider in divergent terms. Compare id. § 153.004(a), and id. § 153.004(b), with id. § 153.004(d–1), (e). Because a part of our analysis revolves around the construction of the section as a whole, we will summarize the various determinations of conservatorship and access by a parent that the section governs and the various standards that the section instructs the trial court to use in making those determinations when there is evidence of abuse or violence.

Id. at *5. The appellate court then moved on to consider the "The Contorted History of the Interpretations of the Word 'History,' saying that "[m]ore than twenty years of case law is inconsistent in its interpretations of the phrase 'history or pattern' in general and the word 'history' in specific. The cases diverge in their holdings on whether a single incident can constitute a history." *Id.* at *8. The court concluded: "We do not interpret section 153.004(b) to mean that a single incident of physical abuse is automatically a history. Instead, the statute leaves it to the trial court's broad discretion to decide whether the act reaches the threshold of being a history." *Id.* at * 12.

E. INTERSTATE JURISDICTION ISSUES. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Tex. Fam. Code ch. 152, provides the exclusive basis for a Texas court to exercise jurisdiction over an interstate child-custody determination. *In re Dean*, 393 S.W.3d 741, 746 (Tex. 2012) (orig. proceeding). Under Tex. Fam. Code § 152.201(b), a Texas court has jurisdiction to make an initial custody determination only if: (1) Texas is the child's home state; (2) no other state has home state jurisdiction or a court of the home state has declined to exercise jurisdiction based on inconvenient forum or unjustifiable conduct and the child and at least one parent have a significant connection to Texas beyond mere presence, and there is substantial evidence in Texas; (3) all courts with jurisdiction under (1) and (2) have declined jurisdiction based on inconvenient forum or unjustifiable conduct; or (4) no court of any other state would have jurisdiction under grounds (1), (2) or (3).

Tex. Fam. Code § 152.102 says that "home state" means:

> the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned.

In re Butterfield, No. 01-18-00903-CV, at *6 (Tex. App.--Houston [1st Dist.] May 16, 2019, orig. proceeding), the court said that the petitioner in the Texas court has the burden to allege facts establishing the Texas court's subject-matter jurisdiction. The operative date for determining whether Texas has jurisdiction is the date the suit was filed in Texas. *In re Walker*, 428 S.W.3d 212, 219 (Tex. App.--Houston [1st Dist. 2014, no pet.); *In re McCoy*, 52 S.W.3d 297, 304 (Tex. App.--Corpus Christi 2001, orig. proceeding); *In re Alanis*, 350 S.W.3d 322, 325 (Tex. App.--San Antonio 2011, orig. proceeding).

In *Interest of D.S.*, 555 S.W.3d 301, 315 (Tex. App.--Dallas 2018, pet. pending), the appellate court held that a trial court must have jurisdiction over a child under the UCCJEA before rendering a judgment terminating parental rights based on a voluntary affidavit of relinquishment. A petition for review has been filed in the Texas Supreme Court, and a reply has been filed, along with two amicus

curiae briefs. On 6-14-2019 the Supreme Court requested briefs on the merits.

F. OTHER RECENT CASES. Recent cases not mentioned above include the following.

1. ***In re L.S.B.*****.** No. 05-17-00929-CV (Tex. App.--Dallas July 27, 2018, no pet.) (mem. op.). An aunt sought to intervene in a termination-adoption proceeding of a three year old child that had been living in foster care with a distant relative for over two years. The ground alleged for standing was the fact that the child had been placed with the aunt for three months several years before the termination proceeding was filed. The appellate court applied abuse of discretion review. The appellate court recognized that Section 102.004(b) does not have an explicit time limit for past contact. However, the aunt had limited contact with the child after her three months of possession ended, and the child had spent two of its three years living with the distant relative. The trial court did not abuse its discretion in dismissing the plea in intervention.

VIII. REBUTTING THE PARENTAL PRESUMPTION. Tex. Fam. Code § 153.131 (a) states the parental presumption:

Tex. Fam. Code § 153.131 (a) states the parental presumption:

> § 153.131. Presumption That Parent to be Appointed Managing Conservator
>
> (a) Subject to the prohibition in Section 153.004,[1] unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
>
> (b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Things to note about the parental presumption.

1. TFC §153.131 not only casts the burden of producing evidence and the burden of persuasion on the party seeking to keep a parent from being appointed managing conservator; it also alters the burden of persuasion from best interest to proving that the appointment of the parent as a managing conservator would significantly impair the child's physical health or emotional development. Several courts have called this a "heavy burden." *In re K.R.B.*, No. 02-10-00021-CV, *4 (Tex. App.--Houston [14th Dist.] Oct. 7, 2010, no pet.) (mem. op.); *Critz v. Critz*, 297 S.W.3d 464, 474-75 (Tex. App.--Ft. Worth 2009, no pet.). The court in *Critz* said: "Impairment must be proved by a preponderance of the evidence indicating that some specific, identifiable behavior or conduct of the parent, demonstrated by specific acts or omissions of the parent, will probably cause that harm. This is a heavy burden that is not satisfied by merely showing that the non-parent would be a better custodian of the child. 'Close calls' should be decided in favor of the parent." *Id*. at 474-75. [Footnotes omitted.] In *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.--Houston [1st Dist.] 2007, no pet.),

the court said that the "evidence must support a logical inference that the parent's specific, identifiable behavior or conduct will probably result in the child being emotionally impaired or physically harmed. This link between the parent's conduct and harm to the child may not be based on evidence which merely raises a surmise or speculation of possible harm."

2. Under TFC § 153.373, the parental presumption vanishes where "the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent, a licensed child-placing agency, or the [DFPS] for a period of one year or more, a portion of which was within 90 days preceding the date of intervention in or filing of the suit," and the appointment of the non-parent, agency, etc. is in the best interest of the child.

3. The parental presumption does not apply in suits to modify a prior SAPCR order. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000).

In *In re F.R.N.*, No. 10-18-00233-CV (Tex. App.–Waco Aug. 7, 2019, no pet.) (mem. op.), the appellate court affirmed the appointment of a mother and her mother-in-law as joint managing conservators of a child with the mother-in-law to establish the primary residence of the child. To overcome the strong presumption in favor of parental custody, the proponent must show that appointing the parent a managing conservator would significantly impair the child, physically or emotionally. *Id.* at *4. This can be shown by evidence of action or omissions, such as physical abuse, severe neglect, drug or alcohol abuse, immoral behavior, parental irresponsibility, and an unstable home environment. In this case, evidence of uncharacteristic behavior after the child's visits with the mother was held to be some evidence of significant impairment of emotional development. The child was diagnosed by a psychologist to have Reactive Attachment Disorder. *Id.* at *2. [Author's note: Reactive Attachment Disorder is a mental disorder listed in DSM-5 whose "essential feature is absent or grossly underdeveloped attachment between the child and putative caregiving adults." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 265-70 (5th ed. American Psychiatric Association 2013). The disorder is found in children exposed to severe neglect prior to placement in foster care, but in less than 10% of that population *Id.* at 266.].

IX. VISITATION. Tex. Fam. Code § 153.192(b) sets out a "standard possession order" (SPO) and creates a rebuttable presumption that this is the reasonable minimum possession that a non-custodial parent should have with his/her children.

1. Restricting Parental Access. In *Marriage of Harrison*, 557 S.W.3d 99, 130 (Tex. App.-- Houston [14th Dist.] 2018, pet. denied), the court found the SPO to be unworkable and awarded the mother four hours of supervised visitation on the Saturdays following the second and fourth Fridays of each month. The lengthy appellate opinion listed evidence of instances of behavior that supported the court's limiting the mother's periods of possession and requiring supervision, and affirmed the trial court's decision.

In *Marriage of D.E.L. & J.J.P.*, No. 14-17-00216-CV (Tex. App.-- Houston [14th Dist.] Feb. 12, 2019, no pet.), at the time of divorce, the husband was in prison for life, without possibility of parole, for a gang-related murder. The trial court appointed husband as a possessory conservator but limited his contact with the children to correspondence by mail. The children do not know that their father is in prison. The appellate court held that the trial court did not abuse its discretion. The appellate

court also affirmed the trial court's changing the children's names away from the father's name.

In *W.D. v. R.D.*, No. 02-18-00328-CV (Tex. App.--Fort Worth July 11, 2019, no pet.), the trial court awarded the mother supervised, in-person visitation and electronic communication with the children, and conditioned her visitation on paying in advance for the supervisor's fees, half to be reimbursed by the father. The appellate court affirmed, saying that the court did not abuse its discretion.

X. CHILD SUPPORT.

1. Dental Insurance. Beginning September 1, 2018, the health support and insurance obligation of the obligor includes dental care and dental insurance. Tex. Fam. Code §§ 154.1815, 154.1825, & 154.183.

2. New Child Support Guideline "Cap." Tex. Fam. Code § 154.125 provides that the Texas Attorney General will recalculate the "cap" every six years. The A.G.'s office has announced that the cap will increase from $8,550 to $9,200 effective September 1, 2019. The new guideline amounts are:

1 child	20%	$1,840
2 children	25%	$2,300
3 children	30%	$2,760
4 children	35%	$3,220
5 children	40%	$3,680

[The foregoing calculations do not take into account adjustments for children in more than one household. See Tex. Fam. Code §§ 154.128 and 154.129.]

3. Amount of Child Support. In *Interest of V.J.A.O.*, No. 05-15-01534-CV (Tex. App.--Dallas May 4, 2017, pet. denied), the appellate court affirmed child support of $5,000 per month for one child. The appellate court relied on the provision in Tex. Fam. Code § 154.126(a), which provides:

> (a) If the obligor's net resources exceed the amount provided by Section 154.125(a) , the court shall presumptively apply the percentage guidelines to the portion of the obligor's net resources that does not exceed that amount. Without further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child.

Supporting facts are detailed in the appellate Opinion.

4. Calculating Net Resources. In *Attaguile v. Attaguile*, No. 08-16-00222-CV (Tex. App.--El Paso Sept. 28, 2018, no pet.), the appellate court rejected an argument that retirement funds in a 401k plan and money in a bank account are net resources for purposes of calculating child support.

XI. MODIFICATION OF SAPCR DECREE. Tex. Fam. Code ch. 156 establishes the parameters for modifying a final SAPCR decree.

A. MODIFICATION BY TEMPORARY ORDER. Tex. Fam. Code § 156.006(b) provides that in granting temporary orders in a custody modification case a court cannot change the person who has the exclusive right to establish the primary residence of a child, or create or eliminate or alter a geographical restriction on the child's primary residence, from what the previous final order provided unless the change is in the best interest of the child and: (1) the order is "necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or (3) the child is 12 years of age or older and has expressed to the court in chambers as provided by Section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child." Under Section 156.006(b-1), the person filing the motion must execute and attach to the motion an affidavit based on the person's personal knowledge, or the person's belief based on representations made to the person by a person with personal knowledge, that contains facts that support the allegation of significant impairment. Section 153.006(c) says that the (b)(2) ground of voluntary relinquishment does not apply to a conservator who temporarily relinquished primary care and possession during military deployment, military mobilization, or temporary military duty. In *In re Lee*, No. 04-19-00440-CV (Tex. App.--San Antonio Aug. 7, 2019, orig. proceeding) (mem. op.), the trial court issued a temporary order changing the geographical restriction to allow the primary custodial parent to move to Florida. The other parent applied for mandamus, and the court of appeals issued a stay order. The appellate court issued mandamus to set aside the temporary order on the ground that, even if the proponent's evidence was believed, the evidence did not meet the high burden of significant impairment. The appellate court said that the proponent must show bad acts or omissions committed against the children. *Id.* at *2.

B. MODIFYING CONSERVATORSHIP AND POSSESSION. Tex. Fam. Code § 156.101 governs suits to modify prior final SAPCR decrees. The grounds for modifying conservatorship, possession or access are set out in Section 156.101:

> § 156.101. Grounds for Modification of Order Establishing Conservatorship or Possession and Access
>
> (a) The court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and:
>
> (1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier of:
>
> (A) the date of the rendition of the order; or
>
> (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based;
>
> (2) the child is at least 12 years of age and has expressed to the court in chambers as provided by Section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child; or

(3) the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months.

(b) Subsection (a)(3) does not apply to a conservator who has the exclusive right to designate the primary residence of the child and who has temporarily relinquished the primary care and possession of the child to another person during the conservator's military deployment, military mobilization, or temporary military duty, as those terms are defined by Section 153.701.

C. CONTINUING JURISDICTION TO MODIFY. Under Tex. Fam. Code § 152.202, a Texas court that has made a child custody determination has exclusive continuing jurisdiction of custody issues until: (i) a Texas court determines that neither the child, nor the child and one parent, nor the child and a person acting as parent, have a significant connection to Texas and that substantial evidence is no longer available in Texas concerning the child's care, protection, training, and personal relationships; or (ii) a court of Texas or another state determines that the child, child's parents, and person acting as parent, do not presently reside in Texas. Tex. Fam. Code § 152.202(b). However, court that made a custody determination and lost continuing jurisdiction can modify its decree if it has initial child custody jurisdiction under Tex. Fam. Code § 152.201. Tex. Fam. Code § 152.202(b). In *In re Dixon*, No. 04-19-00162-CV (Tex. App.--San Antonio May 8, 2019, (orig. proceeding) (memo. op.), after a custody determination in Texas the mother and child moved to Virginia. One year later, the father filed a custody modification proceeding in the Texas court. The mother filed a plea to the jurisdiction and motion to dismiss based on forum non conveniens. The trial court denied her motion, and the wife sought mandamus review. As to significant connection to Texas, the appellate court recognized that visitation within Texas is evidence of a significant connection, citing *In re Forlenza*, 140 S.W.3d 373, 376-77 (Tex. 2004). In this case, however, mother and child had lived in Virginia for almost 15 months and the child did not come to Texas that entire time. Other factors that can be considered are the child's relationship with the Texas parent and other friends and family in Texas. *Forlenza*, at 377. The parties disagreed about how much telephone contact occurred, and whether the mother obstructed contact. The appellate court held that the mother and daughter did not have a significant relationship to Texas. As to substantial evidence in Texas, the appellate court noted that the child attended school in Virginia, had a Virginia doctor and play-therapy counselor, and takes karate and horseback riding lessons and swims on a swim team and participates in Girl Scouts, all in Virginia. There was no indication of relevant evidence in Texas. Mandamus granted.

XII. NATIVE AMERICAN INDIAN ISSUES. On August 19, 2019, the U.S. Court of Appeals for the Fifth Circuit issued a significant decision in *Bracken v. Bernhardt*, No. 18-11479, 2019 WL 3759491 (5th Cir. August 9, 2019), relating to Native American Indian child litigation. In a 2-to-1 vote, Justice Priscilla Owen dissenting, the Panel held that the states of Texas, Indiana, and Louisiana had standing to challenge the constitutionality of the Indian Child Welfare Act of 1978 (ICWA), but the Panel Majority reversed the district court's ruling that the ICWA was unconstitutional. According to the Panel Majority Opinion, the ICWA was enacted because a disturbing number of ethnic Indian children were being removed from tribal families and placed in non-tribal foster homes or institutions. The ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). The ICWA gives the Indian custodian and Indian child's tribe standing to intervene in a state court parental termination or child

custody proceeding. The ICWA also includes a requirement that notice of an involuntary removal proceeding be given to the Indian custodian, and the tribe or the Secretary of the Department of the Interior. The ICWA also sets out the following hierarchy of placement of a removed child: (i) member of the child's extended family; (ii) other members of the child's tribe; (iii) other Indian families. Department regulations provide that the state has the responsibility for determining whether the child in an Indian child. The Court of Appeals held that all plaintiffs had standing under Article III of the U.S. Constitution to challenge the constitutionality of the ICWA and department regulations. Individual plaintiffs had standing to assert that the ICWA denied them equal protection of the law implied under the Due Process Clause of Fifth Amendment to the U.S. Constitution. State plaintiffs had standing to assert that the ICWA violated the Tenth Amendment to the U.S. Constitution and the anticommandeering doctrine and the nondelegation doctrine. *Id.* at *8. The state plaintiffs also had standing to challenge the Interior Department "rules" under the Administrative Procedure Act. As to the merits, the Panel Majority disagreed with the District Court's ruling that the definition of "Indian Child" was race-based and therefore subject to strict scrutiny. The Panel Majority felt that the classification was political, not race-based, *Id.* at *8-11, and that rational basis review should be applied to the equal protection claim. *Id.* at *12. The Panel Majority also found that the ICWA did not improperly require states to apply Federal standards to state-created claims and did not improperly commandeer state agencies, but rather preempted state laws. *Id.* at 12-15. The Panel Majority also overruled the District Court's decision that the ICWA improperly delegated to Indian tribes the ability to establish child placement preferences that preempted state law, saying that tribal rules were the laws of another sovereign government. Finally, the Panel Majority overturned the District Court's decision that placement contrary to the ICWA hierarchy of placements must be based on a preponderance of the evidence, and ruled instead that the ICWA hierarchy should be followed unless clear and convincing evidence is presented to the contrary. Justice Priscilla Owen's Dissenting Opinion had not been released at the time this Article was written.

XIII. PROCEDURAL ISSUES.

1. Ineffective Assistance of Counsel. The Texas Supreme Court has recognized a parent's constitutional right to effective counsel in parental rights termination cases. *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). However, "[t]he doctrine of ineffective assistance of counsel does not extend to most civil cases, including divorce cases involving custody issues." *Interest of A.A.E.*, No. 05-18-00210-CV, at *4 (Tex. App.--Dallas Apr. 10, 2019, n.p.h.) (mem. op.), citing *In re G.J.P.*, 314 S.W.3d 217, 223 (Tex. App.--Texarkana 2010, pet. denied) (ineffective assistance of counsel complaint not available in appeal of child custody determination).

2 . Frivolous Appeal of Termination Decree. In a suit filed by a governmental entity seeking termination of the parent-child relationship, an indigent parent who responds in opposition to the termination is entitled to the appointment of counsel. Tex. Fam. Code § 107.013(a)(1). A number of Texas courts have held that the procedures set forth in *Anders v. California*, 386 U. S. 738 (1967), pertaining to a non-meritorious appeal of a criminal conviction, are applicable to the appeal of an order terminating parental rights. In *Interest of J.F.*, No. 07-19-00174-CV, at *3 (Tex. App.--Amarillo Aug. 6, 2019, no pet.), appointed counsel filed an *Anders* brief and a motion to withdraw. The appellate court made the required independent examination of the entire record to determine whether there are any arguable grounds that might support the appeal. In its independent review of the record, the appellate court found that the parent may have been denied the right to appointed counsel at the

final hearing before the associate judge. The case was reversed and remanded to the trial court to appoint new appellate counsel for the indigent parent.

3. Missing Trial Deadline in Parental Termination. Effective September 1, 2017, the trial court in a parental termination case automatically loses jurisdiction if the trial on the merits does not begin by the deadline imposed by Tex. Fam. Code § 263.401(a). Under Section 263.401(a), the court has until the Monday following the one-year anniversary of the temporary order appointing the Department of Family and Protective Services as managing conservator to commence the final trial, unless an extension is granted. In *Interest of G.X.H.*, No. 14-19-00053-CV, at *2 (Tex. App.--Houston [14th Dist.] June 27, 2019, n.p.h.), the court missed the deadline by over three weeks, and the appellate court held that the trial court's jurisdiction terminated on the Monday deadline. The appellate court rejected the Department's equal protection, due process, and separation of powers attacks on the statute. The court vacated the trial court's decree and dismissed the underlying case. In *Interest of P.N.T.*, No. 14-18-01115-CV, at *1 (Tex. App.--Houston [14th Dist.] June 11, 2019, n.p.h.), applying the pre-2017 version of the statute, which said that "the court shall dismiss the suit" if the deadline is missed, the court said that "[a] party who seeks to enforce the one-year deadline must file a motion to dismiss before a trial on the merits commences." The appellants filed a motion, but did not object when trial started, and so waived error. [Author's note: Under the present version of the statute, the dismissal is automatic].

4. Pro Se Litigants. In *W.D. v. R.D.*, No. 02-18-00328-CV, *6 (Tex. App.--Fort Worth June 27, 2019, n.p.h.) (mem. op.), a pro se litigant appealed complaining that the trial court failed to explain its evidentiary rulings or to inform the litigant how to proffer the evidence in an admissible form. This complaint was rejected, saying that to require a trial judge to explain rulings to a pro se litigant "would impermissibly transform a trial judge from a neutral arbiter into an advocate for the pro se litigant." *Id.* The appellate court quoted *Martinez v. Ct. of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000), where the U.S. Supreme Court said that "the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out."

5. Notice Not Required for Hearing on Turnover Order. In *Marriage of Tyeskie*, 558 S.W.3d 719, 724-25 (Tex. App.--Texarkana 2018, pet. denied), the appellate court held that a former wife was not entitled to notice of a hearing for the divorce court to issue a turnover order. The appellate court relied on the language of the turnover statute, Tex. Civ. Prac. & Rem. Code § 31.002. She waived her claim of lack of due process by failing to raise that in the trial court.

6. What Constitutes an Agreed Judgment? In *Interest of R.S., A.S., and L.S.*, No. 05-17-00848-CV (Tex. App.–Dallas Apr. 12, 2019, n.p.h.) (mem. op.), the appellate court considered wife's appeal from an agreed judgment that she said did not match the MSA. The decree was entitled "Agreed Final Decree of Divorce," but was signed only by husband and not wife, and was signed by the parties' attorneys only as to form. *Id.* at *3 & *5. The court wrote: "A party who approves only the form of the judgment forfeits no right to appeal.... Further, the phrase 'approved as to form and substance,' standing alone does not transform a judgment into a consent judgment." In this case wife filed a motion for new trial complaining of the failure to follow the MSA. The divorce decree was reversed, not because it deviated, but because an consent decree cannot be granted without consent of all parties. *Id.* at 5.

7. Letter of Rendition Not Appealable Order. In *Wilson v. Trevino*, No. 01-19-00441-CV (Tex. App.–Houston [1st Dist.] June 21, 2019, no pet.) (mem. op.) the appellate court held that a letter from the judge granting a motion to dismiss was not an appealable order because it indicated that a future action would occur and that the letter was not to have operative effect.

8. Discovery Issues. TRCP 193.6(a) says that when a party fails to timely supplement a discovery response, the untimely disclosed evidence may be excluded. Exclusion is mandatory and automatic unless the court finds that there was good cause for the failure to amend or supplement, or the failure will not unfairly surprise or prejudice the other party. TRCP 193.6(a). The party seeking to introduce the evidence has the burden of establishing good cause or lack of unfair surprise or prejudice. TRCP193.6(b). The trial court has discretion to determine whether the offering party has met its burden to show good cause or lack of unfair surprise or prejudice, but the record must support such finding. TRCP 193.6(b). In *Interest of D.W.G.K.*, 558 S.W.3d 671, 680 (Tex. App.–Texarkana 2018, pet. denied), the appellate court recognized the constitutional dimensions of parental terminations and held that "in parental-rights termination cases--Rule 193.6(a)'s exceptions should also be strictly construed in favor of the parents and against the Department."

9. De Novo Review. Trial courts are permitted to refer cases to associate judges to hear matters, including trial on the merits. Tex. Fam. Code § 201.005(a). Either party may object, in which event the court must hear the trial on the merits. Tex. Fam. Code § 201.005(b), (c); Tex. Gov't. Code §§ 54A.106(b), (c), .207(b), (c). Any party can appeal from an associate judge's trial on the merits by requesting a "de novo hearing" before the referring court. The requesting party must specify the specific issues to be presented to the referring court. Section 201.015(b). In *Interest of A.L.M.-F.*, No. 17-0603, at *4 (Tex. May 3, 2019), the Supreme Court held that a "trial de novo" is not the same as a "de novo hearing." The Court said that a de novo hearing is "not equivalent to a trial, and review under section 201.015 is not entirely independent of the proceedings before the associate judge." *Id.* The Court held that where a party requests a jury trial for the first time in connection with a de novo hearing, the trial court has the discretion to grant or not grant a jury trial. *Id.* at *9.

10. Bill of Review. A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam). In *In re D.S.*, No. 05-17-01066-CV, at *4 (Tex. App.--Dallas Apr. 18, 2018, pet. pending), the former husband and father of a child filed a bill of review to set aside his divorce decree. In the divorce, the father signed an affidavit of relinquishment or parental rights and an MSA saying that he would maintain life insurance payable to the child and would paid $3,500 per month for sixty months into a trust fund for the child's education. He also signed an agreed decree of divorce. The father's ground to set aside the termination was that the Texas court did not have jurisdiction under the UCCJEA because Massachusetts was the child's home state. Treating the bill of review as a collateral attack on the decree, the appellate court declared the termination decree void for lack of subject matter jurisdiction. The appellate court affirmed the denial of a bill of review on the divorce part of the decree. The court noted that "[w]hen a bill of review fails as a direct attack, it may instead constitute a collateral attack." *Id.* at *4.

11. Appellate Review of Grounds for Termination. In order to terminate the parent-child relationship the proponent must prove by clear and convincing evidence one of the statutory grounds

for termination and that termination is in the child's best interest. Tex. Fam. Code § 161.001(b). When termination is based on multiple grounds, the appellate court can affirm if the evidence is sufficient to support any of the grounds for termination. When termination is based on multiple grounds, the appellate court can affirm if the evidence is sufficient to support any of the grounds for termination. In multiple ground terminations, intermediate courts sometimes find that evidence supports termination on one ground, and do not address the sufficiency of the evidence to support termination under Section 161.001(b)(1)(D) & (E), for allowing the child to be in dangerous surroundings or personally endangering the child. Section 161.001(b)(1)(M) allows termination as to a different child in a later case if the parent had his or her parent-child relationship terminated with respect to another child based subparagraph (D) or (E). If a court of appeals does not address the sufficiency of the evidence for (D) and (E) in the earlier termination proceeding, it is too late to do so in the second termination proceeding. Considering the constitutional dimensions of parental termination, the Supreme Court ruled in two cases that the court of appeals must review grounds (D) and (E) in every appeal where they are raised. *Interest of N.G.*, 577 S.W.3d 230, 234 (Tex. 2019); *Interest of Z.M.M.*, No. 18-0734, 2019 WL 2147266 (Tex. May 17, 2019).

XIV. ATTORNEYS' FEES.

A. SIGNIFICANT CASE ON DETERMINING ATTORNEYS' FEE AWARD. The Supreme Court released an important decision in 2019 regarding the recovery of attorneys' fees in litigation. In *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, No. 16-0006, 2019 WL 1873428, at *12 (Tex. Apr. 26, 2019), the Court wrote:

> When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary. *See Nat'l Lloyds*, 532 S.W.3d at 809 (stating that a party seeking recovery of attorney's fees from the losing party "bears the burden of establishing the fees are reasonable and necessary" (emphasis added)). Both elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 231 (Tex. 2010) (observing that generally the reasonableness of particular fees presents a fact question that the fact finder must decide, as does necessity); *see also Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (explaining that reasonableness is a question of fact for the jury, and that "[t]he second limitation, that fees must be necessary, is likewise a fact question" (citing *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 961 (Tex. 1996))).
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> * * *
>
> Historically, claimants have proven reasonableness and necessity of attorney's fees through an expert's testimony-often the very attorney seeking the award-who provided a basic opinion as to the requested attorney's fees. *See generally Penn Mut. Life Ins. v. Maner*, 101 Tex. 553, 109 S.W. 1084, 1084 (1908). In recent years, Texas law has developed with references to the *Arthur Andersen* method (sometimes referred to as the "traditional" method) and the lodestar method for proving the reasonableness and necessity of attorney's fees. *See, e.g., Metroplex Mailing Servs.*, 410 S.W.3d at 900 (suggesting that "[u]nder the traditional method of awarding fees, [as opposed to the lodestar method,] documentary evidence is not

> a prerequisite"). The court of appeals in this case referenced both methods, distinguishing them and concluding that "Rohrmoos does not assert, and the record does not show, that the lodestar method was statutorily required or that [UTSW] 'chose to prove up attorney's fees using this method.'" 559 S.W.3d at 167 (citations omitted). The court of appeals then affirmed the attorney's fee award, holding that "Howard's testimony concerning his experience, the total amount of fees, and the reasonableness of the fees charged was sufficient to support the award" under *Arthur Andersen*. *Id*. at 168.
>
> These two seemingly different methods for evaluating claims for attorney's fees have created confusion for practitioners and courts alike. As explained below, however, the lodestar method developed as a "short hand version" of the *Arthur Andersen* factors and was never intended to be a separate test or method. With that in mind, we clarify the law governing recovery of attorney's fees in Texas courts. We begin by reviewing fee-shifting and attorney's fee jurisprudence in the federal courts.
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> * * *
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> It should have been clear from our opinions in *El Apple*, *Montano*, and *Long* that we intended the lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. We reaffirm today that the fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts. *See El Apple*, 370 S.W.3d at 760. Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. *See id*. at 762-63. This base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party's claim through the litigation process. *Cf. Blanchard v. Bergeron*, 489 U.S. 87, 93, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (explaining that a fee-shifting statute "contemplates reasonable compensation ... for the time and effort expended by the attorney for the prevailing [party], no more and no less"). And the lodestar calculation should produce an objective figure that approximates the fee that the attorney would have received had he or she properly billed a paying client by the hour in a similar case. *See Perdue*, 559 U.S. at 551, 130 S.Ct. 1662 (noting that "the lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case" (emphasis in original)). This readily administrable and objectively reasonable calculation is the standard for calculating the reasonableness and necessity of attorney's fees in a fee-shifting situation. *See id*. at 551-52, 130 S.Ct. 1662 (recognizing that the lodestar method is administrable and objective, cabins discretion of trial court judges, permits meaningful judicial review, and produces reasonably predictable results).

Id. p. * 20.

B. AWARD OF INTERIM FEES ON APPEAL REQUIRES EVIDENCE. In *In re Mansfield*,

No. 04-19-00249-CV (Tex. App.–San Antonio June 12, 2019, orig. proceeding) (memo op.), the trial court ordered the payment of $5,000 in interim fees pending appeal, under the authority of Tex. Fam. Code § 109.001. The trial court did not hear testimony from any witness or receive any evidence. *Id.* at *3. Because there was no evidence that the order was "necessary to preserve and protect the safety and welfare of the child during the pendency of an appeal," Section 109.001, the appellate court issued mandamus to set the temporary order aside.

XV. PREMARITAL AGREEMENTS. Tex. Fam. Code § 4.003 authorizes persons about to marry to enter into a premarital agreement (PMA) that, among other things, control the disposition of property on martial dissolution. The only defenses to a premarital agreement are that (i) it was not signed voluntarily, or (ii) that it was unconscionable when signed and the party opposing enforcement did not waive financial disclosure, did not receive fair disclosure, and did not have independent knowledge of the other party's wealth. Tex. Fam. Code § 4.006.

1. Summary Judgment Denying Claim of Involuntariness. In *Marriage of Lehman*, No. 14-17-00042-CV (Tex. App.–Houston [14th Dist.] June 28, 2018, no pet.) (mem. op.), the trial court granted a no-evidence summary judgment upholding a PMA against a claim that it was not signed voluntarily. Factors to consider on voluntariness are (1) whether a party had advice of counsel, (2) misrepresentations made in procuring the agreement, (3) the amount of information provided, (4) whether information was withheld, (5) evidence of fraud, and (6) evidence of duress. *Id.* at *5, citing *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 698 (Tex. App.–Austin 2005, pet. denied). Wife's deposition testimony showed that she was not under threat of violence, intoxicated, and that she understood what she was signing. Husband did not threaten her to secure her signature, and she was represented by counsel and made changes to the proposed agreement. *Id.* at 5-6. Wife's affidavit in response to husband's motion for summary judgment was conclusory about lack of voluntariness. The summary judgment was affirmed.

2. Premarital Agreement Set Aside for Lack of Voluntariness. In *Kozera v. Velemir*, No. 01-17–00290-CV (Tex. App.--Houston [1st Dist.] Dec. 13, 2018, pet. pending) (mem. op.), the wife testified that the husband gave her a copy of the PMA for the first time on the day of the wedding. She testified that she signed it in her apartment, and doesn't recall a notary public authenticating her signature. She did not receive or submit financial statements, but she has some awareness of the husband's assets. Wife testified that hte agreement was presented to her in English, which was not her native language. She spoke enough English to know that the agreement related to property, but she did not know what effect the agreement had. Husband testified that wife had full knowledge of his assets. He said that they drafted the PMA together. Husband and another witness testified that they signed the PMA in a pharmacy. The trial court invalidated the PMA, and the court of appeals affirmed, saying that the evidence was sufficient to show lack of voluntariness.

3. Recovery of Attorneys' Fees For Enforcing PMA. In *Marriage of Veldekens*, No. 14-16-00770-CV (Tex. App.–Houston [14th Dist.] June 7, 2018, no pet.) (mem. op.), the husband claimed that he bought his wife's one-half separate property interest in real property using his separate property cash during marriage, resulting in the realty being 100% his separate property. The parties' PMA said that property held by title could be conveyed to the other spouse only by a deed, instrument of conveyance, document of title, or other written instrument. *Id.* at *9. The PMA also provided that money used for the benefit of the other party would be presumed to be a gift. *Id.* at *9. The trial court

did not abuse its discretion in finding the wife's interest in the realty to be her separate property. The trial court's award to wife of $6,500 in attorneys' fees for defending against husband's claim made contrary to the PMA was affirmed.

4. Forfeiture Clause Upheld. In *Marriage of I.C. & Q.C.*, 551 S.W.3d 1191 (Tex. 2018), the PMA provided that future husband would pay future wife $5 million upon divorce. However, future wife would forfeit the payment if she sought to recover property in a manner at variance with the Agreement. Wife sued husband for failing to make periodic payments required by the PMA, and in the alternative pled for rescission of the PMA. The Supreme Court upheld the trial court's determination that wife's request for alternative relief violated the "no contest" clause and caused her to forfeit her claim to the $5 million payment. The Court declined to recognize a "just cause" exception to a no-contest clause.