Recent Developments in Family Law

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I. INTRODUCTION

This article discusses recurrrent issues in family law in areas where the law is developing. Additionally, in 2003, the 78th Texas Legislature made several amendments to the Texas Family Code, and this article provides a summary of the major legislative changes made.

II. ATTORNEY'S FEES

Oftentimes the question arises among practitioners as to under what circumstances can attorney's fees be sought and obtained under the provisions of the Texas Family Code. Identified below are recent legislative amendments to the Family Code as they relate to attorney's fees. Also addressed in this section is the ever-present issue of attorney's fees - both interim fees and fees following a final hearing - in terms of the ability to obtain them as well as enforce them by contempt.

A. LEGISLATIVE AMENDMENTS

In 2003 the Legislature amended Section 157.167 of the Texas Family Code to enhance the likelihood that attorney's fees and costs will be awarded in suits to enforce visitation or child support. Section 157.167(b), which became effective for enforcement orders rendered on or after September 1, 2003, states:

> (b) If the court finds that the respondent has failed to comply with the terms of an order providing for the possession of or access to a child, the court shall order the respondent to pay movant's reasonable attorney's fees and all court costs in addition to any other remedy.

TEX. FAM. CODE § 157.165(b).

Section 157.167(c) allows courts the right to waive the requirement that the respondent pay attorney's fees and costs if the court states the reasons supporting that finding. This particular section, however, only applies upon a showing of good cause, and further contains a caveat that it applies "[e]xcept as provided by Subsection (d).

Under §157.167(d), also effective for orders rendered on or after September 1, 2003, "[i]f the Court finds that the respondent is in contempt of court for failure or refusal to pay child support and that the respondent owes $20,000 or more in child support arrearages, the court may not waive the requirement that the respondent pay attorney's fees and costs unless the court also finds that the respondent:

> (1) is involuntarily unemployed or is disabled; and
>
> (2) lacks the financial resources to pay the attorney's fees and costs.

TEX. FAM. CODE § 157.165(c).

The Legislature amended Section 106.002 of the Texas Family Code to reflect that a Court may render a ***judgment*** (rather than an order) for reasonable attorney's fees and expenses, and order that the ***judgment*** and post-judgement interest be paid directly to the attorney. TEX. FAM. CODE § 106.002(a) and (b) (effective September 1, 2003) (Emphasis added.)

B. INTERIM FEES

The award and collection of interim attorney's fees continues to be an issue in family law cases.

1. AUTHORITY TO AWARD INTERIM FEES.

Texas Family Code § 6.502(a)(4) provides for the award of interim fees in a suit for divorce. Such an order is considered to be temporary spousal support, and is therefore enforceable by contempt . TEX. FAM. CODE § 6.506; *Ex Parte Kinmsey*, 915 S.W.2d 523, 525 (Tex.App.–El Paso 1995, orig. proceeding)(holding that "it matters not whether the trial court awards alimony *pendente lite* to the wife in order to provide her sufficient funds with which to pay her attorney or whether the court orders, as temporary spousal support, that the monies will be paid directly to the attorney for the wife's benefit... [i]n each instance, the wife is recouping the benefit of the support award.... [a]ccordingly, we find that Relator has not been imprisoned for failure to pay a debt.")

Additionally, Section 105.001 of the Code provides for the award of interim fees in a suit affecting the parent-child relationship. TEX. FAM. CODE § 105.001(a)(5). Such an order is not appealable, and is considered temporary child support for the safety and welfare of the child - thus enforceable by contempt. TEX. FAM. CODE § 105.001 (e) and (f).

2. ENFORCING INTERIM FEE AWARD BY SANCTIONS

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

C. ENFORCEMENT OF ATTORNEY'S FEES BY CONTEMPT.

The law pertaining to the enforcement of an award of attorney's fees by contempt in Texas is complex in nature, and it seems that varying opinions exist on the subject. Hence, attorneys should familiarize themselves with the different rulings made on this particular issue.

The general rule is that in Texas, a court shall not imprison a person for a debt. TEX. CONST. Art. I, § 18. However, courts have consistently recognized that obligations incurred for the support of children and spouses do not constitute a "debt" for purposes of contempt. *Ex Parte Kimsey* at 525 (Tex.App.–El

Paso 1995, no writ.)(holding that "[t]he obligation which the law imposes on spouses to support one another and on parents is not considered a 'debt' within Article I, section 18, but a legal duty arising out of the status of the parties.")

The facts in *Kimsey* involved a court order rendered during a temporary hearing held in a divorce proceeding. The court mandated that husband pay the sum of $50,000 in interim attorney's fees into the registry of the court, to be paid "[a]s additional spousal support." *Id*. at 524. Because the court noted that the Family Code allows for orders requiring temporary support payments (in terms of both child support and spousal support) to be enforceable by contempt, it held that "an order of contempt arising from the failure to pay those obligations may be enforced by incarceration without running afoul of the constitutional prohibition." *Id.* at 526.

However, it should be noted that in *Ex parte Hightower*, 877 S.W.2d 17 (Tex.App.–Dallas, writ dism'd w.o.j.), the Court held that unpaid fees and expenses of an attorney ad litem appointed for the child in a suit for modification of visitation was not to be considered "child support" for purposes of exception to constitutional prohibition of imprisonment for debt. Therefore, it was held that trial court's enforcement of payment of fees and expenses by contempt violated the Texas Constitution in this particular case.

Similarly, in *In the Matter of Moers*, 104 S.W.3d 609, 611 (Tex.App. - Houston [1st Dist.] 2003, orig. proceeding), the court held that attorney's fees incurred in suits to modify could not be characterized as 'child support' for purposes of contempt. Moreover, the court, citing *Hightower*, distinguished fees awarded in suits brought to enforce child support from fees awarded in suits brought to modify child support because of consequences which arise from characterizing fees as child support. Based on the long-standing principal that courts are to exercise their contempt power with great caution, the appellate court in *Moers* sought to "limit any extension of the 'duty to support' to services and costs required for ***enforcing*** child support." *Id* at 612. (Emphasis added.) In so doing, the court noted that because "a decree that awards attorney's fees characterized as child support could result in garnishment of the obligor's wages and loss of the obligor's professional licenses in a suit brought to enforce the decree.... [the] court imposes potentially serious consequences on the obligor." *Id.*

Incidentally, in *Moers,* the court distinguished its particular set of facts and final ruling from that noted in *Ex parte Kimsey.* In Footnote 1, the *Moers* court noted that "[i]n *Ex parte Kimsey*, 915. S.W.2d 523 (Tex.App.–El Paso 1995, no writ), the court opined in a footnote that nonpayment of ad litem fees is enforceable by contempt. We note, however, that *Kimsey* dealt with contempt in the nonpayment of attorney's fees required by a temporary order. Because temporary orders have their own rules and regulations that are not applicable to parent-child modification orders, we find *Kimsey* distinguishable on its facts. ***To the extent that Kimsey holds that attorney's fees may be characterized as child support in a suit to modify the parent-child relationship, we respectfully disagree with our sister court."*** (Emphasis added.)

Based on the rulings in *Hightower* and *Kimsey*, then, it appears to remain undecided among the appellate courts as to whether or not attorney's fees can be characterized as "child support" in a suit for modification for purposes of contempt.

In line with the above referenced rulings, the Fourteenth Court of Appeals, in *In re Jih*, 2003 WL 22707113 (Tex.App.–Houston [14th Dist.] November 17, 2003, pet. denied), the court determined that a trial court could not allow collection of attorney's fees in divorce action by contempt proceedings where child support was not ordered. The trial court originally assessed the sum of $15,000 against relator for discovery costs. At a later hearing, the trial court found relator in contempt for failure to pay $15,000 in discovery costs, and assessed $6,275 in attorney's fees against relator. Because it was determined that no child [or spousal] support was ordered, the contempt order issued against relator for failure to pay attorney's fees was found to be void by the

Houston court.

III. ALIMONY

A. AUTHORITY AND ENFORCEMENT

Chapter 8 of the Texas Family Code governs the provisions for and enforcement of court-ordered spousal maintenance in Texas. Specifically, a court may order post-divorce spousal maintenance for either spouse only if these factors are found to exist:

> a. The spouse from whom maintenance is requested was convicted of or received deferred adjudication for a criminal offense that also constitutes an act of family violence under Title 4 and the offense occurred either: 1) within two years before the date on which a suit for dissolution for marriage is filed, or (2) while the suit is pending.
>
> b. The duration of the marriage is ten (10) years or longer and the spouse seeking maintenance lacks sufficient property, including property received upon a just and right division of property following divorce, to provide for the spouse's minimum reasonable needs, and either: 1) the spouse seeking maintenance is disabled and unable to support himself or herself; 2) the spouse is the custodian of a disabled child and is unable to work outside of the home as a result; or 3) the spouse is determined to lack earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs.

TEX. FAM. CODE § 8.051.

Additionally, alimony cannot be ordered for more than 3 years, unless the spouse seeking maintenance has established that he or she is unable to support himself or herself through appropriate employment due to an incapacitating physical or mental disability, in which event the award may be for an indefinite period of time. TEX. FAM. CODE § 8.054. An award of maintenance shall not be for more than the lesser of $2,500 per month or 20% of the obligor spouse's average monthly gross income. TEX. FAM. CODE § 8.055. Effective September 1, 2003, the Legislature amended Section 8.055 of the Code to include the definition of "gross income", which means "resources" as defined in Sections 154.062(b) and (c) of the Code. *Id*. The obligation to pay future alimony terminates on the death of either party, or on the remarriage of the receiving spouse. TEX. FAM. CODE § 8.056. An award of alimony may only be modified downward, and shall not be retroactive. TEX. FAM. CODE § 8.057. A court-ordered award of maintenance, as well as an agreement among the parties for post-divorce maintenance, is enforceable by contempt. TEX. FAM. CODE § 8.059. The court may also enter a judgment against the defaulting spouse for the amount owed, and it can further order that the spouse's wages be garnished for non-payment. *Id.*

B. RECENT CASES

Below is a selection cases which pertain to the eligibility of or enforcement of maintenance.

1. In Re Marriage of Hale. *In re Marriage of Hale,* 975 S.W.2d 694 (Tex.App.–Texarkana 1998, no pet.)

Wife testified that she had many jobs during marriage but was unable to keep them because husband insisted that she quit work. At time of trial, wife was employed and also attending night classes to obtain her GED. Even with her share of the property division, Wife's earnings, and the child support, would not be enough to meet her monthly expenses. Husband argued that the federal minimum wage was the appropriate standard for determining wife's minimum reasonable needs. The court rejected this argument and upheld the award of maintenance.

2. Alexander v. Alexander. *Alexander v. Alexander,* 982 S.W.2d 116, 118 (Tex.App.–Houston [1st Dist.] 1998, no pet.)

Wife testified that she had applied for between 30 to 40 minimum wage jobs for which she was not qualified. She also testified that even if she could find employment at minimum wage, there would still be a deficit in meeting minimum needs, which was sufficient to justify an award of spousal support. This evidence supported an award of maintenance.

3. Lopez. v. Lopez. *Lopez v. Lopez*, 55 S.W.3d 194, 198 (Tex.App.–Corpus Christ 2001, no pet.)

Wife had a high school diploma and beautician's license. However, she stopped renewing her license about five years prior to separation, because the cost of license renewal was too high. Since that time, wife had worked as an aide taking care of an elderly woman, for $300 per month. She also helped her son at a flower shop. The award of maintenance was upheld.

4. Amos v. Amos. *Amos v. Amos*, 79 S.W.3d 747, 751 (Tex.App.–Corpus Christi 2002, no pet.)

Wife testified that she could not return to her normal employment as secretary because she had developed a severe case of carpal tunnel syndrome and had to undergo several surgeries. Wife introduced an exhibit which showed what costs (including transportation, clothing, and child care) and revenue she would incur were she to maintain her current home business or if she were to take a job paying minimum wage. Taking into account these costs, the trial court awarded 20% of husband's gross monthly wages as maintenance, which was upheld on appeal.

5. Ocarolan v. Hopper. *Ocarolan v. Hopper,* 71 S.W.3d 529, 531-33 (Tex.App.–Austin 2002, no pet.)

The parties had been married for 22 years. The most wife ever earned was $10.00 per hour. Wife suffered from a neurological condition which caused short-term memory loss, difficulty in concentrating, and muscle weakness. The trial court awarded nearly all of the community property to husband and ordered him to pay wife maintenance for two years, as follows: $1,000 per month for three months; $1,500 per month for the next eighteen months; and $2,000 per month for the last three months. The court of appeals reversed, saying that spousal maintenance is not a substitute for property division.

6. Limbaugh v. Limbaugh. *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 13 (Tex.App.–Waco 2002, no pet.)

Unrebutted testimony by uneducated wife that she had looked for other houses to clean to supplement her income was sufficient to support maintenance.

7. Pickens v. Pickens. *Pickens v. Pickens*, 62 S.W.3d 212, 215-216 (Tex.App.-Dallas 2001, no pet.)

To prove inability to support herself, wife offered her own testimony, plus the medical records of two of her doctors, and the narrative report of a rehabilitation consultant. She did not offer expert testimony of disability. The medical records did not establish an incapacitating disability, but they corroborated wife's testimony concerning her medical problems. The trial court awarded $1,500 per month maintenance for as long as wife's disability continued. Husband appealed, arguing that wife failed to show by reasonable medical probability that her disability was permanent. Husband also argued that because maintenance is designed to replace earned income, the court should considered the disability standards required to receive workers' compensation benefits. The appellate court rejected husband's contentions, and affirmed the award of maintenance.

8. In Re Dupree. *In re Dupree,* 118 S.W.3d 911 (Tex.App.–Dallas 2003, pet. for review filed).

The parties were divorced on January 8, 1996. In the divorce decree, the parties agreed to contractual alimony, providing that husband would pay wife $8,500 per month as and for alimony, beginning on March 1, 1996, and continuing on for 121 months. The payments were to terminate on Wife's death, but

there was no provision for termination on her remarriage, or on Husband's death. Wife moved to have Husband held in contempt for failure to make 21 payments pursuant to the decree. The trial court held husband in contempt and ordered his conditional confinement in jail, and subsequently revoked its suspension of confinement. The court of appeals granted Husband's petition for writ of habeas corpus, holding that: 1) the divorce decree did not contained language ordering or commanding former husband to pay contractual alimony, and 2) contractual alimony provisions in divorce decree which exceed the statutory authority for a court to award pursuant to Section 8.509 of the Texas Family Code are unenforceable by contempt because of the constitutional prohibition against imprisonment for a debt.

IV. COLLABORATIVE LAW

Effective September 1, 2001, the 77th Texas Legislature introduced to Texas the concept of "collaborative law." The purpose of this process is to reduce the cost of litigation by focusing the parties on agreeing rather than litigating, and by removing any incentive the lawyers might have to litigate the case by forcing the collaborative lawyers to withdraw if the collaborative process fails and litigation ensues. The Family Code provisions on collaborative law are contained in Texas Family Code sections 6.603 and 153.0072. Section 6.603 pertains to collaborative law procedures upon a dissolution of marriage proceeding, and states as follows:

> "(a) [o]n a written agreement of the parties and their attorneys, a dissolution of marriage proceeding may be conducted under collaborative law procedures.
>
> (b) [c]ollaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.
>
> (c) [a] collaborative law agreement must include provisions for:
>
> (1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;
>
> (2) suspending court intervention in te dispute while the parties are using collaborative law procedures;
>
> (3) hiring experts, as jointly agreed, to be used in the procedure;
>
> (4) withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute; and
>
> (5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.
>
> (d) [n]otwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:
>
> (1) provides, in a prominently displayed statement that is boldfaced, capitalized, or

underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(e) [s]ubject to Subsection (g), a court that is notified 30 days before trial that the parties are using collaborative law procedures to attempt to settle a dispute may not, until a party notifies the court that the collaborative law procedures did not result in a settlement:

(1) set a hearing or trial on the case;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the case.

(f) [t]he parties shall notify the court if the collaborative law procedures result in a settlement. If they do not, the parties shall file:

(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

(g) [i]f the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:

(1) set the suit for trial on the regular docket; or

(2) dismiss the suit without prejudice.

TEX. FAM. CODE § 6.603.

Section 153.0072 pertains to collaborative law procedures to be used in a SAPCR, but otherwise has the identical provisions listed in 6.603 above.

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

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

Sixteen years later, in *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983), the Texas Supreme Court recognized that a straight time-related allocation of retirement benefits improperly invades the separate estate of the spouse who continues to work after divorce. *Berry* holds that the increase in value of pension benefits accruing as compensation for services rendered after a divorce is not a part of the community estate subject to division on divorce. *Accord, Bloomer v. Bloomer*, 927 S.W.2d 118, 121 (Tex. App.-- Houston [1st Dist.] 1996, writ denied) ("Pension benefits accruing as compensation for services rendered after a divorce are not part of the parties' community estate subject to a just-and-right division"); *Head v. Head*, 739

S.W.2d 635, 636 (Tex. App.--Beaumont 1987, writ denied) (employee's interest in retirement plans is community property only up to the date of divorce, and the non-employee spouse is entitled only to a share of the value of the retirement benefits as of the date of divorce). To avoid an unconstitutional divestiture of the increased value of retirement benefits attributable to employment after divorce, the community estate's interest in on-going retirement benefits is to be calculated *based on the value* of the community's interest *at the time of divorce*. *Berry*, 647 S.W.2d at 947. *See Grier v. Grier*, 731 S.W.2d 931, 932 (Tex. 1987).

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

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

Accord, *Baw v. Baw*, 949 S.W.2d 764, 767 (Tex. App.--Dallas 1997, no writ); *Smith v. Smith*, 22 S.W.3d 140, 143-44 (Tex. App.--Houston [14th Dist.] 2000, no pet) ("[I]n order to determine the community interest in a defined contribution plan, courts subtract the value of the plan at the time of marriage from the value of the plan at the time of divorce").

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

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

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

C. EMPLOYEE STOCK OPTIONS.

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

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

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

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

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

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

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

The article continues:

> [H]anging a price tag on stock options is a complicated issue. Adding to the confusion is that companies can choose from a number of methods such as the popular Black-Scholes model or the binomial model to value stock options, making it hard to compare earnings, analysts say.
>
> For example, soft drink company Coca-Cola Co. (KO.N), which kicked off the trend toward expensing options last month, surprised veteran valuation experts by saying it would hand the task of valuing options to its investment bankers. But rival PepsiCo Inc. (PEP.N) uses the Black-Scholes model to arrive at the stock option expense it discloses in its footnotes.

* * *

In addition, each model itself relies on a number of subjective assumptions, such as stock price volatility, or their tendency to rise or fall in a time period. Volatility is particularly hard to predict and is often based on the past.

In fact, companies in the same sector use wildly different assumptions for expected volatility, further clouding the picture. Within the applications software sector, for example, Manhattan Associates Inc. assumes volatility of 122 percent, while Oracle Corp. assumes 57 percent volatility, according to a research report by Credit Suisse First Boston.

"The problem is that valuation is an imperfect science, it's not subject to a cookbook calculation," said Anthony Aaron, a partner at accounting firm Ernst & Young's valuation services group. "If it's garbage in, it'll be garbage out."

In particular, the Black-Scholes model, the most popular method of valuing options, has come under blistering attack from companies.

For starters, the model was never designed for employee stock options. It tends to overstate option costs because it assumes that options can be freely traded, although employee options cannot.

In addition, the model is meant for options that have a three- to nine-month timeframe even though most stock options vest over several years, said Aaron. Procter & Gamble Co. (PG.N), for example, last week said it would be prepared to expense stock options but complained that the Black-Scholes model wasn't applicable to longer-term employee stock options.

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

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

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

D. EARLY RETIREMENT AND SEVERANCE PAY

In *Whorrall v. Whorrall*, 691 S.W.2d 32, 38 (Tex. App.--Austin 1985, writ dism'd), the appellate court held that an early retirement incentive received by a husband during marriage was entire community property, and should not be allocated on a time-based *Berry*-style formula. The First Court of Appeals held similarly, in *Bullock v. Bullock*, 1987 WL 17053, *4

(Tex. App._-Houston [1st Dist.] 1987, no writ) (do not publish) ('special incentive for early retirement' payment received during marriage was community property). The Fourteenth Court of Appeals, in *Henry v. Henry*, 48 S.W.3d 468, 476 (Tex. App._-Houston [14th Dist.] 2001, no pet.), held that a "discretionary severance package"" received by the husband during marriage was not a retirement benefit to be allocated based on years of service, but instead was entirely community property. The key factor is whether the payment was earned as deferred compensation over a period of time, or whether it is a discretionary payment from the employer, made to induce an employee to retire early.

VI. MARITAL AGREEMENTS

A. HISTORY OF PREMARITAL AND POST-MARITAL AGREEMENTS.

Premarital and post-marital agreements have not always been permissible in Texas. Both spouses and persons intending to marry were prohibited from entering into agreements for the purpose of converting the character of income or community property into separate property. *Williams v. Williams*, 569 S.W. 2d 867, 870 (Tex. 1978.) Such arguments were considered void as against public policy.

However, in 1948 art. XVI, §15 of the Texas Constitution was amended in order to allow spouses to partition community property then in existence. *Winger v. Pianka*, 831 S.W. 2d 853, 854 (Tex. App.–Austin 1992, writ denied.) Nonetheless, this particular amendment failed to afford persons about to marry the right to enter into an agreement that re-characterized property or income acquired during the marriage as separate property. In fact, the Texas Supreme Court held that premarital agreements that were entered into following this amendment were void as against public policy. *Williams* at 870.

It was not until 1980 that art. XVI, § 15 of the Texas Constitution was again amended, granting both spouses and persons about to marry the right to partition or exchange their interests in property then existing, as well as any property to be acquired in the future. *Winger* at 854.

Moreover, the Texas Supreme Court reviewed the 1980 constitutional amendment and determined that, based on public policy, this amendment not only authorized future premarital agreements, but retroactively validated all premarital agreements entered into prior to 1980 as well, superceding the Court's ruling in *Williams. Beck v. Beck*, 814 S.W. 2d 745, 749 (Tex. 1991), *cert. denied*, 503 U.S. 907 (1992.)

While the 1980 amendment mandated that persons about to marry could partition or exchange their interests in property to be acquired in the future, it did not make clear whether "**salaries**" and "**personal earnings**" constituted "property." The question as to whether salaries and personal earnings fell within the definition of "property to be acquired" thus predictably became an issue. *Winger* at 855. In this particular case, the Court clarified that persons about to marry had the right to partition or exchange their salaries and earnings that would be acquired by them during marriage. *Id.* at 858, 859.

Initially and following the 1980 constitutional amendment, the burden of proof with regards to enforceability fell on the proponent of a marital agreement, requiring him to prove by clear and convincing evidence "that the party against whom enforcement is sought gave informed consent and that the agreement was not procured by fraud, duress or overreaching." TEX. FAM. CODE § 5.45 (repealed.) However, this burden later shifted to the party contesting the enforceability of the agreement, when the Texas Legislature adopted the Uniform Premarital Agreement in 1987. Today, sections 4.006 and 4.105 of the Texas Family Code govern the enforceability of marital agreements, and are each more fully addressed below.

In 1993, section 4.006 of the Texas Family Code was amended, limiting the attack of premarital and post-marital agreements to the statutory defenses of voluntariness and unconscionability contained within the Code. However, it has been argued that common law defenses remain available to those parties who

entered into agreements prior to September 1, 1993. *Marsh v. Marsh*, 949 S.W.2d 734, 738 (Tex. App.–Houston [14th Dist.]1997, no writ.)
For a more comprehensive discussion of the history of premarital and post-marital agreements, see Edwin J. (Ted) Terry's article entitled *Obtaining and Retaining the Benefit of the Bargain: Premarital and Marital Agreements*, 2002 New Frontiers in Marital Property Law.

B. CONSTITUTIONAL AND STATUTORY AUTHORITY FOR PREMARITAL AGREEMENTS

Article XVI, § 15 of the Texas Constitution states that:

> ...***persons about to marry*** and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or ***future spouse*** in any property for the community interest of the other spouse or ***future spouse*** in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or ***future spouse***; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse.... (Emphasis added.)

In addition, Subchapter A of Chapter 4 of the Texas Family Code outlines the requisites of premarital agreements. In this particular sub-chapter Texas implemented the Uniform Premarital Agreement Act, having adopted the Act along with 25 other states after it was promulgated by the National Conference of Commissioners on Uniform State Laws.

The definition of "Premarital Agreement" is contained within Section 4.001 of the Texas Family Code. A "Premarital Agreement" is defined as "an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage." TEX. FAM. CODE ANN. § 4.001(1). *See also* TEX. FAM. CODE ANN. § 4.004 ("[a] premarital agreement becomes effective on marriage")

While not expressly set out within the statute or affirmed by case law, an argument can be made that in order for a premarital agreement to be effectuated, a ceremonial marriage must be conducted. Uniform Premarital Agreement Act, §2 cmt., (noting that "[a] marriage is a prerequisite for the effectiveness of a premarital agreement under this act (see Section 4). This requires that there be a ceremonial marriage.") However, the Commissioner's comment was not adopted by the Texas Legislature, and most of the Commissioners came from jurisdictions that do not recognize informal marriages, unlike Texas which does recognize the validity of informal marriages. *See generally Marshall v. Marshall*, 735 S.W. 2d 587 (Tex. App.–Dallas 1987, writ ref'd n.r.e.) (ruling that a premarital agreement preceding parties' first marriage was inapplicable upon parties' remarriage.)

In addition, a premarital agreement must be in writing and signed by both parties. TEX. FAM. CODE ANN. § 4.002. Although premarital agreements are regarded as contracts for all intents and purposes, they are enforceable without consideration. *Id.*

Parties may amend or revoke a premarital agreement; however, in order for this to be accomplished, the parties must confirm the amendment or revocation in writing. TEX. FAM. CODE ANN. § 4.005.

The statutory definition of property subject to premarital agreements is broad in scope and includes any "interest, present or future, legal or equitable,

vested or contingent, in real or personal property, including income and earnings." TEX. FAM. CODE ANN. § 4.001(2). *See Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.–Austin 1992, writ denied) (establishing that prenuptial agreements may partition future earnings of persons about to marry); *accord Williams v. Williams*, 569 S.W.2d at 870 (holding that Section 4.001 of the Texas Family Code regarding the definition of property "should be construed as broadly as possible in order to allow the parties as much flexibility to contract with respect to property or other rights incident to the marriage, provided the constitutional and statutory definitions of separate and community property or the requirements of public policy are not violated.")

Parties to a premarital agreement can liberally contract with respect to many rights, including:

> (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
>
> (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
>
> (3) the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
>
> (4) the modification or elimination of spousal support;
>
> (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
>
> (6) the ownership rights in and disposition of the death benefit from a life insurance policy;
>
> (7) the choice of law governing the construction of the agreement; and
>
> (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

TEX. FAM. CODE ANN. § 4.003(a).

Clearly, the Texas Legislature intended that parties have the broadest freedom available in terms of altering their marital property rights as they see fit. E.g., *Williams v. Williams,* 569 S.W.2d 867 (holding that a person may waive constitutional and statutory homestead rights otherwise created during marriage in a prenuptial agreement); *Koch v. Koch*, 27 S.W.3d 93 (Tex. App.–Fort Worth 2002, pet. denied) (parties may include a contractual arbitration clause in prenuptial agreement). However, this freedom is limited in that a parties' agreement cannot violate public policy, nor can it adversely affect the right of a child to support. TEX. FAM. CODE ANN. § 4.003(b).

C. STATUTORY DEFENSES TO ENFORCEABILITY OF PREMARITAL AGREEMENTS

Section 4.006 of the Texas Family Code governs the enforceability of premarital agreements in Texas, and states that:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:
>
> (1) the party did not sign the agreement ***voluntarily***; or
>
> (2) the agreement was ***unconscionable*** when it was signed and, before signing the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other

party;

(B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

(Emphasis added.)

D. CONSTITUTIONAL AND STATUTORY AUTHORITY FOR PARTITION AND EXCHANGE AGREEMENTS.

Article XVI, § 15 of the Texas Constitution provides that spouses may enter into marital property agreements, in addition to authorizing agreements for persons about to marry. *See* TEX. CONST. art. XVI, § 15, *supra* .

Additionally, Subchapter B of Chapter 4 of the Texas Family Code sets out the requisites of marital property agreements in Texas. As with premarital agreements, post-marital agreements must be in writing and signed by both parties. TEX. FAM. CODE ANN. § 4.104. In addition, the definition of "property" as it relates to post-marital agreements is identical to that assigned by section 4.001 of the Texas Family Code pertaining to premarital agreements. TEX. FAM. CODE ANN. § 4.101.

Spouses may enter into post-marital agreements in order to "partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire." TEX. FAM. CODE ANN. § 4.102. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. *Id.* Furthermore, section 4.102 was amended by the 78th Texas Legislature effective September 1, 2003, providing that "[t]he partition or exchange of property ***includes future earnings and income*** arising from the property as the separate property of the owning spouse unless the spouses agree in a record that the future earnings and income will be community property after the partition or exchange." *Id.* (Emphasis added.) However, it should be noted that this particular provision applies only to post-marital agreements made on or after September 1, 2003. An agreement entered into by spouses prior to the effective date of the Act is governed by the law in effect at the time the agreement was made. TEX. FAM. CODE ANN. § 4.102, cmt.

Spouses may also utilize post–marital agreements in order to effectuate an agreement that the "income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner." TEX.FAM.CODE ANN. § 4.103.

In addition to reducing a post-marital agreement to writing, it appears that at least some jurisdictions require that partition and exchange agreements include an express intent by the parties to partition and exchange the subject property. *See Pankhurst v. Weitinger & Tucker*, 850 S.W. 2d 726, 730 (Tex.App.–Corpus Christi 1993, writ denied) (ruling that a purported assignment by debtor husband to wife was not enforceable "partition or exchange agreement", where there was no indication in the written document that there was a joint agreement to partition or exchange any community property interest in the suit, and the assignment lacked the wife's signature). *See also Collins v. Collins*, 752 S.W. 2d 636, 637 (Tex. App.–Fort Worth 1988, writ ref'd.) (holding that although in writing and signed by the parties, a joint income tax return which lists individual assets as a party's separate property is not

sufficient to create a partition agreement due to lack of express intent.)

E. STATUTORY DEFENSES TO PARTITION AND EXCHANGE AGREEMENTS.

Section 4.105 of the Code, providing for the enforcement of partition and exchange agreements, is identical to the provisions set out within § 4.006 regarding premarital agreements:

> (a) A partition or exchange agreement is not enforceable if the party against whom enforcement is requested proves that:
>
> (1) the party did not sign the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was signed and, before execution of the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.
>
> (b) An issue of unconscionability of a partition or exchange agreement shall be decided by the court as a matter of law.
>
> (c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

F. SPOUSAL INCOME AGREEMENTS

1. Authority

Article XVI, §15 of the Texas Constitution provides that spousal income agreements are permissible in Texas.

Additionally, section 4.103 of the Texas Family Code sets out the authority for spouses to enter into agreements concerning income or property received from separate property. Section 4.103 states:

> "[a]t any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner."

2. Enforcement

While section 4.105 addresses the enforcement of "partition and exchange agreements" as defined by Section 4.102 of the Code, it should be noted that the standard for enforceability contained within section 4.105 governs agreements between spouses concerning income or property derived from separate property as well. *See* TX. PATTERN JURY CHARGES, FAMILY 207.4 (Vol.5 2002); *Daniel v. Daniel*, 779 S.W.2d 110, 113-114 (it seems evident that the legislature intended income arrangements between spouses, which were covered by former Texas Family Code § 5.53 (entitled "Agreements Between Spouses concerning Income from Property Derived") to be enforced in the same manner as "partition and exchange agreements" covered by former Texas Family Code § 5.52.)

G. COMMUNITY SURVIVORSHIP AGREEMENTS

1. The 1987 Constitutional Amendment. Prior to

1987, spouses could not create survivorship rights between themselves as to community property. To own property with a right to survivorship they first had to partition the community property into separate property and then enter into a survivorship arrangement. In 1987, the Texas Constitution was amended by popular vote to permit spouses to create a right of survivorship in community property.

2. The 1989 Probate Code Provisions. In 1989, the Texas Legislature amended the Texas Probate Code consistent with the 1987 Constitutional Amendment, to permit spouses to set up community property with right of survivorship in community property. Tex. Prob. Code Ann. §§§§ 451-457. An agreement must be in writing and signed by both spouses (§ 452).

H. SPOUSAL AGREEMENTS TO CONVERT SEPARATE PROPERTY TO COMMUNITY PROPERTY

1. Authority

Pursuant to Section 4.202 of the Texas Family Code, spouses may agree that all or part of the separate property owned by either or both spouses is converted to community property. This particular statute was adopted by the 76th Texas Legislature and became effective on January 1, 2000:

(a) an agreement to convert separate property to community property must:

1. be in writing, and

A. be signed by the spouses;

B. identify the property being converted; and

C. specify that the property is being converted to the spouses community property; and

2. is enforceable without consideration.

TEX.FAM.CODE ANN. § 4.203.

Additionally, the mere transfer of a spouse's separate property to the name of the other spouse or to the name of both spouses is insufficient to convert the property to community property under the provisions of the Family Code. *Id.*

2. Enforcement

The standards for enforcement of an agreement to convert separate property to community property are different from those standards imposed for both the enforcement of premarital and partition and exchange agreements.

Specifically, Section 4.205 of the Texas Family Code governs the enforceability of agreements to convert separate property to community property, and provides that:

> (a) "[a]n agreement to convert property to community property under this subchapter is not enforceable if the spouse against whom enforcement is sought proves that the spouse did not:
>
> (1) execute the agreement voluntarily; or
>
> (2) receive a fair and reasonable disclosure of the legal effect of converting the property to community property.
>
> (b) [a]n agreement that contains the following statement, or substantially similar words, prominently displayed in bold-faced type, capital letters, or underlined, is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting property to community property:
>
> "THIS INSTRUMENT CHANGES SEPARATE PROPERTY TO

COMMUNITY PROPERTY. THIS MAY HAVE ADVERSE CONSEQUENCES DURING MARRIAGE AND ON TERMINATION OF THE MARRIAGE BY DEATH OR DIVORCE. FOR EXAMPLE:

"EXPOSURE TO CREDITORS. IF YOU SIGN THIS AGREEMENT, ALL OR PARTY OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO THE LIABILITIES OF YOUR SPOUSE. IF YOU DO NOT SIGN THIS AGREEMENT, YOUR SEPARATE PROPERTY IS GENERALLY NOT SUBJECT TO THE LIABILITIES OF YOUR SPOUSE UNLESS YOU ARE PERSONALLY LIABLE UNDER ANOTHER RULE OF LAW.

"LOSS OF MANAGEMENT RIGHTS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO EITHER THE JOINT MANAGEMENT , CONTROL, AND DISPOSITION OF YOU AND YOUR SPOUSE OR THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF YOUR SPOUSE ALONE. IN THAT EVENT, YOU WILL LOSE YOUR MANAGEMENT RIGHTS OVER THE PROPERTY. IF YOU DO NOT SIGN THIS AGREEMENT, YOU WILL GENERALLY RETAIN THOSE RIGHTS.

"LOSS OF PROPERTY OWNERSHIP. IF YOU SIGN THIS AGREEMENT AND YOUR MARRIAGE IS SUBSEQUENTLY TERMINATED BY THE DEATH OF EITHER SPOUSE OR BY DIVORCE, ALL OR PARTY OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME THE SOLE PROPERTY OF YOUR SPOUSE OR YOUR SPOUSE'S HEIRS. IF YOU DO NOT SIGN THIS AGREEMENT, YOU GENERALLY CANNOT BE DEPRIVED OF OWNERSHIP OF YOUR SEPARATE PROPERTY ON TERMINATION OF YOUR MARRIAGE, WHETHER BY DEATH OR DIVORCE."

TEX.FAM.CODE ANN. § 4.204.

Additionally, section 4.205 of the code was amended to include subsection (c), effective September 1, 2003, which states:

> (c) "[i]f a proceeding regarding enforcement of an agreement under this subchapter occurs after the death of the spouse against whom enforcement is sought, the proof required by Subsection (a) may be made by an heir of the spouse or the personal representative of the estate of that spouse."

Id.

VII. ECONOMIC CONTRIBUTION

A. GENERAL CONSIDERATIONS.

In 2001, the Legislature amended the Family Code by adding new Sections 3.401 through 3.410, eliminating "equitable interests" and creating in their

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

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

The Family Code provisions governing economic contribution claims were again amended in 2003.

Some of the highlights of claims for economic contribution are as follows.

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

2. If the property made the basis of an economic contribution claim is owned by a spouse at the time of marriage, the proponent of the claim must prove the value of the property on the date of the first economic contribution. Attorneys sometimes overlook getting a historical fair market value of the property.

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

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

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

reimbursement claim could be made, based on enhancement.

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

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

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

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

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

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

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

B. TEXAS FAMILY CODE PROVISIONS.

§ 3.401. Definitions

In this subchapter:

(1) "Claim for economic contribution" means a claim made under this subchapter.

(2) "Economic contribution" means the contribution to a marital estate described by Section 3.402.

(3) "Equity" means, with respect to specific property owned by one or more marital estates, the amount computed by subtracting from the fair market value of the property as of a specific date the amount of a lawful lien specific to the property on that same date.

(4) "Marital estate" means one of three estates:

(A) the community property owned by the spouses together and referred to as the community marital estate;

(B) the separate property owned individually by the husband and referred to as a separate marital estate; or

(C) the separate property owned individually by the wife, also referred to as a separate marital estate.

(5) "Spouse" means a husband, who is a man, or a wife, who is a woman. A member of a civil union or similar relationship entered into in another state between persons of the

same sex is not a spouse.

§ 3.402. Economic Contribution

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

(1) the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;

(2) the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;

(3) the reduction of the principal amount of that part of a debt, including a home equity loan:

(A) incurred during a marriage;

(B) secured by a lien on property; and

(C) incurred for the acquisition of, or for capital improvements to, property;

(4) the reduction of the principal amount of that part of a debt:

(A) incurred during a marriage;

(B) secured by a lien on property owned by a spouse;

(C) for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and

(D) incurred for the acquisition of, or for capital improvements to, property;

(5) the refinancing of the principal amount described by Subdivisions (1)- (4), to the extent the refinancing reduces that principal amount in a manner described by the appropriate subdivision; and

(6) capital improvements to property other than by incurring debt.

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

(1) expenditures for ordinary maintenance and repair or for taxes, interest, or insurance; or

(2) the contribution by a spouse of time, toil, talent, or effort during the marriage.

§ 3.403. Claim Based on Economic Contribution [as amended in 2003]

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

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

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

(2) a fraction of which:

(A) the numerator is the economic contribution to the property by the contributing estate; and

(B) the denominator is an amount equal to the sum of:

(i) the economic contribution to the property owned by the benefitted marital estate by the contributing marital estate; and

(ii) the contribution by the benefitted estate to the equity in the property owned by the benefitted estate.

(b-1) The amount of the contribution by the benefitted marital estate under Subsection (b)(2)(B)(ii) is measured by determining:

(1) if the benefitted estate is the community property estate:

(A) the net equity of the community property estate in the property owned by the community property estate as of the date of the first economic contribution to that property by the contributing separate property estate; and

(B) any additional economic contribution to the equity in the property owned by the community property estate made by the benefitted community property estate after the date described by Subdivision (A); or

(2) if the benefitted estate is the separate property estate of a spouse:

(A) the net equity of the separate property estate in the property owned by the separate property estate as of the date of the first economic contribution to that property by the contributing community property estate or the separate property estate of the other spouse; and

(B) any additional contribution to the equity in the property owned by the separate property estate made by the benefitted separate property estate after the date described by Subdivision (A).

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

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

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

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

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

(b) The claim for economic contribution created under this subchapter does not create an ownership interest in property, but does

create a claim against the property of the benefited estate by the contributing estate. The claim matures on dissolution of the marriage or the death of either spouse.

§ 3.405. Management Rights

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

§ 3.406. Equitable Lien

(a) On dissolution of a marriage, the court shall impose an equitable lien on property of a marital estate to secure a claim for economic contribution in that property by another marital estate.

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

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

§ 3.407. Offsetting Claims

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

§ 3.408. Claim for Reimbursement

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

(b) A claim for reimbursement includes:

(1) payment by one marital estate of the unsecured liabilities of another marital estate; and

(2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse.

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

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

§ 3.409. Nonreimbursable Claims

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

(1) the payment of child support, alimony, or spousal maintenance;

(2) the living expenses of a spouse or child of a spouse;

(3) contributions of property of a nominal value;

(4) the payment of a liability of a nominal amount; or

(5) a student loan owed by a spouse.

§ 3.410. Effect of Marital Property Agreements

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

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

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

(1) order a division of a claim for economic contribution of the community marital estate to the separate marital estate of one of the spouses;

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

(3) order that a claim for economic contribution of one separate marital estate in the separate marital estate of the other spouse be awarded to the owner of the contributing marital estate.

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

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

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

C. PATTERN JURY CHARGES 2002. Here is the latest version of the instructions and questions that are included in the 2002 PATTERN JURY CHARGES (FAMILY LAW), relating to claims for economic contribution. The authors have proposed edits to the PJC's, to bring them into line with the 2003 amendments. Deletions are indicated by ~~overstrike~~ and additions are included by <u>underscoring</u>.

PJC 204.1 Economic Contribution

PJC 204.1A Economic Contribution--Instructions

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

A spouse must prove by clear and convincing evidence that funds expended were the separate property of that spouse. "Clear and

convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

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

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

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

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

QUESTION 1

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

1. the fair market value

   Answer: $_____

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

Answer: $_____

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

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

QUESTION 2

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

1. the fair market value

Answer: $_____

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

Answer: $_____

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

QUESTION 3

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

1. by the community estate

Answer: $_____

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

Answer: $_____

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

Answer: $_____

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

QUESTION 4

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

1. by *the community estate*

Answer: $_____

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

Answer: $_____

3. during the marriage by PARTY A's separate estate, as proved by clear and convincing evidence

Answer: $_____

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

QUESTION 5

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

Answer: _____

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

QUESTION 6

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

1. by *the community estate*

Answer: $_____

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

Answer: $_____

3. during the marriage by PARTY A's separate estate, as proved by clear and convincing evidence

Answer: $_____

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

QUESTION 7

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

Answer: _____

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

QUESTION 8

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

Answer: _____

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

QUESTION 9

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

1. by *the community estate*

Answer: $_____

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

Answer: $_____

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

Answer: $_____

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

QUESTION 10

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

1. by the community estate

Answer: $_____

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

Answer: $_____

3. during the marriage by PARTY A's separate estate, as proved by clear and convincing evidence

Answer: $_____

COMMENT

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

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

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

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

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

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

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

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

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

PJC 204.1B. The question in PJC 204.1B is based on TFC §§ 3.401(3), 3.403(b)(1), (d). The current date or the date of disposition of the item of property should be substituted for *CURRENT*

DATE OR DATE OF PROPERTY DISPOSITION. A description of all lawful liens specific to the property on that date should be substituted for *LIENS ON CURRENT DATE OR DATE OF PROPERTY DISPOSITION*. Determination of the existence of a "lawful lien specific to the property" is a question of law for court determination.

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

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

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

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

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

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

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

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

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

estate of the spouse on whose property the lien attached, should be substituted for *DEBT Z*.

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

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

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

D. CASE LAW. In *LaFrensen v. LaFrensen*, 106 S.W.3d 876, 879 (Tex. App.--Dallas 2003, no pet.), the appellate court described an economic contribution claim in the following terms:

> According to the family code, the amount of the claim is derived by multiplying the equity in the residence on the date of the divorce by a fraction. The fraction's numerator is the amount of the economic contribution by the community. Its denominator is equal to the sum of that same economic contribution, plus the equity in the residence on the date of the marriage, plus any economic contribution to the residence by the husband's separate estate. See Tex. Fam.Code § 3.403(b).

This description is now slightly inaccurate because of the 2003 amendments to the Texas Family Code.

In *Langston v. Langston*, 82 S.W.3d 686, 689 (Tex. App.--Eastland 2002, no pet.), the court of appeals in dicta defended the constitutionality of imposing a lien in one spouse's separate property to secure an economic contribution claim, and later subjecting the property to foreclosure for failure to pay the claim. The court commented:

> The underlying but ultimate issue in this case is whether the imposition and foreclosure of an equitable lien against a spouse's separate property is tantamount to divesting that spouse of his separate property. It is not. Although a court cannot divest a spouse of his separate property, the trial court must impose an equitable lien on that spouse's separate property to secure the other spouse's claim for economic contribution. That lien, if not satisfied, is subject to foreclosure as any other judgment lien. [FN1] However, the court cannot abrogate the safeguards provided by the procedures to foreclose a judgment lien by directly divesting title to one's separate property and vesting title in another.

VIII. RELOCATION

The 78th Legislature amended Section 105.002 of the Texas Family Code, effective for SAPCRs filed on or after September 1, 2003, to allow a jury to render decisions on the issues of: (1) the appointment of a sole managing conservator in addition to the appointment of joint managing conservators and a possessory conservators; (2) the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child; (3) the determination of whether to impose a restriction on the geographic area in which a joint

managing conservator may designate the child's primary residence; and (4) if a geographical restriction is imposed, the determination of the geographic area within which the joint managing conservator must designate the child's primary residence.

TEX. FAM. CODE § 105.002.

Further, in *Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002), the Texas Supreme Court held that a jury's verdict, designating the parent entitled to determine the child's primary residence, was binding on the trial court, and that the trial court is not permitted to impose a geographical restriction on relocation if the jury awards that right to one of the parents. *Id.* at 19, 20.

In this particular case, the Supreme Court also reviewed the standards for relocation articulated by other states, noting a "shift toward less stringent relocation standards." *Id.* at 16. These standards included:

> a. reasons for and against the move;
>
> b. education, health, and leisure opportuni ties;
>
> c. accommodation of special needs or talents of the children;
>
> d. effect on extended family relationships;
>
> e. effect on visitation and communication with the noncustodial parent;
>
> f. the noncustodial parent's ability to relocate;
>
> g. parent's good faith in requesting the move;
>
> h. continuation of a meaningful relationship with the noncustodial parent;
>
> i. economic, emotional, and educational enhancement for the children and the custodial parent;
>
> j. employment and educational opportunities of the parents;
>
> k. the ages of the children;
>
> l. community ties; and
>
> m. health and educational needs of the children.

Id. at 14-16. The court found enough evidence in support of relocation to uphold the jury's verdict against a challenge to the legal sufficiency of the evidence.

In *Bates v. Tesar,* 81 S.W.3d 411, 435-438, (Tex.App.–El Paso 2002, no pet.), the court of appeals rejected the argument that a relocation restriction violated the custodial parent's right to due process of law, or right to travel.

In *Franco v. Franco*, 81 S.W.3d 319 (Tex.App.–El Paso 2002, no pet.), the court of appeals affirmed a trial court's decision not to impose a relocation restriction.

In the case of *In re C.R.O.*, 96 S.W.3d 442 (Tex.App.–Amarillo 2002, pet. denied), the appellate court rejected a constitutional argument of restraint of travel and affirmed a relocation restriction prohibiting a custodial parent from moving to Hawaii.

In *Echols v. Olivarez*, 85 S.W.3d 475, 480 (Tex.App.–Austin 2002, no pet.), the court of appeals noted that Texas was one of the many states that:

> "have an articulated policy in favor of frequent and continuous contact between the child and both parents after the dissolution of the family of origin... See Tex. Fam. Code Ann. §§ 153.001, 153.251 (West 196 & Supp. 2002) [FN 7]. However, in the context of relocation cases,

> slavish adherence to such policy ignores the realities of a family that has been dissolved. After the dissolution of the family, each parent must establish a separate life. And in today's society, it is unrealistic to expect that any family, whether intact or not, will remain in one geographic location for an extended period of time. See Terry, supra, at 1012. "The high incidence of divorce, remarriage, second divorce, unpredictably of the employment market, and competing economic factors are all forces that affect the lives of many families and render the possibility of relocation a condition to be faced by most." *Id.* In fact, there is "an emerging trend of recognition by social scientists that the divorced family is a fundamentally different unit than the marital family and that a child's circumstances may actually be improved by a relocation when other positive factors are present."

Id. at 988, 989.

See Joan F. Jenkins, Sallee S. Smyth, *Relocation Issue is on the Move*, 66 Tex. B.J. 49 (2002.)

IX. ARBITRATION

An issue arising in family law with increasing frequency is arbitration agreements, and arbitration awards. Here are the parameters of the discussion.

A. A RUSH FOR THE EXITS.

Dissatisfaction with the delay, expense, and uncertainty of the court system caused many to turn to alternative dispute resolution procedures. Mediation has proven spectacularly successful as an alternative to litigation. But cases that do not settle in mediation still need a dispute resolution procedure, and people are increasingly turning to arbitration as an alternative to litigation at the courthouse. Arbitration is growing so fast in so many domains that a significant number of appellate cases, both state and federal, are being issued on a regular basis addressing questions about the contours of the arbitration process. There are many important long-term implications of the move of our citizens away from government-regulation litigation to private litigation, including a loss of accountability of the adjudicators to the public at large; a lack of assurance that the law is being applied, and applied correctly, to dispute resolution; the irrevocable exclusion of the jury from dispute resolution in advance of the dispute arising; the suspension of development of common law through the appellate process, etc. We also need to ask why our citizens are fleeing the litigation process, and whether this flight should be encouraged or whether changes should be made to the litigation process to make it a more attractive option. It is not the purpose of this article to discuss these long-range consequences, but there should be discussions about these matters as we advance into the world of private dispute resolution.

B. STATUTORY BASES FOR ARBITRATION.

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

C. WHEN DOES FEDERAL ARBITRATION LAW APPLY?

The U.S. Constitution's Commerce Clause is the constitutional basis supporting the federal legislation regarding arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 304 U.S. 64 (1967). As noted in the case of *In re FirstMerit Bank*, N.A., 52 S.W.3d 749, 754 (Tex. 2001): "[T]he United States Supreme

Court has construed the FAA to extend as far as the Commerce Clause of the United States Constitution will reach." The U.S. Supreme Court has determined that even intrastate activities that affect interstate commerce come within Congress's purview under the Commerce Clause. *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). However, since family law matters have not, for the most part, been seen to fall under the Commerce Clause basis for federal jurisdiction, most likely the federal arbitration statute does not apply to Texas family law proceedings. This is especially likely after recent U.S. Supreme Court rulings that appear to have remembered that the powers of Congress in fact derive from the U.S. Constitution, and not the mere will to legislate. *See United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (striking down portion of the federal Violence Against Women Act, because it could not be supported by Commerce Clause since regulation of this type of criminal conduct is traditionally non-commercial and is within the purview of the states).

The U.S. Supreme Court, in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985), noted an historical antipathy by courts, dating back into English history, against arbitration agreements. The Court evaluated the federal arbitration statute in this way:

> The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs," H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.

The Court went on to say that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 221.

Several decision uphold the right of the parties to choose what law will apply to their arbitration agreement. *See, e.g., Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 472, 109 S.Ct. 1248, 1252, 103 L.Ed.2d 488 (1988) (upholding choice of California law to govern arbitration although interstate commerce involved because applying federal law would have forced the parties to arbitrate in a manner contrary to their agreement); *D. Wilson Constr. Co. v. Cris Equip. Co.*, 988 S.W.2d 388, 392 (Tex. App.--Corpus Christi 1999, pet. granted by agr.) (applying Texas Arbitration Act on agreement of parties although interstate commerce involved), *rev'd and rem. for rendition of judgment in accordance with parties' agreement.*

The El Paso Court of Appeals decision in the Verlander case discussed in Section X(G)(8) below suggests a role of Federal arbitration law in Texas family law litigation.

D. TEXAS PUBLIC POLICY FAVORS ARBITRATION.

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

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

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

E. ADR VS. MANDATORY ARBITRATION.

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

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

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

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

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

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

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

F. ARBITRATION UNDER THE TEXAS FAMILY CODE.

There are two Family Code provisions relating to arbitrating family law cases. Both refer to discretionary referral of a pending case to arbitration as an alternate dispute resolution mechanism. The statutory sections themselves do not say whether they apply to a pre-existing agreement to arbitrate, such as is contemplated in Texas Civil Practice & Remedies Code ch. 171, or only to an assignment to ADR after a lawsuit is filed. However, Section 6.601 is under Family Code Chapter 6, Subchapter G, "Alternative Dispute Resolution." Section 153.0071 is itself titled "Alternate Dispute Resolution Procedures." This suggests that the Family Code provisions are akin to Chapter 154 of the Texas Civil Practice & Remedies Code, and reflect a post-filing referral of the case to an alternative dispute resolution process. Unless public policy precludes it, it appears that pre-litigation agreements containing arbitration clauses relating to family law matters would fall under the

general arbitration provisions of Texas Civil Practice & Remedies Code ch. 171.

Here are the Texas Family Code provisions:

> **§ 6.601. Arbitration Procedures**
>
> (a) On written agreement of the parties, the court may refer a suit for dissolution of a marriage to arbitration. The agreement must state whether the arbitration is binding or nonbinding.
>
> (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award.

> **§ 153.0071. Alternate Dispute Resolution Procedures**
>
> (a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.
>
> (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non- jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.
>
> (c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.
>
> (d) A mediated settlement agreement is binding on the parties if the agreement:
>
> > (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
> > (2) is signed by each party to the agreement; and
> > (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
>
> (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact

> and that the parties be placed in separate rooms during mediation. This subsection does not apply to suits filed under Chapter 262.

G. TEXAS FAMILY LAW ARBITRATION CASES.

1. Cooper v. Bushong. In *Cooper v. Bushong*, 10 S.W.3d 20 (Tex. App.–Austin 1999, pet. denied), the Austin Court of Appeals upheld an ADR-related arbitration in a suit to establish paternity and terminate the parent-child relationship.

2. The Roosth Case. In *Southwest Tex. Pathology Assocs., L.L.P. v. Roosth*, 27 S.W.3d 204, 207 (Tex. App.--San Antonio 2000, pet. dism'd w.o.j.), the court held that the wife in a divorce was not required to arbitrate her claim that the husband had improperly signed an amended partnership agreement, where the arbitration clause was in the new partnership agreement but not the old one, and the wife was not invoking any benefits under the new agreement.

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

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

5. Longton v. Longton. In an unpublished opinion, the Austin Court of Appeals upheld an ADR arbitration award dividing the property upon divorce. *Longton v. Longton*, No. 03-01-00093-CV (Tex. App.–Austin Nov. 15, 2001, pet. denied) (not for publication) [2001 WL 1422344].

6. In re Cartwright. In the case of *In re Cartwright*, 104 S.W.2d 706 (Tex. App.--Houston [1st Dist.] April 4, 2002, orig. proceeding), the parties included in their agreement incident to divorce the following arbitration clause:

> Any claim or controversy arising out of the Final Decree of Divorce, Cartwright Operating Agreement, or the Agreement Incident to Divorce that cannot be resolved by direct

> negotiation will be mediated as provided in chapter 154 of the Texas Civil Practices and Remedies Code with JAMES PATRICK SMITH. If the parties cannot resolve the matter through mediation, then JAMES PATRICK SMITH shall be the arbitrator to arbitrate all disputes.

After the divorce, the former wife sued for breach of the AID and the former husband moved to modify possession and access of the child. The court of appeals construed the quoted language to impliedly require binding arbitration, and commented that "[t]he TAA applies to an arbitration if the arbitration is binding." *Id.* at 711. The appellate court ruled that the trial court did not abuse its discretion in setting a reasonable deadline and requiring the parties to complete arbitration before the date of their trial setting, and in appointing as an arbitrator someone other than the person named in the agreement, who could not arbitrate the case by the deadline set by the court. The appellate court did mandamus the trial judge for appointing as arbitrator someone who had previously mediated disputes between the parties, on the grounds that the mediator may have acquired confidential information that she could not ignore in the arbitration. *Id.* at 714.

7. Rodriguez v. Harding. In *Rodriguez v. Harding*, 2002 WL 31863766, *1 (Tex. App.--San Antonio Dec. 24, 2002, no pet.) (do not publish), the parties to a divorce agreed to mediation and in their mediated settlement agreement the parties agreed that the mediator would "be the final arbitrator of any disputes in this matter, including enforcement of the final decree." A dispute arose about the fees to be awarded to a receiver appointed in the case, and one party attempted to challenge the evidentiary support for the arbitrator's award of fees to the receiver. The court of appeals rejected the attack on sufficiency of the evidence, quoting *Cooper v. Bushong* that "[r]eview of arbitration awards is extraordinarily narrow." A complaint that the arbitrator should have been removed for evident impartiality was rejected because no record of the arbitration proceeding or motion to disqualify the arbitrator was brought forward on appeal.

8. The Verlander Case. *Verlander Family Ltd. Partnership v. Verlander*, 2003 WL 304098 (Tex. App.--El Paso Feb. 13, 2003, no pet.) (memorandum opinion), involved a divorce proceeding where the wife alleged that the husband was an alter ego of the Verlander Family Limited Partnership. The partnership agreement, signed by the wife and under which she was a limited partner, provided that disputes must be arbitrated. The trial court refused to refer the matter to arbitration, holding that the alter ego claim was not subject to arbitration. Although the partnership agreement said it would be governed by the laws of Texas, the El Paso Court of Appeals dismissed an accelerated appeal from this order, on the ground that the partnership owned land in New Mexico as well as Texas, so that the Federal Arbitration Act applied, under which there is no right to interlocutory appellate review. In a companion mandamus proceeding, the appellate court held that the trial court had not abused its discretion in refusing to refer the matter to arbitration. *In re Verlander Family Ltd. Partnership*, 2002 WL 731895 (Tex. App.--El Paso April 25, 2002, orig. proceeding), *mandamus denied* (July 3, 2002).

9. Stieren v. McBroom. In *Stieren v. McBroom*, 103 S.W.3d 602 (Tex. App.--San Antonio Feb 28, 2003, pet. denied), at the time of divorce the parties entered into an agreement incident to divorce which provided that any controversy arising from the divorce decree or the AID, that could not be resolved by mediation or negotiation, would be submitted to binding arbitration. The father filed a motion to reduce his child support, which was referred to arbitration. The arbitrator's award reduced the child support, and the mother filed a motion to vacate the arbitration award. The trial court rejected the arbitrator's award, then denied the motion to reduce child support. Applying an abuse of discretion standard on appeal, the court of appeals found no reversible error in vacating the arbitrator's award on the grounds that the award was not in the minor child's best interest, but ruled that the trial court had no authority, after setting aside the arbitrator's award, to proceed to litigate the merits of the motion to modify child support.

10. Jabri v. Qaddura. In *Jabri v. Qaddura*, 108 S.W.3d 404, 407 (Tex. App.–Fort Worth May 8, 2003, no pet.), during a pending divorce with claims against third-parties, and after consultation with their respective attorneys, the parties signed an agreement saying that they "agree to submit all claims and disputes among them to arbitration by the TEXAS ISLAMIC COURT, 888 S. Greenville Ave., Suite 188, Richardson, Texas." A dispute arose as to which issues in litigation must be assigned to arbitration, and the trial court refused to stay litigation. In an accelerated appeal, the court of appeals held the arbitration agreement not to be ambiguous, ruled that all matters were to be assigned to arbitration, and reversed the trial court's order denying a motion to stay the litigation and refusing to compel arbitration.

11. Rich v. Rich. In *Rich v. Rich*, 2003 WL 21027940, *1 (Tex. App.--Houston. [1st Dist.] May 8, 2003, no pet. h.), the parties's decree of divorce contained the following arbitration clause:

> The parties agree that any claim or controversy arising out of this Final Decree of Divorce that cannot be settled by direct negotiation or mediation will be submitted to binding arbitration as provided in Chapter 171 of the Texas Civil Practice and Remedies Code. The arbitrator will be Mary Sean O'Reilly, but if said arbitrator is not able to conduct arbitration, the parties will secure the name of an arbitrator from the court that rendered the Final Decree of Divorce in this case. The cost of the arbitrator will be paid fifty percent (50%) by Kathleen M. Rich and fifty percent (50%) by Paul B. Rich.

In a post-divorce dispute, the ex-husband challenged the arbitration clause on the ground that neither of the spouses signed the decree of divorce, and the trial court denied a motion to refer the case to arbitration. In an accelerated appeal, the court of appeals reversed, saying that the divorce decree reflected the agreement of the parties, even though it was not signed by the parties. The appellate court also found that the ex-husband had accepted benefits under the decree and was estopped to challenge it. The ex-husband also contested the scope of the arbitration clause. The appellate court held that "if the facts alleged touch matters, have a significant relationship to, or are factually intertwined with the contract subject to arbitration, the claim is arbitrable."

X. GRANDPARENTS' RIGHTS AND *TROXEL V. GRANVILLE*

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

The Texas legislature has not amended any of the relevant sections of the Family Code in response to *Troxel*. The relevant sections are discussed below.

Since *Troxel* was decided, constitutional attacks have been levied on grandparent access statutes around the United States, to mixed results. Texas appellate courts have for the most part upheld Texas' grandparent access statute, when attacked for "facial invalidity." Texas lawyers have not done a good job of bringing "as applied" attacks on the statute, but several Texas courts of appeals have ruled that before grandparents can be awarded visitation, they must overcome a special burden of proof "read" into the statute by the appellate court.

A. THE U.S. SUPREME COURT'S DECISION IN *TROXEL V. GRANVILLE*.

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

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

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

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

5. Justice Scalia's Dissenting Opinion. Justice Scalia wrote a dissenting opinion in which he rejected the whole idea of substantive due process, which draws support from three prior cases, as a basis for invalidating legislation. Justice Scalia also said that the "sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance."

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

7. What Does *Troxel* Mean? In the case of *Linder v. Linder*, 72 S.W.3d 841, 852-55 (Ark. 2002), the Supreme Court of Arkansas summarized *Troxel* in this way:

> To summarize, six Justices agreed that the case should be affirmed (O'Connor, Rehnquist, Ginsburg, Breyer, Souter, and Thomas). Eight Justices agreed that the Fourteenth Amendment protects a parent's right to raise his or her child without undue interference from government (all but Scalia; Thomas with reservations). Five Justices agreed that a fit parent is accorded a presumption that the parent acts in the child's best interests (O'Connor, Rehnquist, Ginsburg, Breyer, and Stevens). Four Justices (O'Connor, Rehnquist, Ginsburg, and Breyer) agreed that "special factors" must "justify" the state's intrusion, and

> that one of those factors is a finding of parental unfitness.

The Supreme Court of New Jersey, in *Moriarty v. Bradt*, 827 A.2d 203, 217-18 (N.J. July 14, 2003), summarized *Troxel* in this way:

> In sum, although eschewing the articulation of the level of scrutiny and the standard to be applied to a grandparent visitation statute, Troxel instructs at least this much--that a fit parent has a fundamental due process right to the care and nurturance of his or her children; that that right is protected where a nonparental visitation statute respects a fit parent's decision regarding visitation by (1) according him or her the "traditional presumption" that a fit parent acts in the best interests of the child; and (2) giving "special weight" to a fit parent's determination regarding visitation. Troxel, supra, 530 U.S. at 66, 69, 120 S.Ct. at 2060, 2062, 147 L.Ed.2d at 57-59. Other salient factors mentioned in Troxel include: the breadth of a statute's standing requirement, id. at 67, 120 S.Ct. at 2061, 147 L.Ed.2d at 57; whether harm or potential harm is required before a court may order visitation, id. at 73, 120 S.Ct. at 2064, 147 L.Ed.2d at 61; the denial of visitation in its entirety, id. at 71, 120 S.Ct. at 2062-63, 147 L.Ed.2d at 60; and whether the statute requires more than a simple best interest analysis, id. at 67, 120 S.Ct. at 2061, 147 L.Ed.2d at 57-58.

B. The Effect of *Troxel* in Other States. Sister-state decisions have gone both ways, upholding and striking their grandparent access statutes. Some have rescued the statute by imposing common law requirements (such as a presumption in favor of parent's choice, or an elevated burden of proof, etc.) In order to meet due process standards.

States Upholding Constitutionality, "As Is" or "As Fixed": *In re L.B.S. v. L.M.S.*, 826 So. 2d 178 (Ala. Civ. App. 2002) (Alabama statute constitutional but the statute should be applied on a case by case basis and deference should be given to the parent's decision concerning the issue of visitation); *McGovern v. McGovern*, 33 P.3d 506, 511-12 (Ariz. App. 2001) (construing state statute to be consistent with due process by requiring court to apply rebuttable presumption that fit parent acts in child's best interests); *Roth v. Weston*, 789 A.2d 431, 434 (Conn. 2002) (state's grandparent visitation statute infirm, but rescued by announcing factors the trial court must consider); *Crafton v. Gibson*, 752 N.E.2d 78, 80 (Ind. Ct. App. 2001) (grandparent visitation statute constitutional, but case remanded for trial court to give special weight to the desires of the mother); *Skov v. Wicker*, 272 Kan. 240, 247, 32 P.3d 1122, 1126 (2001) (reading two Kansas statutes together in such a way to narrow the grandparent visitation statute and make it constitutional); *Galjour v. Harris*, 2000-2696 (La. App. 2001) (grandparent visitation constitutional); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052, 1060 (2002) (saving grandparent visitation statute from facial constitutional challenge by reading into statute a presumption in favor of parent's visitation decision); *Zeman v. Stanford*, 789 So. 2d 798, 803 (Miss. 2001) (grandparent visitation statute constitutional); *Blakely v. Blakely*, 83 S.W.3d 537, 548 (Mo. 2002) (grandparent visitation statute constitutional); *Hertz v. Hertz*, 738 N.Y.S.2d 62, 64, 291 A.D.2d 91, 94 (App. Div. 2002) (New York's grandparent visitation statute constitutional as against facial invalidity attack, because it gives the parents decision deference and is more narrowly constructed than the statute in Troxel; court did not decide on invalidity "as applied"); *Ex rel Brandon L. & Carol Jo. L. v. Moats*, 209 W. Va. 752, 764, 551 S.E.2d 674, 686 (2001) (visitation statute constitutional, because of the thirteen factors to consider in determining the best interest of a child).

States Finding Constitutional Difficulties. In a number of states, *Troxel* has resulted in invalidation

of the grandparent access or custody statute. *See Seagrave v. Price*, 79 S.W.3d 339, 345 (Ark. 2002) (trial court's failure to apply a presumption in favor of custodial parent's decision regarding visitation rendered order unconstitutional); *Belair v. Drew*, 776 So.2d 1105, 1107 (Fla. App. 2001) (held that Florida's grandparent visitation statute is facially unconstitutional under the privacy rights protected by Florida's Constitution); *Wickham v. Byrne*, 199 Ill.2d 309, 263 Ill.Dec. 799, 769 N.E.2d 1, 7-8 (2002) (holding section of grandparent visitation statute facially unconstitutional because it requires finding of best interests of child only and does not give parental decision presumptive weight); *Santi v. Santi*, 633 N.W.2d 312, 320-321 (Iowa 2001) (Iowa grandparent access statute unconstitutional); *State Dep't of Soc. & Rehab. Servs. v. Paillet*, 16 P.3d 962, 970 (Kansas 2001) (grandparent visitation order reversed because trial court made no presumption that fit parent acts in child's best interests); *Brice v. Brice*, 133 Md. App. 302, 309, 754 A.2d 1132 (2000) (rejecting facial invalidity attack, but reversing for unconstitutionality "as applied," because the mother was not alleged to be unfit, and she had allowed grandparents some visitation.); *Neal v. Lee*, 14 P.3d 547 (Okla. 2000) (Oklahoma Supreme Court held that, pursuant to *Troxel*, the award of grandparent visitation under Oklahoma's grandparent visitation statute violated the parents' federal constitutional rights since the parents objected to visitation and the grandmother made no showing of harm).

In the case of *In re Marriage of Harris*, 92 Cal.App.4 th 499, 509, 518, 112 Cal.Rptr.2d 127, 135, 142-43 (2001), the California Court of Appeals saved the constitutionality of the California grandparent visitation statute by reading into it a requirement that the need for grandparent visitation must be shown by clear and convincing evidence:

> [W]e conclude section 3104 does not infringe upon a parent's fundamental liberty interest under the California Constitution if subdivision (f) of the statute is read to require a grandparent seeking visitation rights over the objection of a fit parent to show by clear and convincing evidence that the parent's decision would be detrimental to the child.
>
> * * *
>
> Although a statute is facially constitutional, it nevertheless may have been unconstitutionally applied to a specific individual under particular circumstances, unduly infringing upon that person's protected right. (Boddie v. Connecticut (1971) 401 U.S. 371, 379-380, 91 S.Ct. 780, 28 L.Ed.2d 113; Lammers v. Superior Court (2000) 83 Cal.App.4th 1309, 1328, 100 Cal.Rptr.2d 455.) The application of section 3104 to Butler here violated her due process rights under both the United States and California Constitutions because the trial court did nothing more than apply a bare-bones best interest test and did not accord the child rearing decision of Butler, a fit parent, any deference or material weight. Because there were no allegations or findings that Butler was an unfit parent, Butler is entitled to a presumption that she will act in her child's best interest and her decisions regarding visitation must be given deference. (Troxel, supra, 530 U.S. at pp. 68, 70, 120 S.Ct. at pp.2061, 2062.) [FN14] The trial court's best-interest analysis was in contravention of constitutional principles and the statutory mandates of section 3104.

In the case of *In re Custody of C.M.*, 74 P.3d 342, 345 (Colo. App. August of 2003, cert. denied), the Colorado Court of Appeals rejected a "facial invalidity attack," but sustained an "as applied" attack on the constitutionality of that state's grandparent

visitation statute. In doing so, the appellate court read into the statute a special constitutionally-mandated burden of proof that varied from prior practice:

> We recognize that § 14-10-124(1.5), C.R.S.2001, does not specify that the biological parent's decisions are to receive greater consideration than the other relevant factors, and § 19-1-117 also is silent on that point. However, neither statute precludes our interpretation, based on well-settled Colorado case law, that the biological parent's decisions concerning grandparent visitation must carry special weight and significance in the adjudication of the grandparent's petition. We read § 19-1-117 as containing such a requirement. The burden of proof must be such that the parent need not prove that the grandparent visitation would adversely affect the child.
>
> We also decline to elaborate on the precise weight to be afforded a parent's decision regarding grandparent visitation. We anticipate that the appropriate considerations will emerge on a case-by-case basis.

In the case of *Heltzel v. Heltzel*, 2001 WL 1269245, 9-11 (Mich. App. Oct. 23, 2001), the Michigan Court of Appeals held, that to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within section 3, taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.

In *Glidden v. Conley*, 820 A.2d 197, 204 (Vt. Feb. 14, 2003), the Vermont Supreme Court stated that it had an obligation to construe Vermont's grandparent access statute in a manner to "render it constitutional." The Court therefor concluded that the statute's "best interests" consideration must be construed within the context of the grandparent visitation statute to satisfy due process, by requiring that "an evaluation of the best interests of the child under § 1011 requires that a parental decision concerning grandparent visitation be given a presumption of validity . . . ."

C. RELEVANT TEXAS STATUTES. The Texas statutes relevant to this discussion include not only the grandparent access statute, but also the statutes that permit grandparents to seek appointment as sole or joint managing conservator, or as possessory conservator. These involve general and specific standing statutes, and various definitions, set out below.

1. § 101.007. Clear and Convincing Evidence.

> "Clear and convincing evidence" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

In the case of *In Interest of G.M.*, 596 S.W.2d 846, 847 (Tex.1980), the Texas Supreme Court held that the "clear and convincing evidence" standard of proof would be required in all proceedings for involuntary termination of the parent-child relationship. The Texas Legislature now so provides in Texas Family Code § 161.001. As noted in the case of *In re B.L.D.*, 56 S.W.3d 203, 210 (Tex. App.--Waco 2001, no pet. h.), it is "[b]ecause the parent-child relationship enjoys constitutional protection [that] the standard of proof in a termination proceeding is elevated from 'preponderance of the evidence' to 'clear and convincing evidence.'" The question arises whether

the constitutional protection of parents to be free from state interference on non-parent access issues similarly requires an elevated standard of proof before the court can order non-parent access. The *Troxel* plurality opinion requires that the parent's decision be given "some special weight." Does that mean a starting presumption in favor of the parent's decision, or does that mean an elevated burden of proof on the non-parent? *In re Marriage of Harris*, 92 Cal. App.4th 499, 509, 518, 112 Cal.Rptr.2d 127, 135, 142-43 (2001), discussed below, ruled that clear and convincing evidence is required.

2. § 101.009. Danger to Physical Health or Safety of Child

> "Danger to the physical health or safety of a child" includes exposure of the child to loss or injury that jeopardizes the physical health or safety of the child without regard to whether there has been an actual prior injury to the child.

3. § 101.016. Joint Managing Conservatorship

> "Joint managing conservatorship" means the sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party.

Texas courts have permitted grandparents to be appointed as joint managing conservators along with one parent. *See Brook v. Brook*, 881 S.W.2d 297 (Tex.1994); *Connors v. Connors*, 796 S.W.2d 233 (Tex. App.--Fort Worth 1990, writ denied).

4. § 102.003. General Standing to File Suit

> (a) An original suit may be filed at any time by:
>
> (1) a parent of the child;
>
> (2) the child through a representative authorized by the court;
>
> (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
>
> (4) a guardian of the person or of the estate of the child;
>
> (5) a governmental entity;
>
> (6) an authorized agency;
>
> (7) a licensed child placing agency;
>
> (8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, 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;
>
> (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 Department of Protective and Regulatory Services 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; or

(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.

(b) In 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.

5. § 102.004. Standing for Grandparent

(a) In addition to the general standing to file suit provided by Section 102.003(13), a grandparent 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 environment presents a serious question concerning the child's physical health or welfare; 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 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 subchapter.

(c) Access to a child by a grandparent is governed by the standards established by Chapter 153.

6. § 102.005. Standing to Request Termination and Adoption

An original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by:

(1) a stepparent of the child;

(2) an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition;

(3) an adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition; or

(4) another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so.

7. § 102.006. Limitations on Standing

(a) Except as provided by Subsection (b), if the parent-child relationship between the child and every living parent of the child has

been terminated, an original suit may not be filed by:

> (1) a former parent whose parent-child relationship with the child has been terminated by court order;
>
> (2) the father of the child; or
>
> (3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child.

(b) The limitations on filing suit imposed by this section do not apply to a person who:

> (1) has a continuing right to possession of or access to the child under an existing court order; or
>
> (2) has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit.

8. § 153.131. Presumption That Parent to be Appointed Managing Conservator

> (a) Subject to the prohibition in Section 153.004 [history of domestic violence], 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.

A question arises as to whether a grandparent can be appointed a joint managing conservator over the objection of a parent, based merely upon a best interest determination. Several out-of-state cases cited above require clear and convincing evidence to permit just grandparent access–which is far less intrusive than custody. And who has the favorable starting presumption when a grandparent is seeking to be joint managing conservator with both parents? What happens when parents disagree about the appointment of grandparents as joint managing conservators?

In the case of *In re V.L.K.*, 24 S.W.2d 338 (Tex. 2000), the Texas Supreme Court ruled as a matter of statutory interpretation that the parental presumption does not apply to modification proceedings. Does *Troxel* change who has what burden in a modification case? In the *Heltzel* case, discussed on p. 47 above, the Michigan Court of Appeals ruled that *Troxel* protections apply to custody decisions, and that it is unconstitutional to put the burden of proof on a parent seeking to modify a prior custodial award to a non-parent.

9. § 153.191. Presumption that Parent to be Appointed Possessory Conservator

> The court shall appoint as a possessory conservator a parent who is not appointed as a sole or joint managing conservator unless it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child.

10. § 153.373. Voluntary Surrender of Possession Rebuts Parental Presumption

The presumption that a parent should be appointed or retained as managing conservator of the child is rebutted if the court finds that:

(1) the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent, licensed child-placing agency, or authorized agency 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

(2) the appointment of the nonparent or agency as managing conservator is in the best interest of the child.

11. § 153.374. Designation of Managing Conservator in Affidavit of Relinquishment

(a) A parent may designate a competent person, authorized agency, or licensed child-placing agency to serve as managing conservator of the child in an unrevoked or irrevocable affidavit of relinquishment of parental rights executed as provided by Chapter 161.

(b) The person or agency designated to serve as managing conservator shall be appointed managing conservator unless the court finds that the appointment would not be in the best interest of the child.

12. § 153.376. Rights and Duties of Nonparent Possessory Conservator

(a) Unless limited by court order or other provisions of this chapter, a nonparent, licensed child-placing agency, or authorized agency appointed as a possessory conservator has the following rights and duties during the period of possession:

(1) the duty of care, control, protection, and reasonable discipline of the child;

(2) the duty to provide the child with clothing, food, and shelter; and

(3) the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child.

(b) A nonparent possessory conservator has any other right or duty specified in the order.

13. § 153.377. Access to Child's Records

A nonparent possessory conservator has the right of access to medical, dental, psychological, and educational records of the child to the same extent as the managing conservator, without regard to whether the right is specified in the order.

14. § 153.431. Grandparental Appointment as Managing Conservators

If the parents are deceased, the grandparents may be considered for appointment as managing conservators, but consideration does not alter or diminish the discretionary power of the court.

15. § 153.432. Suit for Access

(a) A biological or adoptive grandparent may request access to a grandchild by filing:

(1) an original suit; or

(2) a suit for modification as provided by Chapter 156.

(b) A grandparent may request access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether

the appointment of a managing conservator is an issue in the suit.

16. § 153.433. Possession of and Access to Grandchild

> The court shall order reasonable access to a grandchild by a grandparent if:
>
> (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated; and
>
> (2) access is in the best interest of the child, and at least one of the following facts is present:
>
> > (A) the grandparent requesting access to the child is a parent of a parent of the child and that parent of the child has been incarcerated in jail or prison during the three-month period preceding the filing of the petition or has been found by a court to be incompetent or is dead;
> >
> > (B) the parents of the child are divorced or have been living apart for the three-month period preceding the filing of the petition or a suit for the dissolution of the parents' marriage is pending;
> >
> > (C) the child has been abused or neglected by a parent of the child;
> >
> > (D) the child has been adjudicated to be a child in need of supervision or a delinquent child under Title 3;
> >
> > (E) the grandparent requesting access to the child is the parent of a person whose parent-child relationship with the child has been terminated by court order; or
> >
> > (F) the child has resided with the grandparent requesting access to the child for at least six months within the 24-month period preceding the filing of the petition.

This statute was described in *Lilley v. Lilley*, 43 S.W.3d 703, 705 (Tex. App.--Austin 2001, no pet.), as follows:

> Under certain circumstances, a grandparent may petition a trial court for access to a grandchild. Tex. Fam.Code Ann. § 153.433 (West Supp.2001). Section 153.433 provides that a trial court shall allow the grandparent reasonable access to the grandchild if such access is in the best interest of the grandchild and the grandparent's child is a parent of the grandchild and is deceased. Id. § 153.433(2)(A).

17. § 153.434. Limitation on Right to Request Access

> A biological or adoptive grandparent may not request possession of or access to a grandchild if:
>
> (1) each of the biological parents of the grandchild has:
>
> > (A) died;

(B) had the person's parental rights terminated; or

(C) executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and

(2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.

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

1. Bringing a Constitutional Attack in Texas. There are principles of law that must be considered when evaluating the constitutionality of a state statute.

a. 14th Amendment to U.S. Constitution.

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; . . . Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[Sections 2, 3, and 4 omitted]

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The San Antonio Court of Appeals explained the 14th Amendment Due Process Clause in the following way:

> First, the Clause incorporates many of the protections set forth in the Bill of Rights including a state official's violation of freedom of speech. Second, the Clause contains a substantive component, sometimes referred to as "substantive due process." Id. Substantive due process bars arbitrary governmental actions regardless of the fairness of the procedures used to implement them. Id. The Clause also guarantees fair procedure. Procedural due process requires that a state not deprive its citizens of life, liberty and property without first providing appropriate procedural safeguards. Id.

Levine v. Maverick County Water Control, 884 S.W.2d 790, 795 (Tex. App.--San Antonio 1994, writ denied).

b. Due Course of Law under Texas Constitution.

Art. I, § 19. Deprivation of life, liberty, etc.; due course of law

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

c. Principles of Judicial Review of Constitutionality of Statutes.

(1) Legislation Up To Constitutional Limits. As stated in *State v. Texas Mun. Power Agency*, 565

S.W.2d 258, 271 (Tex. Civ. App.--Houston [1st Dist.] 1978, writ dism'd):

> The Texas legislature may make any law not prohibited by the Constitution of the State of Texas or that of the United States of America.

(2) Due Course of Law Attack Only For Constitutionally-Protected Right. In asserting a due course of law claim, the complaining party must establish that his interest is constitutionally protected. *In re J.W.T.*, 872 S.W.2d 189, 190 (Tex.1994).

(3) Complaining Party Must Be Injured. Courts will not pass on the constitutionality of a statute upon that complaint of one who fails to show he is injured by its operation. *See Friedrich Air Conditioning & Refrigeration Co. v. Bexar Appraisal Dist.*, 762 S.W.2d 763, 771 (Tex. App.--San Antonio 1988, no writ) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1935)). When challenging the constitutionality of a statute, a defendant [in a criminal case] must show that in its operation, the statute is unconstitutional as applied to him in his situation; that it may be unconstitutional as to others is not sufficient. *Bynum v. State*, 767 S.W.2d at 769, 774 (Tex. Crim. App.1989).

(4) Limit Inquiry to Record in Case. Constitutional issues will not be decided upon a broader basis than the record requires. *State v. Garcia*, 823 S.W.2d 793, 799 (Tex. App.--San Antonio 1992, pet. ref'd).

(5) Presumption of Validity. An analysis of the constitutionality of a statute begins with a presumption of validity. *HL Farm Corp. v. Self*, 877 S.W.2d 288, 290 (Tex. 1994)*; Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985). "The burden of proof is on those parties challenging this presumption." *General Services Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001). The same requirements are applied under the Texas Constitution as under the United States Constitution. *Reid v. Rolling Fork Pub. Util. Dist.*, 979 F.2d 1084, 1089 (5th Cir.1992); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex.1990).

(6) Interpret to Avoid Unconstitutionality. "When possible, we are to interpret enactments in a manner to avoid constitutional infirmities." *General Services Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex.1996); *Texas State Bd. of Barber Examiners v. Beaumont Barber Coll., Inc.*, 454 S.W.2d 729, 732 (Tex. 1970). "Legislative enactments will not be held unconstitutional and invalid unless it is absolutely necessary to so hold. " *Texas State Bd. of Barber Examiners v. Beaumont Barber College, Inc.*, 454 S.W.2d 729, 731 (Tex.1970). The statute must be upheld if a reasonable construction can be ascertained which will render the statute constitutional and carry out the legislative intent. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App.1979). "Before a legislative act will be set aside, it must clearly appear that its validity cannot be supported by any reasonable intendment or allowable presumption." *Ex parte Austin Indep. Sch. Dist.*, 23 S.W.3d 596, 599 (Tex. App.--Austin 2000, no pet.).

(7) "Facial Invalidity." A statute can be challenged for unconstitutionality based upon "facial invalidity." A statute is not facially invalid unless it could not be constitutional under any circumstances. *See Appraisal Review Bd. of Galveston County v. Tex-Air Helicopters, Inc.*, 970 S.W.2d 530, 534 (Tex. 1998). A statute need not be declared unconstitutional simply because it might be unconstitutional as applied to the facts of another case. *See Weiner v. Wasson*, 900 S.W.2d 316, 332 (Tex. 1995). *See Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 463 (Tex.1997) ("We may not hold the statute facially invalid simply because it may be unconstitutionally applied under hypothetical facts which have not yet arisen.").

(8) Unconstitutional "As Applied." As noted in 12A TEX. JUR. 3d *Constitutional Law* § 38 (1993):

> A statute otherwise constitutional may be declared unconstitutional in its operation as applied to particular persons, circumstances, or subject matter.

The Austin Court of Appeals explained an "as applied" challenge as follows:

> In an "as applied" constitutional challenge, the challenger must show the statute in issue is unconstitutional when applied to the challenger because of the challenger's particular circumstances. See Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 518 (Tex.1995). To so do, the challenger could show either that (1) the circumstances complained of exist under the facts of the particular case or (2) such circumstances necessarily exist in every case, so that the statute always acts unconstitutionally when applied to the challenger. It is not enough to show that the statute may operate unconstitutionally against the challenger or someone in a similar position in another case.

Texas Workers Compensation Com'n v. Texas Mun. League Intergovernmental Risk Pool, 38 S.W.3d 591, 599 (Tex. App.–Austin 2000, review granted).

(9) Determine Legislative Intent. It is not the function of the courts to judge the wisdom of a legislative enactment. *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407 (Tex. 1969). The cardinal rule of statutory construction is to ascertain and follow the legislature's intent. *Citizens Bank v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex.1979). Courts ascertain that intent by initially looking at the language used in the statute. *Jones v. Del Andersen & Assocs.*, 539 S.W.2d 348, 350 (Tex.1976). The words in the statute should be interpreted according to their ordinary meaning; they are not to be interpreted in an exaggerated, forced, or strained manner. *Howell v. Mauzy*, 899 S.W.2d 690, 704 (Tex.App.--Austin 1994, writ denied). Courts need not analyze extrinsic evidence of legislative intent if the intent is apparent from the language of the statute. *Minton v. Frank*, 545 S.W.2d 442, 445 (Tex.1976). The goal of statutory construction is to give effect to the intent of the legislature. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994). If language in a statute is unambiguous, this Court must seek the intent of the legislature as found in the plain and common meaning of the words and terms used. *Id.*

(10) Challenges Based on Texas Vs. Federal Constitution. In *University of Texas Medical School v. Than*, 901 S.W.2d 926, 929 (Tex.1995) (a *procedural* due process case), the Texas Supreme Court stated that:

> The Texas due course clause is nearly identical to the federal due process clause, which provides: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . U.S. CONST. amend. XIV, § 1. While the Texas Constitution is textually different in that it refers to "due course" rather than "due process," we regard these terms as without meaningful distinction. Mellinger v. City of Houston, 68 Tex. 37, 3 S.W. 249, 252-53 (1887). As a result, in matters of procedural due process, we have traditionally followed contemporary federal due process interpretations of procedural due process issues. . . . Although not bound by federal due process jurisprudence in this case, we consider federal interpretations of procedural due process to be persuasive authority in applying our due course of law guarantee.

However, in *Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992), the Texas Supreme Court differentiated constitutional attacks based on the Texas Constitution from attacks based on the U.S. Constitution:

> In interpreting our constitution, this state's courts should be neither unduly active nor deferential; rather, they should be independent and thoughtful in considering the unique values, customs, and traditions of

> our citizens. With a strongly independent state judiciary, Texas should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, [FN53] but should never feel compelled to parrot the federal judiciary. [FN54] With the approach we adopt, the appropriate role of relevant federal case law should be clearly noted, in accord with Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476- 77, 77 L.Ed.2d 1201 (1983) (presuming that a state court opinion not explicitly announcing reliance on state law is assumed to rest on reviewable federal law). A state court must definitely provide a "plain statement" that it is relying on independent and adequate state law, [FN55] and that federal cases are cited only for guidance and do not compel the result reached. Id. at 1040-41, 103 S.Ct. at 3476-77. See also William J. Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U.L.Rev. 535, 552 (1986). Long offers further reason for developing state constitutional law, since now courts, rather than merely adjudicating state constitutional claims, must be prepared to defend their integrity by both quantitatively and qualitatively supporting their opinion with state authority." Duncan, State Courts, at 838. Consistent with this method, we may also look to helpful precedent from sister states in what New Jersey Justice Stewart Pollock has described as "horizontal federalism." Stewart G. Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex.L.Rev. 977, 992 (1985). [Footnotes omitted]

(11) A Substantive Due Process Challenge. A "substantive due process" of law challenge was described in the case of *In re B--M--N--*, 570 S.W.2d 493, 503 (Tex. Civ. App.--Texarkana 1978, no writ), as follows:

> In substantive due process cases, the courts balance the gain to the public welfare resulting from the legislation against the severity of its effect on personal and property rights. A law is unconstitutional as violating due process when it is arbitrary or unreasonable, and the latter occurs when the social necessity the law is to serve is not a sufficient justification of the restriction of the liberty or rights involved.

(12) Must Raise Constitutional Challenge in Trial Court. Constitutional challenges not expressly presented to the trial court by written motion, answer or other response will not be considered by the appellate courts as grounds for reversal. *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 104 (Tex. 1986).

(13) Avoid Constitutional Ruling if Other Grounds Are Available. In *San Antonio General Drivers, Helpers Local No. 657 v. Thornton*, 156 Tex. 641, 299 S.W.2d 911 (1957), the Supreme Court said that "[a] court will not pass on the constitutionality of a statute if the particular case before it may be decided without doing so."

2. Pre-*Troxel* Texas Cases. Prior to the U.S. Supreme Court deciding *Troxel*, Texas courts of appeals had rejected constitutional attacks on the Texas grandparent access statute, without the sophisticated review of the constitutional issues exemplified by *Troxel*. *See Dolman v. Dolman*, 586 S.W.2d 606, 608 (Tex. Civ. App.--Austin 1979, writ dism'd w.o.j.); *Deweese v. Crawford*, 520 S.W.2d 522 (Tex. Civ. App.–Houston [14th Dist.] 1975, writ ref'd n. r. e.).

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

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

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

> Absent a finding, supported by evidence, *that the safety and welfare of the children is significantly impaired by the denial of the Burks' visitation*, Aubin's decision regarding whether the children will have any contact with the Burks is an exercise of her fundamental right as a parent. That right is shielded from judicial interference by the Due Process clause of the United States Constitution. Texas Family Code Section 105.001, is unconstitutional as applied to Aubin in the trial court's June 15, 1998, and June 29, 1998, temporary restraining orders [FN5] and the trial court's November 2, 1998, temporary order. The trial court clearly abused its discretion in appointing the Burks as temporary possessory conservators. We direct the Honorable Chap Cain, Judge of the 253rd District Court of Liberty County, Texas, to vacate the November 2, 1998, temporary orders. [Emphasis added]

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

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

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

c. The Texas grandparent access statute has already been examined and held to be constitutional. *Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ ref'd n.r.e.), overruled on other grounds by *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex.1989) ("The state has sufficient interest in the family relationship to permit legislation in this area."). *Lilley*, 43 S.W.3d at 712.

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

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

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

> Sailor contends by her first issue that the visitation order and the statute authorizing it, Family Code section 153.433, violate her due process right to autonomy in child-rearing decisions. Considering a similar argument shortly after Sailor filed her brief, this Court held that neither section 153.433 nor an order requiring grandparent visitation violated the parents' due-process rights under the Fourteenth Amendment. Lilley v. Lilley, 43

> S.W.3d 703, 710-713 (Tex. App.--Austin 2001, no pet.). We find no reason to alter our decision regarding the facial constitutionality of the statute.

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

6. Sailor v. Phillips. In the case of *Sailor v. Phillips*, 2001 WL 1379923, *2 (Tex. App.--Austin Nov. 8, 2001) (not for publication), the Austin Court of Appeals again rejected a "facial invalidity" attack on the grandparent access statute, Tex. Fam. Code § 53.433, and then proceeded to consider and reject an "as applied" attack, based on substantive due process of law. The Court mentioned *Troxel*, then discussed the wide discretion given to trial judges in visitation decisions, and meshed the two together in this way:

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

7. In re T.J.K. In the case of *In re T.J.K.*, 62 S.W.3d 830 (Tex. App.--Texarkana, Nov. 15, 2001), a custodial father filed a motion to modify a prior agreed order whereby the maternal grandmother was given grandparent access to a child. One ground for the motion to modify was the U.S. Supreme Court's decision in *Troxel v. Granville*. The trial court rejected the constitutional attack on the grounds that by entering into the agreed order the father waived any constitutional complaint he may have had. The Texarkana Court of Appeals rejected this view, and said that the father was not precluded by his earlier agreement from seeking to modify by elimination the earlier order. The appellate court also held that a finding that the Texas statute is unconstitutional would be a material change that could support the requested modification. The case was remanded to the trial court to consider the constitutional challenge. A contrary view was expressed by the Arkansas Court of Appeals in *Hunt v. Perry*, 2003 WL 22925099 (Ark. Dec. 11, 2003), which held that the doctrine of res judicata requires that a change in the law cannot constitute a change in circumstances warranting modification of a visitation order. *Accord*, *Ingram v. Knippers*, 72 P.3d 17, 21 (Okla. 2003) (consent order granting parents visitation could not be attacked on constitutional grounds because it was based on consent, and because the doctrine of

res judicata precludes relitigating the validity of the earlier decree).

8. Roby v. Adams. In *Roby v. Adams*, 68 S.W.3d 822, 828 (Tex. App.--El Paso 2002, pet. denied), the court held that a grandparent has the burden to overcome presumption in favor of a fit parent's decision, as part of establishing the best-interests-of-child prong of Texas' grandparent visitation statute. Thus, the appellate court rejected a constitutional attack by engrafting on the statute a burden of proof not stated in the Texas Family Code.

9. In re Pensom. In the case of *In re Pensom*, 2003 WL 22492247 (Tex. App.--San Antonio Nov. 5, 2003, orig. proceeding), the court of appeals rejected a facial invalidity attack against the Texas grandparent access statute, TFC § 153.433. However, the San Antonio Court of Appeals engrafted a special burden of proof as constitutionally-required in order to award grandparent access:

> . . . . in order to satisfy the "best interest of the child" prong of the Grandparent Access Statute, a grandparent must overcome the presumption that a fit parent acts in the best interest of his or her child. To overcome this presumption, a grandparent has the burden to prove, by a preponderance of the evidence, either that the parent is not fit, [FN5] or that denial of access by the grandparent would significantly impair the child's physical health or emotional well-being.

Because the trial court failed to make the requisite finding in connection with awarding temporary visitation to grandparents, the court of appeals mandamused the trial court to set aside the temporary visitation orders.

10. In re N.A.S. In the case of *In re N.A.S. & A.D.S.*, 100 S.W.3d 670, 672 (Tex. App.–Dallas March 28, 2003, no pet. h.), a parent's facial invalidity challenge to the grandparent access statute was rejected without stated analysis other than citation to prior Texas cases rejecting a facial invalidity attack. An "as applied" constitutional attack was rejected because the parent did not "explain how the statute operates in practice to violate her rights or how it affects her differently from other parents similarly situated."

11. In re C.P.J. In the case of *In re C.P.J.*, 2003 WL 21783356 (Tex. App.--Dallas August 4, 2003, pet. denied), the Dallas Court of Appeals rejected a facial invalidity attack on the Texas grandparent access statute, based on prior Texas cases to that effect. An "as applied" attack on the statute was rejected, given the absence of findings of fact and conclusions of law, with the appellate court concluding that "the record does not reflect that the trial court failed to 'accord at least some special weight to the parent's own determination' when it made the decision to modify the prior visitation order rather than terminate it."

XI. MISCELLANEOUS

A. RECENT OPINIONS

Revenue Stream from Intellectual Property is Community Property

In *Alsenz v. Alsenz*, 101 S.W.3d 648, 652-654 (Tex.App.–Houston [1st Dist.] 2003, pet. denied), the appellate court ruled in a case of first impression that the revenue stream from intellectual property that was created by the other spouse prior to marriage is considered to be community property.

Piercing of Partnership Veil Disallowed in Texas

In *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 515 (Tex.App.-San Antonio 2001, pet. denied), the court held that a spouse cannot pierce the veil of a partnership, due to the language of the partnership statute.

Additionally, as a condition of piercing, *Lifshutz* requires proof that the community was harmed by the disregard of the entity, not benefitted by the disregard.

In *Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Ass'n*, 77 S.W.3d 487, 499-500 (Tex.App.–Texarkana 2002, pet. denied), the court held that the theory of alter ego, or piercing the corporate veil, is inapplicable to partnerships.

B. SAME SEX MARRIAGES

In 1999, Attorney General John Cornyn issued an Attorney General's opinion stating that a county clerk is not required to accept for filing a declaration of domestic partnership. Op. Tex. Att'y Gen. No. JC-0156 (1999.)

Subsequently, the 78th Legislature enacted Section 6.204 of the Texas Family Code, effective September 1, 2003, which prohibits the recognition of a same-sex marriage or civil union legitimized in another state in Texas. In so doing, Texas became the 37th state to respond to the U.S. Congress's "Defense of Marriage Act,"(DOMA), which provides that U.S. jurisdictions need not give full faith and credit to such unions recognized by a sister state. *Defense of Marriage Act,* 28 U.S.C.A. §§1738C (West Supp. 1997.)

Specifically, DOMA provides that 1) a state need not recognize another state's gay marriage and 2) gay marriages will not be recognized under federal law. A "marriage," as defined by DOMA, is a "legal union between one man and one woman," and the act provides that no state "shall be required to give effect to any public act, record, or judicial proceeding of any other state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State... or a right or claim arising from such relationship." *Id.*

Specifically, Section 6.204 of the Family Code states:

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

In *Littleton v. Prange,* 9 S.W.3d 223, 226 (Tex.App.–San Antonio 1999, pet. denied), the appellate court held that as a matter of first impression, a ceremonial marriage between a man and a transsexual who had been born as a man, but was surgically and chemically altered to appear as a woman, was not valid, and thus the transsexual lacked standing to bring suit as a surviving spouse for a wrongful death claim.

With the recent Supreme Court ruling in Massachusetts rendered in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), however, there remains the potential for a successful federal constitutional challenge on the issue of same sex marriages. In *Goodridge*, the Massachusetts

Supreme Court ruled in November of 2003 that a limitation of protections, benefits and obligations of civil marriage to individuals of opposite sexes lacked rational basis and violated state constitutional equal protection principles. The Court went on to reformulate the definition of "marriage" to mean the "voluntary union of two persons as spouses, to exclusion of all others." *Id.* at 969.

Incidentally, the Massachusetts Supreme Court stayed entry of judgment for 180 days, sending the decision to the state legislature to "take such action as it may deem appropriate." What action is to be taken is yet to be seen, but it is likely that regardless of what the legislature does, the result will have implications across the country.

C. ASSISTED REPRODUCTION

In addition to about a half a dozen minor, mainly technical changes in language, the Uniform Parentage Act in the Texas Family Code added a new subchapter providing for gestational agreements. TEX.FAM.CODE ANN. §§ 160.751 et. seq. Basically, the statute provides that a married couple may contract with a third-party woman for her to carry a child to term for them. The child must be the product of assisted reproduction and cannot be a product of the gestational mother's eggs. If a contract for this activity is submitted to and approved by a court, the net result is that when the child is born the intended parents, rather than a gestational mother, are the child's parents. Similarly, the intended parents have full responsibility for the consequences should something go amiss regarding the birth.

D. AD LITEMS

In 2003, the Texas Legislature completely revamped Subchapters A, B and C of Chapter 107 of the Texas Family Code. The 2003 amendments were put in place in order to clarify any confusion concerning multiple appointments of individuals to a case and to clarify the duties that are assigned to them.

Subchapter A defines and sets out the powers and duties of the four types of court-appointed child representatives: 1) amicus attorney; 2) attorney ad litem; 3) dual role attorney; and 4) guardian ad litem. A person appointed as an amicus attorney, attorney ad litem, or dual role attorney must be a licensed attorney; a guardian ad litem does not fall within this same requirement. An amicus attorney is appointed in order to provide legal services necessary to assist the court in protecting the child's best interest, but shall not provide legal services to the child. Thus, an amicus attorney is not bound by the child's expressed d4esires. An attorney ad litem, however, is appointed to provide legal services and owes the child the same duties an attorney would owe any other client: undivided loyalty, confidentiality, and competent representation. A dual role attorney is an attorney who is appointed to act both as a guardian ad litem and an attorney ad litem. A guardian ad litem is a person appointed to represent the best interest of a child.

Subchapter B deals with when child representatives are to be appointed by the Court. In suits filed by governmental entities, the appointment of a GAL and an AAL for a child is mandatory when the suit is seeking to terminate the parent child relationship or to appoint a conservator for the child. The appointment of an attorney ad litem for certain parents is also mandatory when a governmental entity is seeking to terminate the parent child relationship. The appointment of an amicus attorney is prohibited in suits filed by a governmental entity. In private suits, the appointment of an amicus attorney, attorney ad litem, or guardian ad litem is discretionary. The court is prohibited from appointing an attorney to serve in a dual role in private suits.

Lastly, Subchapter C permits courts to appoint charitable organizations composed of volunteer advocates in SAPCRS.

E. ADR STATEMENTS

Sections 6.404 and 102.0085 were repealed by the 78th Legislature, removing the requirement that an ADR statement be attached to an initial pleading in a divorce or a SAPCR.

F. CHARACTERIZATION AND THE ISSUE OF QUASI-COMMUNITY PROPERTY

Sections 4.102 and 4.205 of the Family Code were amended during the last legislative session to provide that property subject to a partition or exchange agreement does include future earnings and income. The amendments provides that community property which is partitioned and exchanged into separate portions will presumptively include all future income and earnings stemming from the partitioned property, unless the parties agree otherwise in writing.

Next, the so called quasi-community property statute, Section 7.002 of the Texas Family Code, was expanded to recognize the existence of quasi-separate property. That is, property acquired by gift, devise, or descent, owned or claimed before marriage in another state, must be awarded upon divorce to the owning spouse. This section of the Family Code does not apply to division of property upon death.

G. WEDNESDAY NIGHT VISITATION

Family Code Sections 153.311, 153,314, and 153.317 were amended to change the standard possession order of Wednesday night visitation to Thursday night visitation. In effect this creates a long weekend for the "lesser custodial parent" on the first, third, and fifth weekend throughout the school year.

H. CHILD'S PREFERENCE

The Legislature amended Family Code Section 153.008, effective September 1, 2003, to clarify that a child may state his or her preference as to which conservator the child wishes to reside with after the court has appointed joint managing conservators. The prior language gave the child the right to choose a managing conservator. The new language makes the child's choice a stated preference, perhaps weakening its import.