Hot Topics in Family Law

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State Bar of Texas Judicial Section

JUDICIAL SECTION ANNUAL CONFERENCE

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CURRICULUM VITAE OF RICHARD R. ORSINGER

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Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
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Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-1997, 1999-2001, 2003-2006) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA (1987-to date)
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Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (2002, 2003)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002) [Won national ACLEA Award]
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003, 2004)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery

Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94)
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Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

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

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003)

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

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

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

SBOT's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003)

SBOT's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!" (1997); The Lawyer as Master of Technology: Communication With Automation (1997); Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

Various CLE Providers: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and

Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003)

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Hot Topics in Family Law

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I. INTRODUCTION. This article discusses recurrent 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 in 2003.

From page 39 to page 45 of the article, there is a close analysis of where the Texas Supreme Court is going on broad form submission of jury issues and appellate review of the legal sufficiency of the evidence. The article suggests the possibility that issues of tort litigation (specifically exemplary damages) are being worked through in the context of parent-child termination, because of the requirement in each area of law that findings in the trial court be upon clear and convincing evidence.

II. ATTORNEY'S FEES. Oftentimes the question arises among practitioners as to under what circumstances attorney's fees can 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 twice 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. The two versions of Section 157.167, which became effective for enforcement orders rendered on or after September 1, 2003, state:

[Section (a) is the same in both versions]

> (a) If the court finds that the respondent has failed to make child support payments, the court shall order the respondent to pay the movant's reasonable attorney's fees and all court costs in addition to the arrearages.
>
> (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.

[alternate version of (b):]

(b) Except as provided by Subsection (d), for good cause shown, the court may waive the requirement that the respondent pay attorney's fees and costs if the court states the reasons supporting that finding.

(c) For good cause shown, the court may waive the requirement that the respondent pay attorney's fees and costs if the court states the reasons supporting that finding.

[alternate version of (c):]

(c) Fees and costs ordered under this section may be enforced by any means available for the enforcement of child support, including contempt.

(d) Fees and costs ordered under Subsection (a) may be enforced by any means available for the enforcement of child support, including contempt.

[alternate version of (d):]

(d) If 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 arrear- ages, 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(b).

Both versions of Section 157.167 allow courts to waive the requirement that the respondent pay attorney's fees and costs if the court finds good cause and states in the record the reasons supporting that finding. Under one version of the statute, this good cause proviso is not operative where there is a finding of contempt, and the respondent owes $20,000 or more in child support arrearages, and the court does not find 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(b) & (d).

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) & (b).

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 Kimsey*, 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 FEES 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.*, 94 S.W.3d 799 (Tex. App.--Houston [14th Dist.] 2002, pet. denied). In a suit to terminate parental rights, the trial court appointed an attorney ad litem for the child. The trial court ordered each party to deposit $2,500 with the ad litem as security, but the mother failed to do so. The trial court granted the ad litem a judgment for attorney's fees, and further prohibited the mother from presenting at trial witnesses on her behalf other than herself. The Court of Appeals reversed, saying the ruling barring witnesses was tantamount to a death penalty sanction which did not meet the constitutional requirements of *TransAmerican Natural Gas v. Powell*, 811 S.W.2d 913 (Tex. 1991).

C. ENFORCING INTERIM FEES BY CONTEMPT.

In Texas, a court cannot imprison a person for not paying 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.")

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 Family Code allows for orders requiring temporary support payments (in terms of both child support and spousal support) to be enforceable by contempt, the court 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 <u>enforce</u> child support from fees awarded in suits brought to <u>modify</u> 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.)

In line with the above referenced rulings, the Fourteenth Court of Appeals, in *In re Jih*, 2003 WL 22707113 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (memorandum opinion), determined that a trial court could not enforce an award 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 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 of 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. denied).

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 contain 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.

9. In Re Taylor. *In re Taylor,* 130 S.W.3d 448 (Tex.–Texarkana 2004, orig. proceeding).

In the agreed decree of divorce, husband agreed to pay wife "contractual maintenance." The ex-wife filed for contempt enforcement and the ex-husband was sent to jail. The Texarkana Court of Appeals denied habeas corpus, saying contempt was appropriate. The Court distinguished *In re Dupree*, because that case involved "alimony" and this case involved "contractual maintenance." Also, *Dupree* had no language ordering payment, whereas the current decree did.

10. Cooper v. Cooper. *Cooper v. Cooper,* 2004 WL 1351415 (Tex. App.–Houston [1st Dist.] 2004, no pet. h.).

The appellate court affirmed an award of spousal maintenance. The Court said that "minimum reasonable needs" is an issue to be determined on a case-by-case basis.

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.

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.

Six 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 from defined benefit plans. *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"); *Lee v. Novak*, 2001 WL 391530 (Tex. App.–Austin 2001, no pet.) (unpublished).

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 the sweeping language of these cases, 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." However, the unpublished portion of the *Farish* opinion can be considered by other courts, although it has no precedential value. See Tex. R. App. P. 47.7.

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.

In *McClary v. Thompson*, 65 S.W.3d 829, 834 (Tex. App.--Fort Worth 2002, pet. denied), the court of appeals said that "[m]ost forms of property, including real estate, life insurance policies, and stock options, have been characterized as community or separate based upon their character at inception."

In *Boyd v. Boyd,* 67 S.W.3d 398, 410-411 (Tex. App--Fort Worth 2002, no pet.), the court of appeals said:

> Texas courts have consistently held that stock options acquired during marriage are a contingent property interest and a community asset subject to division upon divorce.
>
> *　　*　　*
>
> Because Randall's fair value stock options were acquired during the marriage, they were a contingent community property interest, and the trial court did not abuse its discretion by dividing all of the options between Randall and Ginger.

In *Matter of Marriage of Joiner*, 755 S.W.2d 496, 498 (Tex. App.--Amarillo 1988), *on reh'g*, 766 S.W.2d 263 (Tex. App.-Amarillo 1988, no writ), stands in contrast to the cases going "all or none" for the date the option was granted. In *Joiner*, the Amarillo Court of Appeals considered the proper characterization and division of the husband's stock plan. Under the terms of the husband's plan, a 20% interest in the employee's account vested after six years of service, *i.e.*, after the first fiscal year of participation in the plan, and a 20% interest vested each year thereafter until the tenth year of service, *i.e.*, the fifth fiscal year of participation in the plan, when the account became 100% vested. Prior to marriage, the husband had worked six and one-half years for his employer. *Id.*

On appeal of the parties divorce decree, the appellate court distinguished the husband's stock plan from military retirement or pension plans under which benefits are earned by reason of years of service, on the grounds that the husband's stock plan provided that benefits were not earned during the five-year period of employment required for participation in the plan, but rather provided that an employee first acquired a vested interest in the benefits of the plan at the end of the sixth fiscal

year of employment. *Id.* at 698. Thus, according to the Amarillo Court of Appeals, the initial five-year employment period only generated a mere expectancy which, by not fixing any benefit in any sums at any future date, was not a property interest to which property laws apply. *Id.* Since the character of property as separate or community is fixed at the very time of acquisition, the appellate court continued, the crucial time for determining the character of interests in and benefits of the plan was the time when the vested interests were acquired. *Id.*

Thus, held the Amarillo Court of Appeals, a 20% interest in the benefits of the husband's plan was acquired and vested at the end of the husband's sixth year of employment (prior to marriage), and a similar 20% interest was acquired and vested on each year thereafter for four more years, at which time the plan account was fully vested. *Id.* Because the initial 20% interest was acquired and vested while the husband was a single man, it was his separate property, and the remaining 80% was acquired and vested during the marriage, and thus was community property. *Id.* In *Joiner,* then, the appellate court adopted and advocated a time rule formula to determine the community's interest in a profit-sharing stock plan. On rehearing, the wife contended that the inception of title doctrine-*i.e.,* the character of property interests in the plan as separate or community is fixed at the time the vested interests are acquired-was not applicable to situations involving retirement or pension benefits. 766 S.W.2d 263. Rejecting the wife's argument, and reaffirming that the inception of title doctrine was applicable to the husband's stock plan, the Amarillo Court of Appeals noted that its focus was on the characterization of the separate property-community property interests in the husband's plan, which was relevant to the trial court's decision in dividing the community estate in a manner deemed just and right. *Id.* The appellate court stated that it did not measure the monetary value of the interests, a matter to be proved in the trial court, nor prejudge an apportionment of the value of the community interest, a matter reserved to the discretion of the trial court. *Id.* at 263-264. The Amarillo court also stated that its decision did prevent a party from offering proof that under the peculiarities of the plan - *i.e.*, the amount of annual contributions being dependent upon the company's profits and the husband's salary, as well as upon the performance of the stock purchased with the contributions-there was an increase in the value of the husband's separate property interest which was attributable to his employment during marriage, giving the community an interest in the increased value which was subject to division by the trial court. *Id.* at 264.

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 Web at:
http://www.bayarea.com/mld/bayarea/business/personal_finance/investing/stock_options/3891502.htm.
The article continues:

> [H]anging a price tag on stock options is a complicated issue. Adding to the confusion is that companies can choose from a number of methods such as the popular Black-Scholes model or the binomial model to value stock options, making it hard to compare earnings, analysts say.
>
> For example, soft drink company Coca-Cola Co. (KO.N), which kicked off the trend toward expensing options last month, surprised veteran valuation experts by saying it would hand the task of valuing options to its investment bankers. But rival PepsiCo Inc. (PEP.N) uses the Black-Scholes model to arrive at the stock option expense it discloses in its footnotes.
>
> * * *
>
> In addition, each model itself relies on a number of subjective assumptions, such as stock price volatility, or their tendency to rise or fall in a time period. Volatility is particularly hard to predict and is often based on the past.
>
> In fact, companies in the same sector use wildly different assumptions for expected volatility, further clouding the picture. Within the applications software sector, for example, Manhattan Associates Inc. assumes volatility of 122 percent, while Oracle Corp. assumes 57 percent volatility, according to a research report by Credit Suisse First Boston.
>
> "The problem is that valuation is an imperfect science, it's not subject to a cookbook calculation," said Anthony Aaron, a partner at accounting firm Ernst & Young's valuation services group. "If it's garbage in, it'll be garbage out."
>
> In particular, the Black-Scholes model, the most popular method of valuing options, has come under blistering attack from companies.
>
> For starters, the model was never designed for employee stock options. It tends to overstate option costs because it assumes that options can be freely traded, although employee options cannot.
>
> In addition, the model is meant for options that have a three- to nine-month timeframe even though most stock options vest over several years, said Aaron. Procter & Gamble Co. (PG.N), for example, last week said it would be prepared to expense stock options but complained that the Black-Scholes model wasn't applicable to longer-term employee stock options.

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

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

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

D. VALUE AT TIME OF DIVORCE.

As noted above, in *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983), the Texas Supreme Court recognized 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.

Does the same concept apply to options which will vest only if the employed ex-spouse continues to work at the same company after the divorce? In *Boyd v. Boyd,* 67 S.W.3d 398, 411-412 (Tex. App--Fort Worth 2002, no pet.), the court (sort of) addressed this issue:

> To date, no Texas court has considered how to determine the community property value of stock options at divorce. The cases have only addressed whether stock options are community property. See Kline, 17 S.W.3d at 446; Bodin, 955 S.W.2d at 381; Demler, 836 S.W.2d at 699; see also Charriere, 7 S.W.3d at 220 n. 6 (holding that stock options that could be purchased but not sold without company consent during marriage were community property, even though value of options was dependent upon employee spouse's post-divorce employment). The factors presented here cause us to conclude that the contingent value of the stock options was community property. The method for calculating this contingent value was fixed at divorce, and the minimum price for the stock options was also fixed. Randall would either be able to exercise the stock options in the future for their contingent value (if he was employed and the stock sale took place or the company went public), or he would only be able to recover what he paid for them. Further, the contingent value of the options was not dependent on Randall's post-divorce work for his company, even though he had to be employed to receive it.
>
> The trial court awarded Ginger one half of the contingent value of the stock options as her 50% share of the community estate. If Randall is no longer employed when the stock options are sold, Ginger's contingent community property interest will be extinguished. Any post-divorce increases or decreases in the value of these stock options that are not attributable to Randall's post-divorce work will not be his separate property. Ginger will be entitled to 50% of the increases, and the contingent value of her interest will be reduced by any decreases. **Ginger will not be entitled to any post-divorce increases in the value**

of these stock options that are attributable to Randall's post-divorce work for the company because these post-divorce increases will be his separate property. [Emphasis added]

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

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

A large controversy exists, in connection with trusts established by gift or bequest, whether trust income distributed to a beneficiary during marriage is community property income or whether it is received by the married beneficiary as part of the gift or inheritance. Several cases support the idea that the income, once distributed, becomes the married beneficiary's community property. For example, *Commissioner of Internal Revenue v. Porter*, 148 F.2d 566 (5th Cir. 1945), held that under Texas law trust income held by the trustees became community property of the beneficiary when

it was distributed. *Accord*, *McFaddin v. Commissioner*, 148 F.2d 570 (5th Cir. 1945); *Commissioner of Internal Revenue v. Wilson*, 76 F.2d 766 (5th Cir. 1935). The Dallas Court of Civil Appeals also said that income earned on trust corpus during marriage was community property, in *Mercantile Nat. Bank at Dallas v. Wilson*, 279 S.W.2d 650, 654 (Tex. Civ. App.–Dallas 1955, writ ref'd n.r.e.). And in *Ridgell v. Ridgell*, 960 S.W.2d 144, 148-49 (Tex. App.–Corpus Christi 1997, no pet.), the Corpus Christi Court of Appeals ruled that income distributed from a gift and a testamentary trust was received by the married beneficiary as community property. (It may have been important to the court in *Ridgell* that under the trust instruments the corpus would eventually be distributed to the beneficiary.)

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

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

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

VII. MARITAL AGREEMENTS

A. HISTORY OF PREMARITAL AND POST-MARITAL AGREEMENTS.

Premarital and post-marital agreements have not always been permissible in Texas. Formerly, 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 agreements were considered void as against public policy.

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.) This amendment did not permit spouses (or persons about to marry) to partition property to be acquired in the future. In *Williams*, the Texas Supreme Court held a premarital

agreement that purported to partition after-acquired property to be void as against public policy. *Williams* at 870.

In 1980 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. The amendment also authorized spouses (but not persons about to marry) to agree that income arising from separate property would be separate.

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." 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. *Winger* at 858, 859.

Under Texas legislation adopted in 1981, the burden of proof with regard to the enforceability of premarital agreement fell on the proponent of a premarital 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, when the Texas Legislature adopted the Uniform Premarital Agreement in 1987, this burden shifted to the party contesting the enforceability of the agreement. Today, sections 4.006 and 4.105 of the Texas Family Code govern the enforceability of premarital and post-marital agreements. Each are each more fully addressed below.

For a 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*, State Bar of Texas New Frontiers in Marital Property Law (2002).

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 §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

These different kinds of premarital and post-marital agreements do not all have the same standard of enforceability.

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.)

In *Daniel v. Daniel*, 779 S.W.2d 110, 114 (Tex. App.--Houston [14th Dist.] 1989, no writ), the court ruled that the Legislature, by adopting the voluntariness and unconscionability defenses in the Family Code, "did not intend such provisions to replace all common law defenses, and that the statute simply provides an additional statutory remedy for persons challenging property agreements executed pursuant to the Family Code."

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, the statute limiting the defenses applies only to agreements signed on or after September 1, 1993. The Fourteenth Court of Appeals has since stated 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.)

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 between persons about to marry. *See* Tex. Const. art. XVI, §15.

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 § 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 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." TEX. FAM. CODE § 4.103.

Some courts of appeals 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); *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.

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

F. SPOUSAL INCOME AGREEMENTS

1. Authority

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

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:

> "At 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

The Texas Family Code does not specify defenses for spousal income agreements. However, it has been held that the voluntariness and unconscionability defenses to spousal partition agreements apply to agreements between spouses concerning income or property derived from separate property as well. *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); TX. PATTERN JURY CHARGES, FAMILY 207.4 (Vol.5 2002)

G. COMMUNITY SURVIVORSHIP AGREEMENTS

1. The 1987 Constitutional Amendment. Prior to 1987, spouses could not create survivorship rights between themselves as to community property. 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 §§ 451-457. An agreement must be in writing and signed by both spouses (§ 452).

3. Enforcement

In contrast to premarital agreement, spousal partition agreements, and spousal separate property income agreements, there is no stated statutory defense to community property survivorship agreements. The proponent can enforce the agreement upon proof of death, etc., and by proving "that the agreement was executed with the formalities required by law." Tex. Prob. Code § 456(b). These "formalities" are a written agreement signed by both parties. See Tex. Prob. Code § 452.

H. SPOUSAL AGREEMENTS TO CONVERT SEPARATE PROPERTY TO COMMUNITY PROPERTY

1. Authority

Section 4.202 of the Texas Family Code permits spouses to agree that all or part of the separate property owned by either or both spouses is converted to community property. This statute, which became effective on January 1, 2000, provides:

(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 § 4.203.

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 the standards for enforcing premarital agreements, partition and exchange agreements, and spousal income agreements.

Section 4.205 of the Texas Family Code governs the enforceability of agreements to convert separate property to community property. The defenses are (i) voluntariness, and (ii) fair and reasonable disclosure of the legal effect. Section 4.205 provides:

> (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 § 4.204.

Additionally, Section 4.205 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.

VIII. 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 a 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 and proven, 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 this historical fair market value of the property.

3. The economic contribution claim is calculated as a 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 that is enhanced due to community labor. Tex. Fam. Code §

3.408(b)(2). *See* Tex. Fam. Code § 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.

13. A clause in a premarital or marital property agreement pre-dating September 1, 1999, that waives or partitions a reimbursement claim is effective to waive or partition an economic contribution claim.

B. 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.

IX. RELOCATION

Family Code § 105.002 allows 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. Subsections (3) and (4) are effective for lawsuits filed on or after September 1, 2003.

Even before the 2003 amendments just discussed, 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.

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 opportunities;

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.

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.)

X. TERMINATION OF PARENT-CHILD RELATIONSHIP.

Proceedings to terminate the parent-child relationship present important issues of current interest. Three issues discussed in detail here are (i) incompetence of trial counsel; (ii) jury charges, especially the continued viability of broad form submission of jury questions; and (iii) sufficiency of the evidence review.

A. COMPETENT TRIAL COUNSEL. The Supreme Court decided, in 2003, that the Family Code-created right to counsel for an indigent parent respondent in a termination case includes the

right to competent counsel. *In re M.S.*, 15 S.W.3d 534 (Tex. 2003). In *In re M.S.*, the Court held that an appellate court may be obligated to review the factual sufficiency of the evidence to support a jury verdict even when trial counsel did not file a motion for new trial.

B. FAULTY INSTRUCTION.

Under Tex. Family Code § 161.001, the court can terminate the parent-child relationship between a parent and a child if (i) one or more of the statutory grounds exist, and (ii) termination would be in the child's best interest. Proof must be by clear and convincing evidence. *Id.* § 161.001.

In the case of *In re J.F.C.*, 96 S.W.2d 256 (Tex. 2003), the Supreme Court encountered a termination case where, through typographical error, the instruction that there must be clear and convincing evidence that termination is in the child's best interest, was made applicable to only one of two alternative grounds for termination. There was no objection in the trial court to this error. The Supreme Court found the error harmless, because under TRCP 279 there was a deemed finding of best interest for termination.

C. PRESERVATION OF CHARGE ERROR.

To complain on appeal about error in the jury charge, the party must make the court aware of the complaint, timely and plainly, and obtain a ruling. Tex. R. App. P. 33.1; Tex. R. Civ. P. 274; *see State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). In the case of *In re B.L.D*, 113 S.W.3rd 340, 353 (Tex. 2003), the Supreme Court was confronted with a complaint about the jury charge in a termination case, where the complaint had not been preserved in the trial court through an objection to the charge. The Waco Court of Appeals had ruled that, notwithstanding the failure to preserve error in the trial court, because of the constitutional dimensions of terminating the parent-child relationship, the parents could complain on appeal about charge error that was not preserved in the trial court. *In the Interest of B.L.D.*, 56 S.W.3d 203, 219 (Tex. App.--Waco 2001), *rev'd*, 113 S.W.3d 340 (Tex. 2003). The Supreme Court reversed, saying neither the doctrine of fundamental error nor the requirements of due process of law permit a parent to argue unpreserved complaints on appeal. *Id.* at 351-54 "[W]e conclude that while the parents' and State's interests in obtaining review of unpreserved error may be high, the State's additional competing interest in protecting the best interests of the children through judicial economy, certainty, and finality is at least equally compelling." *Id.* at 354.

D. BROAD FORM SUBMISSION OF JURY QUESTION.

We appear to be in a pendulum swing away from "across the board" broad form submission of jury questions. Disputes regarding broad form jury questions are surfacing repeatedly in termination cases. As a result, termination cases have become the battleground for issues that will have a significant impact in tort litigation.

In *Hyundai Motor Co. v. Rodriguez ex rel. Rodriguez,* 995 S.W.2d 661, 664 (Tex. 1998), the Court observed that "[t]he goal of the charge is to submit to the jury the issues for decision logically,

simply, clearly, fairly, correctly, and completely." In 1973, TRCP 277 was amended to permit broad form submission. In 1988, TRCP 277 was amended to require broad form submission. *See* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. Rev. 601 (1992). TRCP 277 now provides that "[i]n all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions."

The poster child for broad form submission is *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647 (Tex.1990), where the Texas Supreme Court approved submission of a single broad-form question incorporating two statutory grounds for termination of parental rights submitted disjunctively. 802 S.W.2d at 649. The Supreme Court rejected the court of appeals' conclusion that the form of the verdict deprived the parent of the necessary jury agreement on the specific grounds supporting termination, holding that the "controlling question in this case was whether the parent-child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under [the statute] the jury relied on to answer affirmatively the questions posed."

In *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n. 6 (Tex. 1992), the Court said that "[s]ubmitting alternative liability standards when the governing law is unsettled might very well be a situation where broad-form submission is not feasible."

In *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997), the Supreme Court rejected the argument that a broad-form negligence question, without more, can support a judgment against a possessor of land. The Court held that a broad-form negligence question that omitted instructions about the knowledge and risk-of-harm elements of a premises liability claim was improper.

In some multiple-theory cases, submitting claims in broad form tends to obscure the actual fact findings of the jury, making it more difficult for the appellate court to determine whether a jury finding of liability was based on an improper theory of recovery. In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000), the Supreme Court said that "Rule 277 is not absolute; rather, it mandates broad-form submission 'whenever feasible.'" The Court held that "when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error [of including an erroneous ground of recovery] is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory." The *Casteel* question has been raised in a case pending decision by the Supreme Court, *Southwestern Bell Tel. Co. v. Garza*, No. 01-1142 (oral argument 10-15-2003). Where the court of appeals had found that a *Casteel* complaint was not preserved, and further that both grounds for recovery in a disjunctive submission were valid claims under Texas law.

In *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 68 (Tex. 2000), the Court said:

> Because of the broad form submission, it cannot be ascertained whether the jury concluded that the City discriminated by changing Zimlich's job duties, failing to promote him to senior deputy, or failing to promote him to chief deputy. The City has not argued

> that it would be entitled to a new trial if the evidence was legally insufficient to support one or more of these theories of liability. Therefore, whether the rationale in our decision in Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000) should be extended to cases in which there is no evidence to support one or more theories of liability within a broad form submission is not a question that is before us.

That question will be answered in *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135 (Tex. App.--Houston [14th Dist.] Jan. 9, 2003), (*pet. granted* April 23, 2004), where the trial court submitted a single damage question and a single question on the apportionment of liability, that were both predicated on a finding of either ordinary negligence or the malicious credentialing claim. The court of appeals held that there was legally insufficient evidence to support the malicious credentialing claim. The defendant claims reversible error based on *Casteel*, because the appellate court cannot tell if the jury apportioned fault and awarded damages on the basis of the malicious credentialing claim. If the Supreme Court applies the *Casteel* rationale to jury submissions involving valid causes of action but where the evidentiary support is wanting, then plaintiffs in close cases will need to submit separate clusters of liability and damage findings, and there will be a danger for defendants of overlapping damage findings and double-recovery of the same losses.

In the case of *In re A .V.*, 113 S.W.3d 355, 362 (Tex. 2003), the complainant sought to reverse a judgment terminating the parent-child relationship, partially on the ground that one component of the broad form jury verdict lacked evidentiary support. The Supreme Court held that, because the complainant did not make a timely objection, plainly informing the trial court that a specific element of the claim should not be included in a broad-form question because there is no evidence to support its submission, the complaint was not preserved.

In the case of *In the Interest of B.L.D.*, 56 S.W.3d 203, 219 (Tex. App.--Waco 2001), *rev'd*, 113 S.W.3d 340 (Tex. 2003), the trial court submitted a jury charge with the two statutory grounds for termination alleged against the parents in the disjunctive, and with broad-form jury questions regarding whether the parent-child relationships should be terminated. The court of appeals held that the charge violated the parents' due process right to have at least ten jurors agree on either or both statutory grounds supporting termination. 56 S.W.3d at 217. The Supreme Court did not resolve this issue, because error had not been preserved in the trial court. However, the Waco Court of Appeals believed that the continued viability of *E.B.* was in doubt in light of the Supreme Court's decision in *Casteel*, and further that the portion of *E.B.* relating to disjunctive submission was dicta. 56 S.W.3d at 216 n. 15.

In *Thomas v. Oldham*, 895 S.W.2d 352 (Tex. 1995), the trial court submitted a broad form damage question, instructing the jury to consider five separate elements of damage but asking for just one total amount. One defendant argued on appeal that the evidence was insufficient to support certain elements of the jury's award of damages. The Supreme Court ruled that because the defendant had not asked for separate damage findings, it could only challenge the legal sufficiency of the evidence supporting the whole verdict. In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2003), Harris County pointed out to the trial court that particular elements of damage had no support in the evidence and should not be included in the broad-form question. A majority of the Court reversed a judgment

where damage questions were submitted in broad form, and the evidence was legally insufficient to support one element of damages. Three dissenting justices (O'Neill, Enoch and Hankinson) said that the *Casteel* reasoning should be limited to commingled submission of multiple theories of liability, some of which are not supported by substantive law.

The *Smith* case makes it risky for a plaintiff asserting multiple claims to use broad form submission of damage questions. If the principle is extended to "no evidence" challenges to broad form submission of several valid theories of liability, some of which lack evidentiary support, then plaintiffs will probably revert to a separate "cluster" of liability and damage questions for each theory of recovery.

All of this leads to the conclusion that some portion of the Justices on the Texas Supreme Court might we willing to reconsider *E.B.*, regarding disjunctive submission of alternate grounds for termination (substitute "grounds for liability" in tort cases). This debate has taken on new vitality because of the House Bill 4 requirement that "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Pract. & Rem. Code § Section 41.003(d). There are debates right now on the PJC Committees and the Supreme Court Advisory Committee on (i) whether the requirement of unanimity applies to the underlying finding of liability for actual damages (e.g., simple negligence), and if it does then (ii) whether the statute requires that multiple, independent liability issues be submitted in such a way that the trial and appellate court can see whether there was unanimity as to each theory of liability that underpins an award of exemplary damages.

E. SUFFICIENCY OF THE EVIDENCE.

We seem to be in a "see-saw" period regarding the proper standard for appellate review of the legal sufficiency of the evidence, which is being fought out in termination cases where the burden of proof at trial is clear and convincing evidence, just like it is for exemplary damages. The discussion of appellate review of the legal sufficiency of the evidence set out below, ranges widely from family law in the process of making its point, so the reader may wish to skip the extended discussion of sufficiency review in tort cases if the reader's focus is on family law cases.

There are two areas of appellate review of the sufficiency of the evidence that have cropped up in termination cases. One is whether the standard of review is different on appeal because the burden of proof in the trial court is by clear and convincing evidence. The other question is a continuing dispute about appellate review of the legal sufficiency of the evidence, in terms of what evidence contrary to the jury's verdict the appellate court can consider. The latter fight spills out into other areas of the law, such as findings supporting exemplary damages, which must also be based on clear and convincing evidence. Tex. Civ. Pract. & Rem. Code § Section 41.003(b).

1. Ordinary Factual and Legal Sufficiency Review. Under traditional factual sufficiency standards, a court of appeals can reverse and remand for a new trial if a jury finding is so against the great weight and preponderance of the evidence that it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

A court of appeals and the Supreme Court can reverse a judgment in favor of a plaintiff, and render a take-nothing judgment, when there is "no evidence" to support the judgment. A "no evidence" point may be sustained on appeal when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence establishes conclusively the opposite of a vital fact. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998).

2. Effect of Elevated Burden of Proof in the Trial Court.

In the case of *In re C.H.*, 89 S.W.3d 17, 18-19 (Tex. 2002), the Supreme Court considered the appropriate appellate standard for reviewing the factual sufficiency of the evidence in parental termination cases, in which the burden of proof at trial is by clear and convincing evidence. The Court ruled that termination findings must be upheld against a factual sufficiency challenge if the evidence is such that a reasonable jury could form a firm belief or conviction that grounds exist for termination. Thus, the degree of proof is elevated above factual sufficiency review of findings based upon a preponderance of the evidence.

In the case of *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the Supreme Court described legal sufficiency of the evidence review of a verdict that requires clear and convincing evidence. The majority opinion was written by Justice Owen, and joined by Chief Justice Phillips, and Justices Hecht, Jefferson and Smith. Justice O'Neill concurred in the judgment only. Justice Hankinson dissented, joined by Justice Enoch. Justice Schneider separately dissented.

The majority opinion said:

> The distinction between legal and factual sufficiency when the burden of proof is clear and convincing evidence may be a fine one in some cases, but there is a distinction in how the evidence is reviewed. In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard all evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.
>
> If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that

> must be proven is true, then that court must conclude that the evidence is legally insufficient.

Id. at 265-66.

3. Legal Sufficiency–What Evidence is Considered?

Standard Rule. The oft-repeated rule for reviewing a "no evidence" point is that the appellate court "must consider only the evidence and inferences tending to support the jury's finding, viewed most favorably in support of the finding, and disregard all contrary evidence and inferences." *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458 (Tex. 1992); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

Reasonable Inferences. In *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1997), the Court described the standard of review differently–it said that the court must consider all of the record evidence in a light most favorable to the verdict, and every reasonable inference deducible from the evidence is to be indulged in favor of the verdict. The *Formosa Plastics* articulation of the standard includes a review of all the evidence, not just the evidence tending to support the jury's finding.

Undisputed Evidence. In *Universe Life Insurance Company v. Giles*, 950 S.W.2d 48, 51 n. 1 (Tex. 1997), the Court included the following statement in a footnote to the opinion:

> Although we have often stated that a reviewing court must disregard all evidence that is contrary to a jury finding in performing a no-evidence review, that is not to say that courts must disregard undisputed evidence that allows of only one logical inference. See Wininger v. Ft. Worth & D.C. Ry. Co., 105 Tex. 56, 143 S.W. 1150, 1152 (1912); Texas & N.O. Ry. Co. v. Rooks, 293 S.W. 554, 556-57 (Tex. Comm'n. App. 1927) (overruling motion for rehearing).

Accord, *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 519-20 (Tex. 2003).

In *Provident American Ins. Co. v. Castaneda*, 988 S.W.2d 189, 205-206 (Tex. 1998) (Gonzalez, J., dissenting), Justice Gonzalez expressed concerns about the manner in which the Court was considering, in "no evidence" review of an insurance bad faith case, evidence contrary to the jury's verdict. Justice Gonzalez said:

> The Court sustains Provident's no evidence points by relying on evidence contrary to the jury's verdict, calling it "undisputed". However, even if some testimony is not directly contradicted, it may still conflict with other evidence in the record, and there may still be a fact question on the ultimate issues. The Court fails to carefully articulate rules governing when and for what purpose it may consider evidence contrary to a verdict and thus creates more confusion about the "no evidence" standard.

<u>First Amendment Cases.</u> The U.S. Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), requires public officials in defamation cases to prove upon clear and convincing evidence that the defendant communicated with "actual malice," which is to say falsely with knowledge of, or reckless disregard for, the falsity of the statement. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989), the high court on the Potomac said that, on appeal, the federal appellate court "must consider the factual record in full." The high court further said:

> Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," . . ., the reviewing court must "'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect' . . . .

Id., at 688. The "clearly erroneous standard" is used for appellate review of the evidence in federal court, but not in Texas appellate courts.

In *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 755 (Tex. 1984), the Texas Supreme Court determined that the sufficiency of the evidence to support a finding of malice is "not merely a question for the trier of fact," but rather that "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"

In the defamation case of *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002), the Supreme Court considered whether the public official (a district judge) established falsity of communications as a matter of law, and of whether the record as a whole presented clear and convincing evidence of "actual malice." The Supreme Court recognized a constitutionally-mandated standard of review of damages that permits the Supreme Court to review the sufficiency of damages in such a defamation case.

The *Bentley v. Bunton* case is difficult to analyze, because the Opinion authored by Justice Hecht was in some respects a majority opinion and in others a plurality opinion. In Parts I, III, IV and V-A, B, & C (recitation of the evidence, opinion vs. fact, proof of falsity, actual malice as to defendant Bunton) four other Justices joined (Owen, Baker, Jefferson, and Rodriguez). In Part II (whether to decide the case based on federal and not state constitutional law), Justice Hecht was joined by seven other Justices. In Part V-D (evidence of actual malice not clear and convincing as to co-defendant Gates), only three other Justices joined (Owen, Jefferson, and Rodriguez). In Part VI (sufficiency of the evidence to support damages awarded), only three other Justice joined (Owen, Jefferson and Rodriguez). In Part VII (disposition of the case), six Justices joined. Chief Justice Phillips wrote a concurring and dissenting opinion, joined by Justices Enoch and Hankinson (evidence not clear and convincing as to actual malice for either defendant). Justice Baker wrote a dissenting opinion (both defendants were liable, majority improperly conducted factual sufficiency review on mental anguish damages). Justice O'Neill did not participate in the decision.

In Part V-A of Justice Hecht's majority Opinion (supported by 4 other Justices—Owen, Baker, Jefferson, and Rodriguez), the Court considered whether the plaintiff had proven that the defendants acted with "actual malice." Justice Hecht wrote:

> [A]n independent review of evidence of actual malice should begin with a determination of what evidence the jury must have found incredible. . . . <u>As long as the jury's credibility determinations are reasonable</u>, that evidence is to be ignored. Next, undisputed facts should be identified. . . . Finally, a determination must be made whether the undisputed evidence along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice. [Emphasis added]

Id. at 599. Thus, Justice Hecht's Opinion gives the reviewing court the power to decide whether the jury's decisions regarding credibility were reasonable. *Id.* at 599-00. This power was not stated as constitutionally-required in *New York Times, Co. v. Sullivan*, *Harte-Hanks Communications, Inc. v. Connaughton*, and similar cases decided under a federal appellate standard of review (which differs from the one in Texas), nor was it stated in earlier Texas defamation cases. It may be seen as breaking new ground. [Compare p. 585, where the majority concludes that "the jury could reasonably conclude" that Defendant Gates' comments on one occasion endorsed Defendant Bunton's defamatory statements.]

Part VI of Justice Hecht's Opinion relates to the sufficiency of the evidence to support damages. Justice Hecht is joined by only three Justices (Owen, Jefferson, and Rodriguez), so it is a plurality opinion and not stare decisis. In the Opinion, Justice Hecht asserts that the First Amendment requires appellate review of amounts awarded for non-economic damages in defamation cases to insure that any recovery compensates the plaintiff only for actual injuries, and is not a disguised disapproval of the defendant. *Id.* at 605. However, Part VI-B of Justice Hecht's Opinion interprets the ordinary Texas appellate standard of review of damage awards and cites *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996), for the proposition that the Supreme Court can find no evidence of the damage award assessed by the jury. Justice Hecht's Opinion goes on to find some evidence of damages in the case, but no evidence of the $7 million in mental anguish damages that the jury found. The case was therefore remanded to the court of appeals, with a minority of the Supreme Court asking for the Court of Appeals to remit part of the damages or remand the case for retrial. *Id.* at 607-08.

Justice Baker issued a dissenting opinion, which in the part relating to damages stated:

> I am appalled at the Court's remarkable holding about the mental anguish damages award. Specifically, the Court improperly conducts a factual sufficiency review on mental anguish damages based on a tenuous and entirely incorrect conclusion that the United States Supreme Court requires such a review. Because I, for one, cannot ignore our well-established legal principles that . . . preclude this Court from conducting factual sufficiency reviews and issuing advisory opinions, I dissent. *Id.* at 618.

Termination Cases. In the case of *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the Supreme Court described legal sufficiency of the evidence review of a termination verdict that requires clear and convincing evidence. The majority opinion written by Justice Owen (supported by four other justices) has been quoted above as saying that in legal sufficiency review of clear and convincing evidence the court should look at *all the evidence* in the light most favorable to the finding to determine whether a *reasonable trier of fact* could have formed a firm belief or conviction that its finding was true. Justice Owen said that the reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a *reasonable factfinder* could do so. A corollary to this requirement is that a court should disregard all evidence that a *reasonable factfinder* could have disbelieved or found to have been incredible. Justice Owen wrote that this does not mean that a court must disregard all evidence that does not support the finding. Justice Owen commented that disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. *Id.* at 265-66.

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

A. PUBLIC POLICY FAVORS MEDIATION.

> **CPRC § 154.002 Policy**
>
> It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

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

> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
>
> (2) is signed by each party to the agreement; and

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

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

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

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

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

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

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

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

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

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

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

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

> In suits affecting the parent-child relationship, a mediated settlement agreement is binding on the parties and therefore not subject to revocation if the agreement (1) provides in a separate paragraph an underlined statement that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed. Tex. Fam. Code Ann. § 153.0071(d) (Vernon 1996). In such event, a party cannot prevent rendition of a judgment based on the agreement by withdrawing his or her consent after the requirements of section 153.0071(d) have been fulfilled but before rendition.

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

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

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

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

In the case of *In re Circone*, 122 S.W.3d 403, 406 (Tex. App.– Texarkana 2003, no pet.), the court of appeals held that a trial court has no authority to "review the mediation" and instead must enter judgment based on the mediated settlement agreement. Stated differently, the trial court "had no authority to go behind the signed agreement of the parties." *Id.* at 407.

In *Durham v. Durham*, 2004 WL 579224 (Tex. App.--Austin 2004, no pet.) (Memorandum Opinion), the wife opposed entry of judgment based on an MSA because (i) she had withdrawn her consent, and (ii) because of duress in obtaining the agreement. The appellate court rejected the first argument because the Family Code made the MSA irrevocable. On the second issue, the wife testified that the mediator used vulgar language in conversation with her and repeatedly told her that the agreement was better than she could expect at court. She testified that the mediator refused to listen to her claims regarding infidelity and incompleteness or inconsistency of financial records relating to an investment account. Wife asserted that she learned for the first time at the mediation that her 401(k) account was used to secure the purchase of the parties home. She also asserted that the decree failed to divide a joint account. She further alleged that, when the proposed distribution mentioned her getting credit for $20,000 as her interest in the house and the mediator discussed her getting $62,500 for her equity in the house, she believed that she would receive both amounts. The trial court found that there was no overreaching, fraud, or duress during the mediation. The court of appeals recognized that "[m]ediated settlement agreements are subject to being invalidated if they are illegal or procured by fraud, duress, coercion, or other dishonest means," citing *Boyd v. Boyd*, supra. However, the appellate court ruled that the trial court had not erred in finding that such grounds did not exist on these facts.

XII. ARBITRATION.

An issue arising in family law with increasing frequency is arbitration agreements, and arbitration awards.

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 for 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 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.] 2003, no pet.) (Memorandum Opinion), 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."

12. Kilroy v. Kilroy. In *Kilroy v. Kilroy*, 137 S.W.3d 780 (Tex. App.–Houston [1st Dist.] 2004, orig. proceeding), a child's mother and father agreed in the Decree of Divorce to submit future disputes to binding arbitration. After the divorce, the custodial father sought permission to move the child's home to another state. The parents, without filing a motion to modify, proceeded to arbitrate the issue. The paternal grandmother filed a petition in intervention in the district court,

opposing the relocation, and asking that the relocation be litigated in district court. The court issued an order staying the arbitration between the parents. The appellate court mandamused the trial judge to set aside the stay order. The appellate court rejected a contention that, in suits affecting the parent-child relationship, parties to an arbitration agreement must petition the trial court and seek a referral before proceeding to arbitration. The trial court was obliged to allow the parents to arbitrate their dispute. However, the grandmother, not having signed the arbitration agreement, was entitled to proceed with her claims in district court.

XIII. 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 grand-parent 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 unconstitution-ally 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. 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. 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 <u>only when</u> 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 <u>clearly and convincingly</u> demonstrate that the child's best interests require placement with the third person.

In *Glidden v. Conley*, 820 A.2d 197, 204 (Vt. 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 above, 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. 55 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 CASES ON CONSTITUTIONALITY.

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); *see In re C.T.H.*, 112 S.W.3d 262 (Tex. App.–Beaumont 2003, no pet.) (constitutional challenge to Family Code § 156.101 ("Grounds for Modification of Order Establishing Conservatorship or Possession and Access") not reviewable because it was not preserved in the trial court).

(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."

E. TEXAS CASES ON CONSTITUTIONALITY OF GRANDPARENT INVOLVEMENT.

1. 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.).

2. 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.

3. 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]

4. Lilley v. Lilley. In the case of *Lilley v. Lilley*, 43 S.W.3d 703, 710- 713 (Tex. App.--Austin 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.

5. 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]

6. 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).

7. 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.

8. 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 2003, no pet.), 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."

9. In re C.P.J. In the case of *In re C.P.J.*, 2003 WL 21783356 (Tex. App.--Dallas 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."

10. In re Pensom. In the case of *In re Pensom*, 2003 WL 22492247 (Tex. App.--San Antonio 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.

11. In re M.N.G. In the case of *In re M.N.G*, 113 S.W.3d 27, 35 (Tex. App.--Ft. Worth 2003, no pet.), the appellate court held that, absent a directive imposed by *Troxel* requiring specific prerequisites for modification of conservatorship, the trial court erred in placing the burden on the grandmother to establish unfitness of father or actual or potential harm to the child rather than the elements required by the statute to modify custody.

12. In re C.M.V. In the case of *In re C.M.V.*, 136 S.W.3d 280 (Tex. App.–San Antonio 2004, no pet.), the appellate court rejected the contention that *Troxel v. Granville* precludes the grandparents from seeking custody. Rule 13 sanctions for bringing the suit on behalf of the grandparents were overturned.

XIV. FINDINGS AND CONCLUSIONS REGARDING PROPERTY DIVISION. Several appellate courts have held that a trial court, in a divorce, is not required to make findings of fact as to the value of assets in the marital estate. *Finch v. Finch*, 825 S.W.2d 218 (Tex. App.--Houston [1st Dist.] 1992, no writ); *Wallace v. Wallace*, 623 S.W.2d 723 (Tex. Civ. App.-- Houston [1st Dist.] 1981, writ dism'd). Absent these findings, it can be difficult to demonstrate on appeal that the property division was an abuse of discretion. *See Roberts v. Roberts*, 999 S.W.2d 424, 426 (Tex. App.--El Paso 1999, no pet.) (holding that findings on value are necessary to an appeal). Effective September 1, 2001, the Texas Legislature amended the Family Code in a way that should make it

easier to secure appellate review of a divorce property division. The Legislature adopted TFC § 6.71, which reads:

> § 6.711. Findings of Fact and Conclusions of Law
>
> (a) In a suit for dissolution of a marriage in which the court has rendered a judgment dividing the estate of the parties, on request by a party, the court shall state in writing its findings of fact and conclusions of law concerning:
>
> (1) the characterization of each party's assets, liabilities, claims, and offsets on which disputed evidence has been presented; and
> (2) the value or amount of the community estate's assets, liabilities, claims, and offsets on which disputed evidence has been presented.
>
> (b) A request for findings of fact and conclusions of law under this section must conform to the Texas Rules of Civil Procedure.

XV. MISCELLANEOUS

A. RECENT OPINIONS

1. 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.

2. Potential Recovery Under Federal False Claims Act is Community Property

In *D.B. v. K.B.*, 2004 WL 1794720 (Tex. App.–Houston [1st Dist.] 2004, no pet. h.), the Court held that a spouse's potential recovery under the Federal False Claims Act (a qui tam fee) resulting from a complaint filed during marriage was community property, despite the contingent nature of the claim.

3. Post-Divorce Payments under Professional Baseball Contract Are Separate Property

In *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App.–Ft. Worth 2004, no pet.), the trial court held that a husband's post-divorce payments under a Uniform Players Contract (baseball) were compensation for future services, and thus were not divisible in divorce. However, under an addendum to the contract, payments to the husband are guaranteed if he is unconditionally released from the contract, and in that event the future payments were awarded 60% to the husband and 40% to the wife. The appellate court affirmed.

4. 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.

5. Tracing Requires Documentary Evidence

In *Boyd v. Boyd*, 131 S.W.3d 612 (Tex. App.–Fort Worth 2004, no pet.), the appellate court held that the testimony of a spouse, unsupported by documentary evidence, cannot prove separate property by clear and convincing evidence. The holding conflicts with *Holloway v. Holloway*, 671 S.W.2d 51, 56 (Tex. App.–Dallas 1983, writ dism'd); *Faram v. Geruits-Faram*, 895 S.W.2d 839 (Tex. App.–Fort Worth 1995, no writ), and further contradicts *Collora v. Navarro*, 574 S.W.2d 65 (Tex. 1978) which holds that the uncontroverted testimony of an interested witness can establish a proposition *as a matter of law*, if it is clear, direct, and positive and uncontradicted. *See* Tex. R. Civ. P. 166a(c) (summary judgment can be based on testimony of interested witness if clear, positive and direct, otherwise credible and free from contradiction, and could have been readily controverted).

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. §1738C.
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.*

Section 6.204 of the Family Code states:

(a) In this section, "civil union" means any relationship status other than marriage that:

(1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and

(2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.

(b) a marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

(c) the state or an agency or political subdivision of the state may not give effect to

(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 §§ 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 desires. 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.