PERSPECTIVES FROM THIRTY YEARS OF FAMILY LAW PRACTICE

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CHAPTER 13

CURRICULUM VITAE OF RICHARD R. ORSINGER

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

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

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

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 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)
2004 Listed in Texas' Top 100 Lawyers by Texas Monthly Superlawyers Survey

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)
and Advanced Civil Trial Course (1990-91)
Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*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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Board Certified in Family Law
& Civil Appellate Law
Texas Board of Legal Specialization

I. INTRODUCTION. Wisdom comes from experience. Experience comes from making mistakes. This article presents perspectives developed over 30 years of practicing family law. Hopefully some will be helpful to you in your law practice.

I started this paper three different times, and abandoned the first two approaches in favor of this one. This paper raises issues and relates information that would not ordinarily be covered in CLE articles. If this approach is successful, maybe others that follow will give different perspectives on these issues and raise other issues that we should be thinking about. If you want to jump directly to the legal analysis, that starts on page 19.

PRACTICAL CONSIDERATIONS

II. BEST PRACTICE TOOLS.

A. BEST "DOLLY" FOR MOVING BOXES. The best two-wheeled "dolly" is the RUXXAC FOLDAWAY HAND TRUCK. This aluminum dolly carries 275 pounds but folds to only 2 ½" deep. It can support 4 large bankers boxes, but folds up small enough and flat enough to lay on top of boxes in your trunk, or to fit in an overhead bin on a Southwest Airlines Boeing 737. The dolly unfolds and takes shape with little effort. There is a tie-down system using one long elastic cord that you can fix in place using v-shaped wedges in the dolly frame. The secret to the stability is a long handle, wide wheelbase, and very large wheels, 7.25" in diameter, which can roll down streets and sidewalks and go over curbs and up and down steps with ease. The dolly is so light (regular - 10 lb.; extra long - 11.25 lb.) that it can easily be lifted by any gender. There is a manufacturer's lifetime limited warranty.

90751: (standard)
Open - 40"H x 19"W x 9.5"D
Folded - 25.75"H x 19"W x 2.5"D
$97.00 (EA)

90761: (extra long)
Open - 44"H x 19"W x 15.5" D
Folded - 27.75" H x 19" W x 2.5" D.
$101.47 (EA)
You can order from http://www.ruxxac.com.

B. BEST TRAVELING BRIEFCASE. Unless you like lower back pain now, and arthritis in your shoulders and elbows later, you should tote your law books and client files around in a briefcase with wheels. As someone who travels by airplane every week, I would highly recommend the Travelon - 14" Carry-On With View Thru Panels. (14" x 12" x 8.5") The top front of the bag is curved and zips apart very high up on the case, which makes it easy to fold back the flap and see the papers you have placed vertically inside. The bag can fit 6 inches of paper or books, front-to-back. Two large zippered side pockets are great for cell phone, rechargers, and even toilet articles, water bottles, or cigars. The 14" bag will fit under all three seats on a Southwest Airlines Boeing 737, including the narrow space under the aisle seat. The Travelon is manufactured at www.travelonbags.com, but you can't buy it straight from the factory. You can order online at www.baggageforless.com. Look for the Travelon Carry-ons & Duffels. The bag comes in two sizes, the 14 inch height or the 21 inch height. The 14" comes in both ballistic nylon ($79.90 + shipping & handling) and Polyester ($69.90 + shipping & handling). The 21 inch comes in ballistic nylon fabric ($64.90 + shipping and handling).

C. BEST TRIAL NOTEBOOK. The best trial notebook is from Bindertek - The notebooks are two-ring binders, which are easier to open than three-ring binders. The clamping mechanism permits you to open and close the rings with one hand, by lifting a lever, as opposed to having to use two hands. Also, opening and closing the rings is soundless, as opposed to creating a loud clicking noise that distracts everyone in the courtroom. The slits in the front cover allow the covers to fold as flat as the amount of paper inside. The holes in the spine permit you to pull the notebook off of the shelf very easily. The notebooks come in a variety of colors and can be purchased individually or in bulk. A Standard Binder (11-5/8" x 11-1/4"; ½ x

11", Capacity: 575 sheets) is $12.50 individually or can be purchased by the case (25 binders) for $262.50 ($10.50 each). For more information and on-line ordering go to www.bindertek.com.

D. THE BEST ON-LINE LIBRARY. Now you can throw away the CLE notebooks in your library, and turn that space back to the landlord and save the rent. For $295.00 per year, you can have 24/7 access to all CLE articles published by the State Bar of Texas for the last seven years, through the State Bar's On-Line Library. That's over 3,500 articles, all word searchable. When you find the article you want, print it out, use it, and then throw it away. If you want, the State Bar will bill your credit card $27.00 per month. Why pay premium rent for space to store articles that you can print when you need from the internet? To register, go to www.TexasBarCLE.com and sign up.

E. THE BEST REMOTE ACCESS COMPUTER. How would you like to be able to access your office computer from anywhere in the world? If your office computer has a connection to the internet, you can connect to it from any other computer with internet access, using GoToMyPC. A single user can open an account at GoToMyPC.com for $19.95/mo. or $179.40/yr. When you first register, you download the software over the internet to your office computer. To access your computer remotely, using your wireless laptop, or your home computer, or a computer at a hotel or airport kiosk, simply go out onto the internet and go to www.GoToMyPC.com, enter your user name and password, and you will automatically be linked to your office computer. Once the remote link is established, you sign onto your office computer just as you would if you were sitting in your office. If your office computer is hooked to a network, then you can have remote access to your network. On the remote computer, the screen now becomes the screen on your office computer. The remote keyboard becomes the keyboard for your office computer. The connection is through an SSL-encrypted website, and information flow uses 128-bit encryption. There is very little lag time, so I can use my Dallas computer from my San Antonio office, and vice-versa, as seamlessly as when I'm sitting in the other office. The software will print at either your office or through a printer connected to the remote computer you are using. The software leaves no residue of information on the remote computer, so no one can retrieve your passwords or data from the remote machine.

III. WRITE CLEARLY. An important part of persuasion is clarity of thought and clarity of language. When you are trying to persuade someone through your writing, you must first understand what you want to say, and then say it clearly. Writing clearly is not a talent; it is a skill. A skill that requires effort. The following suggestions can improve the readability of what you write.

Suggestion No. 1: First, do an outline. Doing an outline forces you to gather and then order your thoughts. With an outline, you can see redundancies, and spot omissions. You can see that some ideas are subcomponents of other ideas. The outline can serve as a checklist while you are writing, so you don't omit something in the writing process. The outline doesn't have to be elaborate; it can be six points on a piece of paper.

Suggestion No. 2: At the very start, state your purpose. If it is a motion, tell the judge what relief you want granted. If it is a trial brief, tell the judge what you want her to conclude. If you start with a statement of the facts or recital of legal principles without stating your ultimate purpose, the reader won't know what facts to look for and what points to remember. You may lose the reader's attention before the reader even finds out what you want.

Suggestion No. 3: Relate only the facts that are important to the decision. Unneeded facts clutter the reader's mind, and obscure the important information. If a sequence of events is important, set out a chronological list. Use descriptive names (like "husband" or "wife") or first names (like "Sam" and "Sue"). Avoid "petitioner" and "respondent," and especially "movant" and "respondent."

Suggestion No. 4: Cite authority. If there is none, find something analogous. If you can't find anything analogous, then appeal to the reader's common sense or sense of fairness.

Suggestion No. 5: Edit ruthlessly. Cut out unnecessary words or phrases that you use out of habit, but which do not contribute to the meaning. Most every paragraph can be edited to consolidate or eliminate sentences, while still getting the point across. The effort you put into editing, takes work away from the reader while reading. Readers prefer what's easy to read. If your writing is hard to read the reader may start skimming or even stop reading before getting your point.

Suggestion No. 6: Read George Orwell's short article, "Politics and the English Language," 1946, widely available on the Internet, such as at <http://www.mtholyoke.edu/acad/intrel/orwell46.htm>. Among many rich insights, Orwell gives six rules to follow to achieve clear and interesting writing:

1. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.

2. Never use a long word where a short one will do.

3. If it is possible to cut a word out, always cut it out.

4. Never use the passive where you can use the active.

5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.

6. Break any of these rules sooner than say anything outright barbarous.

Consider these sentiments:

> Grasp the subject, the words will follow.--Cato the Elder (234 BC - 149 BC).

> Speak properly, and in as few words as you can, but always plainly; for the end of speech is not ostentation, but to be understood.--William Penn (1644 - 1718).

Also remember, "The Magical Number Seven." In the 1950's, Harvard psychologist George A. Miller studied short term memory and learned that a few minutes after hearing something, people can remember seven "chunks" of similar information, plus or minus two. This suggests:

1. Present all information in small chunks. This requires you to regroup information into clusters, in your outlines, PowerPoint slides, etc.
2. Include no more than nine separate items (the "chunking limit").
3. As the information gets more complex, the chunking limit goes down.

Miller's 1956 paper *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, draws the following conclusion: "The point is that recoding is an extremely powerful weapon for increasing the amount of information that we can deal with." The process of recoding into groups of seven, plus or minus two, is called "chunking."

IV. PUBLIC SPEAKING. My grandfather told me that the key to success is public speaking. He had an 8th grade education but was an MAI appraiser and President of the San Antonio Board of Realtors. What was true for him in his life has been true for me: public speaking has been an important factor in my career.

A. GETTING STARTED. They say that chance favors a prepared mind. My first state-wide speaking opportunity came to me at age 32, when my boss Jim Stewart couldn't give a speech on attorney's fees at the State Bar's Marriage Dissolution Institute, because he was in a jury trial. He asked me to fill in for him on two days' notice. I read the article that someone had written for the topic, didn't like it, so I prepared my own outline of what I wanted to say. Before my speech, I went to the truck delivery dock behind the Anatole Hotel in Dallas, and practiced giving my speech to dumpsters. When my time came, I gave my speech, with great uncertainty of how it would be received. After the speech a few people came up to me, not with compliments but rather to get a copy of the article I spoke from. They liked it better than the paper in the book. I had to tell them that there I had no paper--only notes, but this reassured me that my opinions had value to someone. From that experience I was invited to have my own topic at the next Marriage Dissolution Course, and then the next Advanced Family Law Course, and it launched me into 23 years of public speaking, and writing CLE articles, law review articles and books. Every speaker will have a different story, on how they got started in public speaking.

Over the years I have had the opportunity to be the course director of a number of CLE courses. In that capacity, I have received letters from people I did not know, asking to be included on the faculty of a course. I would respond by asking for a resumé and a writing sample. I seldom received a response.

If you work for a lawyer or law firm with ties to CLE, they can promote your inclusion on a course faculty. If you don't, you will have to do something to come to the attention of people who plan courses, be they

course directors or planning committee members. Maybe your law school alma mater will give you your first state-wide speech. Maybe a local bar family law section will get you started with local CLE, and somebody hears you talk and suggests your name at a planning meeting. Maybe working on a committee with someone with CLE ties will get your name advanced as a recruit. Every planning committee is looking for some "new faces."

B. PREPARING AND GIVING A SPEECH. I learned in law school moot court competition that I don't give a good speech. I worry about whether I'm going too fast or too slow. I worry that I might leave something out. So long ago I gave up giving speeches. Now, instead of giving a speech, I have a conversation with members of the audience. This is not hard to do. Even if there are 1,500 people out there, listening to you, each of them is having a one-on-one communication with you. I see myself as having a number of simultaneous one-on-one conversations, in which I am trying to explain something in a way that the listener understands. It's not really different from having a conversation in the hallway after the speech. If you think of the event as just a conversation, in which you are trying to get your point across, then there's no reason to stress out. This is really no different from what you do all day long, day after day, in your law practice.

It's been my experience that listeners like to follow along in your paper while they listen to your talk. So I don't write a speech, and usually I don't do an outline. To prepare, I just read the article before the speech, highlight (in yellow) the points I want to make, and make some marginal notations. I have found that this makes me and the audience the happiest.

You have to develop your own speaking style, that fits your capabilities and fits your personality. Maybe you have a sense of humor, and you will use humor throughout your speech. Maybe you are enthusiastic, so your speeches will be filled with enthusiasm. Maybe you are a zealot, and your speech will be filled with zeal. Maybe you are insightful, and your speech will be filled with insight. Maybe you are practical, and your speech will be full of practical suggestions. If you are older, maybe you have become wise and your speech will be full of wisdom. You need to find your own style, and be true to it. When you find your style and are true to it, you won't feel the need to make the mistake that audiences never forgive - - reading your speech.

The two hardest speeches I ever gave were speeches at two large Christmas luncheons that <u>had</u> to be funny. I wrote both speeches and they were funny but I read them. My timing was good, so the speeches were successful, but I have no doubt that after 20 Christmas luncheon speeches I would be taking my own advice, and not reading my luncheon speech. I hope I never have to give another funny speech as long as I live.

There are plenty of books on how to give speeches. Pick one up. The books are fun to read, have lots of great quotations, and can make you feel a whole lot better about the process.

V. 80/20 RULE. In 1897, Italian economist Vilfredo Pareto realized that 80% of the land in Italy was owned by 20% of the people. He later discovered that 80% of the peas in his garden were produced by 20% of the pods. Pareto developed a mathematical model, called the Pareto Distribution, to reflect similar observations. The Pareto Distribution has been found to apply to: the frequencies of words in longer texts; the size of human settlements (few cities, many hamlets/villages); the value of oil reserves in oil fields (a few large fields, many small fields); the size of sand particles; and the size of meteorites. <http://en.wikipedia.org/wiki/Pareto_distribution> A 20th century quality control theorist, Dr. Joseph M. Juran, noticed that product defects were unequal in their frequency, i.e. when a long list of defects was

arranged in the order of frequency, a relative few of the defects accounted for the majority of the defectiveness.
<http://www.succeedinginbusiness.com/blog/archives/000087.html> Juran developed a rule he called 'The Vital Few and Trivial Many," which he found applied to other situations, such as employee absenteeism, causes of accidents, etc. *Id.* Juran proposed a rule that 80% of consequences flow from 20% of the causes, which has come to be known as the 80/20 Rule.

The 80/20 Rule is not a law of nature, so it has no validity. But the rule is nonetheless useful, because it causes us to realize that there may be an unequal relationship between inputs and outputs. We may find that, by being selective, a few vital changes may have a large effect.

VI. HONESTY. The old saying is that "honesty is the best policy." Everybody, including politicians, pays lip service to honesty. But not everyone is honest about being honest.

A. HONESTY IN YOURSELF. They say that cheaters never win. But life proves that cheaters often win. Liars often don't get caught. Why not take a few shortcuts to get where you want to go? Crooks get rich, often richer than honest people. So why be honest? One reason is fear: occasionally a white collar criminal has to go to prison. Another reason is RESPECT – both self-respect and respect from others. Respect is hard to measure, but it helps you get clients; it helps you keep friends; it makes your kids look up to you; it helps you go to sleep at night. Many people believe they will be judged at the end of their lives, and honesty is one of the measures of a life well-lived. Some people believe that their actions have a way of coming back to them - - that what goes around comes around, that you reap what you sow.

> Men acquire a particular quality by constantly acting a particular way...you become just by performing just actions, temperate by performing temperate actions, brave by performing brave actions.--Aristotle (384 BC - 322 BC)

B. HONESTY IN OTHERS. My old boss Oliver S. Heard, Jr., said that you want your doctor to be obsessive-compulsive and your lawyer to be paranoid. As lawyers, we owe it to the honorable people in our society to assume their good faith, but we owe it to our clients to be suspicious. This is why you should consider sending written discovery in cases involving financial issues, why you might want to get a sworn inventory from your adversary, or even consider getting sworn deposition testimony of crucial information you do not know for sure but are relying upon to settle your case. Some clients don't want to pay this expense. And some liars will lie under oath as easily as they will in conversation. Verifying what you are told can be expensive, sometimes very expensive. Striking the right balance between cost and certainty depends on the type of assets in the estate, the degree of trust your client has in the opposing party, the character of the opposing lawyer, and the financial resources available to fund the discovery process.

Sometimes you will have a case where the opposing party is telling your client one thing, but the opposing lawyer is doing something inconsistent. Consider the following:

> I have long since come to believe that people never mean half of what they say, and that it is best to disregard their talk and judge only their actions.--Dorothy Day (1897 - 1980), The Long Loneliness, 1952

C. HONESTY WITH CLIENTS. There are many temptations not to be honest with clients. When a prospective client is shopping for lawyers, there is a temptation to be overly optimistic or overly

encouraging about what you can accomplish for a certain fee if you are hired. This may help you get hired, but you are setting your client up for disappointment and maybe even resentment, if the results are not as good, or the fees far exceed your estimate. If you make a mistake in handling a case, there is a natural inclination to omit to mention it, and hope it won't come to light or make a difference in the long run. The best thing to do, when you make a mistake, is to tell the client. If Nixon had come clean about the Watergate incident he might have lost his Attorney General but he wouldn't have lost his Presidency. Hiding a mistake can change a negligence claim into a claim of breach of fiduciary duty. The grievance committee can tolerate negligence better than dishonesty.

D. HONESTY FROM CLIENT. A lawyer I know says "surprises are for birthdays." It is far better to build your case around bad facts than to have your client's credibility and your theory of the case wrecked by bad facts that emerge unexpectedly during the trial. Don't uncritically accept your client's version of the facts, and use the discovery process to see what your opponent has in store for you at trial. Particularly in jury trials, you need to use the bad facts to challenge jurors for cause and maximize the value of your peremptory strikes. And knowing the weaknesses in your case helps you to make better decisions on when to settle the case.

VII. LAWYER ETHICS. Rule 1: Always respond to the grievance committee. Rule 2: Never commingle client trust funds with your funds.

VIII. HANDLING TASKS. There is a skill to handling tasks, whether they are tasks you will do yourself, or tasks you will ask others to do.

A. PROCRASTINATION. Procrastination is the lawyer's worst enemy, worse even than lack of knowledge. We spend hours upon hours each year increasing our knowledge, and keeping up-to-date. We spend almost no time improving our work habits. Abraham Lincoln said: "The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow which can be done to-day."

1. What Causes Procrastination? Procrastination is not just a bad habit. It has psychological causes, and it has been studied by psychologists. One college website suggests four simple and four complex causes of procrastination. The simple causes are: difficulty (we avoid hard tasks in favor of easy ones), time-consuming (larger blocks of time are not as readily available), lack of understanding (problems with unknown solutions are avoided in preference to problems with known solutions), and fear (fear of making a mistake causes avoidance of the task). The four complex causes of procrastination are: perfectionism (the perfectionist delays starting because he feels overwhelmed by the size of the task), anger/hostility (resentment over having to do the task can lead to delay as a way to punish someone), low tolerance for frustration or pressure (if your emotional resources are limited, you delay starting the project because you can't handle it right now), and fear of failure (a person avoids starting a project out of fear that she/he will fail).

A different approach to procrastination suggests that procrastination is caused by goal conflict (several problems simultaneously pressing for attention), fear of commencing work (the problem is so big or complex that you don't know where to start), and self sabotage (you're afraid of failing so you don't want to start; or you're afraid you might succeed so you don't want to start). *See* http://www.mygoal.com/content/procratination/html> (6/20/05).

2. Overcoming Procrastination. The key to overcoming procrastination is to evaluate your underlying reasons for delaying, and to address them. This requires some introspection. In the meantime, here are some

techniques for overcoming procrastination.

Diminish the task in your mind so it is not so daunting. Commit to working for a limited time, like 15 minutes; maybe by the end of 15 minutes you will be interested enough in the project to keep working at it. Publicly commit to a task, and use peer pressure to force yourself to meet your deadline. Work with a diligent person, who by example can help you to stay focused on your task. Eliminate distractions, by closing your door, leaving the office, isolating yourself. Break the task down into smaller, more manageable tasks, and start with any one of them. Have your staff remind you to work the project, and protect you from interruptions once you have started. Offer yourself a reward for getting started, or for keeping going.

When someone says "I work better under pressure," they are probably rationalizing their procrastination. *See* <http://www.sas.calpoly.edu/ssl/procrastination.html>.

I used to have writer's block for long writing projects. Try as I might, I never could get a satisfactory first sentence. I told my old boss Jim Stewart about the problem and he said: "That's easy. Start by writing your second sentence. Come back to your first sentence later." That suggestion caused me to realize that I didn't have to start at the beginning. I could start anywhere, and fit the pieces of the project together later. In writing this paper, I started thinking about the "Big Ideas" located at the end of the paper first. But the first part I wrote was the section on writing clearly. I did this section on procrastination toward the end of the process. I wrote what I felt like writing at the particular time. That made it easier for me to do the project. This approach is valid for all overwhelmingly complicated problems. Start anywhere; you can piece it together later.

If you have a hard time writing up the Agreement Incident to Divorce and Decree after you settle in mediation, then draft your AID and Decree of Divorce before the mediation, and finalize the language as part of the mediation process. It takes extra time in mediation to hammer out the final language for your AID and Decree, but you save weeks of delay by investing a few hours in drafting during the mediation process.

If you don't take the final papers to mediation, and you draft them afterwards, what do you do if your opposing lawyer won't respond to your drafts? Try setting a motion to enter, and giving the opposing lawyer and client a deadline to work against. The first time the judge may give them a continuance to finish reviewing the paperwork. But by the second or third trip to the courthouse, the judge will run out of patience and will sign your decree, with the mediated settlement agreement attached instead of a new AID. It won't look pretty, but it will be over.

If that's too aggressive, then schedule a drafting session with your opposing lawyer, and go and sit in his/her office to "babysit" them while they look at your paperwork.

What if the case won't settle, so you want to try it and get it over? But the other side won't cooperate by preparing their case. Get a scheduling conference with the judge, and get deadlines set for preparing different phases of the case. By setting deadlines for your opponent, you force them to prepare the case in a progressive manner.

B. LEARNING TO DELEGATE/NOT DELEGATE. It is impossible for you to do everything yourself and get everything done that you need to do. So it is necessary to delegate some tasks to other people to get them done. When and what tasks to delegate to others is a matter worthy of consideration.

Delegation of tasks in a family law practice could involve giving tasks to a co-counsel, an expert witness, a younger attorney in your office, a legal assistant, or an outside vendor.

Particularly in marital property disputes, there are many forensics accountants who can perform data gathering and analysis more effectively than the lawyer. In a business valuation case, for example, ask your valuation expert to prepare a list of items the expert wants to see in performing the evaluation. In a tracing case, get your expert to help you send supplemental requests for production of documents that are increasingly specific, as the tracing project develops. In a document intensive case, you may find that a copy service can bates stamp and copy documents more effectively than your office can.

An experienced legal assistant can prepare preliminary drafts of documents, analyze information, interview witnesses, prepare lists of exhibits, Q&As, and do many other things a lawyer can do and do them as effectively as a lawyer can. The complexity of the tasks and the competency of the legal assistant, and even the potential savings to the client, can influence whether the task should be delegated to the legal assistant. Some young lawyers have a tendency to delegate tasks they don't know how to perform to legal assistants who also don't know how to perform them. There is danger that delegation of tasks can be less than optimal, or more than optimal. An open line of communication between the delegator and the delegatee is important to find the right balance.

C. ACCEPTING TASKS. Theodore Roosevelt once said: "Whenever you are asked if you can do a job, tell 'em, 'Certainly I can!' Then get busy and find out how to do it." For a more elaborate explanation of the principle, read about "The Message to Garcia," at <http://www.foundationsmag.com/rowan.html>. A "can do" attitude is much more gratifying to the boss, even if you find that you have to return later for more directions. And don't be afraid to come back later for more guidance. My old boss Oliver Heard used to say: "There are no stupid questions. Just stupid mistakes."

D. MANAGING PROJECTS. Two cardinal rules affect the management of long, complicated projects are: Parkinson's Law and Murphy's Law. Parkinson's Law says: "Work expands so as to fill the time available for its completion." This rule was announced by C. Northcote Parkinson in his book PARKINSON'S LAW: THE PURSUIT OF PROGRESS, (London, John Murray, 1958). Murphy's Law is : "Anything that can go wrong will go wrong." Just who was Murphy, and what led to his insight, is lost in the shadows of time.

Parkinson's Law and Murphy's Law impact project management in the following way:

In scoping out a long-term project, that must be done in stages, there is a recurring problem of failing to anticipate the difficulties that may arise. Vivid examples vary from big-budget Hollywood movies, to the roll-out of Windows 95, to the present Iraq War. So in planning a long-term project, you have to take into account Murphy's Law, that things will go wrong if they can.

However, if you build delays into the process, to account for Murphy's Law, you trigger Parkinson's Law, (work will expand to consume your extra time), and you expose yourself to procrastination on the part of people working on the project. The extra time you have built into the project schedule will be used up "because it is there," and people will wait until later rather than sooner to start their part of the project, because other deadlines are more pressing. One management consultant has suggested that the project supervisor keep the extra-time "buffers" close to the vest, and assign components of the job to different persons on short fuses. The manager should keep the overall progress of the project in the manager's head. *See* < http://www.focusedperformance.com/articles/ccpm.html>.

IX. RISK TO YOUR LAW PRACTICE. All endeavors involve risk. Each of our cases involves an assessment of risk versus reward. The cost of litigation is always an incentive to settlement. But to get a good settlement, often you must have more. There must be risk for your opponent in going to trial. If risk is not inherent in the situation, you need to create risk, perhaps by choosing what claims to file. Risk in litigation is also what helps you get your client to a position where settlement is possible.

This Section of the article is not going to talk about case-related risk. It is going to talk about risk to your law practice. In this sense, "risk" means an impediment to achieving your objectives, be they financial objectives, job satisfaction, personal satisfaction, etc. We will assume objectives like steady inflow of clients, adequate cash flow, profitability, reasonable work hours, avoiding fee disputes, litigation and grievances with clients, harmony in the workplace, and the like.

A. RISK ASSESSMENT. To assess risk in your law practice, you must engage in a risk assessment process. There are several important factors operating here. First, risk is basically uncertain, so that you are estimating risk rather than calculating risk. Second, you have neither the time nor the money to eliminate all risk, so you allocate resources among different risks. If the likelihood of harm is less, or if the degree of harm is less, then you will want to spend less of your resources to reduce that risk, or mitigate that damage. The risk assessment process involves identifying risks, assessing the likelihood of each risk occurring, calculating the harm that may arise, putting safeguards in place, and maintaining these safeguards over time. Risk assessment can be done during strategic planning, during project planning, during annual reviews of the business, or whenever a "close call" or an actual disaster directs your attention to a risk.

B. SOURCES OF RISK. External risks are beyond the reach of the organization; internal risks are subject to influence by the organization. External risk factors include politics (e.g., there is a Republican or Democratic sweep in the next judicial election, or the legislature alters the familiar legal landscape), the economy (economic downturns depress willingness to divorce and ability to pay fees), disasters (hurricanes, earthquakes, terrorist strikes, fire, flooding), and competition. Internal risks include loss of a valued employee (through resignation, death, retirement, relocation to another community), dishonesty by an employee, negligence by an employee, unanticipated cash flow crunches, illness (such as heart attack, stroke, cancer), accident (car wreck, broken arm), disruption (office fire or flooding, computer hard disk failure), litigation (with clients, ex-partners, etc.), or more slow-moving risks like: obsolescence of knowledge or equipment; poor profitability leading to lower compensation, longer work hours, less job satisfaction, unhappiness at home; failure to promote associate attorneys causing them to leave; bothersome employees making an unhappy work place or running off good workers, etc.

C. THE WEAKEST LINK. If you survey your law practice, there may be many risks you are vulnerable to. Envision the components of your law practice as links of a chain. The chain is no stronger than the weakest link. Find you weakest link, and fix it. After that, find the weakest link, and fix that. The very process of looking for the weakest link will lead you to many realizations that are not apparent when all you to is try to fix the problem that is barking in your face.

D. RESPONSES TO RISK. The typical responses to risk are: avoidance, transfer, mitigation, and acceptance.

1. Avoidance. You avoid risk primarily by changing risky behaviors. An example of avoidance of risk would be establishing a law firm policy that written discovery must be sent in all cases. That reduces the risk that you will end up in trial and be confronted with surprise evidence you did not anticipate. Another

example is establishing a calendaring system to be sure you anticipate and meet all deadlines, and move cases along at a satisfactory rate. Another example is having a written fee agreement in all cases. That reduces the risk of a dispute with the client about how the fee is to be calculated, or when payment is due. Another example is declining employment with a client who has already been through two or more lawyers in the same matter. Another example is raising your retainer or billing monthly or twice-a-month to reduce the chances that you will create a large receivable that forces you to choose between forgiving the balance or suing your client. Another is to determine not to sue clients for unpaid fees, so as to avoid legal malpractice counterclaims. Another is to decline to accept employment by a client with unrealistic expectations and resistance to suggestion. Another is to decline to sit on the board of directors of an organization that might engender lawsuits against management.

2. Transfer. You can outsource risk. For example, you could send out all QDROs to a specialist, to avoid making drafting mistakes. You can bring in a CPA in to give tax advice on a divorce property division, instead of assuming that responsibility yourself. You can associate a lawyer with particular experience in a difficult area of the law (business valuation, partnerships, trusts, torts, contract issues, criminal, etc.) You can also transfer risk by maintaining insurance, in case the bad event happens. This includes business interruption insurance and legal malpractice insurance.

3. Mitigation. You can mitigate risk by putting safeguards in place so that if the event occurs, the damage is minimized. For example, you can keep a set of back-up tapes for your document server off location, so that after a fire you can restore the data you lost. You can put a protective "firewall" in place covering your computer connection to the internet, to stop hackers from entering your computer network. You can put anti-virus software on your network server and individual computers in case someone receives or downloads a virus. At another level, to mitigate the risk that a downturn in one area of law practice will damage your organization economically, you can diversify your areas of practice beyond family law practice to include probate and estate planning, elder law, appellate law, business law, etc.

4. Acceptance. You can also accept risk, or take some corrective action to reduce risk to a level you can accept. You can decide that divorces involving complicated business issues is an area of law you want to practice, and you can make the effort to educate yourself to the complications. You are intending to engage in a higher risk type of case, but you are preparing yourself to handle those risks. Some attorneys sometimes talk about not carrying malpractice insurance so they don't present a tempting target for malpractice claimants. I don't ascribe to that view.

LEGAL MATTERS

X. THE LOGIC OF THE LAW. The logic of the law is the syllogism. A syllogism is a manner of reasoning from the general to the specific. You start with a general premise. You then proceed to a minor premise. That leads to a conclusion. Aristotle's famous syllogism was: "All men are mortal. Socrates is a man. Therefore, Socrates is mortal." A family law adaptation of the Socrates syllogism to law would be: property owned prior to marriage is separate property; this house was acquired prior to marriage; therefore this house is separate property. We use syllogisms to solve legal problems. The major premise is a rule of law. If you can fit your case under that rule of law, it will lead to a particular result. Advocates work backward up the chain: we determine what result we want, we see how our facts can be characterized, and we look for a legal principle that, when applied to the facts, leads to the desired result. Then we take that syllogism to court and try to win with it. In brief writing, the syllogistic process applies: start with the

controlling law; show that you fit under it; that dictates the result. If you are defending the case, you will argue that you don't fit under the general rule, and so avoid the result, or you find a more powerful or more appealing syllogism, that leads to the result you want.

XI. ATTORNEYS' FEES.

A. WORKING FOR FREE. Abraham Lincoln is reputed to have said, "A lawyer's time is his stock-in-trade." In 1989, when I left a law firm and for the first time opened up my office as a sole practitioner, I asked Houston family lawyer Don Royall about taking cases, "in the lean times," when you needed the retainer to make your car payment but you knew the client wouldn't pay the balance of the fee. Don said, "If I'm going to make no money, I'd rather make no money fishing than I would make no money representing somebody." I resolved to follow Don's advice. I weakened during Desert Shield, the six month buildup to Desert Storm, which hit San Antonio like a ton of bricks. My telephone didn't ring for weeks at a time. I did every bit of billable work I could do, organized my files, straightened my office, and still ran out of things to do. I weakened, and took some child support and visitation cases that I knew couldn't pay more than the retainer. After America won "the Mother of all Battles" in record time, my case load eventually picked up. But I was still dogged by the non-paying clients I'd taken, who expected first class treatment despite a mounting receivable. I had to work for no fee, while other clients needed work on their cases and had positive balances in my trust account. I vowed "never again."

After September 11, 2001, when Saudi extremists flew jetliners loaded with fuel into buildings in New York and Washington, San Antonio got quiet again. This time I rode it out, taking only cases I would take in ordinary times, only many fewer. September 11 was as bad for me as Desert Shield. But I held to the principle, and when things started to turn around, I didn't regret it.

Somebody gave me a test to use, when I was tempted, for whatever reason, to take or continue to work a case for no fee. They said, "Go home and ask your wife if she would write this prospective client a check for 5, 10 or 15 thousand dollars. If you can convince her to do so, then go ahead and work the case for no fee."

Bar leaders encourage you to give a certain amount of your time away "pro bono publico." In my view, when, to whom, and how much of your time or your money to give away is a personal choice. Whether you choose to give to your church, or to pan handlers, or to breast cancer research, or not at all, is your business, and not anyone else's. Once giving is mandatory, it's no longer giving. It has become a tax.

B. WRITTEN FEE AGREEMENT. Texas law requires that contingent fee agreements be in writing and signed by the attorney and client. Tex. Gov.'t. Code § 82.065. Prudence dictates that other fee agreements be in writing. One reason for contracts is to anticipate, and thereby draft to avoid, future disputes. Many family law clients don't know what to expect from a lawyer over the course of a law suit, and what their obligations will be. You do know this. It is better, and fairer, for the client to know your duties and their duties in advance of hiring you. Written employment agreements help to accomplish this.

C. EVERGREEN RETAINER. An "evergreen retainer" is like a fir tree that is green all year 'round. If your retainer is $10,000.00, and you bill your client $5,000.00 in a month, you charge your bill against the retainer, and give the client a month to replenish the retainer to the $10,000.00 level. This serves two purposes: it avoids your carrying a receivable, and equally important, when a client does not replenish the retainer it gives you early warning that you might be facing a payment problem. It is better to know that before you run up a large receivable than after. You can find out earlier if your client can't afford for you

to continue, or if you need to scale back your activities to fit within the client's means. Both the lawyer and the client are benefitted by this process.

XII. SHOULD YOU FILE A NOTICE OF LIS PENDENS?

A. LEGAL ASPECTS. At common law, the mere pendency of a law suit affecting title to land resulted in all transactions in the land being subject to the outcome of the suit. The Legislature supplanted that rule with the lis pendens statute. *Fannin Bank v. Blystone*, 417 S.W.2d 502, 503 (Tex. Civ. App.--Waco, 1967), *writ ref'd n.r.e.*, 424 S.W.2d 626 (Tex. 1968). Under Prop. Code § 12.007, a party seeking affirmative relief in an action involving title to real property can file with the county clerk a lis pendens notice, identifying the suit and the property in question. This notice gives constructive notice to all persons who thereafter acquire an interest in the land, making their interest subject to the outcome of the law suit. Prop. Code § 13.004; *Cherokee Water Co. v. Advance Oil & Gas Co.*, 843 S.W.2d 132, 135 (Tex. App.--Texarkana 1992, writ denied) ("The rule effectively prevents a grantee from being an innocent purchaser"); *Gene Hill Equip. Co. v. Merryman*, 771 S.W.2d 207, 209 (Tex. App.--Austin 1989, no writ) (the underlying purpose of a lis pendens is to put those interested in a particular tract of land on inquiry as to the facts and issues involved the suit or action concerned). Under Prop. Code § 12.008, the lis pendens can be cancelled by filing a motion in the court hearing the action. The cancellation may be predicated on depositing money in court, in the amount of the judgment sought, plus interest, plus costs. If a bond is given, it must be in twice the amount of the judgment sought, and have two acceptable sureties.

The *Fannin Bank* court of civil appeals' opinion states, in dicta, that even in the absence of a notice of lis pendens under the lis pendens statute, the Family Code provision relating to fraudulent transfers during a divorce gave lis pendens effect to the mere pendency of a divorce, so that persons who purchased property at a foreclosure sale under a deed of trust given by the husband on community property, were on notice of the divorce and were not protected from the wife's claim of fraud that nullified the deed of trust. The Supreme Court denied review, with a per curiam opinion noting evidence sufficient to support a finding that the purchaser at the foreclosure sale had actual notice of the wife's interest in the real estate which was in litigation, and that "[i]t is therefore unnecessary in this case to determine whether the mere pendency of a divorce action renders compliance with article 6640 unnecessary." Thus, the court of appeals' language on that point is dictum. The court in *First Southern Prop., Inc. v. Gregory*, 538 S.W.2d 454, 458 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ), held that the mere pendency of a divorce action was not constructive notice of wife's rights.

B. WHEN TO FILE? Most lawyers believe that the standard temporary injunctive orders, which prohibit either spouse from transferring assets except for necessary living expenses, litigation costs, and in the ordinary course of business, are adequate protection in a divorce. Consequently, few lawyers file lis pendens notices in divorce. Fortunately, few spouses make fraudulent conveyances of real property during divorce, especially when temporary orders prohibit such transfers. However, occasionally a spouse will make a fraudulent conveyance of land, and then the issue arises of whether the other spouse's right or claim to the property is superior or inferior to the third party now claiming title. If a lis pendens notice of the divorce had been filed, there can be no basis for bona fide purchaser (BFP) status. There is little cost to filing a lis pendens notice in a divorce, and little chance of harm. Maybe we should file them more often.

C. THE IMPACT OF MANAGEMENT RIGHTS. Under TFC § 3.104, third parties are entitled to rely upon a presumption that property held in one spouse's name alone is in that spouse's sole management

and control. The presumption does not apply if the third party is not a party to a fraud, and does not have actual or constructive notice of the spouse's lack of authority. Because of this presumption, a spouse is most vulnerable to a fraudulent conveyance by the other spouse involving assets held by muniment, contract, deposit of funds, or other evidence of ownership exclusively in the other spouse's name. In this situation, perhaps more precautions are necessary than with jointly-held property.

D. PERSONAL PROPERTY. Notice of lis pendens operates only against real estate. What about the IRA's, the 401K's, the brokerage accounts, and the children's trust accounts? Try sending the temporary orders to the depository institutions, and see if they will put a "freeze" on the accounts. If not, ask the Court to order that community property assets be placed under joint control, requiring both spouses to sign for a transfer. Alternatively, join the institutions as parties to the divorce, and ask for injunctions prohibiting the removal of funds and assets on deposit.

XIII. TRACING. A big part of what we do as family lawyers is tracing separate property.

A. THE BASIC RULE. The character of separate property is not changed by the sale, exchange, or change in form of the separate property. If separate property can be definitely traced and identified, it remains separate property regardless of the fact that the separate property undergoes mutations or changes in form. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965).

B. TRACING COMMINGLED ACCOUNTS. The modern concept of tracing by retroactive accounting arose in the mid-1970's, before personal computers with electronic spreadsheets. The invention of the "community-out-first" rule was the innovation that made this type of tracing possible. In the early days, lawyers and their staff did the tracing, with pencil on paper. If you made a mistake in characterizing a deposit, you would have to erase many pages of calculations. We learned that tracing errors tend to "wash out" because the community balance in an account periodically goes to zero, terminating the effect of prior errors. Although the community-out-first rule is a rule of law, some rules necessary to reliable tracing have developed as accepted accounting practices, without legal support. For example, most accountants now use the statement date instead of the date of the check. On a particular day, deposits are entered before withdrawals to avoid imaginary overdrafts. Overdrafts are generally treated as temporary loans that get repaid with the next deposit. "Specific intent" to move separate funds through a commingled account trumps the "community-out-first" rule.

C. THE COMMUNITY-OUT-FIRST RULE. Where an account contains both community and separate moneys, it is presumed that community moneys are withdrawn first. *Horlock v. Horlock*, 533 S.W.2d 52, 59 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ dism'd). *Accord, Harris v. Ventura*, 582 S.W.2d 853, 855-56 (Tex. Civ. App.--Beaumont 1979, no writ). However, in *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973), the Supreme Court appears to have used a "separate property out first" rule in tracing commingled funds in bank accounts. The seminal case on the "community-at-first" rule, *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.--Dallas 1955, writ dism'd), in actuality applied the principle from trust law that where a trustee mixes his own funds with trust funds the trustee is presumed to have withdrawn his own money first, leaving the beneficiary's on hand. Since the husband owned none of wife' separate funds, and half of the community funds, it was presumed that the community moneys in the bank account were withdrawn first, before the wife's separate moneys were withdrawn. The "community-out-first" rule cannot be applied when the account contains separate funds of both spouses and no community funds. This suggests that a more fundamental rule exists, which applies regardless of the character of the funds at issue. Even a

rule that the trustee's money come out first is not fundamental. That was the rule in *Sibley*, but in *Sibley*, the first money out was dissipated, and the fight was over the remaining funds. What if, in *Sibley*, the first money out had been invested in GM stock, and the last money out was dissipated? That would have resulted in the trustee's money coming out last. A more fundamental principle would be that the beneficiary is made whole first, and any loss is borne by the trustee. What if there is no "trustee"? What if a joint account contains $100,000.00 in community property funds and the husband withdraws $50,000.00 that he claims he lost "gambling"? Equity could provide that he lost his one-half interest in the funds and the one-half remaining belongs to the wife. That's the hallmark of equity– it permits the court to do what is fair, in the particular circumstance.

D. BROKERAGE ACCOUNTS. Investments held in a brokerage account in street name can present special tracing problems. Dividends and interest can be commingled with proceeds from the sale of separate property investments, and then be invested in stocks that increase in value. That stock then gets sold and the proceeds mixed, and then a new security is purchased, only this may go down in value. The cycle continues. Mix in there the possibility that the spouse purchases some stocks on margin, which is a purchase using community credit. The brokerage company automatically pays margin debt with proceeds from the sale of assets, even if the assets sold are not the assets that were purchased using margin debt. Add to that scenario a margin loan taken out before marriage (separate property debt), but which fluctuates in amount during marriage. You can end up with a quagmire of tracing ownership and reimbursement or economic contribution claims.

In *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987), the Supreme Court considered several stock transactions inside a brokerage account. On the date of marriage, the husband had 200 shares of Texaco stock. That stock was later sold for $5,755.00, and on the same day 200 shares of City Investing stock were purchased for $5,634.00. The City Investing stock was later sold for $6,021.00, and on that same day 200 shares of TransWorld stock were purchased for $6,170.00. $149.00 in cash was supplied to complete this purchase. The trial court found that the husband's tracing had failed. The Court of Appeals affirmed, on the grounds that the husband had shown merely the possibility that separate property could have been the source of funds for the purchases of stock. The Supreme Court reversed, holding that the presumption of community had been overcome *as a matter of law*. The Court said:

> [T]he petitioner has shown the chain of events leading from the Texaco stock to the TransWorld purchase and shown that no other transactions occurred on the days in question, which would have planted the seeds of doubt upon the possible source of the funds used to buy the stocks.

Id. at 666. Thus, judgment was *rendered* that the stock was husband's separate property.

Tracing failed in *Merrell v. Merrell*, 527 S.W.2d 250 (Tex. Civ. App.--Tyler 1975, writ ref'd n.r.e.), where the husband asserted a separate property interest in real property premised upon his use of the proceeds from sale of separate stock to purchase the land. The Court said:

> Appellant testified that he inherited some corporate stocks from the estate of his mother, and that he sold stocks worth approximately $100,000.00, and that such funds were used to finance the purchase of the duplexes. Under the record we are unable to conclude that such funds were properly traced as appellant's separate property and not commingled with appellee's separate property or the community property.

> The record shows that appellant had many stock and bond transactions during the marriage. He bought and sold many shares of stock and some were bought short or on margin. Bonds were also bought on margin. Sometimes he would owe his brokerage firm several thousand dollars, and at other times he would have a credit with them.

Id. at 255.

XIV. EXPRESS TRUSTS. The intersection of trust law and marital property law is confusing and gives rise to much uncertainty at the time of divorce. Family lawyers need to be familiar with the concepts of trust law, and the case law on the topic.

An express trust comes into existence by the execution of an intention to create it by one having legal and equitable dominion over the property made subject to the trust. *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, 987-88 (1948). Since January 1, 1984, express trusts in Texas are governed by the Texas Trust Code. *See* Tex. Prop. Code chs. 111-115. The old Texas Trust Act still controls the validity of trusts created while the Act was in effect, and actions taken relating to express trusts while the Act was in effect. The newer Texas Trust Code applies to trusts created on or after January 1, 1984, and to transactions relating to prior trusts, but which occur on or after January 1, 1984.

A. MERGER OF LEGAL AND BENEFICIAL TITLE. An express trust requires the separation of the legal title from the equitable title in property, with the trustee holding legal title and the beneficiary holding equitable title. *Jameson v. Bain*, 693 S.W.2d 676, 680 (Tex. App.--San Antonio 1985, no writ). Whenever legal title and equitable title to trust property are joined in the same person, the two interests merge, and the property no longer in trust. Tex. Prop. Code § 112.034. However, merger cannot occur for the beneficiary (other than the settlor) of a spendthrift trust, and that if such occurs, the court must appoint a new trustee or co-trustee to administer the trust. Tex. Prop. Code § 112.034(c).

Does merger occur when a person is both sole trustee and the primary beneficiary, but there are contingent beneficiaries who could receive income or principal on the happening of some future event? Prior to the future event, do the contingent beneficiaries have an equitable interest sufficient to avoid merger? Stated differently, a remainder interest in another person avoids merger, but does a contingent remainder interest also avoid merger?

B. EXPRESS TRUSTS AND MARITAL PROPERTY LAW.

1. Spendthrift Trusts. A spendthrift trust contains a provision that "the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee." Tex. Prop. Code § 112.035. 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.

2. Self-Settled Trusts. A person cannot convey his assets into a spendthrift trust, with himself as beneficiary, and shield the assets from his creditors' claims. Tex. Prop. Code § 112.035(d); *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 378 (Tex. App.--San Antonio 1992, writ denied) ("In Texas, a settlor cannot create a spendthrift trust for his own benefit and have the trust insulated from the rights of creditors. Such an instrument is 'self-settled' and, therefore, invalid."). One would think that the rule would apply to a spouse's community property claims to earnings on the principal held in such a trust. However, in *Lipsey v. Lipsey*, 983 S.W.2d 345, 350 (Tex. App.--Fort Worth 1998, no writ), 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.

Id. at 351.

3. Revocable Trusts. An express trust is revocable unless the trust instrument makes it non-revocable. Tex. Prop. Code § 112.051(a). If the trust is revocable, it is still a valid trust, until the trust is revoked. If the beneficial interest in the property is created in a third person (as opposed to the settlor), then the assets in trust cannot be reached by the settlor's creditors. *See* Martin J. Placke, Comment, *Creditors' Rights in Nonprobate Assets in Texas*, 42 BAYLOR L. REV. 141, 143 (1990).

4. Discretionary Distribution Versus Mandatory Distribution. As explained above, the keys to protecting assets held in trust from claims against the beneficiary is (i) whether the trust is a spendthrift trust, and (ii) whether the distribution of assets from trust is mandatory or discretionary. If distributions from a spendthrift trust are discretionary, the assets held in trust are out of the reach of creditors. An exception exists for court-ordered child support under TFC § 154.005 (court can order child support paid out of mandatory distributions, and out of income held in discretionary distribution trust).

Often a trust will require mandatory distributions of income, but allow discretionary distribution of principal. Where distribution of income is mandatory, and the income is not distributed, you are probably faced with a *Long* type situation, where the beneficiary spouse has constructive possession of the income, even while it is in the hands of the trustee. See the discussion of *In the Matter of the Marriage of Long*, 542 S.W.2d at 712 (Tex. Civ. App.--Texarkana 1976, no writ), in Section XIV.B.7 below. That means the other spouse can assert a claim against the undistributed income, and the income on that income, if the court sides with the view that the income on separate property principal is community property.

5. Income Distributed. A 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.). (involving a self-settled trust). 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.

6. Commingling and Tracing Inside an Express Trust. *McFaddin v. Commissioner*, 148 F2d 570 (5th Cir. 1945), said that principal and interest in trust can become commingled such that all distributions will be treated as distributions of income.

7. When The Right to Principal or Income Matures. 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 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). Constructive ownership also applies to income subject to mandatory distribution that is not distributed when due. For twenty plus years the fight has been over income distributed to a married beneficiary from a discretionary distribution spendthrift trust. Is it separate or community property? But now more of these generation-skipping trusts are maturing, and principal and undistributed income is now coming out of trust to the remainder beneficiaries. When the trust ends, and accumulated income is no longer held in trust, but is now owned by the remainder beneficiary free of trust, is that income now community property? Having litigated the rights of married income beneficiaries for several decades, we are now going to be litigating the rights of married remainder beneficiaries.

A commingling issue can arise with a discretionary distribution testamentary or donative spendthrift trust when the beneficiary's right to possess part of the principal matures, but the matured principal remains with the trustee. From the time of maturity forward, the income on the matured principal is community property. Over time the trustee can accumulate four categories of property: (1) unmatured principal; (2) discretionary distribution income on unmatured principal; (3) matured principal; and (4) undistributed income on matured principal. Categories (1) and (2) are not marital property. Category (3) is separate property. Category (4) is community property. When a distribution is made by the trustee without contemporaneous allocation to any of the four categories, what category of funds comes out first? After that fund is exhausted, what comes out second? What is the effect of a clause in the trust document saying that undistributed income becomes part of the principal? If the undistributed income that converts to principal is later distributed, does it come out as principal or income?

XV. BURDENS OF PROOF. In ordinary civil litigation, the burden of proof is easy: the plaintiff has the burden of proof. In divorce and custody litigation, the burden of proof is often not on the petitioner. In family law a number of different presumptions alter the burden of producing evidence and the burden of persuasion. Sometimes specific presumptions arise that override general presumptions. Sometime presumptions fall away in the face of contradictory evidence. The lawyer who knows presumptions can use them to advantage, as opposed to just throwing everything into evidence and hoping to win.

A. PARENT-CHILD. With respect to children, there is a presumption that a parent should have custody as against a non-parent. TFC § 153.131(a) . In *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000), the Supreme Court held that the parental presumption in Section 153.131(a) does not apply in modification suits. The U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000), probably mandates a parental presumption even in modification cases. In *Brook v. Brook*, 881 S.W.2d 297 (Tex. 1994), the Supreme Court held that third parties could be appointed joint managing conservator with one of the child's parents, without meeting the parental presumption. Some courts have discussed a presumption that custody of siblings should not be split. *Q. v. P.*, 560 S.W.2d 122, 127 (Tex. Civ. App.-- Fort Worth 1977, no writ). This appears to be a public policy view, but not an actual presumption which should be included in the jury charge. *R.S. v. B.J.J.*, 883 S.W.2d 711, 720 (Tex. App.--Dallas 1994, no writ). There is a presumption that a child born into a marriage is the child of the husband. TFC § 160.204. This presumption can be rebutted, subject to parameters established in the Family Code.

B. MARITAL PROPERTY. There is a base-line presumption that all property possessed by a spouse is community property. TFC § 3.003. The degree of proof necessary to prove that property is separate property is clear and convincing evidence. *Id.* However, there is no elevated burden of persuasion that property in possession of a spouse is non-marital property, such as property belonging to another, or to a partnership or to a corporation, or property held in trust. This would apply to property held in trust, or assets of a company or partnership, that may be possessed by a spouse. There are other presumptions that might arise, that if triggered override the community presumption. For example, there is a presumption that a transfer from a parent to a child is a gift. *Somer v. Bogart*, 762 S.W.2d 577 (Tex.1988) (presumption of gift arose when father- and mother-in-law put property in the name of son-in-law; the burden of proof to overcome the presumption is clear and convincing evidence).Where one spouse furnishes separate property consideration and title is taken in the name of the other spouse, a rebuttable presumption of gift arises. *Pemelton v. Pemelton*, 809 S.W.2d 642, 646 (Tex. App.--Corpus Christi 1991), rev'd on other grounds sub nom. *Heggen v. Pemelton*, 836 S.W.2d 145 (Tex. 1992). Where one spouse uses separate property to acquire property during marriage and takes title to that property in the names of both spouses, a rebuttable presumption arises that the purchasing spouse intended to make a gift of a one-half separate property interest to the other spouse. *In re Marriage of Thurmond*, 888 S.W.2d 269, 273 (Tex. App.--Amarillo 1994, no writ), citing *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975); see *Graham v. Graham*, 836 S.W.2d 308, 310 (Tex. App.--Tyler 1992, no writ) (recognizing rule but holding it was not applicable); *Peterson v. Peterson*, 595 S.W.2d 889, 892-93 (Tex. Civ. App.--Austin 1980, writ dism'd) (presumption overcome by husband's testimony that no gift was intended). Where one spouse conveys property to the other spouse, there is a rebuttable presumption of gift, even absent a recital in the instrument of conveyance. *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825, 826 (1900). If a spouse makes a gift to the other spouse, there is a presumption that income arising from the gifted property, is part of the gift. Tex. Const. Art. XVI, §15, TFC § 3.005. Tex. Probate Code § 438, "Ownership During Lifetime," provides that "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."

The 79th Legislature made a presumption go away. Previously, TFC § 4.102 provided that a partition or exchange of property "includes future earnings and income 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." This was a presumption that future income was included in the partition. HB 202 amends Section 4.102 to say that a partition or exchange agreement "may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse . . . ." As a result of this amendment, there is no more presumption that future income is included in a partition or exchange.

C. SHIFTING BURDENS OF PROOF. Certain facts, if proved, can reverse the burden of proof. If the party with sole control over the evidence fails to produce it, there is a presumption that the evidence would be adverse to that party. *See Dessommes v. Dessommes*, 505 S.W.2d 673, 679 (Tex.App.-Dallas 1973, writ ref'd n.r.e.) (Guittard, J.) ("The burden of proof is not necessarily determined by which party happens to be in the position of plaintiff. It may rest on broad considerations of fairness, convenience and policy . . . ."). If party destroys evidence, there is a presumption that the evidence would have been adverse to that party. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003). If a party has made it impossible to measure true damages, there is a presumption that the loss is the maximum that could be proved. *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722), <http://www.umanitoba.ca/faculties/law/Courses/Fainstein/armour1.htm> (where jeweler converted stone of unknown value, it was presumed that it was "a jewel of the finest water"). If a fiduciary relationship is established, it is presumed that any transaction in which the fiduciary gained an advantage from the beneficiary is fraudulent, and the burden of proof is on the fiduciary to prove that the transaction was "fair." *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). For example, in *Dickson v. Dickson*, 544 S.W.2d 200, 205 (Tex. Civ. App. – Austin 1976, writ ref'd w.o.j.), when the husband commingled his wife's separate property with community property, the doctrine of commingling did not apply.

D. THINK IT THROUGH. It is evident that the community presumption is a starting point for divorce. Knowledge of shifting presumptions can change that. Learn the shifting and countervailing presumptions, be creative, and maybe you can turn the tables on your adversary.

XVI. DIFFERING ENFORCEMENT STANDARDS FOR PRE- AND POST-NUPTIAL AGREEMENTS. There are five kinds of marital property agreements recognized in the Texas Constitution and Family Code: premarital agreements, TFC Ch. 4, Subch. A; post-marital partition and exchange agreements, TFC Ch. 4, Subch. B; post-marital income agreements, TFC §4.103; community property survivorship agreements, Tex. Probate Code §§ 451-457; and agreements to convert separate into community property, TFC §4.202. *See* Tex. Const. art. XVI, §15. Additionally, Section 65.103 of the Texas Finance Code authorizes joint tenancy community property savings accounts between spouses. The five different kinds of marital property agreements do not all have the same standard of enforceability.

Premarital agreements and post-marital partition agreements and spousal income agreements have the same enforcement standards. The agreements must be in writing and signed by both parties, and (for post-9-1-93 agreements) the only defenses are lack of voluntariness and unconscionability. *See Daniel v. Daniel*, 779 S.W.2d 110, 114 (Tex. App.--Houston [14th Dist.] 1989, no writ) (saying that the Legislature, by adopting the voluntariness and unconscionability defenses in the Family Code in 1987, "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"); *Marsh v. Marsh*, 949 S.W.2d 734, 738 (Tex. App.–Houston [14th Dist.]1997, no writ) (even after the 1993 amendment adding TFC

§ 4.003(c), common law defenses remain available to parties who entered into agreements prior to September 1, 1993).

There is no statutorily-stated 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.

The standards for enforcement of an agreement to convert separate property to community property, set out in TFC § 4.205, are different from the standards for enforcing premarital agreements, partition and exchange agreements, and spousal income agreements. Under Section 4.205, the defenses are (i) voluntariness, and (ii) fair and reasonable disclosure of the legal effect. Unconscionability is not listed as a defense. Section 4.205(b) sets out certain language which, if displayed in bold-faced type, capital letters, or underlined, creates a rebuttable presumption of a fair and reasonable disclosure of the legal effect of converting property to community property. The words warn of exposure to creditors, loss of management rights, and loss of property ownership.

What are the defenses to enforcement of an agreement, signed by persons about to marry, that not only partitions property to be acquired during marriage but also creates survivorship rights in community property and/or converts separate property into community property? Do different portions of the agreement have different defenses? What if, because different defenses apply to different portions of the agreement, some portions of the agreement are held to be enforceable and some not? For example, if you lose the part of the agreement that is subject to contractual defenses, and that portion is not severable, do you also lose the portion of the agreement that is not subject to contractual defenses? It is better to avoid those interesting questions by keeping documents with different enforcement standards separate.

XVII. GRANDPARENT CUSTODY AND ACCESS. 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. An excellent synthesis of the decision is set out in the case of *Linder v. Linder*, 72 S.W.3d 841, 852-55 (Ark. 2002):

> 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. 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.

Troxel has had mixed effects at the state court level. Some courts have found their grandparent access statutes unconsitutional, some have found them unconstitutional as traditionally applied but fixable by reinterpreting existing state law, and some have found their state's statutes to be constitutional. Texas courts of appeals have mostly upheld the constitutionality of Texas statutes, although in the case of *In re Pensom*, 2003 WL 22492247 (Tex. App.--San Antonio 2003, orig. proceeding), the San Antonio Court of Appeals felt it necessary to impose a common law requirement, on top of the statute, to prove that the parent is unfit, or that denial of grandparent access would significantly impair the child's physical health or emotional well-being.

Since the U.S. Supreme Court has reinvigorated substantive due process of law as a factor in family law litigation, litigants faced with unfavorable case law or statutes should evaluate a substantive due process claim. This applies to parents, grandparents, possibly *children* who might have a right to argue on their own behalf, and to fathers of children born into the marriage of another, etc. Conducting a constitutional attack is addressed in Section XIX below.

XVIII. CHILDREN AS LITIGANTS. The law has developed slowly regarding the rights of children to participate in their own custody litigation. Gregory K. In 1992, an Orlando, Florida juvenile court judge ruled that Gregory K could sue his own parents for what news reports described as "divorce." *See* G. Russ, *Through the Eyes of a Child, Gregory K.: A Child's Right to Be Heard*, 27 FAM. L.Q. 365, 370-371 (1993). In *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000), Justice Stephens' Opinion discusses the possible rights a child may have that exist independently from the parent's rights. 530 U.S. at 87, 120 S.Ct. at 2072 (Stevens, J., dissenting). *See* Hillary Rodham, *Children Under the Law*, HARV. EDUC. REV. (1973) ("the presumption of identity of interests between parents and their children should be rejected whenever the child has interests demonstrably independent of those of his parents");Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings* , <http://canada.justice.gc.ca/en/ps/pad/reports/2002-fcy-1.html#cap>.

XIX. MAKING A CONSTITUTIONAL ATTACK ON A STATUTE. In today's environment of "substantive due process," and an expanded "right to privacy," and the willingness of the state judiciary to invoke state constitutional provisions as an alternative to federal constitutional provisions, family lawyers must sometimes consider an effort to declare a statute or rule of common law unconstitutional. There are rules to bringing a constitutional challenge, and failure to observe them will doom your challenge to defeat.

A. 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 the 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), *aff'd*, 74 S.W.3d 377 (Tex. 2002).

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. Raise Constitutional Attack in the Trial Court. Many cases say that a constitutional attack must be raised in the trial court, or it cannot be considered on appeal. *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) ("As a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal"). However, several cases hold that a "facially unconstitutional challenge" may be raised for the first time on appeal. *Rose v. State*, 752 S.W.2d 529, 552-53 (Tex. Crim. App.1987) (op. on reh'g); *Ex parte Flores*, 130 S.W.3d 100, 106 (Tex. App.--El Paso 2003, pet. ref'd); *In re B.S.W.*, 87 S.W.3d 766, 771 (Tex. App.--Texarkana 2002, pet. denied). The safer course is to plead unconstitutionality, and raise it by summary judgment, motion for judgment, and/or motion for to modify judgment or motion for new trial.

XX. ONE WHO SPECIALIZES IN FAMILY LAW. If your only tool's a hammer, then you can only hammer nails. But it takes more than nails to build a house. It is said that an expert knows more and more about less and less. This is not true of family law experts. Family law experts must know about many other

areas of the law. In representing our clients, we need more tools in our toolbox than just the principles of family law.

A. TORT LAW.

1. Personal Injury. In *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977), the Supreme Court abandoned interspousal immunity for intentional torts. In *Price v. Price*, 732 S.W.2d 316 (Tex. 1987), interspousal immunity has abrogated for all causes of action, including negligence. This development introduced family lawyers to the wide world of torts. Tort claims for bodily injury have been thoroughly examined in CLE literature, and will not be examined here.

2. Fraud. Fraud can exist in many family law cases. As family lawyers, we need to know the law of fraud. Fraud can serve as a basis for rescission or it can served as a basis for damages. The elements of common-law fraud are: (1) a material representation, (2) that is false, (3) which was either known to be false when made or was made recklessly without knowledge of its truth, (4) with the intent that the representation be relied upon, (5) that it was relied upon, and (6) which caused injury. *See Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 929-30 (Tex. 1996). Common law fraud claims have a four-year statute of limitations. *See Williams v. Khalaf*, 802 S.W.2d 651, 653 (Tex. 1990). Limitations generally does not begin to run until the fraud is discovered or until it might have been discovered by the exercise of reasonable diligence. *See Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997). Fraud damages are measured in two ways: "out of pocket" damages measured as the difference between value given and value received; "benefit of the bargain" which allows injured party to recover the difference between the value as represented and the value actually received.

3. Exemplary Damages. Under current Texas law, exemplary damages are available only for intentional torts, fraud and gross negligence. Tex. Civ. Prac. Code § 41.003. You must prove the grounds for fraud and exemplary damages by clear and convincing evidence. *Id.* at § 41.003(c). Also, the jury must be unanimous in finding the liability for, and the amount of, exemplary damages. *Id*. at § 41.003(d).

B. CONTRACT LAW. More and more family law cases involve contract disputes, whether they be premarital agreements, mediated settlements agreements, AIDs, or agreed decrees. Family lawyers increasingly need to know the principles of contract information: offer-acceptance; meeting of the minds; consideration; missing terms; merger and the statute of frauds. We also need to know the rules for including ambiguity, rules of construction and the parol evidence rule. We need to know the laws governing breach of contract, including material breach; anticipatory breach; damages vs. recission; the recovery of attorneys fees; and the lack of exemplary damages.

We need to know the defenses to contract claims and the lack of contract defenses for premarital and post-marital agreements signed on or after September 1993.

We need to understand contract damages. "The universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained. By the operation of that rule a party generally should be awarded neither less nor more than his actual damages." *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952). The complaining party is entitled to recover the amount necessary to put him in as good a position as if the agreement had been performed. *Osoba v. Bassichis*, 679 S.W.2d 119, 122-23 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.). However, special or consequential damages may be recovered for breach of contract when they are incidental to and caused by the breach and may reasonably

be supposed to have entered into the contemplation of the parties at the time of the contract. *Smith v. Renz*, 840 S.W.2d 702 (Tex. App.–Corpus Christi 1992, writ denied). Damages can be recovered when "loss is the natural, probably, and foreseeable consequence of the defendant's conduct." *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex. 1981), citing *Hadley v. Baxendale*. We also need to understand the duty to mitigate damages.

We need to know when specific performance is available, as opposed to money damages.

C. FIDUCIARY LAW. Fiduciary law is not well-understood and there are few CLE articles on it. A fiduciary relationship is established as a matter of law (like for the trustee of an express trust, or between partners in a partnership, or a lawyer in a lawyer-client relationship), or it can arise out of particular circumstances. In *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980), the Court said "[t]he problem is one of equity and the circumstances out of which a fiduciary relationship will be said to arise are not subject to hard and fast lines." If a fiduciary relationship is established, then many ordinary rules are changed. For example, it is presumed that any transaction in which the fiduciary gained an advantage from the beneficiary is fraudulent, and the burden of proof is on the fiduciary to prove that the transaction was "fair." *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). Exemplary damages are proper where a fiduciary has engaged in self-dealing. *Cheek v. Humphreys*, 800 S.W.2d 596, 599 (Tex. App.--Houston [14th Dist.] 1990, writ denied). Malice is not a required element where there is an intentional breach of a fiduciary duty. *Murphy v. Canion*, 797 S.W.2d 944, 949 (Tex. App.--Houston [14th Dist.] 1990, no writ).

D. EQUITABLE REMEDIES AND DEFENSES. Family lawyers need to know equitable remedies like recission and reformation, imposing a constructive trust, and the like. There are many equitable defenses like unclean hands, laches, estoppel in pais, quasi-estoppel, judicial estoppel, promissory estoppel, contractual estoppel, acceptance of benefits and the like.

XXI. MEDIATION. Mediation can be outcome determinative. Preparing for mediation is like preparing for trial, except that rules of procedure and evidence have diminished importance. I like to prepare my first and second offers in advance. I also avoid making offers prior to mediation, since that only sets a ceiling or a floor for offers in mediation. Bring a checklist of items, big and small, that need to be resolved, or even better bring an agreement incident to divorce and decree of divorce that can be revised and finalized during mediation. It will lengthen your mediation while you hammer out the details, but it avoids messy post-mediation disputes of issues overlooked in mediation. Be sure to partition future property acquired between the date of mediation and the date of divorce. Once the MSA is signed, prove up the divorce and secure oral rendition of judgment as soon as possible.

PROCEDURE AND EVIDENCE

XXII. JURIES. Unlike the worker's compensation lawyers and medical malpractice lawyers, family lawyers still have a future in jury trials. Here are two issues to keep in mind about juries.

A. JURY SELECTION. Some lawyers see voir dire as an opportunity to ingratiate themselves with the jury, or start winning the jurors over to their side of the case. I hold with the school that the purpose of jury selection is to eliminate unfavorable jurors. My goal in jury selection is to get the court to dismiss as many unfavorable jurors as I can for cause, so that I can use my peremptory challenges for the closer cases. This sometimes requires that I put bad facts before the panel, in a manner calculated to prompt an extreme

reaction, so that the venireperson speaks up and gets disqualified. This approach to jury selection can be antithetical to getting "chummy" with the panel and trying to get them on my side.

For those who do seek challenges for cause, the Texas Supreme recently revisited challenges for cause. A potential juror must be dismissed for cause if "it [ ] appear[s] that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality." . . . [T]he relevant inquiry is not where jurors start but where they are likely to end." *Hafi v. Baker*, --- S.W.3d ----, 2005 WL 1124829, 48 Tex. Sup. Ct. J. 648 (Tex. May 13, 2005).

In another recent case, the Supreme Court ruled that, "to preserve error when a challenge for cause is denied, a party must use a peremptory challenge against the veniremember involved, exhaust its remaining challenges, and notify the trial court that a specific objectionable veniremember will remain on the jury list. . . . This ensures that 'the court is made aware that objectionable jurors will be chosen' while there is still time 'to determine if the party was in fact forced to take objectionable jurors.'" *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 90-91 (Tex. 2005). The Supreme Court expressly rejected the rule, held by several courts of appeals, that "once a veniremember has expressed 'bias,' further questioning is not permitted and the veniremember must be excused." The Court held that "[a]s in any other part of voir dire, the proper stopping point in efforts to rehabilitate a veniremember must be left to the sound discretion of the trial court." *Id.* at 91.

B. JURY CHARGE. Other important action on the jury front is the Texas Supreme Court's retreat from broad form submission. In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000), the Supreme 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." In *Romero v. KPH Consolidation, Inc.,* 2005 WL 1252748 (Tex. May 27, 2005), 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 claimed 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. In *Romero*, the Supreme Court agreed that no evidence supported malicious credentialing, and that that prong of the broad form submission was "factually invalid." The Court then said that "broad-form submission cannot be used to put before the jury issues that have no basis in the law or the evidence." *Id.* at *1. And the Court went on to hold: "We conclude that the trial court erred in overruling Harris County's timely and specific objection to the charge, which mixed valid and invalid elements of damages in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage." *Id.* at *12.

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. In *Romero*, Justice O'Neill did not mention her dissent in *Harris County v. Smith*, and so seems to have acquiesced in the extension of the *Casteel* approach to "no evidence" complaints that cannot be accurately addressed due to

broad form submission.

These developments in broad form submission may not affect family law trials as much, if the lawyers are not using invalid claims or elements of damages, and if separate fact determinations are submitted separately. This may be more likely to arise in parental termination cases, where a laundry list of alleged behavior is submitted with a single jury question for all. However, this current trend in the Supreme Court's decisions should be noted. And if you get in a complicated case, involving disputes over whether a claim sound in reimbursement or economic contribution, or the like, the cautious approach is to submit separate jury questions on each controversial theory.

XXIII. DISCOVERY OF BANK RECORDS. According to TCP&RC §30.007, civil discovery of customer records maintained by a financial institution is governed by Section 59.006 of the Finance Code. Under Finance Code § 59.006, a litigant seeking records of a customer of a bank, S&L, federal S&L, or trust company, must serve the institution with a record request at least 24 days before the production deadline, and must pay the institution's reasonable costs (reproduction, postage, research, delivery and attorney's fees) of complying with the record request. The institution is free to produce the documents unless, prior to the production deadline, the customer seeks an appropriate remedy such as a motion to quash or motion for protective order, and serves a copy of such motion upon the institution and the requesting party. If the customer is not a party to the lawsuit giving rise to the document request, additional steps are necessary: the customer must give a written consent to the institution, or the requesting party must secure a court order for in camera inspection of the records. In such an event, the court may redact part of the information, and must issue a protective order prohibiting further disclosure of the records beyond what is required for litigation.

A different statute relates to credit unions. Finance Code § 125.402 provides, among other things, that a credit union, without the consent of the member, cannot produce records in connection with private litigation without a subpoena or court order.

XXIV. IMPORTANT EVIDENTIARY PRINCIPLES. Family lawyers are litigators, and as such we need to know the rules of evidence. Here are some evidentiary issues that present themselves frequently in family law litigation.

A. HEARSAY RULE - TRUTH OF MATTER STATED. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TRE 801(d). By special definition, a "prior statement by witness," "admission of a party-opponent," and "depositions" in the same case are not hearsay. TRE 801(e). A "statement" is (i) an oral or written verbal expression or (ii) nonverbal conduct of a person that is intended to substitute for a verbal expression. TRE 801(a). A "declarant" is a person who makes a statement. TRE 801(b). When something is and is not offered for the truth of the matter asserted can be tricky. Sometimes evidence would be inadmissible hearsay if offered for one purpose, but not if offered for a different purpose.

B. OFFER FOR A LIMITED PURPOSE. One of the most powerful evidentiary tools in the trial lawyer's toolbox is the "offer for a limited purpose." Limited admissibility is covered in TRE 105. The rule arises when evidence is admissible for some purposes but not others, or admissible against some parties but not all parties. Where evidence is admissible for some purposes, but not generally, and the offer of the evidence is made generally, without limitation as to its use, the trial court should exclude the evidence. If the offer is made generally, opposing counsel should object to its admissibility on appropriate grounds. If the objection is sustained, the proponent should re-offer the evidence "for a limited purpose." If accepted by

the trial court for a limited purpose, the opponent should move the court for a limiting instruction, whereby the court would instruct the jury that it can consider that evidence only for a limited purpose, and no other. *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 642 (Tex. 1987) ("Where tendered evidence should be considered for only one purpose, it is the opponent's burden to secure a limiting instruction"); *see Rankin v. State*, 974 S.W.2d 707, 712 (Tex. Crim. App. 1998) (waiting until jury charge stage to instruct jury is too late; court should instruct jury at the time the evidence is received). If the opposing party does not seek such a limiting instruction, the evidence is received for all purposes, even if it was offered only for a limited purpose. *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994); *Cigna Ins. Co. v. Evans*, 847 S.W.2d 417, 421 (Tex. App.--Texarkana 1993, no writ) (where document was read into evidence without a limiting instruction, it was in evidence for all purposes); *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied) (party could not complain that excluded evidence met state-of-mind exception to hearsay rule when the party made only a general offer of the evidence, and not an offer for the limited purpose of showing state-of-mind). *See Texas Commerce Bank v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 76 (Tex. App.--Corpus Christi 1993, writ denied) (evidence admitted for the limited purpose of punitive damages could not be used on appeal to support the verdict on actual damages).

Using hearsay as an example, the sequence is as follows:

Proponent offers hearsay for all purposes.

Opponent objects based on hearsay; objection is sustained.

Proponent reoffers the hearsay for limited purpose.

Opponent renews hearsay objection.

Court overrules hearsay objection.

Opponent requests limiting instruction.

C. STATE OF MIND EXCEPTION. TRE 803(3) creates an exception to the hearsay rule for statements of the declarant's then existing mental, emotional, or physical condition, except where offered to prove the fact remembered or believed, unless such fact relates to the execution, revocation, identification, or terms of the declarant's will. Under the Rule, the comment must relate to a then-existing state of mind, emotion, sensation, or physical condition, not a prior one. Included would be intent, plan, motive, design, mental feeling, pain, or bodily health. The exception ordinarily does not permit the admission of a statement of memory or belief to prove the fact remembered or believed. Such an offer will, therefore, ordinarily be for a limited purpose.

TRE 803(3) finds frequent use in cases involving children. In *Huber v. Buder*, 434 S.W.2d 177 (Tex. Civ. App.--Fort Worth 1968, writ ref'd n.r.e.), a witness was permitted to relate what three children said about which parent they wanted to live with. *Accord, Melton v. Dallas County Child Welfare Unit*, 602 S.W.2d 119, 121 (Tex. App.--Dallas 1980, no writ), which held that a child's preference on custody fits the state-of-mind exception to the hearsay rule. In *Ochs v. Martinez*, 789 S.W.2d 949, 959 (Tex. App.--San Antonio 1990, writ denied), out-of-court statements by a girl regarding sexual abuse by her step-father were inadmissible since they related to past external facts or conditions rather than present state of mind. In *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585 (Tex. App.--Eastland 1990, writ denied), an adult was permitted

to relate a comment she overheard a child make regarding sexual abuse. In *Baxter v. Texas Dep't. of Human Resources*, 678 S.W.2d 265 (Tex. App.--Austin 1984, no writ), a witness was permitted to relate a child's statements that he had been beaten and was afraid of more beatings, and further that he had seen his parents' pornographic materials. In *James v. Tex. Dep't Hum. Resources*, 836 S.W.2d 236, 243 (Tex. App.--Texarkana 1992, no writ), statements by the children indicating that they had been sexually abused did not meet the state of mind exception. Similarly, in *Couchman v. State*, 3 S.W.3d 155 (Tex. App.–Fort Worth, 1999, pet. ref'd), statements of a 5-year old girl, that a man had molested her, were inadmissible under the state of mind exception, but were admissible under the TRE 803(2) excited utterance exception. In this case, the excitement causing the utterance was the child's burning sensation when taking a bath after the fact, rather than the alleged incident itself.

See generally Chandler v. Chandler, 842 S.W.2d 829, 831 (Tex. App.--El Paso 1992, writ denied), involving a husband's allegation that the wife had defrauded him into thinking that her prior Mexican marriage had been dissolved by a Mexican divorce. The court said that it was not error to permit the wife to testify that a Mexican judge had pronounced her divorced from her first husband, since the information was offered to show the wife's state of mind--not the truth of the matter stated, and also because testimony is hearsay when its probative force depends in whole or in part on the credibility or competency of some person other than the person by whom it is sought of be produced, and the competency or credibility of the Mexican judge was not in issue. The Court went on to say that the evidence was admissible to show wife's state of mind, as regards whether she defrauded her husband about the termination of her prior marriage.

Where evidence is excluded on the ground of hearsay, and the proponent wishes to meet the state of mind exception to the hearsay rule, the proponent must reoffer the evidence for the limited purpose of showing state of mind. Absent such a limited offer, the proponent cannot argue on appeal that it was error to exclude the evidence. *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied).

See generally Lehman v. Corpus Christi Nat. Bank, 668 S.W.2d 687, 689 (Tex. 1987) (witness cannot testify as to the state of mind of another person).

D. TRE 705 - EXPERT AND HEARSAY; INSTRUCTION. Lay witnesses can express opinions, but they cannot rely upon hearsay in formulating those opinions. TRE 701. Experts, on the other hand, can rely upon hearsay in formulating opinions, as long as the hearsay is of a type reasonably relied upon by experts in the particular field. TRE 703.

TRE 705(a) provides that an expert "may . . . disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data" on which his/her opinion is based. A question arises as to what extent an expert can relate to the jury hearsay upon which his opinion is based. The Texas Rules of Evidence require a balancing test to resolve this question.

Caselaw Predating 1998 Amendment to TRE 705. In Goode, Wellborn & Sharlot, TEXAS RULES OF EVIDENCE: CIVIL & CRIMINAL § 705.3 (Texas Practice 1988), the professors state their opinion that "[i]f an expert has relied upon hearsay in forming an opinion, and the hearsay is of a type reasonably relied upon by such experts, the jury should ordinarily be permitted to hear it."

However, in *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 365 (Tex. 1987), the Supreme Court said that "ordinarily an expert witness should not be permitted to recount hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion." When the evidence does come

in, "[the expert's hearsay is not evidence of the fact but only bears on his opinion. In a jury trial, the jury must be so instructed." *Lewis v. Southport Sat. Assen*, 480 S.W.2d 180, 187 (Tex. 1972) (plurality opinion).

In *First Southwest Lloyds Ins. Co. v. MacDowell*, 769 S.W.2d 954, 958 (Tex. App.--Texarkana 1989, writ denied), the court said that "[A] much better argument can be made against the admission on direct examination of unauthenticated underlying data . . . ." In that case, the trial court permitted a fire marshall to tell the jury that his opinion that arson occurred was based partially upon what an eyewitness to the fire told him. The expert was not, however, permitted to say to the jury that the witness said he had seen someone speeding away from the building just after the fire started. The trial court also excluded the fire marshall's report, on the grounds that although it met the government record exception to the hearsay rule, it contained hearsay, to-wit: a recounting of what the eye witness had told the fire marshall.

In *Kramer v. Lewisville Mem. Hosp.*, 831 S.W.2d 46, 49 (Tex. App.--Fort Worth 1992), *aff'd*, 858 S.W.2d 397 (Tex. 1993), the Court said: "While such supporting evidence is not automatically admissible because it *is* supporting data to an expert's opinion, neither is it automatically excludable simply because it is hearsay. The decision whether to admit or exclude evidence is one within the trial court's sound discretion."

In *Beavers v. Northrop Worldwide Aircraft Services, Inc.*, 821 S.W.2d 669, 674 (Tex. App.--Amarillo 1991, writ denied), the court held that permitting an expert to testify that he relied upon a government report did not make the report admissible. Citing *First Southwest Lloyds Ins. v. MacDowell*, the court said that "the better judicial position is not to allow the affirmative admission of otherwise inadmissible matters merely because such matters happen to be underlying data upon which an expert relies."

In *Pyle v. Southern Pacific Transportation Co.*, 774 S.W.2d 693, 695 (Tex. App.--Houston [1st Dist.] 1989, writ dism'd), the appellate court reversed due to the trial court's refusal to permit an expert to relate hearsay regarding prior accidents at a railroad crossing as the basis for his opinion that the crossroad was extra-hazardous.

In *Decker v. Hatfield,* 798 S.W.2d 637, 638 (Tex. App.--Eastland 1990, writ dism'd w.o.j.), it was not error to permit a psychologist to tell the jury that the child said he wanted to live with his mother. The appellate court cited the Goode, Wellborn & Sharlot treatise excerpt saying that the jury ordinarily should be entitled to hear the underlying hearsay, and relied upon TRE 705 to hold that the evidence was admissible to show the basis for the expert's opinion.

In *New Braunfels Factory Outlet Center v. IHOP Realty Corp.*, 872 S.W.2d 303, 310 (Tex. App.--Austin 1994, no writ), the court held that an expert properly testified from a hearsay magazine article, when that was one of the bases of his opinion.

1998 Amendment to TRE 705. The contrary lines of authority have to some extent been supplanted by the 1998 amendment to TRE 705. TRE 705 reads:

> **RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION**
>
> **(a) Disclosure of Facts or Data.** The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

> **(b) Voir dire.** Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.
>
> **(c) Admissibility of opinion.** If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.
>
> **(d) Balancing test; limiting instructions.** When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.
>
> **Notes and Comments**
>
> Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

It can be seen that post-1998 TRE 705(b) offers a right to voir dire the expert about the underlying facts or data outside the presence of the jury. TRE 705(c) permits the trial court to reject expert testimony if the court determines that the expert doesn't have a sufficient basis for his opinion. And TRE 705(d) establishes a balancing test for underlying facts or data that are inadmissible except to support the expert's opinion: the court should exclude the inadmissible underlying information if the danger of misuse outweighs the value as explanation or support for the expert opinion.

E. MOTION IN LIMINE VERSUS OFFER OUTSIDE PRESENCE OF JURY.

The Motion in Limine. Appellate cases have made it clear that the denial of a motion in limine is not itself reversible error. *See Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963). There the Supreme Court said:

> If a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered. If they were in fact asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal . . . .

Id. at 335. Nor can the granting of a motion in limine be claimed as error on appeal. *Keene Corp. v. Kirk*, 870 S.W.2d 573, 581 (Tex. App.--Dallas 1993, no writ) (after motion in limine was sustained as to certain evidence, counsel conducted the balance of his examination of the witness without ever eliciting the excluded evidence; error was therefore waived); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.--Tyler 1993, no writ) (fact that motion in limine was sustained, and proponent offered exhibit on informal bill of exceptions, did not preserve error, since it was incumbent upon the proponent to tender the evidence offered in the bill and secure a ruling on its admission).

If a motion in limine is granted and the evidence is nonetheless offered, or argument of counsel made, in violation of the order in limine, an objection to the offending evidence or argument is prerequisite to raising a complaint on appeal at the violation of the order. If the objection is sustained, then the aggrieved party should move that the jury be instructed to disregard the improper evidence or argument. If the instruction is denied, complaint can be premised on the denial. If the instruction is granted, it will cure harm, except for incurable argument, such as an appeal to racial prejudice. In criminal cases, the aggrieved party who timely objects and receives a curative instruction, but who is still not satisfied, must push further and secure an adverse ruling on a motion for a mistrial, in order to preserve appellate complaint. Immediately pushing for a mistrial should not be necessary in a civil proceeding, for the following reason. If the harm is curable, then by necessity a curative instruction will cure the harm. If the harm is incurable, then an instruction will not cure the harm, and the only relief is a new trial. However, a new trial is not necessary if the aggrieved party wins. Judicial economy suggests that the aggrieved party should be able to raise incurable error after the results of the trial are known, rather than having civil litigants moving for mistrial in a case that they otherwise might have won. TRCP 324(b)(5) specifically permits incurable jury argument to be raised by motion for new trial, even if it was not objected to at the time the argument was made. *See generally In re W.G.W.*, 812 S.W.2d 409, 416 (Tex. App.--Houston [1st Dist.] 1991, no writ) (insinuation that cervical cancer was caused by immoral conduct was incurable error). Counsel's violation of a motion in limine exposes the lawyer to a contempt citation.

Ruling Outside Presence of Jury. TRE 103(b) provides that "[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." If the objection is made in connection with presenting a motion in limine, does Rule 103(b) obviate the need to object in the presence of the jury?

This question was considered in *Rawlings v. State*, 874 S.W.2d 740, 742-43 (Tex. App.--Fort Worth 1994, no pet.). In determining whether counsel's objection was a motion in limine or an objection outside the presence of a jury, the appellate court disregarded the label used by counsel and the trial judge, and looked instead to the substance of the objection or motion. The court made the following observations:

> [A] motion in limine characteristically includes: (1) an objection to a general category of evidence; and (2) a request for an instruction that the proponent of that evidence approach the bench for a hearing on its admissibility before offering it. Conspicuously absent from a motion in limine is a request for a ruling on the actual admissibility of specific evidence.
>
> In contrast, Rule 52(b) seems to require both specific objections and a ruling on the admissibility of contested evidence. In fact, we question whether Rule 52(b) comes into play until specific evidence is actually offered for admission. Rule 52(b) only provides that complaints about the admission of evidence are preserved when the court hears objections to offered evidence and rules that such evidence shall be admitted.

The court concluded that in that case the request was a motion in limine that did not preserve error.

See K-Mart No. 4195 v. Judge, 515 S.W.2d 148, 152 (Tex. Civ. App.--Beaumont 1974, writ dism'd) (even if trial objection was seen as incorporating objections set out in motion in limine, still the objection was a general objection). Restating the objection made outside the presence of the jury was held not to be necessary in *Klekar v. Southern Pacific Transp. Co.*, 874 S.W.2d 818, 824-25 (Tex. App.--Houston [1st Dist.] 1994,

no writ).

F. RUNNING OBJECTIONS. A "running objection" is a request to the court to permit a party to object to a line of questioning without the necessity of objecting to each individual question. Customarily this requires counsel obtaining permission from the court to have a "running objection" to all testimony from a particular witness on a particular subject.

The utility of a running objection has been recognized by the Texas Court of Criminal Appeals. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) ("This Court has held on prior occasions that a continuing or running objection has properly preserved error"). In *Sattiewhite v. State*, 786 S.W.2d 271, 283-84 n. 4 (Tex. Crim. App. 1989), the Court stated:

> In promulgating these rules [Rules of Appellate Procedure and specifically Rule 52(a)], we took no "pot shots" at running objections because in certain situations they have a legitimate function. A running objection, in some instances, will actually promote the orderly progression of the trial. When an attorney has an objection to a line of testimony from a witness, it is often disruptive for the trial judge to force him to make the same objection after each question of opposing counsel just so that the attorney can receive the same ruling from the trial judge to preserve error. As long as Rule 52 is satisfied, that is, as long as the running objection constituted a timely objection, stating the specific grounds for the ruling, the movement desired the court to make (if the specific grounds were not apparent from the context of the running objection) then the error should be deemed preserved by an appellate court.

Running objections have been recognized in civil cases such as *Leaird's, Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690-91 (Tex. App.--Waco 2000, pet. denied), where the court said:

> If a trial court permits a running objection as to a particular witness's testimony on a specific issue, the objecting party "may assume that the judge will make a similar ruling as to other offers of similar evidence and is not required to repeat the objection." *Commerce, Crowdus & Canton*, 776 S.W.2d at 620; *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied); *accord Atkinson Gas*, 878 S.W.2d at 242; *Crispi v. Emmott*, 337 S.W.2d 314, 318 (Tex. Civ. App.--Houston 1960, no writ).

Some courts have held that, in jury trials, running objections apply only to similar testimony by the same witness. *Commerce, Crowdus & Canton v. DKS Const.*, 776 S.W.2d 615 (Tex.App.--Dallas 1989, no writ); *Leaird's Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690 (Tex.App.--Waco 2000, pet. denied); *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied). The extent to which a running objection covers testimony of subsequent witnesses depends on several factors: (1) the nature and similarity of the subsequent testimony to the prior testimony; (2) the proximity of the objection to the subsequent testimony; (3) whether the subsequent testimony is from a different witness; (4) whether a running objection was requested and granted, and (5) any other circumstances which might suggest why the objections should not have to be reurged. *Correa v. General Motors Corp.*, 948 S.W.2d 515, 518-19 (Tex.App.--Corpus Christi 1997, no writ). The Texas Supreme Court recently made the following comment on a running objection in a jury trial:

> Because Volkswagen's initial objection to the evidence complied with Texas Rule of

> Appellate Procedure 33.1(a) and its requested running objection clearly identified the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury, recognition of the running objection for more than one witness was appropriate.

Volkswagen of America, Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2005).

The effect of running objections in a non-jury trial was considered In *Commerce, Crowdus & Canton, Ltd. v. DKS Const., Inc.*, 776 S.W.2d 615, 620-21 (Tex. App.--Dallas 1989, no writ):

> In considering the effectiveness of a running objection, it is widely considered that a party making a proper objection to the introduction of testimony of a witness, which objection is overruled, may assume that the judge will make a similar ruling as to other offers of similar evidence and is not required to repeat the objection. See *Bunnett/Smallwood & Co. v. Helton Oil Co.*, 577 S.W.2d 291, 295 (Tex. Civ. App.--Amarillo 1979, no writ); *Crispi v. Emmott*, 337 S.W.2d 314, 318 (Tex. Civ. App.--Houston 1960, no writ). Some courts, though, have held that a running objection is primarily limited to those instances where the similar evidence is elicited from the same witness. See *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied); *City of Houston v. Rigging*, 568 S.W.2d 188, 190 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.). In these cases, however, the trial was to the jury. In our case, the trial was to the court. We hold that a running objection is an effective objection to all evidence sought to be excluded where trial is to the court and an objection is clearly made to the judge. Therefore, appellant's running objection to any evidence admitted for the purpose of proving alter-ego was an effective objection, and the issue was not tried by consent.

It is important that the basis for the running objection be clearly stated in the reporter's record. *See Anderson Development Co., Inc. v. Producers Grain Corp.*, 558 S.W.2d 924, 927 (Tex. Civ. App.--Eastland 1977, writ rec'd. n.r.e.) ("'The same objection on that question' and a 'running objection' are general objections where several objections have been made"). And it is necessary that the request and granting of a running objection be reflected in the reporter's record. *See Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 217-18 (Tex. App.--Houston [14th Dist.] 1989, writ denied).

FINANCIAL CONSIDERATIONS

As divorce lawyers, we normally think about and talk about the legal aspects of divorce. We focus on determining the extent of the community estate, and how that should be divided. We don't focus as much on financial concepts, and how we can use them in divorce practice to help maximize our client's post-divorce financial circumstances.

Sometimes a better settlement approach is to look at the long-term needs of the spouse with inadequate earning capacity. An accountant or financial planner can prepare a spreadsheet projecting financial needs and financial resources for the rest of a person's life and the property division can be approached as a way to meet those needs. Sometimes a high-earning spouse will agree to pay alimony sufficient to support an adequate lifestyle, even if it's more than a specific percent of the net community estate. This may especially be true if the lawyers are careful not to introduce or exacerbate acrimony by operation of the litigation process. This part of the paper deals with financial concepts, and financial tools, that we should understand and use in resolving divorces. A great deal of space is dedicated to valuing a closely-held business, where many of these

financial concepts come into play, and can be seen in their application. Because many financial considerations involve a long-term perspective, long term and demographic issues are considered.

XXV. THE VALUE OF MONEY. Albert Einstein said that compound interest "is the greatest mathematical discovery of all time." We constantly settle divorces with promises to pay in the future. Taking or making future payment requires us to consider interest earned or interest foregone. We must understand the concepts of the present and future value of money, and discounting for the risk that future benefits will not be received on time, or in the full amount.

A. HOW LONG WILL SAVINGS LAST? In determining a good settlement, it is useful to project out how long a cash settlement will last, if used to pay your client's recurrent expenses. For example, say that in settlement you would like the husband to pay the wife, as part of the property division, $120,000 for the wife to put into savings and use over time for living expenses. Assume that the wife can work after divorce, but needs to augment her income by $2,000 per month, to be taken out of this savings balance. If the wife invests the $120,000 at 5%, but makes withdrawals from the fund at the rate of $2,000 per month, how long before the savings, plus earnings, are exhausted? Go, for example, to the following URL (last checked 7-5-05) <http://www.moneychimp.com/calculator/compound_interest_calculator.htm> on the World Wide Web, select "annuity," and at the bottom of the page, select "See 'How Finance Works' for the annuity formula." That will take you to <http://www.moneychimp.com/articles/finworks/ fmpayout.htm>. Set the "Starting Principal" to 120,000; set "Growth Rate" to 5. Now you will have to try different "Years to Pay," but you'll find that you get to $24,000 per year somewhere between a 5- and a 6-year pay-out. So, the $120,000 settlement, invested at 5% per year, and drawn out at the rate of $2,000 per month, will last between 5 and 6 years. If the wife can only invest at 3% per year rate of return, you change the "Growth Rate" to 3%, and you find that the fund will be exhausted in closer to 5 years.

B. CALCULATING PRESENT AND FUTURE VALUE. In settling divorces, we sometimes have to take payments over time. Would you rather have $10,000 today, or $10,000 ten years from now? If you said "today," then you understand the concept of present value. Present value is measured by the amount of interest income lost when the money is received later instead of now. The present value of a single payment to be received in the future is worth less than the present value of the same amount of money paid in installments over the same amount of time. For example, the present value of the right to receive $120,000 at the end of ten years is worth less than the present value of the right to receive $120,000 paid in monthly installments of $1,000 for ten years. Recurrent payments are called an "annuity." Recurrent payments made at the start of each period are called an "annuity due."

Present value can be studied and even calculated on various websites. Search for "calculate present value" in Google, to find a site that explains these principles. To make present value calculations on-line, Google "present value calculator," "present value annuity calculator," or "present value annuity due calculator."

The following tables demonstrate present value determinations. Table One reflects the present value of a single payment of $1,000, at the end of, 1, 2, or 3, etc. years. If the payment in a case you're handling is really $50,000, rather than $1,000, then multiply the number in the box times 50, to determine the present value. For example, the present value of a payment of $1,000 at the end of five years, discounted at 5% is $783.53. The present value of a payment of $50,000 at the end of five years, discounted at 5% is 50 x $783.53 = $39,176.50. Table One also reflects the present value if you assume a discount rate of 6% and 7%.

Table Two reflects the present value of the right to receive $1,000 per year, for a set number of years. Table

One differs from Table Two in that Table One reflects a single payment at the end of X years, while Table Two reflect payments of $1,000 per year for X years. In Table Two, at the end of five years, the sum of $5,000 will have been paid, but because it was paid in installments over time the present value discounted at 5% is $4,329. If the annual payment for Table Two is $24,000 rather than $1,000, multiply the number in the box by 24.

Table Three reflects the present value of the right to receive $1,000 per month, for a set number of years. Table Two differs from Table Three in that Table Two has payments one time per year, while Table Three has payments of one time per month. In Table Three, at the end of five years, the sum of $60,000 will have been paid, but because it was paid in monthly installments over time the present value at the start of the pay period, discounted at 5% is $52,991. If the monthly payment is $2,500 per month rather than $1,000 per month, multiply the number in the box by 2.5.

Table Four compares the present value of $120,000, paid as a lump sum at the end of ten years, paid as ten annual payments of $12,000, and paid as 120 monthly payments of $1,000 each. Obviously, the more frequent the payments, the greater the present value.

These four tables assume that the promise to pay in the future is not accruing interest, as it would under a promissory note. If the balance to be paid (for example) by the husband bears interest at the market rate, then a present value discount is not needed. Note that if government bonds are paying a 5% rate of return for no risk, then the risk associated with collecting from (for example) the husband should be higher than 5%, to reflect the risk of delayed payment or non-payment. The better the collateral, the lower the risk of delayed or non-payment.

TABLE ONE
The Present Value of $1,000.00 paid in a lump sum at the end of
the indicated period of years, discounted at the specified rate:

Years	1 yr	2 yrs	3 yrs	4 yrs	5 yrs	6 yrs	7 yrs	8 yrs	9 yrs	10 yrs
5%	$952.38	907.03	863.84	822.70	783.53	746.22	710.68	676.84	644.61	613.91
6%	$943.40	890.00	839.62	792.09	747.26	704.96	665.06	627.41	591.90	558.39
7%	$934.58	873.44	816.30	762.90	712.99	666.34	622.75	582.01	543.93	508.35

TABLE TWO
The Present Value of $1,000.00 paid at the end of each year, for
the indicated period of years, discounted at the specified rate:

Years	1 yr	2 yrs	3 yrs	4 yrs	5 yrs	6 yrs	7 yrs	8 yrs	9 yrs	10 yrs
5%	$952.38	1,859	2,723	3,546	4,329	5,076	5,786	6,463	7,108	7,722
6%	$943.40	1,833	2,673	3,465	4,212	4,917	5,582	6,210	6,802	7,360
7%	$943.58	1,808	2,624	3,387	4,100	4,767	5,389	5,971	6,515	7,024

TABLE THREE
The Present Value of $1,000.00 paid at the end of each month,
for the indicated number of years, discounted at the specified rate:

Years	1 yr	2 yrs	3 yrs	4 yrs	5 yrs	6 yrs	7 yrs	8 yrs	9 yrs	10 yrs
5%	$11,681	22,794	33,366	43,423	52,991	62,093	70,752	78,990	86,826	94,282
6%	$11,619	22,563	32,871	42,580	51,725	60,340	68,453	76,095	83,293	90,073
7%	$11,557	22,335	32,386	41,760	50,502	58,655	66,257	73,348	79,960	86,127

TABLE FOUR
The Present Value of $120,000.00, paid (i) in a lump sum at the end of 10 years; (ii) in annual installments of $12,000.00; and (iii) in monthly installments of $1,000.00, discounted at the specified rate:

	Lump Sum	Annual Payments	Monthly Payments*
5%	$73,669.59	92,660.82	94,677.62
6%	$67,007.37	88.321.04	90,523.82
7%	$61,001.92	84,282.98	86,643.85

*Assumes monthly payments are paid on the first day of the month (annuity due)

C. RISK. The time value of money does not reflect the risk that a payment may not be received when due. In the real world, a promise to pay at a future time has some risk associated with it. The element of risk increases the discount rate from the present value interest rate set out above. Ten-year U.S. government bonds yield about 5% per year, (although recently the yield has gone slightly below 4%). Calculating the present value of a promise to pay at a 5% discount rate assumes zero risk of non-payment. According to Ibbotson Associates, who has studied the "risk premium" required by investors before investing in bonds issued by the largest companies listed on the New York Stock Exchange (the "risk premium"), you should add some percentage points to the U.S. government bond interest rate to account for the risk of investing in corporate bonds. If you are going to accept a note from the husband as part of the settlement of the divorce, is the promise to pay, as collateralized, more or less safe than investing in corporate bonds? See the discussion in Section XXVI.B.2 below, regarding the build up method for constructing a discount rate for stock ownership.

D. THE RULE OF 72. Along with equating mass to energy, suggesting the existence of the photon, confirming the molecular theory of gas, establishing that light is constant while space and time are relative, and explaining that mass doesn't attract objects but rather bends space, Albert Einstein also developed the Rule of 72. The Rule of 72 says that to estimate the number of years required to double your money at a given interest rate, you divide the interest rate into 72. For example, under the Rule of 72, at 5% interest compounded annually, it would take approximately 14.4 years to double your money. The actual mathematical calculation is 14.21 years. Here are the exact calculations on the length of time it would take to double your money, at the specified rate of interest, compounded annually:

4.0%	17.67 yrs
4.5%	15.75 yrs
5.0%	14.21 yrs
5.5%	12.95 yrs
6.0%	11.90 yrs
6.5%	11.01 yrs
7.0%	10.24 yrs
7.5%	9.58 yrs

XXVI. VALUING A CLOSELY-HELD BUSINESS USING THE INCOME APPROACH.

A. OVERVIEW. The value of a closely-held business is sometimes the most hotly disputed issue in a divorce case. It can cost more money to litigate, and affect the outcome of the divorce, more than a fight over 5 or 10% extra out of the community estate. There are three different methods of valuing a business: the income approach, the asset appraisal approach, and the comparative appraisal approach. Pratt, VALUING A BUSINESS 53 (1989). This paper sketches the income approach.

B. THE INCOME APPROACH. The income approach involves applying a discount rate to future case flow or future earnings to arrive at a value.

1. Historical Earnings, Adjusted. The value of an interest in a business depends on the future benefits that will accrue to it (usually earnings, cash flow or dividends), and sometimes appreciation. Future benefits are usually projected based on historical benefits. The business's historical earnings must be "normalized," by adding back in inappropriate or non-repeating expenses. An inappropriate expense might be payment of salary and benefits to the owner and the owner's family members in excess of the value of the services they render. Another inappropriate expense might be the business's payment of personal expenses of an owner, that are treated as business expenses but are really disguised distributions of profit to the owner. A non-repeating expense might be attorney's fees incurred to defend a lawsuit that is not likely to occur again.

2. Discount Rate or Capitalization Rate. The value of future benefits must be discounted to present value, using a discount rate (the rate used to convert a series of future cash flows to a single present value).

The Texas State Comptroller's office says the following about discounting future cash flows:

> Because investors prefer immediate cash returns over future cash returns, investors pay less for future cash flows--they "discount" them. The amount investors discount the future cash flows depends on the length of time until the cash is due, the amount of risk that the cash will not be tendered when due and the rate of return available from other comparably risky investments. This discounting procedure converts future income to present value usually using annual discount factors. The discount factor for each successive year declines to reflect the reduced value of revenue received in the future. The appraiser calculates the present worth of the forecast revenue stream by multiplying the projected net income (cash flow) for each year by the calculated discount factor for that year. These discount factors are derived from the discount rate (also known as the yield rate), and the process is known as discounted cash flow (DCF) analysis.

Manual for Discounting Oil and Gas Income,
http://www.window.state.tx.us/taxinfo/proptax/ogman/index.html (4-22-05).

If an appropriate discount rate cannot be derived by studying sales of comparable companies, then business appraisers will arrive at a discount rate using the "build up method," based on statistical information taken from the STOCKS, BONDS, BILLS, AND INFLATION VALUATION EDITION YEARBOOK published by Ibbotson and Associates. Using the build-up method, an appropriate discount rate is constructed out of component parts:

> (i) the risk-free rate of return. This is the rate of return an investor can obtain without taking market risk. Typically an appraiser will use the 20-year U.S. Government bond to set the riskless rate of return. At the present time, the riskless rate of return is about 5%.

(ii) the equity risk premium. This is the additional return an investor expects to compensate for the additional risk associated with investing in equities as opposed to investing in a riskless asset. This premium is based upon the difference in the return of the S&P 500 in excess of the government bond income return for the 79 year period 1926-2004. The current Ibbotson equity risk premium (as of 12/31/04) is 7.2%.

(iii) small company risk premium. This is the return on small company stocks in excess of what is predicted based on the CAPM. The "CAPM," or capital asset pricing model, is a model in which the cost of capital for any security or portfolio of securities equals the riskless rate plus a risk premium that is proportionate to the amount of systematic risk of the security or portfolio. According to Ibbotson, it is the additional return that cannot be explained by the betas of small companies. "Beta" is a measure of a security's sensitivity to the market, that is otherwise known as its systematic risk. The systematic risk of a security is estimated by regressing the security's excess returns against the market portfolio's excess returns. The slope of the regression equation is the beta. [http://www.ibbotson.com/content/results_list.asp?Catalog=Glossary&Category=KC%20Glossary%20B] To understand these concepts better, spend some time with your business valuation expert.

(iv) specific company risk premium. This is an addition to the discount rate to take in to account problems of the individual company, like lack of capital, lack of depth of management, over-reliance on one customer, risk of obsolescence of the product.

From 1926 to 2003, the average inflation rate in the USA was 3.03% per year.

C. SUBPOENA THE BANK. If your divorce involves a business controlled by the opposing party, issue a discovery subpoena to the bank(s) where the business has maintained a line of credit or other loans. The bank will have acquired information to support its loans. This should include financial statements of the business, as well as of key owners of the business. Banks sometimes generate their own financial assessments of the business. Here is a sample list of items to request in a subpoena to the bank:

1. Any subpoena served upon [Bank], in connection with this deposition.

2. All signature cards in the possession or control of [Bank] bearing the name or signature of [Husband], or relating in any way to [name of business].

3. Statements on all accounts in the possession or control of [Bank] on which [Husband] is a named account-holder or from which [Husband] is authorized to draw funds, or which relate to [name of business].

4. All promissory notes, deeds of trust, security agreements, financing statements, UCC-1's, guarantee agreements, or other instruments in the possession or control of [Bank] reflecting or referring to indebtednesses owed by [Husband] or [name of business] to [Bank], or indebtednesses guaranteed by [Husband] or [name of business].

5. All documents in the possession or control of [Bank] relating to any pending or possible loan transactions discussed between [Husband] or [name of business] and [Bank].

6. All loan applications, committee minutes and other memoranda in the possession or control

of [Bank] relating to any loan transaction or proposed loan transaction, between [Husband] or [name of business] and [Bank].

7. All financial statements in the possession or control of [Bank] relating to [Husband] or [name of business], dating within the past ten years.

8. All income tax returns and franchise tax returns in the possession or control of [Bank] relating to [Husband] or [name of business], dating within the past ten years.

9. All appraisals or indications of value of [name of business] that are in the possession or control of [Bank].

10. All profitability assessments by [Bank] of [Husband] or [name of business] as a depositor or borrower, or potential depositor or borrower, of Bank.

11. All other items in the possession of [Bank] relating to [Husband] or [name of business].

XXVII. WHO WANTS THE HOUSE? According to a recent CNN.com article <http://money.cnn.com/2005/05/12/real_estate/re2005_100markets_0506/index.htm>, housing prices across the country increased 12.5% from first quarter 2004 to first quarter 2005. In May 2005 FED Chairman Alan Greenspan gave a speech in which he said he saw no nationwide housing bubble, but that he did see local housing bubbles. The following list reflects this view, but shows that Texas housing prices have shown more modest growth. Here is the median home price in the following communities, together with the percent change in value over the past five years, and the projected increase in value in the next year: New York City, $435,000, 92%, 12.6%; Los Angeles, $442,000, 122.3%, 5%; Washington, D.C., $385,000, 107.4%, 13.9%; San Francisco, $750,000, 67.7%, 13.6%; Miami, $240,000, 106.1%, 15.3%; Philadelphia, $160,000,71%, 11.7%; Phoenix/Mesa, $190,000, 53.1%, 17.7%; Dallas, $137,000, 23.1%, N/A; Fort Worth/Arlington, N/A, 23.5%; N/A; Houston, $136,000, 25.2%, N/A; San Antonio, $123,000, 24.8%, N/A; Austin, $151,000, 24.7%, N/A. However, in the past year, in Gillespie County (i.e. Fredericksburg), in the Texas Hill Country, land prices increased 37%. Richard DeKaser, chief economist for National City Corp., recently released a study of housing markets around America. He assessed 2004 markets for being overvalued or undervalued, based on a 25-year review of fundamentals in that particular market, including the ratio of total family earnings to price of the house (a sort of price-to-earnings ratio). The Texas cities he listed are:

San Antonio is 3% overvalued
Austin is 5% undervalued
Houston is 11% undervalued
Dallas is 11% undervalued
Beaumont is 16% undervalued

<http://money.cnn.com/pf/features/lists/home_valuations/>.

Compare this performance of real estate compared to the stock market. The stock market has averaged 6.5% annual growth over the last century. However, it has been through lengthy downturns, as in the 1930s and 1969-1982. The current price-to-earnings ratio is 22, compared to the historical average of 14.

XXVIII. VALUING OIL & GAS PROPERTIES. Section 23.175 of the Texas Property Tax Code requires the Texas State Comptroller's Office to develop and distribute to each county appraisal district an appraisal manual that specifies the methods and procedures to calculate the present value of oil and gas properties using

discounted future income. Section 23.175 also directs each appraisal district to use the specified methods and procedures. This manual is available on-line at http://www.window.state.tx.us/taxinfo/proptax/ogman/index.html. The manual explains the concept of discounting, the discounted cash flow (DCF) equation, DCF appraisal and three acceptable techniques for estimating a "discount rate" using the DCF method. The Manual states that "[the three acceptable techniques for estimating discount rates are: market surveys, oil and gas sales analysis and weighted average cost of capital (WACC), also called 'band of investment.'" The Manual says that, together, these techniques provide a range of discount rates, and the appraiser must estimate the risk for each oil or gas property to assign a discount rate from the discount rate range.

XXIX. AGING OF AMERICA AND THE WORLD. The world population is growing older. People are living longer, and in many cultures the birth rate is declining. An increasing percentage of persons alive are or soon will become old. This demographic alignment is unprecedented in history, and it will have significant effects that are not well-understood at this time.

In the USA, the growth rate for the entire population since 1950 has been about 1% per year. The growth rate of the population over age 65 has been nearly double that. The population over age 75 has grown nearly three times as fast. From 1950 to 2000, the percent of population under age 18 fell from 31% to 26%, while people aged 65-74 years increased from 6% to 7%, and the percent aged 75+ grew from 3% to 6%. By 2050, it is projected that persons 65-74 years of age will grow to 12% of the population. By year 2040, the number of persons over age 75 will exceed the number of persons 65-74 years of age. *Health, United States, 2004* (published by the U.S. Department of Health and Human Services [DHSS]).

A. ACTUARIAL ARMAGEDDON. One effect of an aging population is the approaching prospect of insolvency of the government-based and private retirement programs in the industrialized countries. Just considering Social Security in the United States, the ratio of workers to retirees has fallen from 8-to-1 in 1955 to 3.3-to-1 in 2004, and is projected to fall to 2.2-to-1 in 2030. Here is a table of the past and projected ratio of workers to retirees in six industrialized countries:

	RATIO OF NUMBER OF WORKERS PER RETIREE	
	1995	2050
USA	4.2	2.3
U.K.	2.7	2.1
Canada	3.6	1.6
Japan	2.6	1.5
Germany	2.3	1.2
Italy	1.3	0.7

Note that in 2050 Italy is projected to have more retirees than workers. *See* Congressional Testimony by James B. Lockhart III, Deputy Commissioner, Social Security Administration, May 18, 2004, <http://www.ssa.gov/legislation/testimony_051804.html>.

B. HEALTH CARE COSTS. Another effect of societal aging is increased expenditures on health care, particularly for treatment of chronic and acute health conditions. The DHHS says that "[p]roviding health care services needed by Americans of all ages will be a major challenge in the 21st century." *Health, United States, 2004*, p. 21. See the discussion of health care in Section XXXIII. below.

C. GUARDIANSHIPS, ESTATES AND ELDER LAW. As our population ages, legal problems of the elderly will come to the fore. If the Federal Estate Tax expires, estate planning can shed itself of the complicated pre-death arrangements designed to depress fair market value, but if the gift tax remains in place then older people will retain control of their wealth until they die. Trusts will be used to perpetuate the dying person's control over the wealth after death (through a chosen representative, the trustee). So we can expect a lot of litigation involving trusts. We can also expect will contests and, when the wealthy person starts to become senile, we can expect contested guardianships of the estate, to get control of the money. There is a natural affinity between family law and probate and elder law, but the focus will be children's control of their parents, and not parent's control of their children. Family lawyers' skills in dealing with psychologists and M.D.s, developed in connection with child custody issues, could be very useful but we will have to learn competency tests rather than the MMPI. A good family lawyer is a better litigator than many probate and guardianship lawyers, because family lawyers have litigated so much.

XXX. EMPLOYMENT BENEFITS. Our population is aging and our clients are aging. Post-retirement planning will increasingly become an issue in divorce.

A. DEFINED BENEFIT RETIREMENT PLANS.

1. Legal Aspects. 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 for the benefits to vest. The community estate owns that fraction of the total retirement. Note that the fraction is often misstated to be the number of months during marriage divided by the number of months of employment. It makes no sense to include in either the numerator or the denominator periods of employment that do not accrue any retirement benefits. For example, if the employee has completely vested in retirement, but nonetheless continues to work, the post-vesting employment in no sense earns a retirement benefit as deferred compensation.

Six years after *Taggart*, 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).

This case law is impacted by new House Bill 410, effective September 1, 2005. New Family Code Section 3.007(a) recognizes that the portion of a defined benefit plan, which accrues due to premarital employment, is separate property. However, Section 3.007(b) tells how to calculate the community interest for work done during marriage, and I fear that the formulation will not work where an employee must work for some time

before she/he starts accruing benefits under the plan. Nor will it work when the retirement rights vest and cease accruing before the marriage ends. In my view, it is only employment that accrues a benefit under the plan that should be used to time-allocate separate and community portions.

The problem can be envisioned by examining the case of *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), which involved a stock plan and not a defined benefit plan, and therefore applies to defined benefit plans only by analogy. 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–but the time allocation related directly to those years of employment where the husband accrued benefit under the plan.

2. Financial Aspects. The financial community, including family lawyers, are familiar with discounting future retirement benefits to present value. Until now, we have ignored additional discounting for risk. We can no longer continue to ignore the risk factors for retirement benefits.

Due to rules permitting overly-optimistic projections of stock growth and future interest rates, many private retirement and benefit plans are not actuarially sound. At a Senate Finance Committee hearing on June 7, 2005, the Executive Director of the Pension Benefit Guaranty Corporation (PBGC) testified that the large underfunded pension plans reported as of April 15, 2005, a record shortfall of $353.7 billion, which translates to just 69% coverage of obligations. That is a 27% increase in underfunding from just one year ago. This statistic relates to plans with $50 million or more in obligations. If all defined benefit pension plans are considered, PBGC estimates that, as of September 30, 2004, the total shortfall in all insured pension plans exceeded $450 billion.
<http://www.pbgc.gov/news/press_releases/2005/pr05_48.htm> The PBGC is a federal corporation created

under ERISA, which is supposed to guarantee the solvency of private pension plans. However, there was testimony at the same hearing that PBGC has a $ 23.3 billion deficit due to insolvent private pension plans. Since PBGC is funded solely by insurance premiums paid by participating corporations, to cover its growing insolvency PBGC will have to increase premiums radically and perhaps even attempt to get underwriting from the U.S. government, which has severe actuarial problems of its own regarding Social Security and Medicare, and a budget deficit that may restrict the government's ability to bail out private plans.

In February 2005, PBGC took over US Airways pension plans, which were only 40% funded. PBGC will cover all but $200 million of the shortfall. US Air was the second largest default in PBGC history, costing PBGC $3 billion, second only to the Bethlehem Steel default which cost $3.7 billion. <http://www.pbgc.gov/news/press_releases/2005/pr05_22.htm> In May, 2005, a federal bankruptcy judge approved an agreement between United Airlines and PBGC for PBGC to assume United Airlines' obligations under its four pension plans, on the condition that PBGC would pay $6.6 billion of the $9.8 billion in pension obligations. In this way, United Airlines shifted to the PBGC the responsibility for paying pension benefits for 120,000 current and former airline workers, but payments will amount to only two-thirds of benefits owed.
<http://www.pbgc.gov/news/press_releases/2005/pr05_36.htm>. If United Airlines gains a competitive advantage by eliminating this pension cost from its operating budget, other airlines may be forced to, or may choose to, enter bankruptcy to eliminate or reduce pension costs.

If you become involved in a divorce with a defined benefit pension plan, you may wish to investigate the financial soundness of the plan. If the plan is a single-employer plan insured by PBGC that has been less than 80% funded for the past year or two and less than 90% funded for several years, the plan administrator is required to give annual written notice of the plan's funded percentage and the limitations on PBGC's insurance guarantees. An employee can also obtain information about the plan's funding by requesting the information in writing from the plan administrator. If the plan is under-funded, then retirement benefits may be worth less than the present value of projected benefits assuming full payment.

B. DEFINED CONTRIBUTION RETIREMENT PLANS. Texas cases have approached the characterization of defined contribution plans as if a defined contribution plan is a savings account. If the employee married after the plan was established, the courts subtract the date-of-marriage value from the date-of-divorce value, and the difference is considered to be community property. *See e.g., Pelzig v. Berkebile*, 931 S.W.2d 398, 402 (Tex. App.--Corpus Christi 1996, no writ). *Accord*, *McClary v. Thompson*, 65 S.W.3d 829, 834-35 (Tex. App.--Fort Worth 2002, pet. denied); *Lee v. Novak*, 2001 WL 391530 (Tex. App.–Austin 2001, no pet.) (unpublished); *Smith v. Smith*, 22 S.W.3d 140, 143-44 (Tex. App.--Houston [14th Dist.] 2000, no pet); *Baw v. Baw*, 949 S.W.2d 764, 767 (Tex. App.--Dallas 1997, no writ). New House Bill 410, effective 9-1-05, permits tracing inside defined contribution plans. The tracing will be simple if the increase in value is attributable to an increase in market value of an apartment building or a ranch. If the increase in value is attributable to a mixture of increases in value of stocks and bonds, which have been liquidated, mixed with dividends and interest, and reinvested, then expensive and complex tracing will be required. House Bill 410 is consistent with general principles of tracing, that for some reason eluded the courts of appeals in deciding how to approach defined contribution plans. This legislative assist is a most welcome, but expensive, correction.

C. EMPLOYEE STOCK OPTIONS. Texas courts have heretofore applied the inception of title rule to employee stock options. If the options were granted during marriage, they are community property, regardless of whether the employee must continue in employment after divorce in order for the options to

vest. *Boyd v. Boyd*, 67 S.W.3d 398, 410-411 (Tex. App--Fort Worth 2002, no pet.) (applying inception of title rule); *Charriere v. Charriere*, 7 S.W.3d 217 (Tex. App.--Dallas 1999, no pet.) (rejecting a time-allocation rule). This is all changed by new House Bill 410, which applies a time allocation-rule to employee stock options. The formula is troubling in that the denominator of the fraction is described in Section 3.007(d)(1) as going from date of grant until the date the grant could be exercised. But Section 3.007(f), requires a recalculation of the fraction if vesting occurs earlier than expected. The statute equates vesting with exercisability, when they are not necessarily the same. It is inaccurate to envision the option as deferred compensation for work done after the option vests. Once the option has vested, the option has been earned, and working or not working after vesting does not "earn" or "forfeit" the option. A time allocation approach is more sensible than the inception of title approach taken by the courts of appeals, so a well-worded statute is a big improvement. But the statute requires some work.

XXXI. SOCIAL SECURITY AND MEDICARE. The Social Security Act was signed by President Roosevelt in 1935. Monthly benefits began in January 1940. Congress provided for cost of living adjustments (COLAs) in 1950. Congress adopted automatic COLAs tied to inflation in 1975.

In 2002, 46.5 million people received Social Security benefits, of which 32.4 million were retirees and their dependents, 6.9 million were survivors, and 7.2 million were disabled and their dependants. 190 million workers were fully insured for Social Security retirement and/or survivor benefits, of which approximately half were baby boomers.

In 2002, 12% of the population was age 65 and over. In 2030 20% of the population is expected to be 65 and over.

A. LEGAL ASPECTS OF SOCIAL SECURITY. Social Security is a benefit flowing from a federal statute. As such, a court in a divorce cannot divest a spouse of his/her social security benefit. However, the divorced spouse of a worker who paid Social Security taxes may be entitled to Social Security benefits by virtue of the marriage. See Section XXXI.B.1 below.

B. FINANCIAL ASPECTS OF SOCIAL SECURITY. Social Security can be examined at the level of an individual, or in the aggregate of all individuals.

1. Individual Level. You can estimate your client's Social Security benefit by going to the Benefits Calculator page of the Social Security Administration, <http://www.ssa.gov/planners/calculators.htm>. Here is an example of one such calculation. For a worker born on January 1, 1950, who had taxable income in 2004 of $100,000 or more, Social Security Retirement benefits would be as follows, if she/he retires in the given year: in 2012 (at age 62 and 1 month) $1,527.00 per month; in 2015 (at age 66) $2,056.00; in 2019 (at age 70) $2,742.00. These numbers are stated in 2005 dollars. If this person qualified for Disability Insurance today, the monthly benefit would be $1,988. If this person died today, a minor child would receive $1,502, and the spouse caring for the child would receive $1,502. There is a family maximum of $3,504.80 per month.

You can also request an individualized Social Security Statement on-line, if you provide the name, social security number, and address where the statement should be mailed, together with information regarding current year's income and projected future income. The statement will come in about 4 weeks.

The following table sets out the earliest retirement ages to receive Social Security retirement payments, based

on current law:

Year of Birth	Full Retirement Age
1937 or earlier	65 years
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1941	65 and 8 months
1942	65 and 10 months
1943-1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

A divorced spouse is entitled to claim benefits based on the contributions made by his/her former spouse, if the marriage lasted at least ten years. The claiming ex-spouse must be at least age 62 and the other ex-spouse must be eligible for benefits, but not necessarily receiving them. The maximum benefit the claiming ex-spouse can receive in this situation is 50% of the benefit the ex-spouse would receive at full retirement age. The claiming ex-spouse can instead apply for benefits under his/her own Social Security record, if that would be advantageous.

2. Aggregate Level. The official Summary of the 2005 Annual Report of the Social Security and Medicare Boards of Trustees states:

> The fundamentals of the financial status of Social Security and Medicare remain problematic under the intermediate economic and demographic assumptions.

This is the grim news from the Trustees running the Social Security and Medicare Trust Funds. The Summary states that the Social Security Trust Fund reserves will be *exhausted* in 2041. To bring the Fund into balance, if we act right now, would require a 15% increase in payroll tax or an immediate reduction in benefits of 13%, or some combination of the two.

Many Americans will need Social Security benefits to help pay bills during retirement. Disabled Americans (30% of Social Security beneficiaries are disabled or survivors) will need the disability benefit to help deal with their disabilities. President Bush has made the viability of Social Security a political issue, so far with little success.

According to the 2005 Social Security Trustees Report ("Trustees Report"), in 13 years (2018) the Old Age and Survivors Insurance Fund (OASI) will start paying out more than it is taking in. If interest (which accrues but is not actually paid by the U.S. government) is included, cash flow becomes negative in 2028. Outgo will exceed income for the Disability Insurance (DI) Trust Fund starting in 2005. If interest to be paid by the U.S. government is included, the DI Trust Fund's cash flow goes negative in 2014. The Trustees Report projects that the Social Security Administration will be able to meet 100% of its obligations based on

a combination of incoming payroll taxes and liquidation of assets (i.e., U.S. government bonds) for OASI until 2043 and for DI until 2027. The combined OASIDI Trust Fund becomes insolvent in 2041. At that point, to use President Bush's words, Social Security will be "bankrupt."

There is a problem even prior to 2041. The Social Security Trust Fund assets consist of non-negotiable U.S. government bonds, not cash. When the Trustees go to cash out the bonds, the federal government will have to pay off the bonds out its general fund. Since the government operates at a deficit, and that deficit is funded by borrowing, to pay off Social Security bonds the federal government will have to borrow from Peter to pay Paul, or the federal government will have to increase its revenues, such as through an increase in the income tax.

Social Security is funded by the payroll tax. Currently payroll taxes are 12.4% of wages up to $90,000.00, half paid by the employee and half paid by the employer. This tax is separate from the income tax that flow into the U.S. government's General Fund.

We can expect two things to happen at some point: (i) taxes to fund Social Security will increase; (ii) Social Security benefits will be delayed or reduced.

C. FINANCIAL ASPECTS OF MEDICARE. The Medicare situation is much worse than the Social Security situation. The Hospital Insurance (HI) Trust Fund pays for in-patient hospital and related care. The HI trust is funded by a 2.9% payroll tax, half paid by the employee and half paid by the employer. According to the Trustee's Report, the HI Fund will become insolvent in nine years (2014).

The Supplemental Medical Insurance (SMI) Trust Fund pays for physician and outpatient services (Part B) and a prescription drug benefit (Part D) that will begin in 2006. The SMI obligation is funded 75% by the federal government (from its General Fund) and the rest by premiums paid by beneficiaries and, as to Part D, some payments from States. The SMI Trust Fund is by definition solvent because federal law requires that it be funded out of the federal government's budget and premiums paid by beneficiaries.

While the looming insolvency of the HI Trust Fund is not much discussed, the insolvency will have to be handled no later than 2014 by (i) reducing benefits, (ii) increasing the Medicare payroll taxes or (iii) appropriating more of the federal budget to HI. The SMI Part D (prescription drugs) draw on the federal budget presents a problem, considering the large government deficits which must be funded through bond sales and the eventual practical limit on the federal government's ability to continue to convince investors (particularly foreign investors) to keep lending money to the United States government. That is a much larger issue that is too difficult to address here, if not anywhere.

Conclusion. Eventually, we are going to hit the wall on Social Security and Medicare. The sooner we act, the less it will hurt. Don't count on the politicians and their supporters to restrict current benefits or increase payroll taxes just to help our children and our grandchildren. Keep an eye on projected insolvency dates, which are revised annually, and plan accordingly.

XXXII. LIFE EXPECTANCY. Life expectancy in the U.S. has increased since 1950, due to a decline in infant mortality, and a decline in mortality from heart disease, stroke and accidents. However, the infant mortality rate increased in 2002 for the first time since 1958. Decreased cigarette smoking has caused mortality to decline. Still, in 2002 25% of men and 25% of women were cigarette smokers. Overweight, obesity and lack of exercise are a negative trend, especially among children. Still, overall life expectancy at

birth in 2002 was 77.4 years. Here are the life expectancy figures for the indicated year, at birth, at age 65, and at age 75, by race and gender:

Life Expectancy at Birth (in years)

Year	White		Black	
	Male	Female	Male	Female
1900	46.6	48.7	32.5	33.5
1950	66.5	72.2	59.1	62.9
2002	75.1	80.3	68.8	75.6

Life Expectancy at Age 65

1950	12.8	15.1	12.9	14.9
2002	16.6	19.5	14.6	18.0

Life Expectancy at Age 75

2002	10.3	12.3	9.5	11.7

In settling a divorce, your client's life expectancy cannot be calculated by as subtracting your client's age from average life expectancy at birth for the current year. This is because the longer you live the more death threats you have outlived, and the greater your chances of exceeding the average life expectancy at birth. You can use the tables above to estimate your client's life expectancy.

XXXIII. HEALTH CARE. According to the U.S. Department of Health and Human Services Report *Health. Unites States, 2004*, health care expenditures in the U.S. in 2002 totaled to $1.6 trillion, an increase of 9.3% over 2001. The United States spends more per capita on health than any other country. Much of this spending is for health care to control or reduce the effects of chronic diseases and conditions that affect an aging population. In 1999-2000, approximately 8% of American over 20 years of age had diabetes, diagnosed or not, and the incidence of diabetes rises sharply with age. *Id.* at 9. Healthcare expenses in the United States increased at the rate of 11% during the 1980s, but dropped to 7.1% in 2000, 8.5% in 2001, and 9.3% in 2002. *Id.* at 14. In 2003, the rate of increase of the medical care component of the Consumer Price Index was 4%, compared to an overall inflation rate of 2.3%. *Id.* at 14.

These trends do not reflect the impact of an unexpected worldwide pandemic like the 1918 influenza virus, which killed 50-100 million people (more than combat and civilian deaths in World War I). Viruses mutate constantly, and if one monkey virus or swine virus crosses species it can present our immune systems with a threat they are not equipped to cope with. AIDS is one such example we are all familiar with. The recent outbreak of SARS was contained, but another avian virus from Asia could be spread worldwide in a matter of weeks, and if it's aggressively deadly we won't have time to find a cure, so a great number of us could get sick or die.

A. PRIVATE HEALTH INSURANCE. Health insurance is a critical aspect of our future welfare. The cost of health insurance for ourselves and our employees is an increasingly important part of our law

practices, and our profitability. And it is an increasingly important factor in our clients' post-divorce welfare. This is particularly true of older divorcing spouses who have limited employment prospects, since the best and most affordable health insurance is obtained through employment.

The major source of health insurance for American not covered by Medicare is private employer-sponsored group health insurance. Private health insurance can be purchased on an individual basis, but typically it costs more and covers less. In 2002, 70% of the population under age 65 had health insurance, 94% through the workplace. DHHS estimates that 6% of employees' total compensation is devoted to health insurance. Health, United Stated, 2004, p. 16. According to one study, in 2004 employer health insurance premiums increased by 11.2 percent, or nearly four times the rate of inflation. This was the fourth consecutive year of double-digit increases. The annual premium for an employer health plan covering a family of four averaged nearly $9,950, or $829 per month. The annual premium for single coverage averaged $3,695. The Henry J. Kaiser Family Foundation, *Employee Health Benefits: 2004 Annual Survey* (September 2004). It is estimated that health insurance premiums will rise to an average of more than $14,500 for family coverage in 2006. <http://www.nchc.org/facts/cost.shtml>. The cost of health insurance is affecting our economy. On June 7, 2005, GM Chair and CEO Rick Wagoner announced that GM will eliminate 25,000 manufacturing jobs in the next 2-1/2 years, due to financial pressures caused in part by the $5 billion per year cost of health care benefits for the company's 1.1 million current employees and retirees and their families (according to Wagoner, $1,500 of the cost of each new GM car is attributable to the company's health care expense).

In 2002, 17% of Americans under age 65 had no health insurance. *Health, United States, 2004*, p. 26. That's nearly one out of every five persons. Texas, however, is higher than average, with an estimated 28.4% uninsured. *Id.* at 13; Table 153.

A good summary of health insurance for Texas residents is on the web at <http://www.healthinsuranceinfo.net/tx00.html>, *A Consumer's Guide to Getting and Keeping Health Insurance in Texas*.

B. HIPAA. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) contains "portability rules" that allow workers to change jobs and group health plans more easily without being denied benefits under the new health plan because they had a pre-existing health condition.

C. TEXAS' HIGH RISK HEALTH INSURANCE POOL. Texas has a high risk pool health insurance program, called the Texas Health Insurance Risk Pool. This plan offers health coverage for persons who are HIPAA eligible and for people with expensive health conditions who are unable to buy individual coverage. You qualify for the Risk Pool if you are HIPAA eligible. More explanation is set out at <http://www.healthinsuranceinfo.net/tx03.html>, *A Consumer's Guide to Getting and Keeping Health Insurance in Texas*.

D. COBRA. The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) amended ERISA to require private employee benefits plans (for 20 or more employees) to permit employees and their dependents, at their own expense, to continue group health care benefits if they leave the group due to a "qualifying event." "Qualifying events" include loss of benefits coverage due to (1) the death of the covered employee, (2) a reduction in hours that causes the worker to lose eligibility for coverage, (3) divorce, which normally terminates the ex-spouse's eligibility for benefits, or (4) a dependent child reaching the age at which coverage terminates.
<http://www.dol.gov/dol/topic/health-plans/cobra.htm>. Where the qualifying event is divorce, coverage can

be continued for up to 36 months. <http://www.dol.gov/ebsa/faqs/faq_consumer_ cobra. html>.

XXXIV. CURRENT AND FUTURE ECONOMIC CONDITIONS. The Federal Reserve publishes the Current Economic Conditions, commonly known as the Beige Book, eight times per year. Each Federal Reserve Bank gathers anecdotal information on current economic conditions in its District through reports from Bank and Branch directors and interviews with key business contacts, economists, market experts, and other sources. The Beige Book summarizes this information by District and sector. An overall summary of the twelve district reports is prepared by a designated Federal Reserve Bank on a rotating basis. The Beige Book is on-line at http://www.federalreserve.gov/FOMC/BeigeBook/2005.

BIG IDEAS

XXXV. THINKING OUTSIDE THE BOX. Albert Einstein said: "Problems cannot be solved by thinking within the framework in which the problems were created." There are many different ways to help yourself to move outside the framework in which a problem was created. Here are some techniques to help you think outside the box.

A. MENTAL GYMNASTICS. My old boss, Jim Stewart had a number of techniques to force thinking outside the box. Jim used what he called "mental judo." In judo, you use an opponent's strength, weight and momentum against the opponent. Mental judo requires you to determine the thrust of the opponent's case, and instead of meeting it head-on, you position yourself in such a way as to use your opponent's thrust to help you achieve your purpose. It requires some thought to understand what your opponent intends to do, and to figure out how to position yourself, on the facts and on the law, to use the force of your opponent's attack to throw them.

Another technique Jim Stewart used surfaced particularly during jury trials, when a witness's testimony or judge's ruling just threw a monkey wrench into the plan of our whole case. On the next break, Jim would go out into the hallway and say: "You know, that's the best thing that could have happened to our case. Now we just have to figure out why!" We would then start a process of how to reframe the testimony, or the ruling, into a light where it actually helped, and not hurt, our case.

B. FRAMING AND REFRAMING. An Aggie walked up to the counter and said: "I'd like to order a cheeseburger, french fries, and a Dr. Pepper." The man behind the counter said: "You must be an Aggie." The Aggie, surprised, said: "How did you know that? All I did was order a cheeseburger, french fries and a Dr. Pepper. Why would that make you think I'm an Aggie?" The man behind the counter rolled his eyes, and said: "Because this is a hardware store."

Like a frame on a picture, a frame in psychology is the context we impose on a situation. A frame is the overlay of meaning we impress onto a situation. The way we frame a situation can affect all we see and think about the situation. Frequently we frame subconsciously, without even realizing how our frame biases us toward a particular way of looking at the situation.

If you are presented with a problem, in your personal life, or in representing a client, you will frame it in a certain way. Family lawyers tend to frame client problems as family law problems, even when they might more suitably be framed as financial problems, or psychological problems, or communication problems. Framing a problem as a family law problem causes the lawyer to fail to see possible solutions that could come

from reframing the situation as a tort problem, or a fiduciary law problem, or a contract problem, or a criminal law problem.

Many successful mediators achieve settlement by reframing the perspectives of the two litigants. It is not necessary to settlement that both parties adopt the same frame; in fact, settlement may only be possible by both parties maintaining different frames. Consider the techniques discussed in this section as tools to help you reframe situations to your advantage.

C. BRAINSTORMING.. One such method is "brainstorming." For brainstorming, you gather a group of people together, that are picked for their different talents, or different perspectives, or because their support is necessary to implement any solutions that may emerge from the brainstorming session. The Gathering Phase. Using a chalk board or white board or flip chart, you write out a description of the problem. Once the problem is understood, participants race ahead, tossing out possible solutions, or ideas or approaches to the problem, even and especially unusual or outlandish ones, which you write down in no particular order. During this idea gathering phase, there can be no criticism of ideas, since you want to open up the flow of ideas. Go until the energy and enthusiasm drops off, and ideas stop emerging. The Grouping Stage. Then you move to a new chalk or white board, or clean sheets of paper, and start grouping similar ideas together. The groups will suggest themselves from the ideas you have written down during the gathering phase. List each idea under a topic (sometimes more than one topic), and as you list an idea, scratch it off the gathering phase board or page. As you are transferring ideas from the gathering place to the grouping place, you may decide to break one category down into two, or to consolidate two categories into one. The Prioritizing Phase. Once grouping is finished, you first go through the groups and strike out or consolidate duplicates. Then you take the items in each group and prioritize them from one to five, or one to ten. The prioritizing can be based on desirability, or feasibility, or effectiveness, or some combination. But try to get a consensus from the group on the order of priorities. For each group, strike off the suggestions that are too difficult to accomplish, or too uncertain in result, or which have too negative side-effects, or cost too much, etc. You should be left with a short list under each topic. Then evaluate the topics, and see if some can be gives a lower priority than other topics, or even eliminated. The Synthesizing Phase. Once topics and suggestions under the topics have been culled, you are left with workable solutions. The group then talks about how to pursue these possible solutions to achieve the desired result. If the leader of the session is well-prepared, a good brainstorming session can be accomplished in 45 minutes to an hour--although the synthesizing phase can last longer, particularly if you break up into subgroups to come up with detailed outlines of how to pursue different solutions.

D. SCENARIO PLANNING. Planning for the future requires thinking outside the box. Previously, planners would work to construct the most likely future, and make plans accordingly. During World War II, the U.S. Air Force developed a technique of trying to imagine different things the enemy might do, and planning a response. During the 1960s, Herman Kahn, who had been part of the Air Force planning effort, refined scenario planning as a tool for business, and became one of America's top "futurists." Scenario planning was implemented by Pierre Wack, at Royal Dutch/Shell Corporation, in the 1970s, and Shell successfully anticipated and survived the precipitous drop of oil resulting from the Yom Kippur War. This made scenario planning popular. Scenario planning is a process in which planners invent, and then evaluate in depth, several widely-divergent scenarios of possible futures. The team does not select the one scenario that is most likely to come true. Instead, the planners assume each will come true, and they evaluate the decisions they can make today that will help prepare for that future. For an example, you can go to http://www.gbn.com/ and see a recent scenario planning presentation to the World Affairs Counsel on "The Future of the Middle East."

XXXVI. CHANGING PARADIGMS. A paradigm is a prevailing view of things. It reflects a consensus on how people see things and how they react to things around them. There are scientific paradigms, cultural paradigms and legal paradigms. Examining the current paradigms, and ongoing changes to the current paradigms, may lead you to insights that cannot not be reached inside the paradigm.

A. SCIENTIFIC PARADIGMS. In 1958, Thomas Kuhn published a book entitled The Structure of Scientific Revolutions. In it he analyzed how scientific theories develop. Kuhn argued that the normal role for scientists is to conduct experiments that reenforce the existing paradigm. When anomalies arise that do not agree with the existing paradigm, at first they are ignored. When enough anomalies accumulate, then researchers realize there is something wrong with the prevailing model, and the search begins for a new model.

At one time, it was generally accepted that the earth was flat. This paradigm fell in the wake of sea voyages in the 1400s and 1500s. At one time, the consensus was that the earth was the center of the universe. This paradigm fell in the face of the mathematical and observational discoveries of the 1600's. Newton's laws of motion fell in 1887, when measurements showed that the speed of light did not obey Newton's laws. Einstein provided the replacement paradigm in 1905, by proposing that the speed of light was constant and that space and time are variable. Newton's conception of gravitational attraction fell in 1916, with Einstein's theory that mass bends space. For over 2,000 years, people believed that human health depended on the balance of four humors in the body (blood, phlegm, bile, and black bile). This paradigm fell in the 1870s, when Pasteur and others developed the germ theory by showing that microorganisms cause disease.

There are countless other paradigms that have come and gone: creationism fell to Darwin's theory of natural selection, as well as evidence of long-term geological change and the fossil record, etc. The theory of Racial inequality fell to evidence of the variability of individual traits.

B. LEGAL PARADIGMS. The Roman Empire was replaced by feudalism which was replaced by monarchy which was replaced by representative government, in Western Europe. The American Revolution established government by consent, and the right to revolt (but this right to revolt did not apply to the Whiskey Rebellion (1794), and finally died an exhausted death at Appomattox Courthouse (1802)). The change of paradigms is easier to see in the broad sweep of history. It is harder to identify the current paradigms in law and to predict changes.

1. Jury. The right to a jury trial, developing in common law countries since 1066, was formalized in the Magna Carta in 1215, and was constitutionally fixed in the USA in 1790 (with the adoption of the 7th Amendment). Yet today, we are suffering a crisis of confidence in the jury system, and the jury system is being assailed from all sides. In Texas, high money recoveries in personal injury cases have led to the Supreme Court and then the Legislature imposing an elevated burden of proof for exemplary damages, at the trial level (*Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), TCP&RC § 41.003(c)) and on appeal (*Southwestern Bell Tel. Co. v. Garza*, --- S.W.3d ----, 2004 WL 3019205, *15 (Tex. 2004) (rehearing pending)), the requirement of a unanimous verdict for exemplary damages (TCP&RC § 41.003(d)); the popularity of arbitration; the judicial approval of pre-trial jury waiver (*In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 131 (Tex. 2004)); increasing restrictions on the use of expert testimony in personal injury litigation (*E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex.1995)) ; and the waning of broad form jury submission. (*Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000)).

2. Family Law. Family law has suffered less a loss of confidence in the jury, but more an erosion of

confidence in the entire litigation process. This is partly because of judicial turnover. In Texas, the partisan election of judges, influenced by presidential or gubernatorial elections and demographic shifts, has resulted in the installation and replacement of many judges without regard to merit. Lagging judicial salaries have caused many trial judges to seek positions on higher courts or in higher-paying private practice jobs. The highly discretionary nature of many family law adjudications resulted in inconsistency in results, and led to statutory child support and visitation guidelines, and the more concrete calculations of economic contribution claims as a substitute for discretionary marital property reimbursement claims. Uncertainty in outcome of divorce, and the increased cost of litigation driven by that uncertainty, prompted the amendment of the Texas Constitution in 1980 to permit pre-marital partition of subsequently acquired property, and prompted the Legislature in 1987 to adopt the Uniform Premarital Agreement Act, giving persons about to marry broad authority to define their mutual rights and responsibilities. In the past 25 years, the voters have changed the marital property provision of the Texas Constitution three times: once in 1980 to permit partition of future property as well as agreements to make income from separate property separate, and to permit gifts of future income; again in 1987 to permit community property survivorship rights; and again in 1999, to permit the conversion of separate property into community property by agreement. These changes permit persons about to marry and spouses to "opt out"of our constitutional scheme of community property.

3. The Litigation Process. The popularity of mediation is an expression of the litigants' desire to avoid the pain, cost and vagaries of trial. The popularity of agreements to arbitrate future disputes reflects a desire to short-circuit the delays of litigation and the chance of being assigned to or returning to a judge the parties would rather not have. The effort since 2001 to try collaborative law as an alternative to litigation is an effort to replace the adversarial method with a cooperative model. It's too early to tell whether collaboration will replace litigation or just be a costly prelude to litigation. Mediation was originally offered as an alternative to litigation, but mediation eventually evolved into just a replacement for trial and not a replacement for the entire litigation process. If collaborative law fails to reduce the acrimony and cost of litigation, then the requirement of replacing lawyers when collaboration fails only increases the cost of divorce.

In Texas in 1989, the Legislature essentially eliminated lawyers from workers' comp dispute resolution. In 2003, damage caps on medical malpractice damages dried up medical malpractice litigation. The proliferation of class action lawsuits led to severe restrictions on class actions, imposed by Texas Supreme Court rulings, state legislation, and most recently congressional legislation. Federal legislation designed to reduce the cost of the welfare system has moved much child support enforcement from private litigation to an administrative process. In child custody disputes, with the power beginning in 1987 to appoint joint managing conservators, to the 1997 presumption in favor of joint managing conservatorship, Texas has moved from a mother/father dichotomy toward a model of shared parenting. Statutory visitation guidelines, adopted in 1989, essentially mandate a 59/41% split of overnight possession. All of these changes restricted judicial discretion, to achieve greater uniformity of result.

4. Standardization. A broad view of Texas family law practice over the past 30 years shows a trend toward standardization, achieved through wide acceptance of State Bar-approved forms, Pattern Jury Charges, federally-required (federal Child Support Enforcement Amendments of 1984) but legislatively-imposed child support guidelines; visitation guidelines; statutory supplanting of traditional conflict of laws rules upon divorce (old TFC § 3.63(b)); and the replacement of common law marital property reimbursement with a more mathematically-precise economic contribution scheme. The Texas Legislature also has adopted uniform laws: URESA, UCCJA, Uniform Premarital Agreement Act, UCCJEA, UIFSA, the Uniform Parentage Act, etc.

5. Legislation Supplementing and Now Modifying Common Law. Traditionally, Texas marital property law was founded on a constitutional provision (Tex. Const. art. XVI, § 15), implemented through developing case law. Then in the late 1960s the Legislature adopted marital property and divorce-related statutes that initially restated common law, but later began to change common law principles ("no fault" divorce in 1969), the abolition of alienation of affection. Conflict of laws rules were replaced in divorce by old TFC § 3.63(b). *See Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982). TFC Ch. 3, subch. E, supplanted marital property reimbursement with an economic contribution claim. HB410, "corrects" unfortunate trends established by our courts of appeals relating to retirement benefits employer stock options, and disability payments.

6. Mobility and Globalization. Our nation and world are more mobile than ever before. Prior to the railroad, most people never went more than 25 miles from where they were born. Now people travel and move thousands of miles from their birthplace. Middle Eastern oil drives all of the world's advanced economies. Our manufactured goods are cheaper than ever before, due to the low cost of labor in China. In return American consumerism is spreading across the globe. Many marriages have spanned several states.

Mobility has impacted family law. To combat provincialism in the litigation of interstate child custody, the National Conference of Commissioners on Uniform Laws adopted the UCCJA in 1968. The U.S. Congress adopted the Parental Kidnaping Prevention Act in 1981. Texas finally adopted the UCCJA in 1986. The even tighter UCCJEA was issued in 1997. URESA, which standardized interstate child support enforcement, was issued in 1950, and revised in 1968, and was replaced by UIFSA in 1992. Expanded rights for non-custodial parents are colliding with post-divorce mobility, resulting in more fights over relocating children. The Texas Supreme Court first articulated standards for child relocation as recently as *Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002). Relocation law is now a patchwork across America, with the only uniformity being the rule of continuing jurisdiction under the PKPA and the UCCJEA. Relocation standards await standardization, which likely can only come from the American Law Institute, unless the U.S. Supreme Court were to find a Commerce Clause, due process, or privileges and immunities component to relocating minor children, in which event Congress could pass a uniform law.

International family law is becoming more of an issue. The Hague Convention on the Civil Aspects of International Child, promulgated in 1980, was ratified by the United States Senate in 1986, and enabling legislation was passed by Congress in 1988. It is working tolerably well between Western nations, but no so well with South American, Middle Eastern and Asian countries. International enforcement of divorce property divisions is still in the Dark Ages.

7. Same-Sex Marriage. The advent of no fault divorce in Texas in 1970, greatly broadened the field in which we make our living, and changed to focus of divorce from proof of fault to division of property. We are now undergoing another paradigm shift involving marriage: same-sex marriage, and civil unions. An early point in the process was the New York case of *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 50 (N.Y. 1989), which recognized the surviving partner of a homosexual couple as a member of the "family" for purpose of New York City's rent control regulations. Then in *Baehr v. Lewin*, 852 P.2d 74 (Haw. 1993), a plurality of the Supreme Court of Hawaii held that state law prohibiting same-sex marriage was subject to strict scrutiny in an equal protection challenge. This ruling was overruled by a constitutional amendment in 1998 which permits the Hawaii legislature to limit marriage to opposite-sex couples. The Hawaiian legislature recognized "reciprocal benefits" for same-sex couples, which is more limited than civil union and much more limited than same-sex marriage. In *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998), a trial judge in Alaska ruled that persons in Alaska had a fundamental right to same-sex marriage (based on

the constitutional right to privacy), and also that denying them the right to marry denied equal protection of the law. Nine months later, Alaskans voted by a margin of more than 2-to-1 to amend the Alaska constitution to permit only opposite-sex marriages.

In 1998, the Netherlands passed a "registered partnership" law, permitting civil unions between gay and between heterosexual couples. Belgium has recognized same-sex marriage, for all purposes except adoption. In 2001, the Netherlands gave same-sex marriage equal status with opposite-sex marriage. In Canada, Ontario, British Columbia, Quebec, Nova Scotia, Manitoba, Saskatchewan, Newfoundland and Labrador, along with the Yukon Territory, have made same-sex marriage legal. Civil unions have been recognized in France and Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996), Finland (2000), Germany (2001), Portugal (2001), the Swiss canton of Zürich (2002), the Argentine city of Buenos Aires (2003), and New Zealand and the Australian state of Tasmania (2004). In June 2005, Spain legalized gay marriage.

a. In Texas. Texas does not recognize same-sex marriage. 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). The Texas Legislature enacted Section 6.204 of the Texas Family Code, effective September 1, 2003, which prohibits Texas, and its governmental subdivisions, from recognizing a same-sex marriage or civil union legitimized in another state. The Texas Legislature has passed a proposition to be put before Texas voters on November 8, 2005, to amend the Texas Constitution to provide that "[m]arriage in this state shall consist only of the union of one man and one woman" and that "[t]his state or a political subdivision of this state may not create or recognize any legal status identical or similar to
marriage." HJR 6, 79th Legislature.

b. Other States. The Supreme Court of Vermont ruled, in *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), that same sex couples are entitled to the same benefits and protections as afforded to married opposite sex couples. In 2000, Vermont enacted statutes recognizing civil unions between gay couples. The Supreme Court of Massachusetts ruled in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), that denying the right of same-sex marriage violated the Massachusetts Constitution. The *Goodridge* case stirred up nation-wide interest in same-sex marriage, and same-sex couples flocked to places around the country where local officials announced their willingness to perform same-sex marriages. These marriages, performed in San Francisco, Sandoval County, N.M., New Paltz, N.Y., and Multnomah County (Portland), Oregon, were subsequently declared to be invalid by the judiciary in those jurisdictions.

Eighteen states have written opposite-sex only marriage laws into their state constitutions: Alaska, Arkansas, Hawaii, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon and Utah. The constitutionality of the state law permitting only opposite-sex marriage was upheld in Arizona in *Standhardt v. Superior Court of State*, 281, 77 P.3d 451, 456 (Ariz. App. 2003), and in Indiana in *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005). Two Washington trial court judges have declared the Washington state marriage restriction violative of the state constitution. *Castle v. State of Washington*, 2004 WL 1985215(Wash. Super., Sept. 7, 2004)*; Anderson v. King County*, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004). In *Hernandez et al. v. Robles et al.*, 7 Misc.3d 459 (Supreme Court, New York County, Ling-Cohan, J., 2005), a New York trial judge ruled the ban against same-sex marriage unconstitutional. Another New York trial judge disagreed, in *Seymour v. Holcomb*, 7 Misc.3d 530, 790 N.Y.S.2d 858 (N.Y. App. Div. 2005), and ruled the ban constitutional. In *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp.2d 980 (D. Neb. May 12, 2005), a federal judge in Nebraska invalidated the Nebraska constitutional provision saying that marriage could only be between

a man and a woman, on the grounds that the amendment violated First Amendment, the amendment violated equal protection guarantees, and the amendment was an unconstitutional bill of attainder.

Legislatures have passed statutes recognizing civil unions or some rights for unmarried domestic partners in the following states: California; Hawaii; Maine; Maryland; New Jersey; Vermont; Washington, D.C. Legislatures in the following states have approved state constitutional amendments banning or permitting the legislature to ban same-sex marriage, for submission to statewide vote: Kansas (approved by voters April 5, 2005); Texas (November 8, 2005); Alabama (June 2006); South Carolina (November 2006); South Dakota (November 2006); and Tennessee (November 2006). On April 20, 2005, Connecticut enacted a statute recognizing civil unions between gay couples, to become effective on October 1, 2005.

c. Full Faith and Credit. The real concern driving the national controversy is a fear that a state that does not permit gay marriage or civil unions in its borders might be forced by liberal judges to recognize a gay marriage or civil union established in another state, because of the constitutional requirement of full faith and credit. Full faith and credit is mandated by Article IV, Section 1 of the United States Constitution. The general full faith and credit statute, adopted by the first Congress in 1790, is set out at 28 U.S.C. § 1728. The conditions for full faith and credit for custody and visitation decrees are set out in 28 U.S.C. § 1728A.

In 1996, the Unites States Congress passed the "Defense of Marriage Act" (DOMA), 28 U.S.C. §1728C. DOMA defines a "marriage" as a "legal union between one man and one woman." DOMA 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." Despite this expression of congressional will, since full faith and credit is constitutionally mandated, federal and state statutes are subject to constitutional attack. George Bush campaigned for President in 2004 with the argument that an amendment to the U.S. Constitution might be necessary to avoid judicial decrees negating statutory prohibitions of same-sex marriage based upon a U.S. Constitutional right to privacy, equal protection, substantive due process, or the like. DOMA has been upheld against constitutional attack by a federal bankruptcy judge in Tacoma, Washington, in *In re Kandu*, 315 B.R. 123, 133 (Bankr. W.D. Wash. 2004), by a federal district judge in Tampa, Florida, in *Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005) , and by a federal district judge in California, *Smelt v. County of Orange*, 2005 WL 1429918 (C.D. Cal. 2005).

In *Littleton v. Prange*, 9 S.W.3d 223, 226 (Tex. App.–San Antonio 1999, pet. denied), the San Antonio court of appeals 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.

The fact that same-sex marriages and civil unions cannot be recognized in Texas courts does not preclude persons of the same sex from asserting rights based in contract, property law, partnership law, etc. For example, in *Small v. Harper*, 638 S.W.2d 24 (Tex. App. – Houston [1st Dist.] 1982, writ ref'd n.r.e.), one woman was held to have created a fact issue regarding an oral partnership with another woman to hold land and share profits. The fact that they were lesbian lovers did not preclude the claim. If a civil union or same-sex marriage from another state cannot be recognized in Texas, perhaps alternate legal theories will allow you to achieve your purpose.

XXXVII. THE IMAGE OF LAWYERS. Periodically a leader of lawyers will decry the lack of respect for lawyers among the population. Lawyers have always been disrespected by some segments of the community.

It's in the nature of law, and the way the law affects people. Often people have disrespect for lawyers because they disrespect certain laws, or the way certain laws apply to them. In that instance, it is the legislators and judges who should be disrespected. Many people disrespect lawyers for using legal principles that defy common sense, or for twisting the meaning of words to avoid or achieve some end. I'm afraid that is an unavoidable aspect of the practice of law.

Here are some quotations about lawyers that reflect a sense of their esteem in different times, and different circumstances.

- Jesus of Nazareth, Luke 11:46 (80-130 AD): "And he said, Woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers."

- Jonathan Swift, GULLIVER'S TRAVELS (1726):

  > I said there was a Society of Men among us, bred up from their Youth in the Art of proving by Words multiplied for the Pleasure, that White is Black, and Black is White, according as they are paid. To this Society all the rest of the People are Slaves.
  >
  > For Example, if my Neighbour hath a Mind to my Cow, he hires a Lawyer to prove that he ought to have my Cow from me. I must then hire another to defend my Right, it being against all Rules of Law that any Man should be allowed to speak for himself. Now in this Case, I who am the right Owner lie under two great Disadvantages. First, my Lawyer being practiced almost from his Cradle in defending Falshood; is quite out of his Element when he would be an Advocate for Justice, which as an Office unnatural, he always attempts with great Awkwardness if not with Ill-will. The second Disadvantage is, that my Lawyer must proceed with great Caution: Or else he will be reprimanded by the Judges, and abhorred by his Brethren, as one that would lessen the Practice of the Law. And therefore I have but two Methods to preserve my Cow. The first is, to gain over my Adversary's Lawyer with a double Fee; who will then betray his Client by insinuating that he hath Justice on his Side. The second way is for my Lawyer to make my Cause appear as unjust as he can; by the Cow to belong to my Adversary; and this, if it be skilfully done, will certainly bespeak the Favour of the Bench.
  >
  > Now, your Honour is to know that these Judges are Persons appointed to decide all Controversies of Property, as well as for the Tryal of Criminals; and picked out from the most dextrous Lawyers who are grown old or lazy: And having been byassed all their Lives against Truth and Equity, are under such a fatal Necessity of favouring Fraud, Perjury, and Oppression; that I have known some of them refuse a large Bribe from the Side where Justice lay, rather than injure the Faculty, by doing any thing unbecoming their Nature or their Office.
  >
  > It is a Maxim among these Lawyers, that whatever hath been done before, may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the Name of Precedents, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail of decreeing accordingly.

In pleading, they studiously avoid entering into the Merits of the Cause; but are loud, violent, and tedious in dwelling upon all Circumstances which are not to the Purpose. For Instance, in the Case already mentioned: They never desire to know what Claim or Title my Adversary hath to my Cow; but whether the said Cow were Red or Black; her Horns long or short; whether the Field I graze her in be round or square; whether she was milked at home or abroad; what Diseases she is subject to, and the like. After which they consult Precedents, adjourn the Cause from Time to Time, and in Ten, Twenty, or Thirty Years, come to an Issue.

It is likewise to be observed, that this Society has a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they have gone near to confound the very Essence of Truth and Falsehood, of Right and Wrong; so that it may take Thirty Years to decide whether the Field, left me by my Ancestors for Six Generations, belongs to me, or to a Stranger three hundred Miles off.

In the Tryal of Persons accused for Crimes against the State the Method is much more short and commendable: The Judge first sends to sound the Disposition of those in Power; after which he can easily hang or save the Criminal, strictly preserving all due Forms of Law.

Here my Master interposing, said it was a Pity that Creatures endowed with such prodigious Abilities of Mind as these Lawyers, by the Description I gave of them, must certainly be, were not rather encouraged to be Instructors of others in Wisdom and Knowledge. In Answer to which, I assured his Honour, that in all Points out of their own Trade, they were usually the most Ignorant and stupid Generation among us, the most despicable in common Conversation, avowed Enemies to all Knowledge and Learning; and equally to pervert the general Reason of Mankind in every other Subject of Discourse, as in that of their own Profession

- Carl Sandburg (1920)

THE LAWYERS, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand Wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know
a dead man's thoughts too well.

In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.

When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it

And find enough to fasten a tooth in?

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

The work of a bricklayer goes to the blue.
The knack of a mason outlasts a moon.
The hands of a plasterer hold a room together.
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers—tell me why a hearse horse snickers hauling a lawyer's bones.

XXXVIII. FEMINIZATION OF THE LAW. In the past 30 years, women have greatly increased their presence in the legal profession. Ronald Reagan appointed the first female to the United States Supreme Court, Sandra Day O'Connor, in 1981. Bill Clinton appointed the first female U.S. Attorney General, Janet Reno, in 1993. In 1982, Governor William Clements appointed the first female, Ruby Sondock, to the Texas Supreme Court. In 1993, Rose Spector was the first woman elected to the Texas Supreme Court. The San Antonio Court of Appeals is now entirely female.

According to a Year 2000 survey by the ABA's Commission on Women in the Profession, women made up 47% of law students, and 27.9 % of all lawyers in America. That same survey showed that two U.S. Supreme Court Justices were women, while 16% of Federal Circuit Court judges were women, and 14.8% of U.S. District judges were women. The survey showed that 26.3% of justices on state courts of last resort were women. In a 2003 report, the Commission reported that women had risen to 49% of law school students, 29.1% of lawyers in America, 17.4% of Circuit Court judges, 16.2% of U.S. District judges, and 28% of justices on state courts of last resort. By 2003, women constituted 32.88 percent of law school faculty. <http://www.abanet.org/women/glance2003.pdf>

How is this feminization of law affecting us? One prominent change is an increased emphasis on balance between professional and personal obligations. According to the 2001 ABA Commission on Women in the Profession's Manual BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE (Deborah L. Rhode), employed women spend about twice as much time on domestic matters as employed men. P. 17. Women therefore feel more impact when professional demands consume available time.

The pressure to spend more time working has increased. The ABA Manual estimates that the average work week has risen by 15 hours since the late 1960s. *Id*. at p. 26, n. 25. In the 1960s, lawyers billed 1,300 hours per year; now many lawyers in private practice bill 2000 hours per year, or more. This push for more billable hours is driven partly by the increased number of lawyers creating competition for legal work, and increased salary levels paid to associate attorneys. Also, technological innovation has increased the demand for instant and total accessability. Having larger numbers of women in the profession has increased the awareness of the imbalance between professional and personal lives, and as we experiment for ways to achieve a better balance (such as alternative work schedules, telecommuting, family leave, organizational support, etc.), male lawyers will also enjoy the benefit of a more balanced life. Traditionally, lawyers have focused on income

as a source of satisfaction; the pendulum may start to swing to other non-monetary aspects of satisfaction.

One wonders whether the feminization of law might move us from an adversarial paradigm to a consensus-building paradigm. Witness the current discussion of Sandra Day O'Connor's moderating role on the U.S. Supreme Court. However, a female prime minister of the United Kingdom went to war in the Faulkland Islands, and a female prime minister of India went to war with Pakistan. Giving women the vote in 1918 didn't improve the quality of our politicians. Realistically, we already seem to be resolving more of our disputes by consensus (e.g., mediation), but the adversarial model of litigation will probably remain as the backdrop to all dispute resolution. If the judiciary is going to remain neutral in dispute resolution, an adversarial process for litigation may be unavoidable.

XXXIX. DIFFERING PERSPECTIVES. It is difficult to keep in mind that different people can have different views of the same subject and they can all be right. Consider John Godfrey Saxe's (1816-1887) poem about six blind men and the elephant.

It was six men of Indostan
To learning much inclined,
Who went to see the Elephant
(Though all of them were blind),
That each by observation
Might satisfy his mind.

The First approached the Elephant,
And happening to fall
Against his broad and sturdy side,
At once began to bawl:
"God bless me! but the Elephant
Is very like a wall!"

The Second, feeling of the tusk
Cried, "Ho! what have we here,
So very round and smooth and sharp?
To me `tis mighty clear
This wonder of an Elephant
Is very like a spear!"

The Third approached the animal,
And happening to take
The squirming trunk within his hands,
Thus boldly up he spake:
"I see," quoth he, "the Elephant
Is very like a snake!"

The Fourth reached out an eager hand,
And felt about the knee:
"What most this wondrous beast is like
Is mighty plain," quoth he;

"'Tis clear enough the Elephant
Is very like a tree!"

The Fifth, who chanced to touch the ear,
Said: "E'en the blindest man
Can tell what this resembles most;
Deny the fact who can,
This marvel of an Elephant
Is very like a fan!"

The Sixth no sooner had begun
About the beast to grope,
Than, seizing on the swinging tail
That fell within his scope.
"I see," quoth he, "the Elephant
Is very like a rope!"

And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right,
And all were in the wrong!

XXXX. CHOICES. As life unfolds, we each make choices, as Robert Frost elegantly described in his 1920 poem "The Road Not Taken." Do we make our destiny, or do we fulfill it?

APPOINTMENT IN SAMARA

A merchant in Baghdad sent his servant to the market.
The servant returned, trembling and frightened. The
servant told the merchant, "I was jostled in the market,
turned around, and saw Death.

"Death made a threatening gesture, and I fled in terror.
May I please borrow your horse? I can leave Baghdad
and ride to Samarra, where Death will not find me."

The master lent his horse to the servant, who rode away,
to Samarra.

Later the merchant went to the market, and saw Death in
the crowd. "Why did you threaten my servant?" He asked.

Death replied,"I did not threaten your servant. It was
merely that I was surprised to see him here in Baghdad,
for I have an appointment with him tonight in Samarra."

XXXXI. ATTITUDE. William James (1842 - 1910), the great American psychologist, said: "Human beings, by changing the inner attitudes of their minds, can change the outer aspects of their lives." Martha Washington (1732 - 1802) said: "I am still determined to be cheerful and happy, in whatever situation I may be; for I have also learned from experience that the greater part of our happiness or misery depends upon our dispositions, and not upon our circumstances."