FAMILY LAW UPDATE

BUSY LEGISLATURE, BUSY COURTS

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IKE VANDEN EYKEL
EMILY MISKEL
Koons, Fuller, Vanden Eykel & Robertson, P.C.
2311 Cedar Springs, Suite 300
Dallas, Texas 75201
(214) 871-2727
(214) 871-0196, fax
www.koonsfuller.com

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SPECIAL THANKS

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I. Introduction

In addition to the Family Code revisions by the 81st Legislative Session, last year was a busy year for Texas courts. This article covers some of the significant legislative and judicial changes in family law for the calendar year 2009. This article is intended to present summaries of some of the key changes in Texas family law, but does not address every statutory revision or relevant case. Family law can be a highly technical area of practice, so it is always wise to consult with a specialist on complex issues or changing areas of the law.

II. Divorce Procedure

A. Legislative Changes

60-Day Waiting Period Waived in Certain Cases
Tex. Fam. Code § 6.702.

If a court finds that (1) Respondent has been convicted or received deferred adjudication for a family violence offense against Petitioner or a member of Petitioner's household or (2) Petitioner has an active protective order against Respondent as a result of family violence committed during the marriage, then the 60 day waiting period for granting a divorce is waived.

B. Featured Cases

✯ *Texas Supreme Court* ✯

A new citation is not required for service of an amended petition requesting a more onerous judgment.
In re E.A., 287 S.W.3d 1 (Tex. 2009).

In a divorce, Father and Mother were appointed joint managing conservators, with mother having the exclusive right to determine the children's primary residence and father having visitation. Five months after the divorce, Father filed a motion to modify, seeking the right to designate the primary residence of the children, but failing to allege special circumstances. Father obtained service on Mother, who did not make any answer. Father subsequently amended his petition to request sole managing conservatorship, alleging that Mother used drugs, and attached a supporting affidavit. Father attempted to serve the amended petition via certified mail three times, but all attempts were returned undelivered. The trial court granted a default judgment giving Father the exclusive right to determine the children's residence, denying visitation to Mother, and ordering Mother to pay child support. Mother appealed, arguing that a new citation was required for the amended petition, and therefore sufficient service to support a default judgment had not been obtained.

Although prior Texas law required a new citation for a more onerous petition, the court held that service under T.R.C.P. Rule 21(a) is sufficient to support a default judgment. In this case, however, Father failed to actually achieve service of the more onerous petition on Mother, so the default judgment was overturned.

The concurring opinion indicates concern that this may allow litigants to add to their petitions after default occurs. Commentators also note a potential constitutional issue in termination of parental rights cases.

Since husband not served with more onerous petition, error on face of the record.
Cox v. Cox, 298 S.W.3d 726, No. 03-08-00650-CV (Tex. App.—Austin 2009).

This case relates to the Texas Supreme Court case discussed above. In a divorce, Husband and Wife entered into an agreement that purported to be binding and irrevocable and contained agreed temporary orders which the court entered. On the day of the default judgment hearing, Wife filed an amended petition. When Husband did not appear at the hearing, the trial court entered a final decree incorporating provisions from the amended petition that were not contained in the agreement.

Husband appealed, claiming he had not received notice. The court considered several factors. Wife did not file her amended petition until the day of the hearing. Since she did not provide any proof of service, the court assumed that Husband was served on the day the pleading was filed. Therefore Husband did not receive notice at least three days before the hearing. Further, the address on the certificate of service was not Husband's correct address. Based on all these factors, the court held that Husband was not properly served under T.R.C.P. 21(a), and a default judgment could not be entered under the more onerous amended petition.

There is no right to counsel in a divorce case.
Chrisman v. Chrisman, 296 S.W.3d 706, 2009 WL 1233691 (Tex. App.—El Paso 2009).

Wife appealed a divorce decree, claiming she was denied effective assistance of counsel. The court affirmed the decree, noting that no Texas court has ever determined that a divorcing spouse has a constitutional right to effective assistance of counsel.

Trial court did not err in considering mother's SAPCR pleadings, though they were filed under the cause number of a severed divorce case.
In re S.M.V., 287 S.W.3d 435 (Tex. App.—Dallas 2009).

Husband and Mother filed for divorce. When the Biological Father of a child intervened, the trial court severed the SAPCR from the divorce. All three parties filed pleadings in the SAPCR requesting orders for conservatorship, visitation, and support. The divorce and SAPCR were tried concurrently. At trial, Husband moved to strike Mother's pleadings in the SAPCR because she had filed them under the cause number of the divorce. The trial court overruled his objection, and issued an order appointing Husband, Biological Father, and Mother as joint managing conservators. Husband appealed on the grounds that the trial court erred by allowing Mother to put on evidence in the SAPCR proceeding when she had not filed any pleadings under that cause number.

The appellate court looked to T.R.C.P. 71 which requires that if a party has mistakenly designated any pleading, the court, if justice requires, shall treat the pleading as if it had been properly designated. In considering Mother's pleadings, the trial court was following guidance from the Texas Supreme Court that decisions should be based on substance rather than technicalities. Since husband was a party to both the divorce and SAPCR, he had actual notice of all pleadings. Therefore, the trial court did not err.

Filing a general denial to a spouse's petition claiming interest in a home can be sufficient to raise a separate property claim.
Chavez v. Chavez, 269 S.W.3d 763 (Tex.App.—Dallas 2009).

In Wife's divorce petition, she pleaded an interest in the parties' home. Husband filed a general denial. The trial court found the home to be Husband's separate property. Wife appealed, claiming that Husband never claimed the home to be separate property in any pleading. The court held that Husband's general denial had, by denying Wife's interest, properly raised the

issue of ownership. The court further held that in a divorce suit, with regard to property division, a trial court may construe pleadings more liberally than in other civil suits.

C. Additional Cases

In order to recover funds from a trust, the trust must be joined as a party to the divorce, and the trustee must be served. Further, even if a spouse is a trustee, the spouse must be sued in his or her trustee capacity.
In re Ashton, 266 S.W.3d 602 (Tex.App.—Dallas 2009, orig. proceeding).

Trial court abused its discretion by denying father's motion to disqualify mother's attorney due to conflict of interest.
In re Z.N.H., ___ S.W.3d ___, 2009 WL 474067 (Tex. App.—Eastland 2009).

Trial court erred in denying a motion for new trial without hearing when the facts alleged by the movant entitled him to a new trial.
Anderson v. Anderson, 282 S.W.3d 150, 2009 WL 622631 (Tex. App.—El Paso 2009).

Trial court erred in granting summary judgment when wife had produced some evidence that she had not voluntarily signed the agreement and husband's statute of limitations and laches defense not ripe until divorce filed.
Martin v. Martin, 287 S.W.3d 260, 2009 WL 988651 (Tex. App.—Dallas 2009).

Trial court erred by entering three final judgments.
Lavender v. Lavender, 291 S.W.3d 19, 2009 WL 1748970 (Tex. App.—Texarkana 2009).

Father could not request an extension to file a motion for new trial under T.R.C.P. 306a when he received notice of the judgment less than twenty days after trial court signed the order.
In re Rhodes, 293 S.W.3d 342, No. 02-09-043-CV (Tex. App.—Fort Worth 2009, orig. proceeding).

Trial court abused its discretion by dismissing an inmate's petition for divorce for want of prosecution.
Hutchinson v. Hutchinson, 299 S.W.3d 840, 2009 WL 3449732 (Tex. App.—Dallas 2009).

Trial court abused its discretion by denying mother's motion for new trial after she did not receive proper service of process under the Hague Convention.
Velasco v. Ayala, ___ S.W.3d ___, 2009 WL 3931074 (Tex. App.—Houston [1st Dist.] 2009).

Trial court erred in awarding custody of children after dismissing divorce and declining jurisdiction under the UCCJEA.
In re Lay Wah, ___ S.W.3d ___, 2009 WL 2152565 (Tex. App.—Dallas 2009).

If decree is unclear about how annuity company is to make payments, an interpleader action is appropriate, and the company can be awarded attorney fees.
Clayton v. MONY Life Ins. Co. of America, 284 S.W.3d 398, 2008 WL 5671661 (Tex. App.—Beaumont Feb. 26, 2009).

Rule 11 does not require a writing to be filed before a party withdraws consent, rather it must be filed before enforcement is sought. Further, a court can orally render judgment on a Rule 11 that is effective immediately; signing and entry of a corresponding decree is a ministerial act.
Wright v. Wright, No. 04-08-00175-CV, 2009 WL 331892 (Tex.App.—San Antonio Feb. 11, 2009).

III. Property Division

A. Legislative Changes

Dividing Certain Employee Benefits
Tex. Fam. Code § 3.007.

This change corrects the formula for calculating separate property claims in certain employee benefits. The amendment corrects the numerator in the equation for determining the property interest in restricted stock grants and stock options granted prior to or during marriage but vesting after dissolution.

Economic Contribution – Repealed
Tex. Fam. Code §§ 3.401-3.410, 7.007.

One of the biggest changes resulting from the 81st Legislature was the repeal of the economic contribution claim and the amendment of the reimbursement claim. Elements from the previous economic contribution claim have been incorporated into the newly-revised statutory reimbursement claim. Economic contribution had been difficult to calculate, because the damaged estate was entitled to share in the gains from the original investment. Although the reimbursement grounds have been expanded, in a reimbursement claim, the damaged estate is only entitled to a dollar-for-dollar return of the original money. The change also eliminated the ability to offset a reimbursement claim against a spouse's separate property homestead for use and enjoyment of the house. This significant change affects cases filed after September 1, 2009.

B. Featured Cases

Statutory list of reimbursement claims is non-exclusive, not intended to limit trial court's power to use equity.
Bigelow v. Stephens, 286 S W.3d 619, 2009 WL 1474735 (Tex. App.—Beaumont 2009).

Wife used money from sale of separate property home and insurance proceeds from separate property to reduce Husband's separate property debt. Trial court awarded Wife approximately $30,000 in reimbursement. Husband challenged the award, claiming that Wife's use of separate funds to pay a secured note did not meet the statutory requirements for reimbursement. The court held that the statutory definition of reimbursement contains a non-exhaustive list of potential claims. The Legislature, by giving examples, did not intend to limit the trial court's power to use equity to achieve a fair division of the parties' property.

Note: Since the Legislature has now revised the statutory definition of reimbursement, it is unclear whether the provision will still be considered a non-exhaustive list, or whether a court would find that since the Legislature added some claims, but not others, it has expressed its intent that those be the exclusive remedies.

Husband who failed to give credible evidence concerning property division at trial cannot complain of trial court's division on appeal.
Palacios v. Palacios, ___ S.W.3d ___, 2009 WL 1653453 (Tex. App.—Amarillo 2009).

In a divorce, the court divided four main disputed property items: two properties in Mexico, a residence, and a lot. At trial, Husband admitted that he had no idea about one of the values, and that he had no evidence of appreciation. Husband then appealed the trial court's division, claiming the trial court abused its discretion. The appellate court held that the ultimate goal of the trial court is to reach a just and right distribution of the estate. Given this, valuing the marital property is not the end in itself but rather a means to the end. Conclusory statements about what

property is worth are of little assistance in determining market value. Under the doctrine of invited error, Husband may not complain about a result that he and his ex-wife helped cause when both failed in their obligation to tender credible and probative evidence upon which the trial court could reasonably rely.

Note: One commentator disagrees with the application of the doctrine of invited error, stating that it would have been more appropriate for the court to refuse to rule until the parties provided sufficient evidence to support a division.

Admission of parol evidence allowed to establish existence of pre-marital agreement when original unable to be produced.
Jurek v. Couch-Jurek, 296 S.W.3d 864, 2009 WL 3020084 (Tex. App. – El Paso).

At divorce, neither spouse could locate a copy of their premarital agreement. However, Wife offered evidence that their agreement was identical to her sister's premarital agreement. The attorney who prepared the agreements testified that they were identical. A CPA testified that the spouses confirmed the existence of a premarital agreement shortly after the marriage. The spouses also conducted their finances as if a premarital agreement existed – they maintained separate bank accounts, bought property based only on their separate financial information, and received title only in their own names. Based on this evidence, the trial court admitted the agreement and divided the property in accordance with it.

Husband appealed, stating that Texas Rule of Evidence 1002 prohibits admission of parol evidence regarding the contents of the agreement. The appellate court interpreted the best evidence rule together with Texas Rule of Evidence 1004, stating that if a document cannot as a practical matter be produced because of its loss or destruction, then the production of the original is excused. Since Husband failed to prove that the original was purposefully destroyed by Wife, the trial court's judgment was affirmed. Further, although Husband initially objected to the admission of the agreement based on one subsection of rule 1004, he failed to renew his objection throughout trial and appealed based on a different subsection of rule 1004. This is an example of the importance of continued objection and of ensuring that the objection at trial matches the appellate complaint.

C. Additional Cases

In appealing a disproportionate division, it is hard to prove that the trial court's valuation of small businesses is an abuse of discretion.
Curlee v. Curlee, No. 11-07-00269-CV, 2009 WL 714191 (Tex.App.—Eastland Mar. 19, 2009).

To demonstrate abuse of discretion in valuing a business, a spouse must show evidence of true value and prove that the ultimate division was manifestly inequitable so as to warrant reversal.
In re Ridgeway, No. 06-08-00104-CV, 2009 WL 670296 (Tex.App.—Texarkana Mar. 17, 2009).

Trial court erred in failing to include a separate property mortgage in valuing wife's separate property estate.
Knight v. Knight, ___ S.W.3d ___, 2009 WL 3461149 (Tex. App.—Houston [14 Dist.] 2009).

If there is commingling and accounts cannot be traced without gaps in statements, the accounts will be considered community property.
In re Born, No. 06-08-00066-CV, 2009 WL 1010876 (Tex.App.—Texarkana Apr. 16, 2009).

A reimbursement award will be overturned if a spouse fails to prove that funds contributed were separate property.
Beckner v. Beckner, No. 02-07-00456-CV, 2009 WL 279485 (Tex.App.—Fort Worth Feb. 5, 2009).

IV. Post-Decree Enforcement

A. Legislative Changes

Attorney Fees
Tex. Fam. Code §§ 9.014, 9.106, 9.205.

The amendment removes the words "as costs" and simply provides that attorney fees may be ordered in post-decree enforcement proceedings and proceedings to divide previously-undivided property. Additionally, attorney fees may be awarded in a post-decree rendering of a QDRO between the parties to the divorce.

B. Featured Cases

✯ *Texas Supreme Court* ✯

Agreements incorporated in a divorce decree are contractual obligations not enforceable by contempt.
In re Coppock, 277 S.W.3d 417, 52 Tex. Sup. Ct. J. 361, 2009 WL 353499 (Tex. 2009).

The trial court's final decree of divorce incorporated a mediated settlement agreement. The agreement permanently enjoined them from communicating with each other in a coarse or offensive manner. Wife subsequently communicated with Husband numerous times in a manner he considered to violate the decree. On Husband's motion to enforce, the trial court held Wife in contempt, ordered her to serve imprisonment, and placed her on community supervision. When she failed to report for incarceration, the court issued a writ of capias for her arrest. The court of appeals—treating Wife's petition for writ of habeas corpus as a petition for writ of mandamus—denied relief. The Supreme Court ordered Wife released on bond pending review of her habeas corpus petition.

In a habeas corpus action challenging confinement for contempt, the relator bears the burden of showing that the contempt order is void—if it is beyond the power of the court to enter it or if it deprives the relator of liberty without due process of law. To be enforceable by contempt, an order must set out the terms of compliance in clear and unambiguous terms. A person cannot be sentenced to confinement unless the order unequivocally commands that person to perform a duty or obligation. Without decretal language making clear that a party is under order, agreements incorporated into divorce decrees are enforceable only as contractual obligations.

A contempt order ordering imprisonment for failure to make car payments required by a divorce decree is void as imprisonment for debt. Also, contempt order may not be used to make substantive changes to divorce decree.
In re White, ___ S.W.3d ___, 2009 WL 1153396 (Tex. App.—Tyler 2009, orig. proceeding).

In a division of the debts of the spouses, the trial court ordered Husband to pay the lien on a truck awarded to Wife. On an enforcement motion by Wife, the trial court found Husband in contempt for missed payments and ordered him confined for thirty days. The trial court suspended Husband's commitment on conditions including that pickup and delivery of the parties' child be confined to Anderson County, Texas. Husband filed a mandamus proceeding in

the appellate court, contending that the trial court's order violates the Texas constitutional provision against imprisonment for debt.

Although an order requiring payment of debt may be enforced through legal processes such as execution or attachment, a confinement order premised on failure to pay a debt is void. If a court finds that certain property at issue currently exists and awards that property as part of the community estate's division, the party is a constructive trustee and it is not a debt. In such cases, a court may find the holding party in contempt. Here, Husband's payments for the truck are addressed in the division of the marital estate, specifically, debts to Husband. The divorce decree does not indicate that funds to make payments on the truck presently existed, nor does it specify particular community funds from which the payments were to be paid. Without such identification of existing funds, Husband cannot be considered a constructive trustee or fiduciary who holds community assets that rightfully belong to Wife. Therefore, Husband's obligation to make payments on the truck is a debt owed to the finance company. Thus, the trial court abused its discretion and the portion of the order for enforcement by contempt is void as imprisonment for debt.

Husband also appealed the trial court's order regarding pickup of the child. The appellate court held that the modification procedure in the Texas Family Code is the exclusive means for making substantive changes to a divorce decree that provides for possession of and access to a child. Because the trial court's contempt order made substantive changes to the possession of and access to the child as ordered in the underlying divorce decree, the trial court abused its discretion by ordering that pickup and delivery of the child be confined to Anderson County, Texas.

Trial court erred by refusing to compel arbitration agreement incorporated in divorce decree.
Provine v. Provine, ___ S.W.3d ___, 2009 WL 4967245 (Tex. App.—Houston [1st Dist.] 2009).

The divorce decree incorporated a mediated settlement agreement dividing the community estate. The mediated settlement agreement provided that any and all disputes would be decided through binding arbitration with the mediator. Wife subsequently filed an enforcement action, and Husband moved to compel arbitration. The trial court denied Husband's motion, and Husband appealed.

A party moving to compel arbitration must establish (1) the existence of a valid, enforceable arbitration agreement and (2) that the claims asserted fall within the scope of that agreement. The burden then shifts to the party opposing arbitration to prove a defense to the arbitration agreement under contract law. Once the trial court concludes that an arbitration agreement applies, and the opposing party failed to prove any defenses, the trial court has no discretion but to compel arbitration and stay its own proceedings.

The decree's property division was contained in the mediated settlement agreement, which the trial court expressly incorporated within its divorce decree. Because the trial court possesses continuing jurisdiction to enforce the agreement, the trial court had jurisdiction to rule on the motion to compel arbitration, as it was the parties' agreed mechanism for enforcement of the provisions of the decree. In this case, the fact that the mediator was named as the arbitrator is not a defense to the agreement because the parties expressly consented to it. Therefore, the trial court erred in refusing to compel arbitration of the dispute.

Any district court has jurisdiction to hear breach of contract actions based on provisions in a divorce decree.
Chavez v. McNeely, 287 S.W.3d 840, 2009 WL 1331854 (Tex. App.—Houston [1st Dist.] 2009).

Husband and Wife were divorced three times, with Husband being paralyzed at the time of the third divorce. The Harris County court entered an agreed decree, which provided that Wife would provide as much toward the care and providing for the needs of Husband as possible, limited only by her personal financial situation. Later, Husband filed a breach of contract suit in Waller County, and the trial court rendered a judgment in his favor. Wife appealed, claiming the court lacked subject matter jurisdiction because the Family Code provides exclusive jurisdiction in the court that rendered the divorce decree.

The appellate court held that the Waller County court was a court of general jurisdiction, and that it had jurisdiction unless exclusive jurisdiction had been conferred on the Harris County court. The relevant provisions of the Family Code provide that a party affected by a divorce decree may request enforcement of that decree by filing a suit to enforce as provided by this chapter in the court that rendered the decree and that the court that rendered the decree of divorce or annulment retains the power to enforce the property division. This statutory language is permissive, not mandatory. Had the Legislature intended that the sections provide exclusive jurisdiction, it could have done so by using clear statutory language, as it has done in other situations. Husband's suit is a breach of contract action based upon an agreement incorporated into a final divorce decree. A breach of contract action to recover money damages invokes the general jurisdiction of the district court. Therefore Waller County had jurisdiction over the claim.

C. Additional Cases

Order for psychiatric evaluation was within discretion of trial court because father did not stipulate to all relief sought by mother.
In re Brown, 277 S.W.3d 474, 2009 WL 145456 (Tex. App.—Houston [14th Dist.] 2009).

Trial court should not have clarified unambiguous provision in divorce decree.
In re R.F.G., 282 S.W.3d 722, 2009 WL 901935 (Tex. App.—Dallas 2009, no pet. h).

Wife cannot recover non-refundable retainer paid to husband's lawyer.
In re C.H.C., 290 S.W.3d 929, 2009 WL 1887128 (Tex. App.—Dallas 2009).

On habeas corpus, appellate courts have jurisdiction only to determine whether a contempt order is void.
In re R.E.D., No. 01-08-00727-CV, 278 S.W.3d 850, 2009 WL 277089 (Tex.App.—Houston [1st Dist.] Feb. 5, 2009).

When property is awarded upon the condition that payment be made, it is not a modification to award the property to the other spouse upon nonpayment; under contract principles, payment is a condition precedent, and title will not vest until it is satisfied.
Torres v. Sierra, No. 04-08-00516-CV, 2009 WL 331833 (Tex.App.—San Antonio Feb. 11, 2009).

A homestead may not be conveyed without the joinder of both spouses. Since specific performance is an equitable remedy, it is not an abuse of discretion for a trial court to hold a sales contract void when it does not list both Husband and Wife as sellers.
Herzfeld v. Herzfeld, No. 05-06-00332-CV, 285 S.W.3d 122, 2009 WL 692650 (Tex.App.—Dallas, Mar. 18, 2009).

V. SAPCR Procedure

A. Legislative Changes

Jurisdiction over Certain Fathers
Tex. Fam. Code § 102.011.

Jurisdiction may be had over a nonresident who registered with the paternity registry or who signed an acknowledgment of paternity for a child born in Texas.

Parenting Facilitators and Parenting Coordinators
Tex. Fam. Code § 153.601-610

Many changes were made to Subchapter K regarding the qualifications and duties of parenting facilitators and coordinators. A parenting facilitator operates on a non-confidential basis, and can submit reports to the court regarding the parties' participation. A parenting coordinator is confidential, like a mediator, and may only report an opinion on whether efforts should continue. A parenting facilitator may recommend clarifications or ways to implement an existing order, and may monitor compliance with court orders. The changes also provide that parties may submit a joint proposal or statement, but that it is not an agreement unless it is prepared by the parties' attorneys and meets requirements already specified for other types of agreements (including Rule 11 agreements, mediated settlement agreements, collaborative law agreements, etc). The changes also increase the minimum qualifications required of a parenting facilitator or coordinator and require training in dispute resolution.

Social Study Evaluator
Tex. Fam. Code § 107.0511

Adds yearly continuing education requirements for persons conducting social studies, including 15 hours of continuing education and 8 hours of family violence training.

VI. Conservatorship

A. Legislative Changes

Child Preference Affidavits - Repealed
Tex. Fam. Code §§ 153.008, 156.101.

To address the problem of parents obtaining dueling affidavits from a child expressing his preference on which parent should designate his residence, the Legislature removed the authority for a court to accept these child-preference affidavits. Now, the only way for a child to express a preference to the court is to speak with the judge in chambers. Judges have not yet settled on uniform policies for implementing the new law, so many issues regarding the process remain to be decided.

Designation of Primary Residence
Tex. Fam. Code § 153.133.

This change allows parents to end a stalemate over which will designate the primary residence by allowing parties to an agreed parenting plan to restrict the child's residence to a specified geographic area.

Changes to the Standard Possession Order

Tex. Fam. Code §§ 153.310-317.

The term "school" is defined to be either the school in which the child is enrolled or, if the child is not enrolled in school, the public school district in which the child resides. Certain periods of possession, including spring break and summer possession, are clarified to begin and end at 6:00 p.m. The section on weekend possession extended by a holiday is clarified to refer to student holidays. Finally, the section concerning the expanded possession schedule was re-written. The section now places all elections under one code section and requires that all elections be made in writing or by oral statement in open court at or before rendition of the order.

International Abduction Risk Factors

Tex. Fam. Code § 153.502.

A section was added allowing the court to consider whether the actions of a parent planning to remove a child were in an effort to flee family violence rather than simple abduction.

Presumption that Standard Possession Order is Minimum Time – Repealed

Tex. Fam. Code § 153.137

While this section of the family code used to provide a presumption that the standard possession order constituted a minimum amount of possession time for a joint managing conservator, that presumption was repealed.

B. Featured Cases

Trial court may impose residency restrictions on child when it appoints one parent sole managing conservator.

In re A.S., 298 S.W.3d 834, 2009 WL 3320918 (Tex. App.—Amarillo 2009).

Mother was in Austin for college where she met and lived with Father. Father physically abused mother, resulting in criminal convictions. Mother was designated their child's sole managing conservator. However, the trial court restricted the child's domicile to Travis and contiguous counties in order to allow Father, as possessory conservator, the opportunity to see his son. Mother appealed, because it was her intention to move out of state.

Mother asserted that the trial court could not lawfully impose the restriction because it had appointed her sole managing conservator, giving her the exclusive authority to determine the child's primary residence. The court held that, although the Family Code provides that a trial court may geographically restrict a child's residence when his parents act as joint managing conservators, there is no statute that expressly denies the authority to a trial judge when a parent is appointed sole managing conservator. The Family Code provides that a sole managing conservator has the exclusive right to designate the primary residence of the child unless limited by court order. Therefore, a court may impose a geographic restriction even if a parent is appointed sole managing conservator.

Trial court abused its discretion by imposing a residency restriction in temporary orders after mother failed to make 'extreme efforts' to find employment in Dallas County.

In re Cooper, ___ S.W.3d ___, 2009 WL 3766428 (Tex. App.—Dallas 2009, orig. proceeding).

Wife had been a resident physician in Dallas. Husband moved to Dallas after completing dental school in San Antonio. After the birth of her second child, Wife dropped out of her residency program to become the children's full time caregiver. The couple separated in 2008, and Wife moved with the children to South Carolina to finish her residency. Wife filed for divorce in Dallas, and the trial court entered agreed temporary orders allowing the children to

live in South Carolina with Wife. When Wife's residency program ended, she conducted a job search in the Dallas area, but she was unable to secure employment. Wife testified that she was offered only one job in North Carolina. She accepted the sole job offer, signed a contract, and moved to North Carolina. She applied for a modification of the agreed temporary orders to allow her to move the children. The associate judge issued a report permitting Wife to temporarily designate North Carolina as the children's residence pending trial of the divorce case. Husband appealed to the trial court. At a de novo hearing, the trial court expressed skepticism about Wife's job search efforts and restricted the children's residence to Dallas and contiguous counties. Wife filed for mandamus review.

Because temporary orders are not appealable, mandamus is an appropriate remedy when a trial court abuses its discretion involving temporary orders in a suit affecting the parent-child relationship.

Public policy in Texas calls for frequent and continuing contact with parents. The court listed several factors to be considered in a relocation case and stated that the analysis must concentrate primarily upon the general quality of life of the custodial parent and child because the child's best interest is closely intertwined with the custodial parent's well-being. No authority supports the trial court's requirement that Wife make "extreme efforts" to find employment within the residency-restricted area. To the contrary, courts favor modifying residency restrictions to allow the custodial parent to relocate when the proposed relocation will significantly improve the custodial parent's economic circumstances to the child's benefit.

Because the trial court imposed upon Wife a greater burden than the law allows, the trial court abused its discretion. The appellate court granted mandamus, stating that compliance with the trial court's temporary orders would require Wife to choose between custody of her children and financial ruin, and she had no adequate remedy at law.

Venue transfer to county of children's principal residence for preceding six month period mandatory under Family Code section 155.201(b)

In re Nabors, 276 S.W.3d 190, 2009 WL 145264 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

TDFPS removed children from their foster parents on allegations of abuse. Although the investigation determined that the foster parents were not at fault, the children were not returned. The foster parents filed a petition for adoption and motion to modify the SAPCR in Harris County. The foster parents also filed a motion to transfer venue to Fort Bend County, stating that it was the children's principal residence during the six months preceding the filing of the suit. The trial court denied the motion to transfer, and the foster parents filed a petition for writ of mandamus.

The transfer procedures in the Family Code provide the exclusive mechanism for transferring a SAPCR. The appellate court held that it was proper to file in Harris County, because that court had continuing, exclusive jurisdiction. TDFPS's argument that the principal residence should be Harris County since TDFPS was awarded sole managing conservatorship has been repeatedly rejected. Since the children's actual residence had been in Fort Bend County for six months preceding the suit, transfer was mandatory. It was an abuse of discretion for the trial court not to grant the transfer.

Trial court must transfer venue to county of child's principal residence for preceding six months.

In re Dozier, 2009 WL 214334 (Tex. App.—Amarillo 2009, orig. proceeding) (memo op.).

In another similar case, a court again upheld the mandatory venue transfer requirement. Husband and Wife lived in Potter County. Wife moved to Cottle County, but filed for divorce in Potter County. Over a year later, the trial court entered a final decree of divorce naming

Husband and Wife joint managing conservators and restricting the residence of the child to Potter or Randall counties. The trial court ordered Wife to establish the child's residence in those counties by a date certain. Wife filed a motion to modify and a motion to transfer venue to Cottle County. Husband disputed the transfer, claiming that the child did not reside in Cottle County on the date the motion was filed. When the trial court denied the transfer, Wife petitioned for mandamus.

The appellate court held that transfer is mandatory where a child has resided in another county for six months or longer. A court may not require that the period of residence be continuous and uninterrupted but should look to the child's principal residence during the six months preceding the commencement of the suit. Even though child was not a resident of the county on the date the suit was filed, the trial court had a mandatory duty to transfer.

A petition to enforce the award of attorney's fees is subject to Family Code § 155.201(b)'s mandatory transfer section.
In re Silverman, ___ S.W.3d ___, 2009 WL 1099197 (Tex. App.—Austin 2009, orig. proceeding).

The mandatory transfer rules can apply beyond a SAPCR modification, as illustrated in this case. Mother filed an enforcement against Father for failing to comply with a custody decree, and the court issued a contempt order. Mother filed a second enforcement motion to enforce an award of attorney fees from the first contempt order. Father then moved to transfer the case to Harris County.

The appellate court held that the SAPCR transfer provisions are mandatory, and that since Mother's enforcement actions were filed under the same cause number as the SAPCR, the mandatory transfer provision applies.

C. Additional Cases

Custody order entered in child's home state controls when two valid custody and support orders exist in separate states.
Ellithorp v. Ellithorp, ___ S.W.3d ___, 2009 WL 130271 (Tex. App.—El Paso 2009).

Possession order requiring drug testing prior to periods of possession was sufficiently specific and enforceable.
In re A.L.E., 279 S.W.3d 424, 2009 WL 334855 (Tex. App.—Houston [14th Dist.] 2009).

Trial court erred in dismissing suit for lack of standing when there was conflicting testimony.
In re Y.B., 300 S.W.3d 1, 2009 WL 1405166 (Tex. App.—San Antonio 2009).

Future relinquishments do not meet the requirement of Family Code §156.006(b).
In re Rampy, 03-09-00208-CV (Tex. App. -- Austin 2009, orig. proceeding).

Trial court abused its discretion when it awarded mother sole managing conservator without evidence of a material change in circumstances.
In re A.B.P., 291 S.W.3d 91, 2009 WL 1677819 (Tex. App.—Dallas 2009).

Trial court abused its discretion by appointing attorney ad litem and ordering social study in uncontested divorce and SAPCR involving indigent parent.
In re Villanueva, 292 S.W.3d 236, 2009 WL 2060093 (Tex. App.—Texarkana 2009, orig. proceeding).

Family Code §156.102 applies when mother filed petition within a year of divorce even if hearing happens more than a year later.
In re S.A.E., ___ S.W.3d ___, 2009 WL 2060087 (Tex. App.—Texarkana 2009).

Challenge to an acknowledgment of paternity and genetic testing within four year statute of limitations does not result in irreparable harm.
In re C.S., 277 S.W.3d 82, 2009 WL 57048 (Tex. App.—Amarillo, orig. proceeding).

Family Code Chapter 153 does not apply to modification actions.
In re S.E.K., 294 S.W.3d 926, 2009 WL 2648263 (Tex. App. – Dallas 2009).

VII. Non-Parent Access

A. Legislative Changes

Authorization Agreement for Non-Parent Relative
Tex. Fam. Code Ch. 34.

This change adds a new regime where one parent may use an affidavit to authorize a relative to make decisions on behalf of the child. The change was intended to assist indigent parents who must seek alternative caregivers during times of crisis, but do not have the financial means to seek a court order. A parent must follow the specific instructions for drafting and executing the agreement and is only required to give the other parent notice by mail within 10 days. The revocable agreement allows the non-parent relative to make medical and educational decisions for the child. Since this is a brand new procedure, courts are likely to face challenges to aspects of the law and clarify its application over the coming years.

Rights of Siblings
Tex. Fam. Code § 153.551, 102.0045, 156.002.

The changes to these sections grant standing to siblings separated by TDFPS to seek access. A sibling also has standing to file a modification if the sibling has been separated from the child by TDFPS.

Grandparent Access
Tex. Fam. Code §§ 153.432-33.

Grandparents must execute an affidavit, attached to their first pleading, which sets out the facts supporting the burden they must meet in order to be entitled to possession or access (i.e. that denial of possession or access would significantly impair the child's physical health or emotional well-being). Further, the court must state the necessary findings in any order granting possession or access

B. Featured Cases

Family Code § 102.004(a)(2) limits standing to file SAPCR to relatives within three degrees of consanguinity, not affinity.
In re A.M.S., 277 S.W.3d 92, 2009 WL 78135 (Tex. App.—Texarkana 2009).

Paternal Aunt and her Husband sought to be named joint managing conservators of a child, and the trial court granted the order. The child's parents appealed. The appellate court held that the parents consented to Aunt's suit and that Aunt had standing. However, the court also held that since Aunt's Husband was not related within three degrees of consanguinity, he did not have

statutory standing to be appointed conservator, and the child's parents could not waive his lack of standing by consenting to the suit.

A non-parent must overcome the parental presumption by proving that appointment of a parent as managing conservator would significantly impair a child's physical health or emotional development.
In re B.B.M., 291 S.W.3d 463, 2009 1801035 (Tex. App. – Dallas 2009).

Mother and Father separated, and then Mother found out she was pregnant with Father's child. Mother placed the child for adoption without notifying Father of his paternity. Mother signed a relinquishment and the adoptive parents took the child. Once Father found out, he registered his notice of intent to claim paternity. The adoption agency filed suit to terminate the parents' rights and Father counter-petitioned to establish paternity. A jury did not terminate Father's parental rights, but granted managing conservatorship to the adoptive parents. Father appealed.

The appellate court cited a strong presumption that the best interest of a child is served by appointing a natural parent as managing conservator. The potential harm caused by the child's removal from the adoptive parents' home is legally insufficient. In order to overcome the parental presumption, a non-parent must prove that appointment of a parent as managing conservator would significantly impair the child's physical health or emotional development.

C. Additional Cases

The following cases reinforce the same issues and principles as the featured cases discussed above:

Step-grandmother lacked standing to seek either possession and access or conservatorship.
In re M.T.C., ___ S.W.3d ___, 2009 WL 3401123 (Tex. App.—Texarkana 2009).

Grandparents must show that denial of access would significantly impair child's physical health or emotional well being in order to obtain court-ordered access to child.
In re J.M.T., 280 S.W.3d 490, 2009 WL 475118 (Tex. App.—Eastland 2009).

Even if appointed as joint managing conservators with parents, non-parent must overcome the parental presumption pursuant to Family Code § 153.151.
Critz v. Critz, 297 S.W.3d 464, 2009 WL 2972619 (Tex. App. – Fort Worth 2009, no pet.).

VIII. Child Support

A. Legislative Changes

Medical Support
Tex. Fam. Code § 154.181-191.

Reasonable cost for health insurance for an obligor with more than one child is now defined to be a total cost not exceeding 9% of the obligor's annual resources.

Child Support Lien
Tex. Fam. Code § 157.317-318.

The new language establishes a procedure for an obligor to release a child support lien. Procedures for the obligee to dispute the release of the lien are also established. A child support lien is effective for 10 years and may be renewed for subsequent 10 year periods.

Disability Benefits
Tex. Fam. Code § 157.009.

This new section explicitly provides for credit against a child support arrearage and interest for a payment to the child as a result of the obligor's disability.

Child Support Payments - Order of Priority
Tex. Fam. Code § 157.268.

This section changed the order of priority to provide that payments are credited first to any principal owed on child support, then interest, then attorney fees and other costs.

B. Featured Cases

Trial court erred in failing to award interest on unpaid child support.
Herzfeld v Herzfeld, 285 S.W.3d 122, 2009 WL 692650 (Tex. App.—Dallas 2009).

Husband stopped paying child support before permitted. The AG notified Husband of the principal owed, and the Husband paid the amount. Wife subsequently filed a child support lien for unpaid principal and interest. The trial court awarded some principal and no interest. Wife appealed. The appellate court held that a lien arises without action by a court as long as notice complies with statutory requirements, regardless of whether the amounts have been adjudicated. Further, since interest is statutorily mandated, a trial court does not have discretion to alter the amount of interest.

Trial court erred in awarding attorney's fees as additional child support in motion to modify child support.
In re K.J.D., ___ S.W.3d ___, 2009 WL 3491199 (Tex. App.—Dallas 2009).

Mother filed a petition to modify, asking Father to pay increased child support. Father counter-petitioned to decrease support. The trial court decreased father's child support, made the decrease retroactive, and ordered Mother to pay attorney fees as additional child support. Mother appealed. The appellate court held that a trial court may only award attorney fees as child support in an enforcement. Attorney fees awarded in an enforcement are not a debt and can themselves be enforced by contempt, therefore it is appropriate to characterize them as additional child support. Attorney fees may be awarded in a modification, but they are considered a debt. It is not proper to award attorney fees as additional child support in a modification.

Note: One commentator notes that if both actions are present in one case, the attorney should be prepared to segregate the fees for each.

Retroactive child support is not "past-due support" permitting collection of a federal income-tax refund.
In re R.C.T., 294 S.W.3d 238, 2009 WL 909583 (Tex. App.—Houston [14th Dist.] 2009).

The Attorney General filed a proceeding to modify a child-support order and increase the child support that Father was paying. The trial court signed an agreed order increasing the support, stating a retroactive amount due, and providing a payment schedule to address the retroactive support. The Attorney General then filed a child-support lien with the Harris County clerk and notified the U.S. Treasury that Father owed past-due support. The Department of Treasury informed Father that his federal income-tax refund would be intercepted and paid to the Attorney General. Father filed a motion to vacate the lien since he was current on the installments. The trial court vacated the lien and ordered the tax refund returned to Father, and the Attorney General appealed.

The appellate court upheld the lien. Based on the express language of the statute, the retroactive amount was an amount due and owing, and thus resulted in a child-support lien, regardless of whether Father was current on the court-ordered payout schedule. The statute does not require the debt to be an arrearage in order for a lien to arise. In fact, the lien arises by operation of law for all amounts due and owing, regardless of whether the amounts have been adjudicated or otherwise determined.

However, the retroactive support is not a delinquency and does not satisfy the definition of past-due support under the federal income-tax-refund-intercept statute. Therefore, the trial court did not err in ordering the Attorney General to return the intercepted income-tax refund to John.

Family Code § 154.066 does not require court to consider whether obligor's 'voluntary unemployment' was for the primary purpose of avoiding child support.
Iliff v. Iliff, 2009 WL 2195559 (Tex. App. – Austin 2009) (mem. op.).

Father quit a high-earning job as an engineer and did not gain other employment. In the divorce, the trial court found that Father was intentionally unemployed, despite Father presenting evidence of mental health problems. The trial court ordered Father to pay child support based on his proven income before the divorce. Father appealed.

The Family Code allows a trial court to apply the child support percentage guidelines based upon earning potential if the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment. A parent with the ability to find gainful employment cannot evade his support obligation by voluntarily remaining unemployed or underemployed. The evidence in the record supported the trial court's finding that Father was intentionally unemployed or underemployed and that he voluntarily quit his job. There was no abuse of discretion in the trial court's decision to apply the percentage guidelines based on Father's earning potential.

Father argued that the trial court was required to find that his voluntary unemployment was for the primary purpose of avoiding child support. In support, he relied on the holdings of appellate courts in Houston and Fort Worth. The Austin court, however, has declined to adopt that reasoning, stating that the Family Code does not require the court to consider whether the obligor's 'voluntary unemployment' was for the primary purpose of avoiding child support.

Mother failed to prove father intentionally underemployed.
In re J.G.L., ___ S.W.3d ___, 2009 WL 2648401 (Tex. App. – Dallas 2009).

Texas courts are split on the requirements for intentional unemployment. Below is a case from Dallas holding that courts are required to demonstrate that obligor is decreasing income *for the purpose* of reducing child support.

The divorce trial court found that the Family Code guidelines direct Husband to pay child support payments of $593.77 per month based upon his actual monthly net resources. The court, however, found that Husband was voluntarily underemployed and set child support payments at $825 per month. Husband appealed.

While trial courts must provide specific reasons for the variance between the child support percentage guidelines and the child support awarded, a finding of voluntary underemployment allows the court to set child support at the earning potential rather than the actual earnings of the child support obligor. To begin the voluntary underemployment analysis, the trial court considers obligor's proof of current wages. The burden then shifts to obligee to demonstrate obligor's intent to decrease income for the purpose of reducing child support payments. Evidence of intent, such as the circumstances of obligor's education, economic adversities, business reversals, business background, and earning potential, gives rise to an inference of voluntary underemployment. Here, Wife did not meet her burden of presenting evidence demonstrating

Husband's intent to decrease income. Wife did not present witnesses contradicting Husband's witnesses, so there was no evidentiary basis for the trial court to exercise its discretion on the issue.

Voluntary relinquishment under Family Code § 157.008 can occur even when mother remains domiciled with children.
In re W.J.B., 294 S.W.3d 873, 2009 WL 2617476 (Tex. App. -- Beaumont 2009).

When Father and Mother divorced, Mother was given primary possession of the children and Father was ordered to pay child support. After the divorce, Father purchased a house and Mother moved in with the children. Father then also moved in. Although Mother had agreed to pay rent, she never did, stating that Father never paid child support. Father testified that he purchased the house with the hope that he, Mother, and the children could live together again as a family. Father stated that he did not think he was required to continue to pay child support when he was directly supporting the family who were living together. The trial court denied Mother's motion to enforce the child support, and Mother appealed on the grounds that it was undisputed that the child support was unpaid.

Mother challenged the trial court's implied finding that she had relinquished actual possession and control of the children to Father in a manner that exceeded his possessory rights under the parenting plan. Father bore the burden of proving that Mother had voluntarily relinquished the children in excess of any court-ordered periods and of proving the amount of actual child support that he provided during that period. Because Father had the burden of proving his offset, and prevailed in the trial court, Mother had the burden to show that no evidence supported the findings.

Mother argued that despite their living arrangement during the time period in issue, she did not relinquish possession and control of the children to Father because the children were not domiciled separate from her. The statutory provision in issue does not define the term relinquish, and the statute expressly contemplates that relinquishment be evaluated under the terms of the possession orders. Based on the record, the trial court could reasonably conclude that Mother voluntarily relinquished rights to sole periods of possession by allowing Father to move into the home and to act as a full-time parent, which included paying for the children's actual support during that time.

C. Additional Cases

A child support order is not evidence of an obligor's ability to pay support for twelve consecutive months as required by Family Code § 161.001(1)(f).
In re N.A.F., 282 S.W.3d 113, 2009 WL 333801 (Tex. App.—Waco 2009).

Trial court abused its discretion by dissolving a valid administrative writ used to enforce modified child support award.
In re B.N.A., 278 S.W.3d 530, 2009 WL 445610 (Tex. App.—Dallas 2009).

Trial court violated due process by having father confined 8 days before signing contempt judgment.
In re Broughton, ___ S.W.3d ___, 2009, WL 5276756 (Tex. App.—Beaumont 2010).

Trial court's failure to admonish father of right to counsel entitled him to release from commitment order.
In Re Casey, ___ S.W.3d ___, 2009 WL 1162282 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding).

Interest on annuity payments are part of net resources.
In re A.A.G., ___ S.W.3d ___, 10-07-00347-CV (Tex. App.—Dallas 2009).

Trial court abused its discretion by ordering psychiatric treatment for father without making it a condition of possession of or access to child.
In re Marriage of Swim, 291 S.W.3d 500, 2009 WL 1940877 (Tex. App.—Amarillo 2009).

AG did not have authority to release husband's child support obligation when mother had not assigned rights to AG.
In re J.P., 296 S.W.3d 830, 2009 WL 2751043 (Tex. App.—Fort Worth 2009).

Father's request for child support findings of fact made pursuant to T.R.C.P. 296 instead of Family Code § 154.130.
In re T.A., ___ S.W.3d ___, 2009 WL 2913820 (Tex. App.—El Paso 2009).

Trial court did not err by refusing to reimburse father for "overpayments" resulting from social security disability payments.
In re H.J.W., ___ S.W.3d ___, 2009 WL 4725301 (Tex. App.—Dallas 2009).

Court may not merely infer income yielding an obligation for back child support. The court must hold further hearings and require parties to produce income information in order to determine retroactive child support owed.
In re J.A.J., 283 S.W.3d 495, 2008 WL 5780819 (Tex.App.—Beaumont 2009).

IX. Miscellaneous

A. Legislative Changes

Mandatory Suspension of Concealed Handgun License if Family Violence
Tex. Fam. Code § 85.022.

This change makes suspension of a concealed handgun license mandatory, not discretionary, where a person is found to have committed family violence.

B. Featured Cases

United States Supreme Court

Retirement plan's payment of proceeds to ex-wife upon husband's death proper where husband never changed beneficiary
Estate of Kennedy, 129 S.Ct. 865 (2009).

Retirement plans are administered under a federal law known as ERISA. Over the years, many conflicts have arisen when divorce decrees from state courts conflict with provisions of the federal law. This case addressed the situation where a spouse, through a divorce decree, waives interest in the other spouse's retirement, but the employee spouse never changes the beneficiary designated under the plan. The Supreme Court decided that the benefits of certainty from an uncomplicated rule are favored over opening up inquiries into the employee's intent. An employee's beneficiary designation in the plan documents will control. The Supreme Court held that, although ex-Wife's waiver was not void as a prohibited assignment or alienation, the plan administrator properly disregarded the waiver because it conflicted with ex-Husband's designation in accordance with the plan documents.

✯ *Texas Supreme Court* ✯

A form "pre-trial scheduling order" does not meet T.R.C.P. 329b(c)'s requirement for a written and signed order granting a new trial.

In re Lovito-Nelson, 278 S.W.3d 773, 52 Tex. Sup. Ct. J. 405, 2009 WL 490067 (Tex. 2009) (per curiam).

The trial court granted a final order in a SAPCR designating Mother, Father, and Grandmother as joint managing conservators of three children. Mother and Grandmother filed a motion for new trial. The court heard the motion and initialed a handwritten entry on the docket sheet granting a new trial. At the same time, the trial court and counsel for all parties signed an agreed pre-trial scheduling order. The order set various pretrial deadlines and a final trial date and stated: "Trial on the merits is hereby set on this date." After some time, Father's counsel wrote to the trial judge that the court never signed a written order granting a new trial, and that since more than 105 days have passed since the final order was signed by the court the judgment was now final and the pre-trial scheduling order in this matter was moot. Father filed a Motion to Sign the Order on Motion for New Trial. The court denied it, concluding that the motion was moot and the scheduling deadlines remained in full effect. Father petitioned for mandamus in the appellate court, was denied without opinion, and appealed to the Supreme Court.

The Supreme Court held that the Rules of Civil Procedure are clear and require a written order to grant a new trial. A trial court's oral pronouncement and docket entry cannot be substituted for the required written order. Although the Court had never applied the rule as to scheduling orders, it is important that the requirement of a written order granting a motion for new trial be a bright-line rule. Otherwise, all sorts of conduct could be given the same effect, including a trial setting or other setting, a status conference, a hearing on a discovery motion, or a request for discovery. The uncertainty would carry over to appellate deadlines and possibly give rise to mandamus proceedings. The requirement is not difficult to meet, and the movant who fails to satisfy it is not left without possibility of relief. She may still attempt to prosecute an appeal, a restricted appeal, or a bill of review. But a motion for new trial cannot be granted without a signed, written order explicitly granting the motion.

Trial court can confirm an earlier ruling after vacating that same ruling and granting a new trial.

In re Hidalgo, 279 S.W.3d 456, 2009 WL 456581 (Tex. App.—Dallas 2009) (op. on re-hearing).

This case involves a complicated procedural timeline, but has now been simplified due to an intervening Texas Supreme Court holding. Wife filed an enforcement, and the trial court denied Wife's relief on January 3, 2006. Wife filed a motion for rehearing, and ninety-one days later, on April 4, the court changed the order, finding in favor of wife. Within thirty days of that order, Husband filed a motion for new trial, complaining that the trial court had lost plenary power. The court held on July 5 that the April 4 ruling was effectively the grant of a new trial, but still set aside that judgment, confirming the original order of January 3 as the final order.

At the time, the law was clear that after granting a new trial, the court retains plenary power to "ungrant" and reinstate the prior order only within 75 days. Based on that rule, the July 5 order was void. However, the Texas Supreme Court then issued the *Baylor* decision, reasoning that when a new trial is granted, the case stands on the docket as if no trial had been had and the trial court should have the power to set aside a new trial order any time before judgment is rendered. *In re Baylor Med. Ctr. at Garland*, 289 S.W.3d 859 (Tex. 2008). Therefore, the July 5 order reinstating the January 3 order was not void.

Note: The Court made a similar ruling regarding motions for new trial in *In re Department of Family & Protective Services*, discussed below.

Malpractice claims against attorneys may not be "fractured" into separate claims for negligence, breach of contract, or fraud, unless client is presenting a separate claim distinct from malpractice.
Beck v. The Law Offices of Edwin J. Terry, Jr. et al, No 03-07-00635-CV, 284 S.W.3d 416, 2009 WL 1165304 (Tex.App.—Austin May 1, 2009).

Husband and Wife settled their divorce in mediation and the court rendered a decree. Husband subsequently received advice from an independent accountant that the settlement was unworkable because of the impact it would have on his corporations. Husband sued his attorneys for professional negligence, breach of fiduciary duty, DTPA claims, and breach of contract. The trial court granted summary judgment on the last three claims, and the appellate court affirmed.

A case arising out of an attorney's alleged bad legal advice or improper representation may not be split into separate claims when the real issue is whether the professional exercised the proper degree of care, skill, and diligence. This rule serves to prevent legal-malpractice plaintiffs from opportunistically transforming a negligence claim into other claims to avail themselves of longer limitations periods, less onerous proof requirements, or other tactical advantages. This does not mean that clients can sue their attorneys only for negligence or that they are barred from asserting non-negligence claims predicated on overlapping facts. However, the claimant must do more than merely reassert the same claim for legal malpractice under an alternative label. The plaintiff must present a claim that goes beyond what traditionally has been characterized as legal malpractice.

C. Additional Cases

Wife concealing 5 of her 8 previous marriages was sufficient to justify annulment.
Leax v. Leax, ___ S.W.3d ___, 2009 WL 1635199 (Tex. App.—Houston [1st Dist.] 2009).

The same requirements apply to "restoring" a name as any other type of name change.
In Re Barnes, ___ S.W.3d ___, 2009 WL 1107913 (Tex. App.—Amarillo 2009).

Cohabitation did not create a constructive trust.
Smith v. Deneve, 285 S.W.3d 904, 2009 WL 1492997 (Tex. App.—Dallas 2009).

Parent who has possession of the children for more than one-half of the calendar year is entitled to the claim children as exemptions on their tax return.
In re S.L.M., 293 S.W.3d 374, 2009 WL 2343264 (Tex. App, -- Dallas 2009).

Trial court did not err by requiring father to invoke privilege against self-incrimination on a question-by-question basis.
Murray v. T.D.F.P.S., ___ S.W.3d ___, 2009 WL 2476690 (Tex. App.—Austin 2009).

Trial court erred in ordering children's return to Mexico when it was not their habitual residence.
In re J.G., ___ S.W.3d ___, 2009 WL 3838859 (Tex. App.—Dallas 2009).

Trial court's award of additional attorney's fees in a temporary order pending appeal was void when mother did not file motion requesting that order within 30 days of father perfecting appeal.
Brejon v. Johnson, ___ S.W.3d ___, 2009 WL 5174256 (Tex. App.—Houston [1st Dist.] 2009).

Infecting spouse with sexually transmissible disease can be a breach of fiduciary duty, but damages must be proven.
Bertram v. Bistrup, No. 03-05-00333-CV, 2009 WL 1099248 (Tex.App.—Austin Apr. 22, 2009).

A common law marriage existing at the time of a different divorce becomes valid when the prior marriage is dissolved if the parties then cohabitate and hold themselves out as married.
Baqdounes v. Baqdounes, No. 01-07-01102-CV, 2009 WL 214508 (Tex.App.—Houston [1st Dist.] Jan. 29, 2009).

X. Same Sex Issues

A court may void a same-sex marriage, even though extrinsic evidence may not normally be used to support a collateral attack.
Mireles v. Mireles, No. 01-08-00499-CV, 2009 WL 884815 (Tex.App.—Houston [1st Dist.] Apr. 2, 2009).

Wife petitioned to set aside a divorce decree and declare the marriage void because Husband had been born a female. Husband argued that Wife was may not present extrinsic evidence to support her bill of review. The trial court voided the marriage and Husband appealed. Although the appellate court acknowledged that a party may not use extrinsic evidence to support a collateral attack, the court outlined an exception for occasions where the court "has not, under the very law of its creation, any possible power" to decide the case. The court held that a Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person.

Note: With two additional same-sex divorce cases currently pending, this is an area of law to keep apprised of, as there is the potential for significant developments in the near future.

In re M.K.S.-V, 301 S.W.3d 460, (Tex. App.—Dallas) (op. on rehearing).

A same sex couple lived together and one became pregnant through artificial insemination by a sperm donor. When the relationship ended, the birth mother moved out with the child. Because the former couple wanted to maintain some continuity for the child, they agreed on a schedule allowing the non-birth mother regular access to and possession of the child. The schedule continued for almost two years when the birth mother discontinued the visits. The former girlfriend filed suit seeking to be appointed joint managing conservator of the child or, in the alternative, to adopt her. Not being a biological parent, she asserted standing to sue for conservatorship as a person who had actual care, control, and possession for at least six months. She further asserted that she was a "parent by estoppel" and had standing to sue for adoption as a person who had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition.

The trial court found the former girlfriend did not have standing to pursue her suit for conservatorship but had standing to pursue the adoption. The trial court found she had standing to pursue the adoption under the provision requiring substantial past contact with the child sufficient to warrant standing to do so. The former girlfriend also asserted the birth mother breached a contract, as shown by the possession agreement. The birth mother moved to dismiss the adoption claims, arguing that her parental rights had not been and would not be terminated, the former girlfriend had never married her and was not a step-parent, and the birth mother would not consent and had not consented to the adoption. The birth mother also moved to dismiss the former girlfriend's claim for the breach of the possession agreement, arguing it amounted to a conservatorship claim for which she lacked standing. Following a hearing on the motion, the trial court dismissed all claims asserted by the former girlfriend and confirmed the previous finding that she lacked standing to pursue her claims for conservatorship.

The Family Code provides that "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition" may file an original suit requesting

conservatorship. In computing the time necessary for standing, the court may not require that the time be continuous and uninterrupted, but shall consider the child's principal residence during the relevant time period preceding the date of commencement of the suit. This is a fact issue. The record shows that the possession agreement shared characteristics of a standard possession order. The child had her own room at the former girlfriend's house. There were occasions when the former girlfriend would pick the child up from school when she was sick and then purchase and administer medication. She was listed as a parent on the child's school records, attended school activities, and the teachers were aware that she would pick the child up from school. Witnesses testified that the birth mother has referred to the former girlfriend as the child's mother and treated her as one of the child's parents. The former girlfriend also established a college fund for the child. After the relationship ended, the couple continued to attend church with the child as a family unit. The record does not suggest this pattern of possession and caregiving was intended to be a temporary arrangement. To the contrary, the possession agreement and the parties' actions evinced an intent that the child occupy the former girlfriend's home consistently over a substantial period of time. Therefore, we conclude the trial court erred in determining that she did not establish the six month period of actual care, custody, and control requisite to establish her standing to file an original SAPCR petition.

As for the adoption, consent is a requirement, separate from standing, for adoption under the Family Code and also for adoption by estoppel. At the hearing on standing, the birth mother denied consenting that the former girlfriend could adopt the child. The former girlfriend did not testify to any actual agreement. Without consent or an agreement, she cannot adopt the child and the trial court did not err in dismissing her adoption claims.

XI. Military Issues

A. Legislative Changes

Military Deployment
Tex. Fam. Code §§ 153.701-709, 156.105.

New sections were added to address issues unique to military deployments. Military deployment is deemed a material and substantial change of circumstances sufficient to justify a SAPCR modification. However, provisions were also added to provide for temporary orders for deployment. Either conservator may file for temporary orders upon a conservator being ordered to deploy in a way that will materially affect that conservator's ability to exercise his or her rights and duties. The temporary orders may appoint a designated person to exercise the visitation of the deployed conservator or to exercise the right to designate primary residence in that person's place. The designated person also gets authority to enforce the temporary orders. These temporary orders terminate after the deployment concludes. Deploying service members may seek expedited hearings. A deployed parent may also request make-up visitation, provided that the parent requests such orders not later than the 90th day after returning.

B. Featured Cases

Texas Supreme Court
"All military retirement pay as received" does not include VA disability benefits.
Hagen v. Hagen, 282 S.W.3d 899, 2009 WL 1165304, 52 Tex. Sup. Ct. J. 698 (Tex. 2009).

The parties' 1976 divorce decree awarded Wife a percentage of Husband's military retirement pay if, as, and when received. When Husband retired, he elected to receive disability payments in lieu of retirement benefits, reducing the amount of retirement pay he received. Wife

sought clarification. The court held that while military disability pay is divisible, VA disability benefits were not.

The dissent criticizes the court's reasoning saying there logically cannot be a difference between "gross pay" and "all pay" leading to differing results in the caselaw. The dissent notes an alternate theory supporting the court's decision that disability pay cannot be divided before disability exists, because it is void as lacking ripeness and standing. The dissent further hints that, since the decree appointed Husband as trustee of the funds for Wife's use and benefit, he possibly breached his fiduciary duty when he converted retirement pay to disability pay.

Father on active military duty was not entitled to relief from default judgment under Servicemembers' Civil Relief Act when he did not demonstrate that his service affected his ability to present a defense.
In re K.B., 298 S.W.3d 691, 2009 WL 2179976 (Tex. App.—San Antonio 2009).

The Servicemembers Civil Relief Act protects active members of the armed services from having a default judgment entered against them in any civil action or proceeding, including a child custody proceeding. Father was an active duty member of the United States Army at the time he was served with the SAPCR. Despite the petition reflecting that he was on active duty in the military, the trial court did not appoint counsel to represent him before rendering the default order in violation of the requirements under the Act. Because the trial court erred by failing to enforce the mandatory provisions of the Act, Father argued that the default judgment must be set aside. Mother responded that Father failed to demonstrate his entitlement to relief under the Act.

A default judgment entered without following all requirements of the Act is voidable, not void. In order to reopen the judgment, the aggrieved servicemember must sufficiently demonstrate to the court that (1) he was materially affected by reason of his military service in making a defense to the action, and (2) he has a meritorious or legal defense to the action. Father failed to demonstrate either prong. Father acknowledged he was properly served with the lawsuit, and had actual knowledge of the suit six weeks prior to the default judgment being entered. The record further confirms he took no steps to file an answer or otherwise protect his interests under the Act. He failed to explain how or why his military service, or even his preparation for deployment in Iraq, prejudiced his ability to file an answer or otherwise protect his interests during the six weeks after service of the suit until the default judgment was entered. Father wholly failed to declare that he has a good and meritorious defense to the SAPCR suit at issue. Because he failed to demonstrate entitlement to relief under the Servicemembers Civil Relief Act, the trial court correctly refused to set aside the default judgment.

C. Additional Cases

The following cases are further examples of the rule that military disability pay is different from normal compensation:

Divorce decree dividing Air Force "disposable retired or retainer pay to be paid" did not divide CRSC received in lieu of retired pay.
Sharp v. Sharp, ___ S.W.3d ___, 2009 WL 3928131 (Tex. App.—San Antonio 2009).

Trial court erred by ordering husband not to reduce his military retired pay by waiving it for disability benefits.
Gillin v. Gillin, ___ S.W.3d ___, 2009, WL 4339164 (Tex. App.—San Antonio 2009).

Benefits from the temporary disability retired list are not retirement pay.
Thomas v. Piorkowski, 286 S.W.3d 662 (Tex. App.— Corpus Christi 2009).

XII. Termination

A. Legislative Changes

New Grounds for Termination
Tex. Fam. Code § 161.001.

Attempted murder or solicitation of murder of the child's other parent are now explicit grounds for involuntary termination.

Continuing Support for Children Adopted after age 16
Tex. Fam. Code § 162.3041.

If the TDFPS entered into an adoption assistance agreement with a child's adoptive parents after the child's 16th birthday, the adoptive parents may continue to receive assistance until the child turns 21, if the child is working or enrolled in school.

B. Featured Cases

★ ***Texas Supreme Court*** ★

Under former Family Code § 263.401, if motion for new trial is granted after final judgment, a trial court must enter final orders or extension in new trial within one year of initial removal of child

In re Department of Family & Protective Services, ___ S.W.3d ___, 52 Tex. Sup. Ct. J. 277, 2009 WL 51579 (Tex. 2009, orig. proceeding).

A trial court appointed TDFPS managing conservator of two children and rendered an order terminating Mother's parental rights. Mother filed a motion for new trial and it was granted. Later, Mother filed a motion to dismiss and for immediate return of the children. Mother argued that, because the trial court granted her motion for new trial and set aside its termination order, the court then failed to render a final order within the statutory one-year deadline; since the statutory deadline expired with no extension or final order, the court was required to dismiss. The trial court denied Mother's motion to dismiss, and Mother prevailed on a mandamus action in the court of appeals. TDFPS filed a petition with the Texas Supreme Court seeking mandamus ordering the appellate court to reverse its order to the trial court to dismiss.

If the dismissal dates set by the Family Code are jurisdictional, then the trial court had jurisdiction only to dismiss the case once the dates had passed, and its orders beyond those dates are void. The Supreme Court held that the one-year dismissal deadlines are not jurisdictional. The statute merely states that the trial court "shall dismiss the suit" and "may not retain the suit on the court's docket" when the deadlines expire. The Court stated further that if the Legislature intended for the deadlines to be jurisdictional, it would not have expressly permitted them to be waived.

At the time Mother moved for dismissal of the suit, the one-year dismissal date had passed as well as the 180-day period for the trial court to retain the suit on its docket. Mother did not waive her right to dismissal by failing to request that the trial court render a final order before the one-year dismissal date. There was no final order in place as of the time Mother filed her motion to dismiss. Thus, under the clear provisions of the Family Code, the trial court had no discretion to deny Mother's motion to dismiss the Department's suit and abused its discretion in doing so. The Department argued that the trial court rendered a final order before the one-year dismissal date and the rendition of that order allowed the court to retain the case on its docket. The Supreme Court agreed that the trial court rendered a final order but disagreed that the order

survived the granting of a new trial. When a trial court grants a motion for new trial, the case is reinstated on the trial court's docket as though no trial had occurred, and the slate is essentially wiped clean as to orders such as an oral pronouncement of judgment and written judgment based on the trial.

Note: When read together with *Hidalgo* and *Baylor*, above, it is clear that the Texas Supreme Court believes that when a new trial is granted, it is as if all previous trial orders cease to exist.

✯ *Texas Supreme Court* ✯

Family Code § 263.405(i) is unconstitutional as applied when it bars parents from raising an ineffective assistance of counsel claim on appeal.

In Re J.O.A., 283 S.W.3d 336, 2009 WL 1165303, 52 Tex. Sup. Ct. J. 714 (Tex. 2009).

After parents' rights were terminated, Mother's and Father's counsel filed notices of appeal and motions to withdraw. Neither filed a required statement of points. Trial court appointed replacement counsel after the fifteen-day deadline for submitting the statement had passed. Parents appealed, claiming they received ineffective assistance of counsel. The appellate court declared the requirement unconstitutional because it barred consideration of the parents' ineffective assistance of counsel claim. TDFPS appealed to the Supreme Court.

An ineffective assistance of counsel claim requires a showing of a deficient performance by counsel so serious as to deny the defendant a fair and reliable trial. A right of appeal might not be constitutionally required, but, once granted, the right cannot be unreasonably withdrawn. In evaluating constitutional due process claims, the court should weigh three factors— (1) the private interests at stake, (2) the government's interest in the proceeding, and (3) the risk of erroneous deprivation of parental rights—and balance the net result against the presumption that the procedural rule comports with constitutional due process requirements. (1) The parent's fundamental liberty interest in maintaining custody and control of his or her child, the risk of permanent loss of the parent-child relationship, and the parent's and child's interest in a just and accurate decision weigh heavily in favor of permitting appellate review and the State's fundamental interest in protecting the child's best interests is not antagonistic to those interests. (2) The State's goal of ensuring the child's safety and stability is served by procedures promoting an accurate determination of whether the natural parent could provide a normal home and disserved by procedures that do not. (3) The fundamental liberty interests at issue are too dear and the risk of erroneous deprivation too significant to countenance the waiver of a parent's appellate rights through procedural neglect. Therefore, if counsel's failure to preserve a factual sufficiency complaint is unjustified, then counsel's incompetency in failing to preserve the complaint raises the risk of erroneous deprivation too high, and the procedural rule must give way to constitutional due process considerations.

An ineffective assistance of counsel claim requires more than merely showing that appointed counsel was ineffective. The defendant must show that counsel's deficient performance prejudiced the defense and that counsel's errors were so serious as to deprive the defendant of a fair trial. Here, the ineffective assistance of counsel claim raised due process concerns and section 263.405(i) of the Family Code was held unconstitutional to the extent it prevents a court from considering those claims. The Supreme Court remanded the cause to the trial court for a new trial.

Permanent injunctions and protective orders are distinct remedies.

In re Ada, 287 S W.3d 382, 2009 WL 1470590 (Tex. App.—Texarkana 2009).

Mother filed for divorce and to have Father's parental rights terminated while Father was incarcerated. Trial court severed the termination proceeding and granted the divorce, entering a permanent injunction prohibiting Father from contacting Mother or children. Father appealed.

Father argued that the trial court erred in issuing a protective order without an affirmative finding that family violence had occurred and that family violence was likely to occur again. Father also argued that the trial court erred in issuing a protective order in the final divorce decree, rather than a separate document entitled "Protective Order." However, the court held that the divorce decree did not contain a protective order, but rather contained a permanent injunction which is not required to comply with the statutes governing protective orders.

C. Additional Cases

Findings improperly included in a judgment instead of a separate statement of facts are still valid.
In Re C.A.B., 289 S.W.3d 874, No. 14-08-00360-CV (Tex. App.—Houston [14th Dist.] 2009).

Trial court erred in declaring family code §161.002(b) unconstitutional.
In re C.M.D., 287 S.W.3d 510 (Tex. App.—Houston [14th Dist.] 2009) (6/25/09)

Possibility of parole is not sufficient evidence to show trial court abused discretion for termination under Family Code § 161.001(1)(q)
In re Z.C., ___ S.W.3d ___, 2009 WL 385380 (Tex. App.—Fort Worth 2009).

Voluntary relinquishment of parental rights under Family Code § 161.001(1) is sufficient evidence that termination of parental relationship is in best interest of child.
In re A.G.C., 279 S.W.3d 441, 2009 WL 396271 (Tex. App.—Houston [14th Dist.] 2009).

Failure to include improper admission of evidence in a statement of points for appeal constitutes waiver.
In Re K.C.B., 280 S.W.3d 888, 2009 WL 638187 (Tex. App.—Amarillo 2009).

Associate judge's report constitutes rendering a final order under Family Code § 263.401.
In re T.D.S.T., 287 S.W.3d 268, 2009 WL 1099197 (Tex. App.—Amarillo 2009).

Trial court abused its discretion by denying a motion to dismiss after the statutory deadline without a proper extension.
In Re J.H.G., 290 S.W.3d 400, 2009 WL 1335156 (Tex. App.—Dallas 2009).

Family Code § 263.405(b) and (i)'s procedural restrictions do not violate due process.
In re J.S., 291 S.W.3d 60, 2009 WL 1636816 (Tex. App.—Eastland 2009).

Requiring trial court hearing to determine appellate issues as non-frivolous as a prerequisite for a free record does not violate due process.
In re S.N., 292 S.W.3d 807, 2009 WL 2209863 (Tex. App.—Eastland 2009).

Trial court cannot take judicial notice without notifying the parties that it has done so and giving them an opportunity to challenge the decision.
In re C.L., ___ S.W.3d ___, 2009 WL 3319932 (Tex. App.—Waco 2009).

Family Code § 263.405's 15-day deadline for a statement of points is constitutional when mother failed to show an issue she was prevented from raising on appeal.
M.C. v. TDFPS, ___ S.W.3d ___, 2009 WL 3450987 (Tex. App.—El Paso 2009).

Trial court abused its discretion by granting T.D.F.P.S.'s plea to the jurisdiction when parents consented to relative's SAPCR.
In re Cervantes, ___ S.W.3d ___, 2009 WL 3766375 (Tex.App.—Waco 2009, orig. proceeding) (op. on rhrng.).

TDFPS was not required to present evidence at frivolousness hearing when judge also presided over bench trial regarding termination.
In re J.J.C., ___ S.W.3d ___, 2009 WL 3817892 (Tex. App.—Houston [14th Dist.] 2009).

Evidence of father's paranoia and other mental problems was sufficient evidence to show that termination of parental rights was in child's best interest.
In re M.R.J.M., ___ S.W.3d ___, 2009 WL 485719 (Tex. App.—Fort Worth 2009) (op. on rehearing).

Evidence that mother had intermittent explosive disorder was sufficient to support termination.
In re E.I.T., ___ S.W.3d ___, 2009 WL 3644926 (Tex. App.—Beaumont 2009).

Evidence of neglect was sufficient to support termination of parental rights.
In re E.S.C., 287 S.W.3d 471 (Tex. App.—Dallas 2009).

Evidence of parents mental deficiency was insufficient to support termination under Family Code § 161.003.
In re A.L.M., ___ S.W.3d ___, 2009 WL 3877943 (Tex. App.—Texarkana 2009).

Evidence was factually insufficient to support finding that termination was in best interest of child when mother posed no threat to child and TDFPS intended to place child with biological father.
In re J.N., ___ S.W.3d ___, 2009 WL 4042124 (Tex. App.—Amarillo 2009).

XIII. Conclusion

Family law in Texas is a specialized and always-changing practice. It is important to remain up-to-date on the regular changes to the law by courts and the legislature. The goal of this paper is to illustrate some of the highlights and to remind the general practitioner to continue to update your family law practices as the law changes.