TexasBarBooks

TEXAS FAMILY LAW PRACTICE MANUAL

Practice Notes

2020

Texas Family Law Practice Manual
2020 Edition

Practice Notes

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2020 Edition

Practice Notes

A project of the
Council of the Family Law Section
of the
State Bar of Texas

Austin

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2020 Edition

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Introduction

The practice notes in this manual were written by a committee of the Council of the Family Law Section of the State Bar of Texas, and great care has gone into their preparation. This manual is a practice guide for lawyers in Texas practicing under the Family Code; insofar as possible, it is organized by cause of action. Each chapter in this volume has a detailed table of contents. The forms for this manual are located in the three companion volumes.

A substantial debt of gratitude is owed to the more than one hundred members of the family bar who have given thousands of hours of their volunteer time over the years—fifty and counting—to maintain the manual as the most up-to-date, comprehensive, and user-friendly publication of its kind available anywhere.

§ 1 Practice Notes

The practice notes are short synopses of the law, designed to serve as a primer to the very basic matters involved in a particular chapter. These notes are, at most, black-letter law and do not try to resolve questions in controversial areas. They bring together the Family Code sections, Rules of Civil Procedure, and other basic law relating to the topic treated by the chapter. For the lawyer experienced with the Family Code, these notes should serve as a reminder of some of the basics; for the lawyer not so experienced with the Code, they should provide an orientation to the major matters with which the lawyer needs to be concerned when contemplating a particular cause of action.

Although the notes are not intended as a treatise on the subject, they contain much important information that must be understood before the forms may be used responsibly.

§ 2 Digital Download

The *Texas Family Law Practice Manual* is available in two digital versions: online and downloadable. The online version, available by subscription, is accessible on a variety of platforms including PC, mobile phones, and tablets. The complimentary downloadable version contains the entire text of the manual as two Adobe Acrobat PDF files (practice notes and forms).

In both versions, applicable Texas and federal case and statute citations in the practice notes are linked to case reports and main code sections cited via Casemaker online. Both versions are searchable and hyperlinked to allow for easy, rapid navigation to topics of interest.

For more information about the digital download including usage notes, see the material in the Introduction in volume 1 of the forms portion of this manual.

§ 3 Corrections and Updates

In drafting the manual, the members of the committee devoted a great deal of effort to making it error free, but it undoubtedly contains some errors. We would appreciate your pointing out to us any errors you find in the manual, as well as any revisions you believe are advisable. Please mail any corrections or suggestions to the following address:

Director, TexasBarBooks
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487
books@texasbar.com

Periodic updating of the manual is planned to reflect changes in the law. It is also expected that, over time, additional topics will be covered and the scope of coverage of existing topics will be expanded. We welcome your suggestions about new topics that you would find helpful. Please send your suggestions to the address shown above.

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Chapter 1

Ethics and Malpractice Considerations

I. Introduction

§ 1.1 Scope of Chapter

This chapter addresses the regulation of attorneys and law practice, accountability for professional responsibility, and liability for professional malpractice in Texas, with emphasis on family law practice.

Family law attorneys practice in environments filled with hostility, bitterness, and demands. Their clients frequently are frustrated with the system, angry at the opposing party and attorney, and ready to blame anyone, including their own attorneys, if they are dissatisfied with the outcome of litigation.

Family law practitioners tend to have a higher frequency of malpractice claims than practitioners in all other areas of practice except personal injury lawyers. Any attorney with doubts about family law practitioners' exposure to grievance complaints should read the section on disciplinary actions in the *Texas Bar Journal* each month for examples of disbarments, resignations, suspensions, and public and private reprimands of attorneys in family law matters.

By studying the ethical standards to which all family law attorneys must adhere, any attorney will quickly understand why grievance complaints and malpractice claims are increasing in family law. To counter this trend, the best available tool is a full understanding of accountability for professional responsibility and liability for professional malpractice.

II. The Profession and Its Regulation

§ 1.2 State Bar Act

The State Bar of Texas is an administrative agency of the judicial department. Tex. Gov't Code § 81.011(a). The Supreme Court of Texas exercises administrative control over the bar. Tex. Gov't Code § 81.011(c). The supreme court promulgates the rules governing the bar and may adopt rules for the administration of the bar and for the discipline of the bar's members. Tex. Gov't Code § 81.024. Disciplinary jurisdiction is divided into grievance districts. Tex. Rules Disciplinary P. R. 2.01, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1 (West 2013). Grievance committees in each district investigate any alleged ground for discipline of an attorney and take action appropriate under the disciplinary rules. *See* Tex. Gov't Code § 81.072.

§ 1.3 State Bar Rules

Rules governing the State Bar were initially adopted by the members of the State Bar of Texas and thereafter promulgated by the Supreme Court of Texas on February 22, 1940, and subsequently amended several times. The portions of the rules dealing with discipline and suspension of attorneys are entitled the "Texas Disciplinary Rules of Professional Conduct" and the "Texas Rules of Disciplinary Procedure." A copy of the rules can be found in the Texas Government Code, in the Texas Rules of Court—State (West), and at **www.legalethicstexas.com/Ethics-Resources/Rules.aspx.** A copy can also be obtained without charge at the Office of the Chief Disciplinary Counsel for the State Bar of Texas in the following cities:

Austin Office, 1414 Colorado, Austin, TX 78701, 512-427-1350

Dallas Regional Office, 14651 Dallas Parkway, Suite 925, Dallas, TX 75254, 972-383-2900

Houston Regional Office, 4801 Woodway Drive, Suite 315-W, Houston, TX 77056, 713-758-8200

San Antonio Regional Office, 711 Navarro, Suite 750, San Antonio, TX 78205, 210-208-6600

§ 1.4 Texas Rules of Disciplinary Procedure

The Texas Rules of Disciplinary Procedure provide these sanctions for professional misconduct: disbarment; resignation in lieu of disbarment; indefinite disability suspension; suspension for a term certain; probation of suspension, which may be concurrent with the period of suspension, on reasonable terms appropriate under the circumstances; interim suspension; public reprimand; and private reprimand. *See* Tex. Rules Disciplinary P. R. 1.06FF.

The term *sanction* may also include a requirement of restitution and the payment of reasonable attorney's fees and direct expenses. Tex. Rules Disciplinary P. R. 1.06FF.

§ 1.5 Texas Disciplinary Rules of Professional Conduct

The Texas Disciplinary Rules of Professional Conduct are mandatory. The aspirational goals are grouped in the preamble rather than intermingled with rules within the body. Substantial commentary after each rule provides historical background and interpretational guidance.

The ethics opinions issued by the Professional Ethics Committee of the Supreme Court of Texas provide interpretations of the rules and the Texas Code of Professional Responsibility (the predecessor to the rules). These ethics opinions are published in the *Texas Bar Journal* and are available on the Internet at **www.legalethicstexas.com/Ethics-Resources/Opinions.aspx**.

Informal explanations of the rules may be obtained by calling the Attorney Ethics Helpline within the Office of the Chief Disciplinary Counsel at 800-532-3947. A consultation may be not only informative but also probative of good faith should a question later arise.

§ 1.6 American Bar Association's Model Rules of Professional Conduct

The text of the Model Rules, approved by the American Bar Association House of Delegates, can be obtained at **https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html**.

§ 1.7 Texas Code of Ethics and Professional Responsibility for Legal Assistants

The Code of Ethics and Professional Responsibility adopted by the board of directors of the Paralegal Division of the State Bar of Texas can be found on the Internet at **https://txpd.org/page.asp?p=Code%20of%20Ethics**.

§ 1.8 Texas Lawyer's Creed

Adopted by the Texas Supreme Court and courts of appeals in 1989, the Texas Lawyer's Creed is a mandate to the legal profession that goes beyond disciplinary rules and standards. The Texas Disciplinary Rules of Professional Conduct are cast in terms of "shall" and "shall not" and are merely a "floor" of professional conduct. The Texas Lawyer's Creed recognizes that professionalism requires more than mere compliance with these imperatives. The Creed addresses an attorney's most important relationships in his or her practice of law: those between the attorney and our legal system, the attorney and the client, the attorney and other attorneys, and the attorney and the judge.

According to The Order of Adoption, the standards set forth in the Creed are not a set of rules that attorneys can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.

The Creed requires an attorney to advise clients of its contents when undertaking representation. See form 2-2 in this manual for the full text of the Texas Lawyer's Creed as appended to the attorney's employment contract.

[Sections 1.9 and 1.10 are reserved for expansion.]

III. Professional Responsibility

§ 1.11 Professional Misconduct

§ 1.11:1 Definitions and Sanctions

Professional misconduct that subjects an attorney to disciplinary action includes violation of a disciplinary rule and violation of the barratry statute. *See* Tex. Penal Code § 38.12.

An attorney who has knowledge that another attorney has committed a violation of the rules of professional conduct that raises a substantial question as to that attorney's honesty, trustworthiness, or fitness as an attorney in other respects is required to inform the appropriate disciplinary authority. Tex. Disciplinary Rules Prof'l Conduct R. 8.03(a), *reprinted in* Tex. Gov't Code Ann., tit 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9).

On proof of conviction of a felony involving moral turpitude or of a misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or property, suspension pending appeal is mandatory. An attorney who receives probation will be suspended. Tex. Gov't Code § 81.078(b). On proof of final conviction, the attorney will be disbarred. Tex. Gov't Code § 81.078(c); Tex. Rules Disciplinary P. R. 8.05.

Moral turpitude is inherently immoral conduct that is willful, flagrant, or shameless and that shows a moral indifference to the opinion of the good and respectable members of the community. *Searcy v. State Bar of Texas*, 604 S.W.2d 256, 258 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.).

In a significant change of policy, the Texas Supreme Court held that under Texas's disciplinary scheme, an attorney who had pleaded guilty to possession of a controlled substance—a third-degree felony—was not subject to compulsory discipline. Instead, the attorney's actions could be reviewed and sanctioned following standard grievance procedures. *In re Lock*, 54 S.W.3d 305, 312 (Tex. 2001).

The term *misconduct* is defined in both the Texas Rules of Disciplinary Procedure and the Texas Disciplinary Rules of Professional Conduct. Professional misconduct by an attorney includes—

1. acts or omissions, individually or in concert with another person or persons, that violate one or more of the Texas Disciplinary Rules of Professional Conduct;

2. conduct that occurs in another state or in the District of Columbia and results in the disciplining of the attorney in that other jurisdiction, if the conduct is professional misconduct under the Texas Disciplinary Rules of Professional Conduct;

3. violation of any disciplinary or disability order or judgment;

4. conduct that constitutes barratry as defined by Texas law;

5. failure to comply with rule 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of the attorney's cessation of practice;

6. practice of law either during a period of suspension or when on inactive status;

7. conviction of a serious crime or being placed on probation for a serious crime with or without an adjudication of guilt ("serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of these crimes; Tex. Rules Disciplinary P. R. 1.06GG); or

8. conviction of an intentional crime or being placed on probation for an intentional crime with or without an adjudication of guilt ("intentional crime" means any serious crime that requires proof of knowledge or intent as an essential element or any crime involving misapplication of money or other property held as a fiduciary; Tex. Rules Disciplinary P. R. 1.06V).

Tex. Rules Disciplinary P. R. 1.06CC.

An attorney shall not—

1. violate the disciplinary rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not the violation occurred in the course of an attorney-client relationship;

2. commit a serious crime or commit any other criminal act that reflects adversely on the attorney's honesty, trustworthiness, or fitness as an attorney in other respects ("serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of these crimes; Tex. Disciplinary Rules Prof'l Conduct R. 8.04(b));

3. engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

4. engage in conduct constituting obstruction of justice;

5. state or imply an ability to influence improperly a governmental agency or official;

6. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

7. violate any disciplinary or disability order or judgment;
8. fail to timely furnish to the Office of the Chief Disciplinary Counsel or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he in good faith timely asserts a privilege or other legal ground for failure to do so;
9. engage in conduct that constitutes barratry as defined by Texas law;
10. fail to comply with rule 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice;
11. engage in the practice of law when the attorney is on inactive status, except as permitted by section 81.053 of the Government Code or article XIII of the State Bar Rules (concerning certain volunteer work), or when the attorney's right to practice has been suspended or terminated, including but not limited to situations where an attorney's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with article XII of the State Bar Rules relating to mandatory continuing legal education; or
12. violate any other Texas laws relating to the professional conduct of attorneys and to the practice of law.

Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a).

The attorney-client relationship is not a necessary element in a charge of a violation of rule 8.04, as it is under many other disciplinary rules. These forms of misconduct are prohibited regardless of whether they involve the practice of law.

§ 1.11:2 Examples of Misconduct

An attorney's attempt to get a client to sign a false affidavit was professional misconduct under former DR 1-102(A)(3)–(5), and this violation, standing alone, warranted suspension for two years, even though it ("attempted perjury") might not be a violation of the Penal Code. *Archer v. State*, 548 S.W.2d 71, 76 (Tex. App.—El Paso 1977, writ ref'd n.r.e.).

An attorney's conviction for knowingly making a false statement on a loan application constituted a crime involving moral turpitude warranting disbarment. *Searcy v. State Bar of Texas*, 604 S.W.2d 256, 258–59 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.).

Bond jumping and importation and distribution of marijuana were all acts involving moral turpitude within the meaning of the State Bar Act providing for disbarment. Attorneys are held to a more strict standard than laypersons because of public trust. An attorney assumes responsibility to the law itself because the attorney is an officer of the court. *Muniz v. State*, 575 S.W.2d 408, 411 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.).

A Florida attorney was suspended for three months after he wrote letters prejudicial to his clients' efforts to adopt a child. The attorney wrote the letters after getting into a fee dispute with his clients in the adoption proceedings. The court held that, though the clients suffered no actual harm, the attorney's intentional and unjustifiable attempt to injure them resulted from his allowing "personal prejudices to interfere with his professional responsibilities." The fee dispute arose after the clients had received the child but before a final hearing. In a letter to the social worker assigned to the case, the attorney intimated that the couple might not be financially able to care for the child and urged further investigation. After the social worker refused to withdraw her favorable opinion, the attorney wrote another letter that detailed the fee disagreement, indicated his "distress" at having the child placed with his clients, and implied that he had concerns about the couple's moral standards. *Florida Bar v. Ball*, 406 So. 2d 459, 460 (Fla. 1981).

An Ohio attorney was publicly reprimanded for uttering and transmitting obscene language to the adverse party and to other attorneys in pending litigation because that conduct violated the disciplinary rule prohibiting lawyers from engaging in any conduct that adversely reflects on fitness to practice law. *Columbus Bar Ass'n v. Riebel* 432 N.E.2d 165, (Ohio 1982).

§ 1.12 Attorney's Fees

Attorney's fees may give rise to a variety of ethical considerations, which are discussed in chapter 20 in this manual.

§ 1.13 Conflicts of Interest

§ 1.13:1 Conflicts of Interest between Attorney and Client

Generally: An attorney has a strong fiduciary relationship to the client that precludes any conflict of interest. *Smith v. Dean*, 240 S.W.2d 789, 791 (Tex. App.—Waco 1951, no writ).

Refusing to Accept Employment: If there is a potential conflict of interest between the interests of the client and those of the attorney, the attorney must refuse that employment:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Tex. Disciplinary Rules Prof'l Conduct R. 1.06.

COMMENT: Although not required, a written waiver from each client can avoid future problems or allegations of misconduct.

An attorney who had formerly represented both parties on common matters was allowed to testify in a divorce case regarding the wife's fitness to have custody of the children. The attorney had represented the couple before in adoption proceedings and in two unrelated damage suits. The court said the record did not show that an attorney-client relationship ever existed between the attorney and the wife concerning the divorce and noted that the attorney withdrew as counsel for the husband when it became evident the attorney would have to testify. *Grosberg v. Grosberg*, 68 N.W.2d 725, 727 (Wis. 1955).

An attorney, while representing the husband in a contested divorce, joined the law firm representing the wife in the same action. He then filed a motion attempting to hold his former client in contempt. The district grievance committee ruled that, once the attorney established an attorney-client relationship with the husband, he acted improperly in subsequently representing the wife in the same matter, regardless of whether any confidences were actually revealed. Neither he nor his firm could represent the wife. 45 Tex. B.J. 605 (1982).

The duty to withdraw because of conflict also applies to court-appointed attorneys. In *Haley v. Boles*, 824 S.W.2d 796 (Tex. App.—Tyler 1992, orig. proceeding), a trial judge appointed an attorney to represent an indigent criminal defendant. The trial court denied the attorney's motion to withdraw based on the fact that the wife of the attorney's partner was the district attorney. In conditionally granting the subsequent application for writ of mandamus, the court of appeals noted that the propriety of attorney-spouses representing opposing parties in a criminal case was a case of first impression but that, if

there is impropriety in spouses representing adversaries, the disqualification extends to the partners and associates of the spouse. *Haley*, 824 S.W.2d at 797.

Former Clients: An attorney may permissibly acquire an interest adverse to that of a former client only on a showing that acquiring the interest did not require breaching any confidence, taking any unfair advantage, or using any information acquired in the attorney-client relationship. *Waters v. Bruner*, 355 S.W.2d 230, 233 (Tex. App.—San Antonio 1962, writ ref'd n.r.e.).

A law firm had no duty to protect a former client's property that was the subject of a writ of execution issued to the firm under a judgment against the former client for unpaid attorney's fees. Since the attorney-client relationship had ended well before the litigation began, the firm had no duty to protect the property sold to satisfy the judgment. *Merrell v. Fanning & Harper*, 597 S.W.2d 945, 950 (Tex. App.—Tyler 1980, no writ).

Acquiring Interest in Litigation: An attorney shall not acquire a proprietary interest in the cause of action or subject matter of litigation the attorney is conducting for a client, except that the attorney may acquire a lien granted by law to secure the attorney's fee or expenses and contract in a civil case with a client for a contingent fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(h).

The rule is preventive, for it may be violated even without a showing that a client has suffered actual harm. The rule prohibits attorneys from acquiring proprietary interests in the subject matter of litigation in order to avoid the possibility of adverse influence on the attorney and harm to the client. *State v. Baker*, 539 S.W.2d 367, 373 (Tex. App.—Austin 1976, writ ref'd n.r.e), *overruled on other grounds*, *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989). In *Baker*, the attorney was disciplined for purchasing property on the client's behalf at a sheriff's sale and thereafter using title to the property to secure fees for himself without notice to and consent of the client.

Loans to Clients: An attorney shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that an attorney may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter, and an attorney representing an indigent client may pay court costs and expenses of litigation on behalf of the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(d).

It is generally improper for an attorney to advance money for the client's living expenses. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 106 (1954) (personal injury case).

Business Ventures with Clients: An attorney shall not enter into a business transaction with a client unless the transaction and terms on which the attorney acquires the interest are fair and reasonable to the client and are fully disclosed in a manner that can be reasonably understood by the client, the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction, and the client consents in writing thereto. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a).

Standard commercial transactions between the attorney and the client for products or services that the client generally markets to others are excluded from the definition of "business transactions." Tex. Disciplinary Rules Prof'l Conduct R. 1.08(j). Tex. Disciplinary Rules Prof'l Conduct R. 1.08 cmt. 2 reiterates this exclusion, noting that the general prohibition does not apply to standard commercial transactions between the attorney and client for products or services that the client generally markets, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In these transactions the attorney has no advantage in dealing with the client, and the restrictions are unnecessary and impracticable. The rule departs from former DR 5-104(A), which forbade an attorney to enter into a business transaction with a client if they had differing interests and if the client expected the attorney to exercise his professional judgment to protect the client, unless the client consented after disclosure. The rule does not refer to the exercise of the attorney's professional judgment or to the client's expectations. Business transactions are flatly prohibited unless the attorney strictly complies with Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a), which appears to require written consent of the client regardless of his expectations.

§ 1.13:2 Conflicts of Interest among Clients

Conflicts Created by Multiple Representation: An attorney may not accept or continue employment if two or more of the attorney's clients might have interests that are conflicting, inconsistent, diverse, or otherwise discordant. *Lott v. Ayres*, 611 S.W.2d 473, 476 (Tex. App.—Dallas 1980, writ ref'd n.r.e.).

Rule 1.06 provides:

> (a) A lawyer shall not represent opposing parties to the same litigation.

> (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
>
> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
>
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
>
> (c) A lawyer may represent a client in the circumstances described in (b) if:
>
> (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
>
> (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.
>
> (d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.
>
> (e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.
>
> (f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Tex. Disciplinary Rules Prof'l Conduct R. 1.06.

The prohibition extends only to interests that are in fact adverse and hostile. For example, it did not preclude one attorney from representing both parents in a proceeding to

terminate their parental rights. *In re H.W.E.*, 613 S.W.2d 71, 72 (Tex. App.—Fort Worth 1981, no writ); *see also* Tex. Fam. Code § 107.013(b).

An attorney may properly represent both buyer and seller in real estate transactions if all parties agree after full disclosure of the facts. One court held such representation proper under these circumstances: The purchasers were satisfied with the attorney's handling of the original transaction; they were aware of the attorney's position as trustee; and they understood that as trustee he had power to sell the property in case of default. *Dillard v. Broyles*, 633 S.W.2d 636, 642 (Tex. App.—Corpus Christi–Edinburg 1982, writ ref'd n.r.e.).

Conflicts Created by Prior Representation: Without prior consent, an attorney who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client in which the other person questions the validity of the attorney's services or work product for the former client, or if the representation in reasonable probability will involve a violation of Tex. Disciplinary Rules Prof'l Conduct R. 1.05, or if it is the same or a substantially related matter. Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a). The fact that the lawyer has no recollection of the initial consultation or the matter disclosed in the meeting is of no consequence. The former client is entitled to a conclusive presumption that he imparted confidences and secrets. *In re Z.N.H.*, 280 S.W.3d 481, 485 (Tex. App.—Eastland 2009, no pet.).

The issue of what constitutes a "substantial relation" in this regard has arisen in some cases. An attorney's representation of a husband and wife in a personal injury action involving the wife's injuries did not preclude his representation of the wife in a divorce action filed while the first suit was pending. When the firm assumed representation of the wife in the divorce, it terminated representation of the husband in the personal injury suit. *Lott v. Lott*, 605 S.W.2d 665, 668 (Tex. App.—Dallas 1980, writ dism'd). The prior representation of a couple in a protest to a zoning change did not prevent an attorney from later representing the husband in a divorce case. *In re Frost*, No. 12-08-00154-CV, 2008 WL 2122597 (Tex. App.—Tyler May 21, 2008, orig. proceeding) (mem. op.).

Similarly, the court did not find a sufficient relation to create a conflict when an attorney represented a clinic in a contract dispute against a doctor to whom he had previously given advice on the status of an out-of-state divorce decree. *Braun v. Valley Ear, Nose & Throat Specialists*, 611 S.W.2d 470, 472 (Tex. App.—Corpus Christi–Edinburg 1980, no writ).

A party who fails to seek disqualification timely waives the complaint. *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994) (orig. proceeding) (per curiam). The court will consider the length of time between the moment the conflict became apparent to the aggrieved party and the time the motion for disqualification is filed in determining whether the complaint was waived. *Vaughan v. Walther*, 875 S.W.2d 690, 690–91 (Tex. 1994) (orig. proceeding) (per curiam); *see also In re Epic Holdings, Inc.*, 985 S.W.2d 41, 52–54 (Tex. 1998) (orig. proceeding). The court should also consider any other evidence that indicates the motion is being filed not due to a concern that confidences related in an attorney-client relationship may be divulged, but as a dilatory trial tactic. *See Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding); *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App.—Waco 1995, orig. proceeding).

COMMENT: Because the appeal of the denial of attorney disqualification does not adequately remedy the injury, mandamus relief is available to correct an abuse of discretion.

"Friendly Divorces": One attorney's representation of both parties in a divorce is a common source of conflict of interest. The husband and wife usually initiate this arrangement to save expenses when they consider that the divorce will be friendly. However, once a conflict arises, they both are likely to blame the attorney for their problems, for each party will maintain that the attorney was his or her exclusive representative. One commentator has observed:

> In handling the dissolution of a marital estate, the attorney's ethical obligations require attempts to maximize the client's share of marital property, minimize tax consequences and protect support, custody and visitation rights. When an attorney attempts to represent both parties to a divorce, there is an inherent conflict which necessarily limits the ability of the attorney to advocate the best interests of the client.

Ronald E. Mallen, *On Guard: How to Avoid That Malpractice Suit*, 1 Fam. Advoc. 10, 12 (1978). See also section 1.25:3 below regarding the attorney's duty to advise clients of conflict of interest.

Separation agreements, like divorces, can generate the same problems with conflict of interest. A separation agreement may be voided because of one party's taking unfair advantage or overreaching. One court found that a husband was the unwitting victim of a separation agreement that was "unconscionable, oppressive and unfair" because of the

following conditions: He was unfamiliar with the technicalities of the agreement; he was led to believe that his wife's attorney would protect both their interests; and he was not advised before making the agreement that he should seek independent legal advice. *Jensen v. Jensen*, 557 P.2d 200 (Idaho 1976).

"An attorney may ethically communicate with an opposing party who is not represented by counsel with respect to prospective litigation provided he does not mislead the opposing party in any way or undertake to advise him as to the law or his status as a litigant." Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 335 (1967).

For an in-depth discussion of multiple representation of spouses in an uncontested divorce, see Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Texas L. Rev. 211, 245–58 (1982).

Note: Tex. Comm. on Prof'l Ethics, Op. 583 (2008) states, "Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary documents to effect an agreement resulting from the mediation. Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effect the terms of an agreed divorce."

§ 1.14 Confidentiality

Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct concerns the attorney's duties with regard to the confidentiality of client information. See the discussion in the practice notes in section 2.8 in this manual regarding confidences and secrets of clients and the obtaining of information.

§ 1.15 Commingling Funds

An attorney must hold funds and other property belonging in whole or in part to clients or third persons that are in an attorney's possession in connection with a representation separate from the attorney's own property. These funds must be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state where the attorney's office is situated or elsewhere with the consent of the client or third person. Other client property must be identified as such and appropriately safeguarded. The attorney must keep complete records of account funds and other property and preserve

them for five years after termination of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a).

On receiving funds or other property in which a client or third person has an interest, an attorney must promptly notify the client or third person. Unless expressly permitted in the rules or otherwise permitted by law or by agreement with the client, an attorney must promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, on request by the client or third person, promptly render a full account regarding the property. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(b).

When in the course of representation an attorney is in possession of funds or other property in which both the attorney and another person claim interests, the attorney must keep the property separate until there is an account and severance of their interests. All funds in a trust or escrow account may be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their interests, the attorney must keep the portion in dispute separate until the dispute is resolved, and the undisputed portion must be distributed appropriately. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(c).

A two-year suspension of an attorney's license was upheld as a proper sanction for commingling funds. The jury found that the attorney had deposited a client's funds in a general business account. The court held that a fraudulent, willful, or culpable intent was not necessary to invoke the suspension and that the client's consent did not absolve the attorney from liability. The purpose of former DR 9-102 was to guard against loss of a client's funds that may occur even with "good intentions." *Archer v. State*, 548 S.W.2d 71, 73–74 (Tex. App.—El Paso 1977, writ ref'd n.r.e.).

True retainer fees are earned when received and may be deposited in the attorney's account, but a refundable retainer belongs to the client until it is earned or expenses are incurred and must be held in the lawyer's trust account. Retainer fees are discussed in section 20.4 in this manual.

§ 1.16 Advertising

§ 1.16:1 Background

It is unconstitutional to prohibit attorneys from advertising prices charged for uncontested divorces, simple adoptions, uncontested personal bankruptcies, changes of name,

and routine services, as long as the advertising is not false, deceptive, or misleading. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

However, certain restrictions on targeted direct-mail solicitation may be imposed by a state bar without violating the First Amendment free-speech guarantees as applied to commercial speech. "Intermediate scrutiny" is to be applied to regulation of commercial speech, and state bar associations have the right to restrict certain forms of advertising by lawyers. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

§ 1.16:2 Texas Advertising Guidelines

The following practice notes briefly summarize salient parts of the rules adopted by the Supreme Court of Texas relating to advertising, but attorneys planning any form of advertising or solicitation, including on websites, should examine the advertising rules closely and direct any inquiries to the Advertising Review Committee of the State Bar of Texas.

Firm Names and Letterhead: The practice of law under a trade name or a name that is misleading as to the identity of the attorneys practicing under the name or under a firm name that includes names other than one or more of the attorneys in the firm is prohibited. The use of words such as "professional corporation," "limited liability partnership," or similar designations and abbreviations for the entity are allowed. Use of the name of a deceased or retired partner or predecessor firm is not considered misleading. A married woman is not prohibited from practicing under her maiden name. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(a).

If a law firm has a multistate practice, letterhead of the firm for a Texas office must indicate which attorneys listed are not licensed to practice in Texas. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(b).

If an attorney occupies a judicial, legislative, or public executive or administrative position, the firm may not include the attorney's name during any substantial period in which the attorney is not regularly and actively practicing with the firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(c).

An attorney may not hold himself or herself out as being a partner, shareholder, or associate of one or more other attorneys unless it is, in fact, true. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(d).

While an attorney may not advertise or seek professional employment under a trade name or fictitious name in any communication, an attorney who practices under a firm name may use that name in an advertisement or communication. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(e).

An attorney may not use a firm name, letterhead, or other professional designation that violates rule 7.02(a) (concerning false or misleading communications about the attorney's services or qualifications). Tex. Disciplinary Rules Prof'l Conduct R. 7.01(f).

There is little case law focusing on the representations contained in a professional letterhead. *State Bar of Texas v. Leighton*, 956 S.W.2d 667, 670 (Tex. App.—San Antonio 1997), *pet. denied*, 964 S.W.2d 944 (Tex. 1998). However, one case holds that a lawyer commits a material misrepresentation if a letterhead is used advertising board certification when his certification has expired. *State Bar of Texas v. Faubion*, 821 S.W.2d 203, 206 (Tex. App.—Houston [14th Dist.] 1991, writ denied). According to the State Bar, a member of the College of the State Bar of Texas may advertise the membership on professional letterhead.

Communications about Services: Making or sponsoring false or misleading communications about attorneys' services or qualifications is specifically prohibited. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a). The following seven categories of communications are considered false and misleading:

1. Communications containing material misrepresentations of fact or law or omitting a fact necessary to prevent the statement as a whole from being materially misleading. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(1).

2. Communications that contain any reference in a public media advertisement to past successes or results obtained unless (a) the attorney served as lead counsel in the matter or was primarily responsible for the settlement or verdict, (b) the client actually received the amount involved, (c) the reference is accompanied by adequate information about the nature of the case or matter and the damages or injuries the client sustained, and (d) if the gross amount received is stated, the attorney's fees and litigation expenses withheld are also stated. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(2).

3. Communications that are likely to create an unjustified expectation about the results the attorney can achieve or that state or imply that the attorney can achieve results by means that violate the law or the disciplinary rules. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(3).

4. Communications comparing the attorney's services with other attorneys' services unless the comparison can be substantiated with objective, verifiable data. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(4).

5. Communications stating or implying that the attorney is able to influence any tribunal, legislative body, or official improperly or on irrelevant grounds. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(5).

6. Communications in an advertisement in the public media or in a solicitation communication that designate one or more areas of practice unless the attorney is competent to practice in those areas. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(6). (Although an attorney is not required to be board certified to advertise a specialty, certification is conclusive of an attorney's competence. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(b).)

7. Communications that use an actor or model to portray a client of the attorney. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(7).

Prohibited Solicitations and Payments: An attorney may not contact, in person or by regulated telephone or other electronic means (not including the attorney's website) that will result in live, interactive communication, someone (other than a family member) who was not previously a client regarding a particular event or series of events when the attorney's objective is pecuniary gain. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(a), (f). However, an attorney employed by a nonprofit organization may contact members of the organization for limited purposes. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(a). Attorneys may not pay referral fees to nonattorneys, although they may pay for advertising and for the expenses of an attorney referral service. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(b). Attorneys may not advance or offer to advance anything of value to a prospective client or other person, except for amounts allowed under Tex. Disciplinary Rules Prof'l Conduct R. 1.08(d) and legitimate referral fees. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(c). An attorney shall not enter into an agreement to collect fees in violation of the above rules, nor may he accept referrals from an attorney referral service unless it meets the requirements of chapter 952 of the Texas Occupations Code. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(d), (e).

Advertisements in Public Media: Communications made through the public media are governed by rule 7.04. Attorneys may advertise by stating a specialty only as permitted by rules 7.04(a) and 7.04(b). Attorneys may list particular areas of practice in legal directories, as long as the information is not false or misleading. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(a).

An attorney who advertises in the public media must publish or broadcast the name of at least one attorney who is responsible for the content of the advertisement. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b)(1). Attorneys may also advertise that they are, for example, "Board Certified, Family Law—Texas Board of Legal Specialization" if in fact they are so recognized by the Texas Board of Legal Specialization. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b)(2)(i). Attorneys may include statements that they are members of an organization the name of which implies that its members possess special competence only if the organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the bar. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b)(2)(ii). An infomercial or comparable presentation must state that it is an advertisement both verbally and in writing at both the beginning and the end and in writing during any portion that explains how to contact an attorney or firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b)(3). The statements required by rule 7.04(b) must be displayed conspicuously and in easily understood language. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.04(c).

Attorneys may advertise their services in the public media either directly or through a public relations firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(d). All advertisements must be reviewed and approved in writing by the lawyer or another lawyer in the firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(e). Copies of advertisements and a record of where they were used must be retained for four years after their last use. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(f).

In advertisements in the public media, a person who portrays an attorney whose services are being advertised or narrates the advertisement as if he were such an attorney must in fact be an attorney whose services are being advertised. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(g).

If contingent fees are advertised, the advertisement must state whether the client will be required to pay court costs and whether the client will be responsible for other expenses. If specific percentages are disclosed, the advertisement must state whether the percentage is calculated before or after the expenses are deducted from the recovery. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(h).

If a fee or range of fees is advertised, the attorney is expected to honor those prices for the period during which the advertisement is expected to be in circulation or to be effective or for the time stated in the advertisement. However, quoted prices are not expected to be honored for longer than one year. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(i).

The use of false or misleading mottoes, slogans, or jingles in the public media is prohibited. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(m).

The geographic location of the attorney's principal office must be disclosed. No other office may be advertised unless that other office is staffed by an attorney at least three days a week or the advertisement states the days and times an attorney will be at the office or that meetings with attorneys will be by appointment only. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(j).

If the rules require that specific items of information accompany communications about an attorney's services, the required items must be presented in the same manner as the communication and with equal prominence. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(q).

Advertisements on the Internet must display the statements and disclosures required by rule 7.04. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(r).

Additional rules apply to cooperative advertising by attorneys from different firms, referral services, and payments for advertising made by another attorney. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.04(k), (*l*), (n)–(p).

Prohibited Written, Electronic, or Digital Solicitations: An attorney is prohibited from sending or transmitting certain written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications to a prospective client for the purpose of obtaining professional employment. The following communications are prohibited: those that involve coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment; those that contain information forbidden by Tex. Disciplinary Rules Prof'l Conduct R. 7.02; those that fail to satisfy the requirements of Tex. Disciplinary Rules Prof'l Conduct R. 7.04 that would apply if the communication were an advertisement in the public media; and those that contain a false, fraudulent, misleading, deceptive, or unfair statement or claim. Tex. Disciplinary Rules Prof'l Conduct R. 7.05(a).

The format of a written, electronic, or digital solicitation communication is governed by rule 7.05(b), and requirements for audio, audio-visual, digital media, recorded telephone message, and other electronic communications are governed by rule 7.05(c). *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.05(b), (c).

All written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications must be reviewed by the attorney and signed or approved in writing by the attorney or by another attorney in the firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.05(d). A copy of each such communication, its approval, the dates and places it was sent, and the means by which it was sent must be retained for four years. Tex. Disciplinary Rules Prof'l Conduct R. 7.05(e).

Communications to family members or to preexisting clients, communications made at the request of the prospective client, communications made without concern for a specific past occurrence or event or series of past occurrences or events and not concerned with a specific legal problem of which the attorney is aware, and communications not motivated by the desire for employment or the possibility of pecuniary gain are exempt from the provisions of rule 7.05(b), (c). Tex. Disciplinary Rules Prof'l Conduct R. 7.05(f).

Prohibited Employment: An attorney is generally prohibited from accepting or continuing employment if the employment was procured by conduct prohibited by the advertising rules, certain criminal conduct, or barratry. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.06.

Filing Requirements: There is a specific procedure for preapproval of advertising by the Advertising Review Committee of the State Bar of Texas. A copy of the written, audio, audio-visual, digital, or other electronic communication, including a representative sample of the envelope or other packaging to be used, together with an application form and a filing fee, must be submitted no later than the sending of the communication. Tex. Disciplinary Rules Prof'l Conduct R. 7.07(a). A copy of an advertisement in the public media in the form in which it will appear—for example, video, print copy, audiotape—the production script and other information, the time and locations of dissemination or proposed dissemination, a completed application form, and a filing fee must be submitted. Tex. Disciplinary Rules Prof'l Conduct R. 7.07(b). Requirements for filing with regard to a website are prescribed in rule 7.07(c). *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.07(c).

An attorney may seek an advance advisory opinion about compliance of a proposed solicitation not less than thirty days before its dissemination. An opinion of noncompliance is not binding in a disciplinary proceeding, but a finding of compliance is binding as to all materials submitted for preapproval if the information received in connection with the solicitation is true and not misleading. The finding of compliance is admissible evidence if offered by a party. Tex. Disciplinary Rules Prof'l Conduct R. 7.07(d).

Certain types of communications are exempt from the approval process. These advertisements, if they contain no false or misleading information, include those providing basic information, such as the name, address, electronic address, telephone numbers, office and telephone service hours, and fax numbers of the attorney or attorneys in a firm, with a designation such as "attorney" or "law firm"; fields of specialization and concentration or practice limitation; dates of admission; foreign language ability; acceptance of credit cards; identification with group prepaid legal plans; and any fee for initial consultation or fee schedule. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.07(e).

Jurisdiction: Rule 8.05 designates who will be subject to discipline by the State Bar of Texas for violation of the Texas advertising guidelines. In certain cases, an attorney admitted in Texas may be disciplined for advertisements made in other jurisdictions. Tex. Disciplinary Rules Prof'l Conduct R. 8.05.

§ 1.16:3 Television Advertising

Subchapter J of chapter 81 of the Texas Government Code applies to television advertisements that promote a person's provision of legal services or solicit clients to receive legal services. *See* Tex. Gov't Code § 81.151(a). "Based on clear legislative intent, the State Bar Advertising Review Department considers Section 81.151 to apply only to television advertisements for legal services **regarding medications or medical devices**." **www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceandEthics/AdvertisingReview** (click on "Frequently Asked Questions Regarding SB 1189 effective Sept. 1, 2019").

§ 1.17 Attorney as Witness

An attorney who finds it necessary to testify as a witness should first consult rule 3.08, which provides:

> (a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case;
>
> (4) the lawyer is a party to the action and is appearing pro se; or
>
> (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.
>
> (c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Tex. Disciplinary Rules Prof'l Conduct R. 3.08.

However, disqualification is a severe remedy. *In re Sanders*, 153 S.W.3d 54, 57 (Tex. 2004) (orig. proceeding). "Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice" to merit disqualification. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding). Because of the severity of the remedy, courts must adhere to an exacting standard so as to discourage the use of a motion to disqualify as a dilatory trial tactic. *In re Butler*, 987 S.W.2d 221, 224 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). The party requesting disqualification must demonstrate that the opposing

lawyer's dual role as attorney and witness will cause the party actual prejudice. *Ayres v. Canales*, 790 S.W.2d 554, 558 (Tex. 1990) (orig. proceeding); *see also In re Frost*, No. 12-08-00154-CV, 2008 WL 2122597 (Tex. App.—Tyler May 21, 2008, orig. proceeding) (mem. op.). Finally, a lawyer should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness. Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10.

[Sections 1.18 through 1.20 are reserved for expansion.]

IV. Professional Malpractice

§ 1.21 Nature of Legal Malpractice Action

The weight of authority in Texas holds that a legal malpractice action is a common-law tort arising from an attorney's negligence that breaches a duty to represent a client competently and that proximately causes damages to the client. *See Woodburn v. Turley*, 625 F.2d 589 (5th Cir. 1980); *Oldham v. Sparks*, 28 Tex. 425, 428 (1866); *Gabel v. Sandoval*, 648 S.W.2d 398, 399 (Tex. App.—San Antonio 1983, writ dism'd).

There is some Texas authority for breach-of-contract malpractice actions based on an attorney's breach of agreement to perform legal services. *See Bolton v. Foreman*, 263 S.W.2d 618, 619 (Tex. App.—Galveston 1953, writ ref'd n.r.e.); *Kruegel v. Porter*, 136 S.W. 801, 803 (Tex. App. 1911), *aff'd*, 155 S.W. 174 (Tex. 1913). With the advent of advertising and specialization by attorneys in Texas, the historical basis for the courts' reluctance to hold attorneys liable on an implied or expressed warranty theory may slowly erode.

In addition to other remedies, a client may seek fee forfeiture. The Texas Supreme Court has held that a client need not prove actual damages in order to obtain a forfeiture of an attorney's fee when the attorney breaches his fiduciary duty to the client, because the central purpose of the remedy regarding forfeiture is to protect the relationship of trust from an agent's disloyalty or other misconduct. *Burrow v. Arce*, 997 S.W.2d 229, 237–40 (Tex. 1999). For a detailed discussion of the *Burrow* case and fee forfeiture in general, see Gregg S. Weinberg & B. Todd Wright, *"Trust Me" and Other Swear Words—Another Grim Tale of Attorney's Fee Forfeiture*, *in* State Bar of Tex. Prof. Dev. Program, Advanced Family Law Course 25 (2000).

§ 1.22 Elements of Legal Malpractice

§ 1.22:1 Attorney-Client Relationship and Duty

In a negligence action for malpractice, the plaintiff must prove the existence of an attorney-client relationship at the time of the alleged malpractice. *Shropshire v. Freeman*, 510 S.W.2d 405, 406 (Tex. App.—Austin 1974, writ ref'd n.r.e.).

An attorney shall not accept or continue employment in a legal matter that he knows or should know is beyond his competence unless another attorney competent to handle the matter is associated with him in the matter (with the client's prior informed consent) or unless the advice or assistance of the attorney is required in an emergency and the attorney limits the advice and assistance to that which is reasonably necessary under the circumstances. Additionally, an attorney shall not neglect a legal matter entrusted to him or "frequently" fail to carry out completely the obligations that the attorney owes his clients. "Neglect" is defined as inattentiveness involving a conscious disregard for the responsibilities owed a client. Tex. Disciplinary Rules Prof'l Conduct R. 1.01.

The general duties of an attorney in representing a client have been described as follows:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Cook v. Irion, 409 S.W.2d 475, 477 (Tex. App.—San Antonio 1966, no writ), *disapproved on other grounds*, *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989) (quoting *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954)).

COMMENT: There is a conflict of authority regarding the enforceability of a provision in a legal services contract requiring the arbitration of a malpractice claim. Several cases approve enforcement of such arbitration clauses. *See In re Pham*, 314 S.W.3d 520, 526 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 268 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Henry v. Gonzalez*, 18 S.W.3d 684, 691–92 (Tex. App.—San

Antonio 2000, pet. dism'd). *But see In re Godt*, 28 S.W.3d 732, 738–39 (Tex. App.—Corpus Christi–Edinburg 2000, orig. proceeding), which holds to the contrary. See also Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. Tex. L. Rev. 625 (1997). In *In re Pham*, 314 S.W.3d at 526, the Houston court of appeals said that the public policy arguments against enforcement of such clauses are best directed to the legislature.

§ 1.22:2 Negligent Breach of Duty

"Neglect" Is Not Negligence: "Neglect of a legal matter entrusted to him" involves indifference and consistent failure to carry out the obligation that the attorney has assumed to the client or conscious disregard for responsibilities owed the client. "Neglect is usually evidenced by more than a single act or omission." 61 A.B.A. J. 986 (1975) (ABA Informal Op. 1273).

Good-Faith Errors in Judgment: The "error in judgment" rule has been substantially rewritten in *Cosgrove v. Grimes*, 774 S.W.2d 662, 664–65 (Tex. 1989). Cosgrove initially retained an attorney (Bass) to sue for a personal injury claim arising from an automobile accident. Bass left town and, according to Cosgrove, told Cosgrove he had turned the case over to attorney Grimes. However, Grimes testified that he first heard of the case when Cosgrove came to his office a mere five days before the statute of limitations was to have expired. Cosgrove gave Grimes the information about the accident, including its location and the person to sue (one Timothy Purnell). Grimes testified that he found Cosgrove to be an intelligent man on whom he could rely for the basic facts. Suit was filed on the basis of the information. It later was discovered that Purnell was the passenger, not the driver, and that the petition stated the wrong location of the accident. Both the decision of the court of appeals (*Cosgrove v. Grimes*, 757 S.W.2d 508, 510–11 (Tex. App.—Houston [1st Dist.] 1988)) and that of the supreme court detail the application of the error-in-judgment rule.

The rule, commonly known as the good-faith defense, has historically excused an attorney for any error in judgment if he acted in good faith and in an honest belief that the act or advice was well founded and in the best interest of the client. See *Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. App.—San Antonio 1966, no writ), *disapproved on other grounds*, *Cosgrove*, 774 S.W.2d at 665, in which the plaintiffs' attorneys in a personal injury action sued only one of three potential defendants. An instructed verdict was granted against the plaintiffs after the two-year statute of limitations expired. In an appeal from the legal malpractice action, the court concluded that the good-faith defense applied and that the appellants had failed to establish the attorneys' negligence.

The good-faith exception has been applied to an attorney's failure to dispose of a client's nonvested military retirement benefits in a divorce action and to warn him of a possible later partition action based on the unclear law at the time. *Medrano v. Miller*, 608 S.W.2d 781, 784 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.), *disapproved on other grounds*, *Cosgrove*, 774 S.W.2d at 665. It has been held inapplicable in the following disciplinary proceedings:

1. Violating a disciplinary rule prohibiting receiving compensation from anyone other than one's client. *State v. Baker*, 539 S.W.2d 367, 375 (Tex. App.—Austin 1976, writ ref'd n.r.e.), *disapproved on other grounds*, *Cosgrove*, 774 S.W.2d at 665.
2. Violating disciplinary rules against commingling. *Archer v. State*, 548 S.W.2d 71, 74 (Tex. App.—El Paso 1977, writ ref'd n.r.e.).
3. Making false statements that suit had been filed and failing to file suit before the running of the statute of limitations. *Hicks v. State*, 422 S.W.2d 539, 542 (Tex. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.), *disapproved on other grounds*, *Cosgrove*, 774 S.W.2d at 665.

A review of the cases involving the rule indicates quite clearly that it had been held to be a subjective test before the decision in *Cosgrove. Cosgrove* mandates that the proper standard is the objective exercise of professional judgment:

> There is no subjective good faith excuse for attorney negligence. A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney. The jury must evaluate his conduct based on the information the attorney has at the time of the alleged act of negligence. In some instances an attorney is required to make tactical or strategic decisions. Ostensibly, the good faith exception was created to protect this unique attorney work product. However, allowing the attorney to assert his subjective good faith, when the acts he pursues are unreasonable as measured by the reasonably competent practitioner standard, creates too great a burden for wronged clients to overcome. The instruction to the jury should clearly set out the standard for negligence in terms which encompass the attorney's reasonableness in choosing one course of action over another.
>
> If an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations. An attorney who makes a reasonable

> decision in the handling of a case may not be held liable if the decision later proves to be imperfect. The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith.

Cosgrove, 774 S.W.2d at 664–65.

No Ensuring Desired Result: The duty to use reasonable care, diligence, and skill does not include ensuring or guaranteeing the desired result. *Cosgrove*, 774 S.W.2d at 665.

§ 1.22:3 Proximate Cause

To constitute malpractice, the attorney's negligent breach of duty must proximately cause the client's damages. *See Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995); *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1080–81 (Tex. App. 1904, no writ).

A client who claims that the attorney's malpractice caused loss of the cause of action must prove that the initial suit would have been successful but for the attorney's negligence and must show the amount that could have been collected on a successful judgment. *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

In an Oregon case, for example, a child sued an attorney who had negligently failed to perfect her adoption. On discovering the legally defective procedure, the would-be father refused to recognize any obligation to support the child. The court dismissed the suit because it found insufficient certainty that the child would have collected support but for the attorney's negligence. *Metzker v. Slocum*, 537 P.2d 74 (Or. 1975).

Note, however, that the determination of proximate cause differs in cases of malpractice involving the negligent handling of an appeal. Although the issue of proximate cause is usually a question of fact, the supreme court has determined that in a case of appellate legal malpractice it is a question of law. *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 628 (Tex. 1989).

§ 1.22:4 Client Must Be Damaged

Amount of Damages: Another essential element is that the client must sustain damages as a result of the attorney's negligence. *Fireman's Fund American Insurance Co. v.*

Patterson & Lamberty, Inc., 528 S.W.2d 67, 69 (Tex. App.—Tyler 1975, writ ref'd n.r.e.).

On proof that the attorney's negligence proximately caused the client's damages, proper recovery is the amount the client would have recovered from the original defendant. *Schlosser v. Tropoli*, 609 S.W.2d 255, 259 (Tex. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (upholding $100,000 judgment against attorney who allowed case to be dismissed for want of prosecution).

In a malpractice action by a husband for the attorney's failure to raise the issue of retirement benefits and secure the benefits for the husband at the time of the divorce, the court found that the plaintiff had suffered no damage. The husband was in no worse position because of the subsequent partition of the benefits than he would have been if the benefits had been properly divided in the divorce suit eight years earlier. *Medrano v. Miller*, 608 S.W.2d 781, 784 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.), *disapproved on other grounds, Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989).

If the attorney is found liable, any payment collected from the original defendant is credited against damages assessed against the attorney. *Fireman's Fund American Insurance Co.*, 528 S.W.2d at 70.

If a judgment is entered against a client because of the attorney's negligence, the client may recover the amount of the judgment from the attorney even if the client has not yet paid the judgment. *Montfort v. Jeter*, 567 S.W.2d 498, 499–500 (Tex. 1978).

Recovery in a malpractice action is not limited to actual damages but may also include damages for mental anguish and exemplary damages. *See Montfort*, 567 S.W.2d at 500.

Requirement of Actual Damages: The client must suffer actual damages in order to recover from a negligent attorney. In *Philips v. Giles*, 620 S.W.2d 750, 751 (Tex. App.—Dallas 1981, no writ), the court upheld an attorney's plea in abatement in a malpractice suit on the grounds that the plaintiff-client's suit was premature. In the client's divorce, the attorney had negotiated a settlement in which the husband agreed to pay the wife $500,000 in monthly installments over five years, and the attorney allegedly told the wife she would owe no taxes on the settlement. After the wife's accountant told her that the monthly payments were taxable, she began paying taxes and sought reimbursement from the attorney. The appellate court held the malpractice action premature since no actual tax liability had been established.

Deciding when an action is premature, however, is not always straightforward. In *Bailey v. Travis*, 622 S.W.2d 143 (Tex. App.—Eastland 1981, writ ref'd n.r.e.), summary judgment for the attorney in a malpractice action was upheld. Travis had represented Bailey in a case, but Bailey hired a different attorney to appeal. While appeal was pending, Travis successfully sued Bailey for attorney's fees from the first case. Bailey later sued Travis for malpractice in the first trial, but Travis successfully moved for summary judgment on the basis that, under rule 97 of the Texas Rules of Civil Procedure, the malpractice action should have been filed as a compulsory counterclaim when Travis sued Bailey for attorney's fees. In upholding the summary judgment, the appeals court held that Bailey had been damaged as a result of the alleged malpractice at the time he filed his answer in Travis's suit for fees. Accordingly, said the court, "Bailey's claim . . . had ripened into an enforceable cause of action, even though the full extent of his damages might not have been known." *Bailey*, 622 S.W.2d at 144. See section 1.24:1 below for a discussion of when a cause of action accrues.

§ 1.22:5 Additional Meritorious Action

In addition to establishing the defendant-attorney's primary negligence, the plaintiff-client must often prove an additional meritorious lawsuit in a legal malpractice action to establish that he or she would have prevailed in the suit that is the subject of the malpractice action. The plaintiff-client must establish that the underlying cause of action was meritorious, that it would have resulted in a favorable judgment but for the attorney's negligence, and that the judgment could have been collected. *Lynch v. Munson*, 61 S.W. 140, 142 (Tex. App.—1901, no writ).

§ 1.22:6 Breach-of-Contract Action

The plaintiff's burden of proof in a legal malpractice action under the theory of breach of contract has three main elements: existence of the contract, breach by the attorney, and damages. *See Kruegel v. Porter*, 136 S.W. 801 (Tex. App.—1911), *aff'd*, 155 S.W. 174 (Tex. 1913).

§ 1.23 Who Can Sue for Legal Malpractice

§ 1.23:1 No Private Actions under Texas Disciplinary Rules of Professional Conduct

The Disciplinary Rules of Professional Conduct exist solely as professional sanctions and do not create a private cause of action for malpractice. Comment 15 in the preamble states: "These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached."

In an action in which the physician in a medical malpractice action filed a counterclaim against the attorney representing the plaintiff and alleged that the attorney knew the plaintiff's claim was frivolous, the court dismissed the counterclaim for failure to state a cause of action. The court held that the remedy provided in the former Texas Code of Professional Responsibility is a public, not a private, one. It entitles the physician to file a grievance complaint, but not a malpractice action. *Martin v. Trevino*, 578 S.W.2d 763, 770 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.). *But see Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 233 (Tex. App.—Corpus Christi–Edinburg 1985, writ ref'd n.r.e.) (appellant should seek recovery in private cause of action against appellee's attorney whose violation of former Texas Code of Professional Responsibility rendered postjudgment settlement agreement unenforceable).

§ 1.23:2 Privity Generally Required

Texas law does not extend an attorney's liability for negligence beyond the client to third persons. *Bryan & Amidei v. Law*, 435 S.W.2d 587, 593 (Tex. App.—Fort Worth 1968, no writ).

Attorney immunity is an affirmative defense for the attorney. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). Generally, attorneys are immune from civil liability to nonclients for actions taken if the attorneys conclusively establish that their alleged conduct was within the scope of their legal representation of a client. *Diaz v. Monnig*, No. 04-15-00670-CV, 2017 WL 2351095, at *4 (Tex. App.—San Antonio May 31, 2017, no pet.) (mem. op.).

In *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999), the court held that, although persons not in privity with an attorney cannot

sue the attorney for legal malpractice, a nonclient may sue an attorney for negligent misrepresentation without regard to the nonclient's lack of privity with the attorney.

The privity requirement has consistently been held to preclude a negligence action by intended beneficiaries against an attorney who had failed to prepare a will in accordance with the testator's wishes before the testator's death. *Thomas v. Pryor*, 847 S.W.2d 303, 304–05 (Tex. App.—Dallas 1992), *writ granted, judgm't vacated w.r.m.*, 863 S.W.2d 462 (Tex. 1993); *Dickey v. Jansen*, 731 S.W.2d 581 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). However, this position has been criticized, and in at least one case, when the supreme court granted writ of error, the attorney's insurer settled the case. *Berry v. Dodson, Nunley & Taylor, P.C.*, 729 S.W.2d 690 (Tex. 1987); *Berry v. Dodson, Nunley & Taylor, P.C.*, 717 S.W.2d 716 (Tex. App.—San Antonio 1986, writ granted). Also, one court has held that an heir could proceed with a negligent misrepresentation claim against the decedent's attorneys if the heir's relationship with the attorneys was that of a joint client. *Estate of Arlitt v. Paterson*, 995 S.W.2d 713, 720–21 (Tex. App.—San Antonio 1999, pet. denied), *disapproved on other grounds*, *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006).

The lack-of-privity defense does not extend to fraudulent conduct that is outside the scope of the attorney's legal representation of his client, just as it does not extend to other wrongful conduct outside the scope of representation. *Cantey Hanger, L.L.P.*, 467 S.W.3d at 484. Such acts are entirely foreign to the duties of an attorney. *Poole v. Houston & T.C. Railway Co.*, 58 Tex. 134, 137 (1882).

§ 1.24 Defenses to Legal Malpractice

§ 1.24:1 Statutes of Limitation

In Texas, malpractice claims are tort actions governed by the two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.003. If the suit is brought on a legitimate breach-of-contract theory based on a contractual relationship, it is governed by the four-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.051. However, malpractice actions have been barred by the two-year statute even though the pleadings were couched in breach-of-contract language and filed within four years of the alleged malpractice. *See Woodburn v. Turley*, 625 F.2d 589 (5th Cir. 1980); *Gabel v. Sandoval*, 648 S.W.2d 398, 399 (Tex. App.—San Antonio 1983, writ dism'd); *Citizens State Bank of Dickinson v. Shapiro*, 575 S.W.2d 375, 386–87 (Tex. App.—Tyler 1978, writ ref'd n.r.e.).

Beginning of Period: As a general rule, the statute of limitations begins to run in legal malpractice actions when the tort occurs. The tort occurs when "the force wrongfully put in motion produces the injury, the invasion of personal or property rights accruing at that time." *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967) (quoting 34 Am. Jur. *Limitations of Actions* § 160 at 126). Earlier cases had held that the period began "when the negligence or breach of duty occurs." *Crawford v. Davis*, 148 S.W.2d 905, 908 (Tex. App.—Eastland 1941, no writ).

In a malpractice action for failing to secure an express lien in a deed and thus subordinating the client's lien, the court determined that the limitations period began when the faulty deed was filed, not when the plaintiff later suffered damage as a result of the negligence. *Cox v. Rosser*, 579 S.W.2d 73, 76 (Tex. App.—Eastland 1979, writ ref'd n.r.e.).

When an attorney negligently advised a client to execute a release that inadvertently surrendered the client's entire cause of action, the limitations period began when the client detrimentally relied on the attorney's advice and signed the release. The times when the advice was given and when the damage occurred were not controlling. *Pack v. Taylor*, 584 S.W.2d 484, 486 (Tex. App.—Fort Worth 1979, writ ref'd n.r.e.); *see also Zidell v. Bird*, 692 S.W.2d 550, 557 (Tex. App.—Austin 1985, no writ) (discussing rule for determining when negligence cause of action accrues).

"Discovery Rule": Before 1988, courts had declined to extend the "discovery rule" to legal malpractice actions. Used most frequently in medical malpractice actions, the rule begins the limitations period when the plaintiff discovers an injury if the plaintiff could not know of the injury at the time it occurred.

In 1988 the supreme court imposed the discovery rule in legal malpractice cases. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). In *Willis*, a husband and wife asked an attorney friend to draft the property settlement agreement in their divorce. The first draft of the agreement gave the wife the right to remain in the parties' home until the youngest child reached age eighteen. At the husband's urging, the attorney deleted that provision. The wife testified at trial that, despite the deletion, the attorney told her she would still have to agree before the home could be sold. Less than a year after the divorce, the husband sought partition of the home. Not surprisingly, the wife filed a malpractice action against the attorney. The divorce decree was signed on November 19, 1979. The wife received notice of the partition attempt on September 18, 1980. The malpractice suit was filed on December 21, 1981. The attorney argued that the statute of limitations had expired because the date of injury was the date of divorce. The court disagreed, holding that the statute of limitations for legal malpractice actions does not

begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action. Mrs. Willis's discovery date was the date of notice of the partition. Therefore, the action was timely filed. The appellate court's determination that the discovery rule does not apply to legal malpractice was overruled.

In 1990 the supreme court reiterated that the discovery rule applies in a legal malpractice cause of action. *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990).

A defendant seeking summary judgment based on limitations must prove when the cause of action accrued and negate the discovery rule by proving as a matter of law that there is no fact issue about whether the plaintiff discovered or should have discovered the nature of the injury. The defendant bears the burden of negating the discovery rule as a matter of law. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988).

Statute Tolled While Underlying Lawsuit Appealed: When an attorney allegedly commits malpractice while providing legal services in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 119 (Tex. 2001). Limitations are tolled for the second cause of action because the viability of the second cause of action depends on the outcome of the first. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

Fraudulent Concealment: The running of the statute is tolled when the attorney fraudulently conceals the negligence from the client. *McClung v. Johnson*, 620 S.W.2d 644, 647 (Tex. App.—Dallas 1981, writ ref'd n.r.e.) (failure to disclose tolls the statute of limitations during attorney-client relationship, but tolling ceases when relationship ends); *Anderson v. Sneed*, 615 S.W.2d 898, 902 (Tex. App.—El Paso 1981, no writ) (attorney fraudulently concealed his failure to file personal injury case within limitations period); *Crean v. Chozick*, 714 S.W.2d 61, 62–63 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (client's allegations that attorney failed to disclose legal effect of signed requests for admissions raised material fact issue on concealment, thus tolling statute of limitations).

§ 1.24:2 Good-Faith Defense

The good-faith defense is the equivalent of the "error in judgment" rule. See section 1.22:2 above.

§ 1.24:3 Satisfaction

A malpractice action may be barred if the client's claims are satisfied otherwise. For example, when a client was able to receive all retirement benefits in a subsequent partition action against her ex-husband, summary judgment was granted to her attorney, even though he failed to procure these benefits in the divorce. *Perkins v. Barrera*, 607 S.W.2d 3, 5–7 (Tex. App.—Tyler 1980, no writ).

§ 1.24:4 Other Defenses

Another defense an attorney may assert is contributory negligence. In a divorce settlement, for example, relying on a client's faulty information regarding marital assets may not amount to malpractice. *See Boley v. Boley*, 506 S.W.2d 934 (Tex. App.—Fort Worth 1974, no writ). However, an attorney has been held liable for malpractice for relying on a client's faulty information in a personal injury action. *See Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989).

A client's agreement to hold the attorney harmless for any potential liability is not a defense to a malpractice action. An attorney is generally prohibited from obtaining an agreement attempting to limit liability for legal malpractice. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(g).

§ 1.25 Potential Areas for Legal Liability

§ 1.25:1 Attorney's Fees

A substantial proportion of all attorney-related litigation involves fee disputes. Usually a lawsuit for fees results in a compulsory counterclaim for malpractice under Texas Rule of Civil Procedure 97(a). *See Goggin v. Grimes*, 969 S.W.2d 135, 138 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *CLS Associates, Ltd. v. AB*, 762 S.W.2d 221, 224 (Tex. App.—Dallas 1988, no writ). See chapter 20 for further discussion.

§ 1.25:2 Failure to Advise Client of Legal Consequences of Acts

An Arkansas court upheld a malpractice judgment resulting from an attorney's failure in a divorce action to advise the wife of the consequences of executing a property settlement without obtaining a lien on the husband's property. She had no security for payments due under the settlement agreement, and the attorney was held liable for

payments on which the husband defaulted. *Rhine v. Haley*, 378 S.W.2d 655 (Ark. 1964).

COMMENT: During negotiations of a settlement, the attorney should be mindful of identifying available assets to secure payments to be made to the client.

§ 1.25:3 Failure to Advise Client of Conflict of Interest

An attorney representing both parties in a divorce action may be liable to one spouse if the settlement is uneven. In *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966), the husband's business attorney drew up a property settlement based solely on the husband's fraudulent assessment of the value of the property at approximately one-tenth of its true value. The wife did not see the attorney before the hearing at which the court approved the settlement. In holding the wife's subsequent malpractice suit viable, the court found that an attorney representing both spouses in a divorce has a duty to advise them of the advantage of having separate counsel and to take affirmative action to protect both parties' interests. The court noted:

> The edge of danger gleams if the attorney has previously represented the husband. A husband and wife at the brink of division of their marital assets have an obvious divergence of interests. Representing the wife in an arm's length divorce, an attorney of ordinary professional skill would demand some verification of the husband's financial statement; or, at the minimum, inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification. Deprived of such disclosure, the wife cannot make a free and intelligent choice.

Ishmael, 241 Cal. App. 2d at 527, 50 Cal. Reptr. at 596; see also "Friendly Divorces" under section 1.13:2 above.

§ 1.25:4 Failure to Avoid Improper Entry of Judgment against Client

Allowing the entry of a judgment against a client without the client's consent may be legal malpractice. The attorney is liable for any damages imposed on the client as a result of the improperly entered judgment. *Montfort v. Jeter*, 567 S.W.2d 498, 499–500 (Tex. 1978).

An attorney who negligently failed to appear or notify the client of the divorce trial setting became liable to the client, whose spouse got custody of the children, the house, a share of the family business, and alimony based on an inflated estimate of the client's worth. *Warwick, Paul & Warwick v. Dotter*, 190 So.2d 596 (Fla. Dist. Ct. App. 1966).

To pursue a legal malpractice action against an attorney who negligently allows a default judgment to be entered, the client must establish that he both suffered monetary loss and had a meritorious defense. *Rice v. Forestier*, 415 S.W.2d 711, 713 (Tex. App.—San Antonio 1967, writ ref'd n.r.e.).

§ 1.25:5 Failure to Convey Settlement Offer to Client

An attorney must inform clients of offers of settlement made by the opposing party. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.02(a). There are certain exceptions. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.02 cmts. 2, 3.

In *Smiley v. Manchester Insurance & Indemnity Co.*, 375 N.E.2d 118 (Ill. 1978), an attorney's failure to convey a settlement agreement to his client was found to be negligence as a matter of law.

§ 1.25:6 Failure to Timely Pursue Client's Claim

An attorney who negligently lets the statute of limitations run on a client's cause of action becomes liable for any amount the client could have collected from the original defendant. *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1083 (Tex. App. 1904, no writ); *Fox v. Jones*, 14 S.W. 1007 (Tex. App. 1889, no writ). "Missing the statute of limitations is a classic example of negligence that any layperson can understand. No expert testimony is necessary in such cases." *Mazuca & Associates v. Schumann*, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied).

§ 1.25:7 Inappropriate Relationships with Clients

The attorney who engages in sexual misconduct with a client is inviting disaster. The only reported Texas case involving sexual misconduct by a lawyer is *Kahlig v. Boyd*, 980 S.W.2d 685 (Tex. App.—San Antonio 1998, pet. denied). Client, Kahlig, brought suit against his former attorney, Boyd, based on fraud and a claim for deceptive trade practices, after the client discovered that the attorney was having an affair with Kahlig's current wife during a custody case with a former wife. The trial court held that the attorney's behavior did not constitute fraud or a deceptive trade practice. The court of

appeals agreed, stating that "while we have determined that Boyd's conduct does not give rise to a legal remedy under the theories presented at trial under current Texas law, substantial questions remain about the ethical propriety of Boyd's conduct. The proper forum to determine these ethical issues is the State Bar of Texas Grievance Committee." *See Kahlig*, 980 S.W.2d at 691. The attorney was sanctioned by the Committee.

An attorney's fee amounting to $3 million was forfeited because of an improper romantic relationship between the attorney and client. The trial court described the conduct as a serious breach of fiduciary duty. *See Piro & Lilly, L.L.P. v. Sarofim*, No. 01-00-00398-CV, 2002 WL 538741, at *8–10 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002) (not designated for publication). There is ample authority for the forfeiture of the attorney's fee for breach of fiduciary duty. *See Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

§ 1.26 Procedures to Help Avoid Malpractice Actions

Attorneys for the Texas Lawyers' Insurance Exchange advise that attorneys who follow the procedures described below can reduce the chances of facing a malpractice claim.

§ 1.26:1 Calendaring System

To avoid missing important deadlines, every firm should have an effective calendaring system that includes all cases the firm handles, not just those in the litigation section. Deadlines are crucial to all types of law practice. For example, one attorney postponed drafting a will for so long that the testator died, and the expected beneficiary sued for malpractice. *See Estate of Arlitt v. Paterson*, 995 S.W.2d 713 (Tex. App.—San Antonio 1999, writ denied). When a tickler system is set up so that every file comes up for regular review, problems like this can be avoided. Files coming up for review may need no action other than being "retickled," but the review provides the attorney a good occasion to write the client that things are proceeding as expected or to explain why no immediate action is necessary. The system also provides incentive to make progress on files that are not urgent and would otherwise remain idle for too long.

§ 1.26:2 Nonengagement Letters

Attorneys should always write nonengagement letters when they decline or withdraw from employment and should keep a permanent file of these letters. This practice can eliminate many potential malpractice actions based on claims that an attorney failed to

pursue a claim for a client. See form 2-3 and the practice notes in section 2.2 in this manual.

§ 1.26:3 File Retention

Complete records of trust account funds and other property should be kept by the lawyer and preserved for a period of five years after termination of the representation. Tex. Rules Disciplinary P. R. 17.10; Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a). A court of appeals has held that the term *other properties*, as used in the disciplinary rules, includes the client's papers and other documents that the lawyer has in his file. *Hebisen v. State*, 615 S.W.2d 866, 868 (Tex. App.—Houston [1st Dist.] 1981, no writ). Also, files concerning clients who refused legal advice should be maintained and should contain a copy of the letter to the client detailing advice given, reasons for the advice, and confirmation that the client declined to accept the advice.

COMMENT: It may be inappropriate for the attorney to destroy the client's file. Because the attorney is the agent of the client, the work product generated by the attorney in representing the client belongs to the client. *In re George*, 28 S.W.3d 511, 516 (Tex. 2000). Moreover, information contained in the file may become necessary after several years, as in the case of QDROs.

§ 1.26:4 Problems When Firms Break Up

When a firm breaks up or when one or more members leave, confusion may arise over which attorneys retain which clients. To avoid such confusion, the firm should contact every client who will be affected, confirm which attorney the client wishes to retain, and preserve the agreement in writing. This procedure can avert the frequent potential for malpractice that occurs when an attorney leaves a firm without arranging for someone to handle a file, to the legal detriment of the client. See also section 1.13 above.

§ 1.26:5 Supervision of Support Staff and New Associates

Attorneys need to supervise their support staff and new associates closely. If, for example, a law clerk arrives at the wrong answer to an important question, the attorney is the one who will take the wrong action and face a possible malpractice suit. Clerks should be told to document their research so that its accuracy can be verified, and new secretaries should be responsible for filing petitions only when the attorney is certain that they know where and by when to file them. In short, all personnel must know both substan-

tively and procedurally what their jobs require. Careful screening and interviewing of applicants can help, of course, as can hiring only professional secretaries and paralegals. Instruction and training of support staff in the area of security and confidentiality of client information is critical.

For a detailed discussion on this issue, see Edward L. Wilkinson, *Supervising Lawyers, Supervised Lawyers, and Nonlawyer Assistants—Ethical Responsibilities under the State Bar Rules*, 64 Tex. B.J. 452 (2001); see also Tex. Disciplinary Rules Prof'l Conduct R. 5.01–.03.

§ 1.26:6 Avoiding Overload

Many malpractice suits result from mistakes made during periods of personal stress, and some attorneys let themselves become overextended or burdened with too many cases and other responsibilities so that they lose both perspective and effectiveness. For their clients' sake as well as their own, many attorneys would be wise to slow down the pace and offer each other support when signs of stress, such as abuse of alcohol or other drugs, become evident. The Texas Lawyers' Assistance Program, which may be contacted at 1-800-343-8527, is an excellent resource for obtaining immediate peer support for lawyers whose lives or practices are suffering because of physical or mental illness, including substance abuse or emotional distress. All information provided to the Texas Lawyers' Assistance Program is confidential.

§ 1.27 Standard of Care for Specialists

All Texas attorneys, whether specialized or not, appear now to be under the same standard of care. However, attorneys who have been board certified as specialists in Texas and who hold themselves out to the public as specialists may eventually be held to a higher standard, perhaps the same standard of care as that applied to similar specialists in other fields.

Texas courts have held in medical malpractice cases that specialists must exercise a higher degree of skill than that of general practitioners. *King v. Flamm*, 442 S.W.2d 679, 681 (Tex. 1969).

At least one other jurisdiction has held legal specialists to a higher standard of care than the ordinary practitioner. In *Wright v. Williams*, 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194, 199 (1975), the California court of appeals held the following:

> One who holds himself out as a legal specialist performs in similar circumstances to other specialists but not to general practitioners of the law. We thus conclude that a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field.

The case involved a maritime law specialist.

§ 1.28 Standard of Care for Court-Appointed Representatives

See chapter 13 of this manual for discussion of the standard of care for ad litems and amicus attorneys.

§ 1.29 Attorney Professional Liability Insurance

Professional liability insurance most often chosen by attorneys is known as a "claims made and reported policy." This type of policy provides coverage for those claims made against the named insured and reported during the period while the policy is in effect. The definitions of some important terms in this type of coverage follow.

Insured means the insured named in the policy, any past or present partner, officer, director, member of a professional association, stockholder, employee, independent contractor, or of counsel as respects professional services rendered on behalf of the named insured. Attorneys who retire from the named insured are also covered. Coverage is available for members of prior law firms and predecessor firms.

Covered conduct means any claims arising out of the conduct of the insured's profession as a lawyer or as a lawyer acting as an arbitrator, as a mediator, as a notary public, as an officer of any bar association, and in certain other capacities. The insured is also covered when acting in the capacity of a lawyer as an administrator, executor, guardian, or trustee.

Liability limits are stated in the policy declarations and include damages, attorney's fees, other fees and costs, and expenses of investigating the claim.

Deductible is stated in the declarations, is applied to each claim, and is paid by the insured. It is first applied to the claims expenses with the remainder, if any, applied to the damages.

Disciplinary proceedings are covered by the policy, and the insured is indemnified for any reasonable fees, costs, and expenses incurred in responding to them.

Extended reporting period coverage allows the insured to purchase, for an additional premium, extended reporting period coverage for one, two, or three years or for an unlimited period after the insured separates from the named insured firm.

[Section 1.30 is reserved for expansion.]

V. Ineffective Assistance of Counsel

§ 1.31 Right to Effective Assistance of Counsel

There is a statutory right to counsel for indigent parents in cases filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator of a child. *See* Tex. Fam. Code § 107.013(a)(1). More importantly, there is a right to *effective assistance of counsel* in such termination cases. *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). The Fort Worth court of appeals observed that "[i]t would seem a useless gesture on the one hand to recognize the importance of counsel in termination proceedings, as evidenced by the statutory right to appointed counsel, and, on the other hand, not require that counsel perform effectively." *See In re K.L.*, 91 S.W.3d 1, 13 (Tex. App.—Fort Worth 2002, no pet.).

COMMENT: Although the doctrine of ineffective assistance of counsel has not previously been applied in nongovernmental termination cases, the trend seems to point in that direction.

§ 1.32 Standard for Determining Effective Assistance

The criminal case standard regarding assistance of counsel applies equally in termination cases. *In re M.S.*, 115 S.W.3d 534, 545 (Tex. 2003). In a criminal law context, the test for determining whether a defendant has been accorded ineffective assistance of counsel was announced by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984):

> First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth

> Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable . . . . [T]he proper standard for attorney performance is that of reasonably effective assistance.

Strickland, 466 U.S. at 687.

In determining whether counsel's performance in a particular case is deficient, the court must take into account all of the circumstances surrounding the case and primarily focus on whether counsel performed in a "reasonably effective" manner. *In re M.S.*, 115 S.W.3d at 545. Counsel's performance falls below acceptable levels of performance when the "representation is so grossly deficient as to render proceedings fundamentally unfair . . . ." *Brewer v. State*, 649 S.W.2d 628, 630 (Tex. Crim. App. 1983). In evaluating attorney performance, courts must give great deference to counsel's performance, indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," including the possibility that counsel's actions are strategic. *Strickland*, 466 U.S. at 689. The challenged conduct will constitute ineffective assistance only when "the conduct was so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

§ 1.33 Proof of Ineffective Assistance

The appellant has the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). An assertion of ineffective assistance will be sustained only if the record affirmatively supports such a claim. *See Ex parte Ewing*, 570 S.W.2d 941, 943 (Tex. Crim. App. 1978). When the record is silent as to defense counsel's subjective motivations, courts will ordinarily presume that the challenged action might be considered sound trial strategy. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). In determining claims of ineffective assistance, courts will not indulge in speculation. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). An error in trial strategy will be deemed inadequate representation only if counsel's actions are without any plausible basis. *See Ex parte Ewing*, 570 S.W.2d at 945; *Thomas v. State*, 886 S.W.2d 388, 392 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

In *Bermea v. Texas Department of Family & Protective Services*, 265 S.W.3d 34, 43 (Tex. App.—Houston [1st Dist.] 2008, pet. denied), the court of appeals held that the failure to file a statement of the point or points on which a party intends to appeal con-

stitutes deficient conduct by the attorney, which satisfies the first prong of the test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). However, the second prong of the *Strickland* test requires a showing that the results of the proceedings would have been different if the party had effective counsel.

§ 1.34 Presumptions against Ineffective Assistance

The review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within a wide range of reasonable professional assistance. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). The appellant must overcome the presumption that counsel's actions might be considered sound trial strategy. *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). Without a record to explain trial counsel's rationale, there is a "strong presumption that counsel was competent." *Perez v. State*, 56 S.W.3d 727, 730–31 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd).

[Sections 1.35 through 1.40 are reserved for expansion.]

VI. Texas Deceptive Trade Practices–Consumer Protection Act Liability

§ 1.41 Application of Act to Legal Services

There is a professional services exemption to the Deceptive Trade Practices–Consumer Protection Act (DTPA). "Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." Tex. Bus. & Com. Code § 17.49(c).

However, the section also provides exceptions to the exemption. The following acts would bring professional services back into the DTPA: an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; a failure to disclose information in violation of Tex. Bus. & Com. Code § 17.46(b)(24); an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or a breach of an express warranty that cannot be characterized as advice, judgment, or opinion. Tex. Bus. & Com. Code § 17.49(c)(1)–(4). These exceptions apply to an action against both a professional rendering services and any entity that

could be held vicariously liable for the professional's conduct. Tex. Bus. & Com. Code § 17.49(d).

§ 1.42 Statute of Limitations

All DTPA actions must be brought within two years of the date on which the act or practice occurred or within two years after the consumer discovered or reasonably should have discovered the act or practice. This period may be extended for 180 days if the plaintiff proves that failure to timely commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone commencing the action. Tex. Bus. & Com. Code § 17.565.

[Sections 1.43 through 1.50 are reserved for expansion.]

VII. Grievances

§ 1.51 Grievance Procedure

A grievance may be filed with the State Bar by any person who believes that a rule of professional conduct has been violated by an attorney. In most cases, grievances must be filed within four years from the time of the alleged act of misconduct. *See* Tex. Rules Disciplinary P. R. 17.06.

When a complainant signs the grievance form, the attorney-client privilege is waived in order for the chief disciplinary counsel to investigate the complaint. *See* Tex. R. Evid. 503(d)(3); Tex. Disciplinary Rules Prof'l Conduct R. 1.05.

The chief disciplinary counsel shall within thirty days examine each grievance received to determine whether it constitutes an inquiry, a complaint, or a discretionary referral. If the grievance is determined to constitute a complaint, the attorney (respondent) shall be provided a copy of the complaint with notice to respond in writing to the allegations in the complaint. The attorney shall deliver the response to both the office of the chief disciplinary counsel and the complainant within thirty days after receipt of the notice. *See* Tex. Rules Disciplinary P. R. 2.10. Failure to respond to a complaint is a separate violation of the disciplinary rules. Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a)(8). For example, an attorney's failure to respond to four disciplinary complaints warranted dis-

barment. *Rangel v. State Bar of Texas*, 898 S.W.2d 1, 3–4 (Tex. App.—San Antonio 1995, no writ).

The chief disciplinary counsel will investigate the complaint to determine whether there is just cause. The determination must generally be made within sixty days of the date the respondent's response to the complaint is due but may be extended under certain circumstances. The chief disciplinary counsel may set a complaint for an investigatory hearing, a nonadversarial proceeding that may be conducted by teleconference and is strictly confidential. The investigatory hearing may result in a sanction negotiated with the respondent or in the chief disciplinary counsel's dismissing the complaint or finding just cause. Tex. Rules Disciplinary P. R. 2.12.

On investigation, if the chief disciplinary counsel determines that just cause does not exist to proceed on the complaint, the chief disciplinary counsel shall place the complaint on a summary disposition panel docket, which may be conducted by teleconference. At the summary disposition panel docket, the chief disciplinary counsel will present the complaint together with any information, documents, evidence, and argument deemed necessary and appropriate by the chief disciplinary counsel, without the presence of the complainant or respondent. The summary disposition panel shall determine whether the complaint should be dismissed or should proceed. If the panel dismisses the complaint, both the complainant and respondent will be notified. There is no appeal from a determination by the summary disposition panel. All complaints presented to the summary disposition panel and not dismissed will proceed in accordance with rules 2.14 and 2.15. The fact that a complaint was placed on the summary disposition panel docket and not dismissed is wholly inadmissible for any purpose in the instant or any subsequent disciplinary proceeding or disciplinary action. Tex. Rules Disciplinary P. R. 2.13.

Files of dismissed disciplinary proceedings will be retained for 180 days, after which time they may be destroyed. No permanent record will be kept of complaints dismissed except to the extent necessary for statistical reporting purposes. Tex. Rules Disciplinary P. R. 2.16D.

For each complaint not dismissed after an investigatory hearing, resolved through a negotiated judgment entered by an investigatory panel, or dismissed by a summary disposition panel, the chief disciplinary counsel shall give the respondent written notice of the acts or omissions engaged in by the respondent and of the Texas Disciplinary Rules of Professional Conduct that the chief disciplinary counsel contends are violated by the alleged acts or omissions. Tex. Rules Disciplinary P. R. 2.14D.

A respondent given written notice of the allegations and rule violations complained of, in accordance with rule 2.14, shall notify the chief disciplinary counsel whether the respondent seeks to have the complaint heard in a district court of proper venue, with or without a jury, or by an evidentiary panel of the committee. The election must be in writing and served on the chief disciplinary counsel no later than twenty days after the respondent's receipt of written notification pursuant to rule 2.14. If the respondent timely elects to have the complaint heard in a district court, the matter will proceed in accordance with part III of the Texas Rules of Disciplinary Procedure. If the respondent timely elects to have the complaint heard by an evidentiary panel or fails to timely file an election, the matter will proceed in accordance with the rules governing hearings before and imposition of sanctions by an evidentiary panel. Tex. Rules Disciplinary P. R. 2.15; *see also* Tex. Rules Disciplinary P. R. 2.17, 15.01–.09.

The respondent or the commission may appeal the judgment of the evidentiary panel to the Board of Disciplinary Appeals. Tex. Rules Disciplinary P. R. 2.23. An appeal from the decision of the Board of Disciplinary Appeals on an evidentiary proceeding is to the Supreme Court of Texas in accordance with Tex. Rules Disciplinary P. R. 7.11. Tex. Rules Disciplinary P. R. 2.27. If the complaint is heard in a district court, the judgment may be appealed as in civil cases generally. Tex. Rules Disciplinary P. R. 3.15.

[Sections 1.52 through 1.60 are reserved for expansion.]

VIII. Useful Websites

§ 1.61 Useful Websites

The following websites contain information relating to the topic of this chapter:

American Bar Association Model Rules of Professional Conduct (§ 1.6)
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

Ethics Opinions issued by the Professional Ethics Committee of the Supreme Court of Texas (§ 1.5)
www.legalethicstexas.com/Ethics-Resources/Opinions.aspx

State Bar Rules (§ 1.3)
www.legalethicstexas.com/Ethics-Resources/Rules.aspx

Texas Code of Ethics and Professional Responsibility for Legal Assistants (§ 1.7)
https://txpd.org/page.asp?p=Code%20of%20Ethics

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Chapter 2

Attorney-Client Relationship and Communications

§ 2.1 Communications about Legal Consequences

One of the foremost problems in the area of family law is the attorney's failure to completely inform his client of all legal consequences. The client should be fully informed of all legal consequences, and, if in the lawyer's judgment a proposed settlement would be unwise, it is the lawyer's ethical duty to so inform the client.

Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct addresses the matter of communication of information from the lawyer to the client. The rule provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information and shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.03.

Further guidance concerns the adequacy of communication between lawyer and client under varying circumstances. Tex. Disciplinary Rules Prof'l Conduct R. 1.03 cmt.

§ 2.2 Initial Consultation

The initial consultation between the lawyer and the client may or may not lead to ongoing representation. If a continuing attorney-client relationship is formed, an agreement for legal services should be signed. Without an agreement, there can be uncertainty and misunderstanding.

A fee agreement for the initial consultation can eliminate uncertainty by clearly defining the nature of the first meeting and stating what conditions must be satisfied if there will be a continuing attorney-client relationship. The agreement should require a fee for the initial conference and clearly state that a separate written agreement will be required as evidence of the subsequent employment.

If there will not be a continued relationship, a nonengagement letter is advisable to emphasize that the lawyer will not accept the employment. In a Texas Lawyers' Insurance Exchange case, an attorney tentatively accepted a personal injury case. After evaluating the case further, the attorney returned the file to the client and told the client he would not accept the case. The client sued the attorney after the statute of limitations on the personal injury claim ran, and, because of the absence of a nonengagement letter, a weak personal injury claim resulted in a substantial loss to the insurer for negligence on the part of this attorney. *See* 46 Tex. B.J. 998 (1983); see also the discussion of grievance and malpractice problems in chapter 1 of this manual.

§ 2.3 Attorney's Fees

In *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964), the court noted that, because of the confidential relationship, courts "scrutinize with jealousy" all contracts for compensation made between attorney and client while the relationship exists. "There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney." *Archer*, 390 S.W.2d at 739. The presumption applies only if the contract for compensation was made while the attorney-client relationship was in existence.

For discussion of the various ethical and practical aspects of setting, contracting for, proving up, and collecting attorney's fees, see chapter 20 of this manual.

§ 2.4 Tax Deduction for Attorney's Fees

The provisions in effect for tax years before 2018 that allowed deduction of appropriate attorney's fees in cases in which the attorney has actually given tax advice to the client or fees expended for the production or collection of taxable income (for example, alimony) under 26 U.S.C. § 212(1), (3) have been temporarily suspended.

These and other "miscellaneous deductions" are not allowed for any taxable year beginning after December 31, 2017, and before January 1, 2026. 26 U.S.C. § 67(g), as added by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11045, 131 Stat. 2054 (2017).

§ 2.5 Death of Client

An attorney-client relationship terminates on the death of the client. However, when property issues remain, the attorney may still act on behalf of the client. *Murphy v. Murphy*, 21 S.W.3d 797, 798 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (per

curiam). There is no reported case regarding whether an attorney may continue acting on behalf of a client in a suit affecting the parent-child relationship.

§ 2.6 Limited Representation by Attorney

Unless the representation is terminated, "a lawyer should carry through to conclusion all matters undertaken for a client." Tex. Disciplinary Rules Prof'l Conduct R. 1.02 cmt. 6. A statement of representation in "family law matters" is ambiguous and could lead to problems concerning the nature of the representation. Any doubts about the scope of representation should be clarified by the lawyer.

A lawyer may limit the scope, objectives, and general methods of the representation if the client consents after consultation. Tex. Disciplinary Rules Prof'l Conduct R. 1.02(b). The employment agreement should carefully state the scope of the attorney's representation and exclude, in writing, areas of nonrepresentation. For example, the employment agreement for a divorce case might state that the attorney agrees to "represent client in a divorce from spouse and related matters of grounds for divorce, division of property, and conservatorship of children through trial and signing of final judgment. Legal representation *does not* include title searches of property, defense of claims of creditors, preparation of wills, probate, corporate or partnership matters, tort claims, criminal defense, and appeals."

A provision in the attorney-client contract that authorizes an attorney to settle a client's case without the client's consent violates rule 1.02(a)(1) of the Texas Disciplinary Rules of Professional Conduct, rendering the entire contract voidable at the client's option. *Sanes v. Clark*, 25 S.W.3d 800, 805 (Tex. App.—Waco 2000, pet. denied). Similarly, a provision prohibiting settlement without the attorney's consent violates rule 1.02(a)(2), and the contract is likewise voidable at the client's option. *Lopez v. Maldonado*, No. 13-15-00042-CV, 2016 WL 8924108, at *3 (Tex. App.—Corpus Christi–Edinburg Dec. 21, 2016, no pet.) (mem. op.).

A party is not entitled to "hybrid representation" by being simultaneously self-represented and represented by an attorney. *In re S.V.*, No. 05-16-00519-CV, 2017 WL 3725981, at *13 (Tex. App.—Dallas Aug. 30, 2017, pet. denied).

§ 2.7 Arbitration Provisions in Employment Contract

Agreements to arbitrate fee disputes between lawyers and clients have been encouraged by bar associations for years. *See* ABA Model Rules of Arbitration (1995). Comment

19 to rule 1.04 endorses the arbitration of fee disputes and states: "If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it." Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 19.

The attorney-client employment contract should never contain an agreement to arbitrate malpractice disputes or grievance disputes. Prospectively limiting a lawyer's liability to a client for malpractice is strictly controlled by rule 1.08(g):

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

Tex. Disciplinary Rules Prof'l Conduct R. 1.08(g).

There is a conflict of authority regarding the enforceability of a provision in a legal services contract requiring the arbitration of a malpractice claim. Two cases approve enforcement of arbitration clauses even if they are contained in a legal services contract: *Henry v. Gonzalez*, 18 S.W.3d 684, 691–92 (Tex. App.—San Antonio 2000, pet. dism'd by agr.), and *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). However, *In re Godt*, 28 S.W.3d 732, 738–39 (Tex. App.—Corpus Christi–Edinburg 2000, orig. proceeding), holds to the contrary. See also Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. Tex. L. Rev. 625 (1997).

When the attorney and client agree to arbitrate and the agreement encompasses the claims asserted, the trial court must compel arbitration and stay litigation pending arbitration. *See* Tex. Civ. Prac. & Rem. Code § 171.021; *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305 (Tex. 2006). However, unconscionable contracts, whether relating to arbitration or not, are not enforceable under Texas law. *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008). "The determination that a contract or term is or is not unconscionable is made in light of its setting, purpose, and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy." *In re Poly-America*, 262 S.W.3d at 348–49 (quoting *Restatement (Second) of Contracts* § 208 cmt. a (1979)).

Provisions that one or more specified disputes are excepted from arbitration do not simply make the agreement so one-sided as to be unconscionable. *See In re FirstMerit Bank*, 52 S.W.3d 749, 757–58 (Tex. 2001) (orig. proceeding). In fact, excluding a claim by a law firm for the recovery of its fees and expenses is expressly allowed. *See Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 501–02 (Tex. 2015).

§ 2.8 Client Information

§ 2.8:1 Gathering Information

The attorney representing the client in a divorce case must obtain information regarding all issues in the case. To properly develop the issues, do the required research, obtain witnesses, hire experts, and prepare the client, the attorney must acquire the information as early in the case as possible.

§ 2.8:2 Information Regarding Property

In a divorce case, the court is required to make a just and right division of the estate of the parties. Tex. Fam. Code § 7.001. The estate of the parties includes only community property. *See Cameron v. Cameron*, 641 S.W.2d 210, 213 (Tex. 1982); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977). Moreover, the court may not award the separate property of one spouse to the other spouse. *See Eggemeyer*, 554 S.W.2d at 140. Thus, it is critical to obtain enough information about each property to present evidence to enable the court to make a just and right division and also to confirm separate property to its owner.

§ 2.8:3 Information Regarding Taxes

In ordering the division of the estate of the parties on dissolution, the court may consider whether an asset will be subject to taxation and, if so, when the tax will be required to be paid. Tex. Fam. Code § 7.008. In order to present relevant evidence to the court to make appropriate adjustments for hypothetical taxes, the attorney must obtain data necessary to assist the court in determining tax consequences resulting from the decision to divorce.

Income Taxes: Adjustments for income taxes to be paid on the receipt of retirement benefits and the exercise of stock options is relevant in the valuation of those properties.

Capital Gains Taxes: A gain realized from selling or trading stocks, bonds, real estate, or other investment property may be taxed. The amount of capital gains tax that would be paid in the event of sale could be relevant to determine a just and right division.

§ 2.8:4 Social Security and Driver's License Numbers

Three Texas statutes give direction for handling a person's Social Security and driver's license numbers.

The Family Code requires that all final parent-child relationship orders except those under Code chapters 161 (termination) and 162 (adoption) contain the Social Security number and driver's license number of each party to the suit, including the child, except that the child's Social Security number or driver's license number is not required if such a number has not been assigned. *See* Tex. Fam. Code § 105.006(a)(1).

The Civil Practice and Remedies Code requires that a party's initial pleadings contain the last three numbers of a party's Social Security number and driver's license number. *See* Tex. Civ. Prac. & Rem. Code § 30.014.

Finally, the Business and Commerce Code states that a person may not require an individual to reveal his or her Social Security number to obtain services unless the person furnishing the services adopts a privacy policy, makes the policy available to the individual, and maintains the confidentiality and security of the number so obtained. Tex. Bus. & Com. Code § 501.052(a). The privacy policy must include how personal information is collected, how and when the information is used, how the information is protected, who has access to the information, and how the information is disposed of. Tex. Bus. & Com. Code § 501.052(b). A violation of subsection (a) may result in a civil penalty of up to $500 for each calendar month during which a violation occurs. Tex. Bus. & Com. Code § 501.053.

COMMENT: See section 6 in the Introduction in volume 1 of this manual (forms) concerning requirements for the protection of this sensitive data in documents that are filed with the court.

§ 2.8:5 Requirement to Report Party's Current Address

In a civil case filed in a district court, county court, statutory county court, or statutory probate court, each party or the party's attorney must provide the clerk of the court with

written notice of the party's name and current residence or business address, unless the party has not appeared or answered in the case. The notice must be provided when the party files its initial pleading with the court or not later than the seventh day after the date the clerk requests the information. If the party's address changes during the case, the party or the attorney must provide the clerk written notice of the new address. Failure to provide the notice may be punished by a fine unless the party or the attorney could not reasonably have obtained and provided the information. Tex. Civ. Prac. & Rem. Code § 30.015.

§ 2.8:6 Duty to Maintain Confidences and Secrets of Clients

An attorney cannot represent both parties in the same litigation and comply with ethical obligations. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06(a). An attorney has the duty to maintain his clients' confidences and secrets. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.05. The rule is couched in terms of "confidential information," which includes both "privileged information" and "unprivileged client information." "Privileged information" is information of a client protected by the attorney-client privilege of Tex. R. Evid. 503 or by the principles of attorney-client privilege governed by Fed. R. Evid. 501. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the attorney during the course of or by reason of the representation of the client.

A lawyer may reveal confidential information under the following conditions:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, the Texas Disciplinary Rules of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

Tex. Disciplinary Rules Prof'l Conduct R. 1.05(c).

An attorney may reveal unprivileged client information when the attorney is impliedly authorized to do so in order to carry out the representation or when the attorney has reason to believe it is necessary to do so in order to carry out the representation effectively, to defend the attorney or the attorney's employees or associates against a claim of wrongful conduct, to respond to allegations in any proceeding concerning the attorney's representation of the client, or to prove the services rendered to a client, or the reasonable value of the services, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(d).

If an attorney has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the attorney *shall* reveal confidential information to the extent revelation of the information reasonably appears necessary to prevent the client from committing the act. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(e).

In all other situations, the attorney's obligation is to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action. Tex. Disciplinary Rules Prof'l Conduct R. 1.05 cmt. 18. If the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the attorney is not required to reveal preventive information but may do so. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.05(c)(7), (c)(8).

Comment 14 to rule 1.05 notes the following:

> Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of

> lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

Tex. Disciplinary Rules Prof'l Conduct R. 1.05 cmt. 14.

The same statement is *not* made with regard to paragraphs (e) and (f).

An attorney shall also reveal confidential information when required to do so by rules 3.03(a)(2), 3.03(b), and 4.01(b). Tex. Disciplinary Rules Prof'l Conduct R. 1.05(f). Rule 3.03(a)(2) states that an attorney shall not knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act. Tex. Disciplinary Rules Prof'l Conduct R. 3.03(a)(2). Rule 3.03(b) states that if an attorney discovers that he has offered material evidence that is false, the attorney shall make a good-faith effort to persuade the client to authorize the attorney to correct or withdraw the evidence. The attorney is obligated to take reasonable remedial measures, including disclosure of the true facts, if the client will not authorize the correction or withdrawal of the false evidence. Tex. Disciplinary Rules Prof'l Conduct R. 3.03(b). Rule 4.01(b) states that an attorney shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client." Tex. Disciplinary Rules Prof'l Conduct R. 4.01(b).

COMMENT: Attorneys are required to report child abuse or neglect. Tex. Fam. Code § 261.101. See section 2.9 below.

§ 2.8:7 Health Insurance Portability and Accountability Act (HIPAA)

Regulations under the Health Insurance Portability and Accountability Act (HIPAA), promulgated by the federal health and human services department, extend the data security obligations of health-care providers and insurers to a broad class of businesses that can include lawyers and law firms. Texas businesses must "implement and maintain reasonable procedures, including taking any appropriate corrective action, to protect from unlawful use or disclosure any sensitive personal information collected or maintained by the business in the regular course of business." Tex. Bus. & Com. Code § 521.052(a). In addition to items such as Social Security numbers, driver's license numbers, account numbers, birth dates, and the identity of immediate relatives, "sensitive personal information" includes the physical or mental health or condition of the individual, the provision of health care to the individual, and payment for the provision

of health care to the individual. Tex. Bus. & Com. Code § 521.002(a)(2)(B). The law also requires notification in the event of a breach of security of computerized data. Such notification is required when sensitive personal data "was, or is reasonably believed to have been, acquired by an unauthorized person." Tex. Bus. & Com. Code § 521.053(b). Lawyers and law firms could be subject to the Texas Medical Records Privacy Act, chapter 181 of the Texas Health and Safety Code, as a "covered entity" if they merely come "into possession" of protected health information. *See* Tex. Health & Safety Code § 181.001(b)(2)(B). These rules require planning and implementation of security procedures to protect personal health information as well as actions that must be taken in the event of a breach of security.

§ 2.8:8 Interception of Communications

Recording One's Own Conversations: Either of two individuals having a telephone conversation may record it without violating the Federal Communications Act, 47 U.S.C. § 605. *See Rathbun v. United States*, 355 U.S. 107 (1957). This general rule has been applied to conversations between spouses. *See Kotrla v. Kotrla*, 718 S.W.2d 853, 855 (Tex. App.—Corpus Christi–Edinburg 1986, writ ref'd n.r.e.). However, a Texas attorney has been publicly reprimanded for involving a nonattorney in the installation of a device to record telephone conversations of her estranged husband. She also engaged in third-party recordings of telephone conversations without the knowledge or consent of the parties involved in the conversations. It is noted, however, that the telephone calls did not involve any clients. 52 Tex. B.J. 234 (1989).

What issues touch on lawyers' recording their own conversations with third parties? Texas lawyers are governed by Ethics Committee Opinion 575, which states that undisclosed recordings may be made by a lawyer, but only if the following qualifications are met. First, a lawyer should make an undisclosed recording of a telephone conversation involving a client only if there is a legitimate reason to make the recording in terms of protection of the legitimate interests of the client or of the lawyer. Second, a lawyer should not record a telephone conversation with a client unless the lawyer takes appropriate steps consistent with the requirements to safeguard confidential information that may be included in the recording. Third, in view of the requirement that a lawyer not be involved in the commission of a serious crime, a lawyer should not make an undisclosed recording of a telephone conversation if the conversation proposed to be recorded by the lawyer is subject to other laws (for instance, the laws of another state) that make such a recording a serious criminal offense. Finally, regardless of whether the client is involved in the telephone conversation or has consented to the recording, the

lawyer may not record a telephone conversation if making such a recording would be contrary to a representation made by the lawyer to any person. *See* Tex. Comm. on Prof'l Ethics, Op. 575 (2006) (overruling Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 392 (1978), and Tex. Comm. on Prof'l Ethics, Op. 514 (1996)).

Recording Conversations to Which One Is Not a Party—Federal Regulations: 18 U.S.C. § 2511(1) precludes the interception of a wire, oral, or electronic communication. "Intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4).

Distinguishing between audiotape and videotape recordings requires a characterization as to a "wire" or "oral" communication. The definitions of the two are quite different:

> "[W]ire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.

18 U.S.C. § 2510(1).

As a practical matter, the best example of a wire communication is the telephone, so that the statute clearly addresses telephone wiretapping.

> "[O]ral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.

18 U.S.C. § 2510(2).

When there is no telephone interception, arguably there is no "wire communication" in question. There is therefore a pure constitutional question whether the federal statute has any application to instances involving only videotape recording, because in that instance there has been no transmission of interstate or foreign communications. This constitutional question was noticed by way of footnote in one case:

> Even the Simpson court had "no doubts" that Congress has the power to prohibit the interception of telephone communications within the marital home. 490 F.2d at 805 n.6. We think the defendants' error stems from their confusion between "wire" and "oral" communications; it was only as to the latter that the authors of Title III envisioned any constitutional difficulties, since many "oral" communications lack *any* interstate nexus. "Wire" communications, on the other hand, are defined in Title III as only those made through the use of "facilities . . . furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications." 18 U.S.C.A. § 2510(1). Since telephone communications are made through the use of such interstate facilities, their interception may be proscribed by Congress, even though they take place entirely intrastate.

Kratz v. Kratz, 477 F. Supp. 463, 475 n.26 (E.D. Pa. 1979).

In *Kratz*, the parties had filed for divorce and were estranged, although they continued to reside within the marital home. The husband employed a third person to place a wiretap on the telephone within the home, through which he intercepted calls between the wife and her paramour.

The circuit courts that have considered the application of title III to interspousal wiretaps have split on the issue. The Fifth Circuit has made a distinction between the placing of a tapping device on the telephone within the marital home by one of the spouses and the employment of a disinterested third party to place the tap. In *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), the court found that Congress did not intend to intrude into domestic conflicts normally left to state law when it enacted title III. It found a lack of a positive expression of congressional intent to include purely interspousal wiretaps within the Act's prohibitions. The court also distinguished electronic surveillance by a third party, such as a private investigator, even if the outsider had been employed by a spouse, because it was a greater offense against a spouse's privacy than mere personal surveillance by the other spouse. This distinction was later the basis of a decision by the Fifth Circuit in *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974). The *Simpson* opinion has been criticized for excluding spousal telephone wiretapping:

> Justice Brandeis aptly described the "evil" of wiretapping in his dissenting opinion to *Olmstead v. United States*, 277 U.S. 438, 475–476, 48 S. Ct. 564, 571, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting): "The evil incident to

> invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him."

United States v. Jones, 542 F.2d 661, 670 (6th Cir. 1976).

A Seventh Circuit case, however, limited *Simpson* to its facts, in which both spouses lived in the marital home and no investigator installed the device or monitored the calls. In *United States v. Rizzo*, 583 F.2d 907, 909–10 (7th Cir. 1978), the court upheld the conviction of an investigator who installed a recording device with the consent of one spouse while both spouses resided in the marital home. The Fourth Circuit has ruled that title III prohibits all wiretapping, including unconsented-to wiretapping of the family telephone while both spouses are residing in the marital home. *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984). The Eighth Circuit has followed suit in *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989). The Eleventh Circuit has also held that no exception for interspousal wiretapping exists in title III, citing numerous cases so holding. *See Glazner v. Glazner*, 347 F.3d 1212, 1215–16 (11th Cir. 2003).

One Texas appellate court has determined that the federal wiretap statutes do prohibit one spouse from taping the other spouse's conversations and that admission of the tapes into evidence was reversible error. *Turner v. PV International Corp.*, 765 S.W.2d 455, 470 (Tex. App.—Dallas 1988), *writ denied per curiam*, 778 S.W.2d 865 (Tex. 1989). The Texas Supreme Court was careful to note, however, that it was neither approving nor disapproving the appellate court's ruling on the admissibility of the tape-recorded conversations.

The Second Circuit has inquired into an alleged interception of a communication between a parent and a child. In *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), the court noted that it was required to consider the extent to which the federal wiretap statutes were applicable to interspousal wiretaps used in preparation for divorce litigation. It also noted that it was a case of first impression in the Second Circuit although the Fifth Circuit had considered the question in *Simpson* and the Sixth Circuit in *Jones*. The lawsuit was predicated on allegations that the husband had intercepted and recorded telephone conversations between the wife and their daughter. The wife alleged that the husband had taught their son to activate the recording device whenever

his mother called. No outside telephone calls were recorded, and the taping device was placed on the father's telephone, rather than on the mother's. The court also noted by way of footnote that the father was enjoined by court order from remaining in the same room with his children when they spoke to their mother by phone. Nevertheless, the court concluded that the facts differed from those in *Jones* and in *Schrimsher*, which were criminal, rather than civil, proceedings in which the defendants had invaded the privacy of innumerable persons, both known and unknown, by virtue of unrestricted telephone wiretaps. The court determined that the facts did not give rise to coverage by the federal statutes. *Anonymous*, 558 F.2d at 679.

Careful attention should be paid to the Eighth Circuit's ruling in *Rice v. Rice*, 951 F.2d 942 (8th Cir. 1991), in which an attorney was sued by his client's former husband for advising the client to install a recording device on her telephone to document visitation arrangements. As a result of the device's installation, telephone conversations between the former husband and the children were taped. The plaintiff-former husband encouraged the court to apply the ruling of *Kempf* retroactively. The court declined to do so, because the law was unsettled within the circuit at the time the attorney gave the advice. *Rice*, 951 F.2d at 945.

With regard to the telephone taping of conversations between the children and the other parent, the question of consent must be addressed. The federal statute provides an explicit exception for interceptions that are consented to in advance by one of the parties to the intercepted conversation. 18 U.S.C. § 2511(2)(d). Arguably, a parent (and/or de facto custodian) of the minor children would have an absolute right to consent to the taping on behalf of the children, who, at their young and tender age, were incapable of offering their own consent. Powers of consent, exercised for the purpose of protecting one's children, would be an absolute bar to the application of the federal statutes. The issue of parental consent was raised by the father in *Anonymous*, 558 F.2d at 679–80, but was not reached by the court.

The Eighth Circuit has since disapproved the holding in *Anonymous*. *See Platt v. Platt*, 951 F.2d 159 (8th Cir. 1989). The district court had dismissed a man's lawsuit against his estranged wife for intercepting his telephone calls to their daughter while she was in the wife's custody. The basis for the dismissal was that the doctrine of interspousal immunity barred the lawsuit. This ruling was predicated on the holding in *Anonymous* that the wiretapping statute does not apply to purely domestic conflicts. The appellate court ruled that, in light of its decision in *Kempf*, it was apparent that the district court had relied on a nonexistent interspousal immunity. *Platt*, 951 F.2d at 160.

Recording Conversations to Which One Is Not a Party—State Statutes: It is a second-degree felony (punishable by confinement in the Texas Department of Criminal Justice—Institutional Division for a term of two to twenty years and a fine of not more than $10,000) for one who "intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication." Tex. Penal Code § 16.02(b)(1), (f). The terms *intercept*, *oral communication*, and *wire communication* have the meanings assigned by article 18A.001 of the Texas Code of Criminal Procedure. Tex. Penal Code § 16.02(a). The article 18A.001 definitions are virtually the same as those in the federal statute (without the references to interstate commerce or communications). *See* Tex. Code Crim. Proc. art. 18A.001(13), (19), (24).

A civil lawsuit may be brought by a party to a communication against a person who intercepts, tries to intercept, or employs or obtains another to intercept or try to intercept the communication or who uses or divulges information he knows or reasonably should know was obtained by interception of the communication. Tex. Civ. Prac. & Rem. Code § 123.002(a)(1), (a)(2). The term *communication* means speech uttered by a person or information including speech that is transmitted in whole or in part with the aid of a wire or cable. Tex. Civ. Prac. & Rem. Code § 123.001(1). The term *interception* means the aural acquisition of the contents of a communication through the use of an interception device that is made without the consent of a party to the communication. Tex. Civ. Prac. & Rem. Code § 123.001(2).

The Texas wiretap statute does not apply if one party to the conversation consents to the taping or interception. *Hall v. State*, 862 S.W.2d 710, 713 (Tex. App.—Beaumont 1993, no writ); *Kotrla*, 718 S.W.2d at 855 (allowing intercepting party to offer taped conversations as evidence in divorce).

Three Texas courts of appeals have held that the interception of a telephone conversation by a spouse is illegal. *See Collins v. Collins*, 904 S.W.2d 792, 797 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Kent v. State*, 809 S.W.2d 664, 668 (Tex. App.—Amarillo 1991, pet. ref'd); *Turner*, 765 S.W.2d at 469–71. Inferentially, the *Collins* court held that the guardian of a child may not tape a child's telephone conversation with the child's parent. *See Collins*, 904 S.W.2d at 798. The interception and use of intercepted communications are governed by 18 U.S.C. §§ 2510–2521 and also by Tex. Civ. Prac. & Rem. Code §§ 123.001–.004. The illegal interception of a wire, oral, or electronic communication is a second-degree felony. *See* Tex. Penal Code § 16.02(b).

There is no marital immunity. *Collins*, 904 S.W.2d at 797.

A wife received a $1 million punitive damage award based on the husband's wiretap of her attorney's office. *Parker v. Parker*, 897 S.W.2d 918, 929–30 (Tex. App.—Fort Worth 1995, writ denied), *disapproved on other grounds*, *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998).

E-Mail: Interception of electronic communication, such as e-mail, is both a state and federal criminal act. *See* Tex. Penal Code § 16.02(b)(1)–(5), (f); 18 U.S.C. §§ 2511(1)(a)–(e), 2701.

Use of Evidence Obtained through Illegal Interception: Illegally obtained evidence retrieved through information gathered in violation of these statutes is inadmissible. *Collins*, 904 S.W.2d at 799.

Website: If the communication is to or from another state, knowledge of the sister state's laws is essential. A state-by-state guide to taping phone calls and in-person conversation can be found on the Internet at **www.rcfp.org/reporters-recording-guide/state-state-guide**.

§ 2.9 Requirement to Report Child Abuse—Inapplicability of Attorney-Client Privilege

Section 261.101 of the Texas Family Code provides:

> (a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.
>
> (b) If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for

which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

(b–1) In addition to the duty to make a report under Subsection (a) or (b), a person or professional shall make a report in the manner required by Subsection (a) or (b), as applicable, if the person or professional has cause to believe that an adult was a victim of abuse or neglect as a child and the person or professional determines in good faith that disclosure of the information is necessary to protect the health and safety of:

(1) another child; or

(2) an elderly person or person with a disability as defined by Section 48.002, Human Resources Code.

(c) The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, an employee or member of a board that licenses or certifies a professional, and an employee of a clinic or health care facility that provides reproductive services.

(d) Unless waived in writing by the person making the report, the identity of an individual making a report under this chapter is confidential and may be disclosed only:

(1) as provided by Section 261.201; or

(2) to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

Tex. Fam. Code § 261.101.

Knowing failure to make a report as required by section 261.101(a) or (b) constitutes a Class A misdemeanor or state jail felony. Tex. Fam. Code § 261.109.

Except for reports of alleged abuse or neglect in any juvenile justice program or facility or reports of alleged or suspected abuse or neglect involving a person responsible for

the care, custody, or welfare of the child, a report of alleged abuse or neglect shall be made to (1) any local or state law enforcement agency; (2) the Texas Department of Family and Protective Services (TDFPS); or (3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred. Tex. Fam. Code § 261.103(a). Except for reports to be made to the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred or reports of alleged abuse, neglect, or exploitation occurring in a juvenile justice program or juvenile facility, a report must be made to TDFPS if the alleged or suspected abuse involves a person responsible for the care, custody, or welfare of the child. Tex. Fam. Code § 261.103(c). Alleged abuse, neglect, or exploitation of a child that occurs in any juvenile justice program or juvenile facility shall be reported to the Texas Juvenile Justice Department and to a local law enforcement agency for investigation. Tex. Fam. Code § 261.405(b). A report may be made to the Texas Juvenile Justice Department if the report is based on information provided by a child while under the supervision of the department concerning the child's alleged abuse of another child. Tex. Fam. Code § 261.103(b).

Family Code section 261.101(c) removes any exemption for otherwise privileged communications and applies the reporting requirement specifically to attorneys. *See* Tex. Fam. Code § 261.101(c).

COMMENT: The report may be made to TDFPS on a 24-hour toll-free number, 1-800-252-5400.

Immunities: A person acting in good faith who reports or assists in the investigation of a report of alleged child abuse or neglect or who testifies or otherwise participates in a judicial proceeding arising from a report, petition, or investigation of alleged child abuse or neglect is immune from civil or criminal liability that might otherwise be incurred or imposed. This immunity extends to an authorized volunteer of TDFPS and a law enforcement officer who participates at the request of the department in an investigation of alleged or suspected abuse or neglect or in an action arising from an investigation if the person was acting in good faith and in the scope of the person's responsibilities. A person who reports his or her own child abuse or neglect or who acts in bad faith or with malicious purpose in reporting alleged child abuse or neglect is not immune from civil or criminal liability. Tex. Fam. Code § 261.106.

Notice of the reporting requirement should be contained in the contract of employment between attorney and the client.

§ 2.10 Cloud Computing

Cloud computing is a process whereby computer data is stored on a computer owned and maintained by a third party. A Texas lawyer describes the cloud as "your hard drive in the sky." Dick Jordan, *Cloud Nine*, 77 Tex. B.J. 395 (2014). Another legal observer reports that cloud computing is merely "a fancy way of saying stuff's not on your computer." Quinn Norton, *Byte Rights*, Maximum PC, Sept. 2010, at 12. Because of the many benefits, including saving time, resources, and money, the popularity of cloud computing is growing rapidly.

Because client data is stored on remote servers outside the lawyer's control, the American Bar Association and almost two dozen state bars have examined the ethics issues and published decisions regarding the use of cloud computing. Under the new additions to ABA Model Rule 1.6(c), the lawyer has a duty to "make reasonable efforts to prevent the inadvertent or unauthorized access to information relating to the representation of a client." The Texas Lawyers' Insurance Exchange Newsletter, Issue No. 2, 2011, states that most policies do not have an exclusion that applies to claims involving cloud computing. The Exchange suggests that the following security measures are reasonable:

1. Confidentiality: Lawyers should ensure that cloud vendors will keep information private. A vendor's published privacy policy may provide sufficient assurance of confidentiality by employees of the vendor.

2. Auditing: Cloud computing vendors often have AICPA SAS 70 Type II audits available for customers to provide to their auditors in order to analyze the adequacy of security.

3. Physical security: Security monitoring of data should be continuous—twenty-four hours a day, seven days a week.

4. Network security: Cloud vendors should have firewalls blocking unauthorized connections, and third parties should audit firewall security periodically.

5. Software security: Independent audits of software security should be conducted by data centers periodically. Security patches and software updates must be applied within thirty days of publication.

6. Data transmission security: All transmission of sensitive data, such as passwords and client information, should use Secure Sockets Layer (SSL).

7. Backups and redundancy: Data centers should have multiple backups during the day. At least one backup location should be a considerable distance away from the data center. Multiple Internet service providers and power grids should be available in a network of data locations.

8. Data portability: A lawyer or law firm should ensure the ability to download all data in a commonly used format.

§ 2.11 Access to Residence to Retrieve Personal Property

A person unable to enter his residence or former residence to retrieve personal property may be entitled under certain circumstances to a writ authorizing him to enter with a peace officer to retrieve the property. The applicant must show that he is unable to enter a residence he is or was authorized to occupy because the current occupant has denied him access or poses a clear and present danger of family violence to him or his dependent; that he is not prohibited by law from entering the residence; and that he or his dependent requires certain specifically described personal items located in the residence and will suffer personal harm if the items are not retrieved. A bond is required. On sufficient evidence of urgency and potential harm and sufficient notice to the current occupant and opportunity to be heard, the justice of the peace may issue a writ authorizing the applicant to enter the residence accompanied by a peace officer to retrieve the listed property. Tex. Prop. Code § 24A.002. A temporary writ effective for up to five days may be issued ex parte and without bond under certain circumstances. *See* Tex. Prop. Code § 24A.0021.

The property is inventoried when retrieved by the applicant, who is to be assisted by the peace officer. Tex. Prop. Code § 24A.003(a), (c). The current occupant may file a complaint within ten days after the entry alleging that the applicant has appropriated property belonging to the occupant or the occupant's dependent. Tex. Prop. Code § 24A.006.

It is a class B misdemeanor to interfere with a person or peace officer acting under the writ; it is a defense to prosecution that the actor did not receive a copy of the writ or other notice that the entry or property retrieval was authorized. Tex. Prop. Code § 24A.005. A landlord is not liable for an act or omission arising in connection with permitting or facilitating entry in accordance with the writ. Tex. Prop. Code § 24A.004.

§ 2.12 Useful Websites

The following website contains information relating to the topic of this chapter:

State-by-state guide to taping phone calls and in-person conversations (§ 2.8:8)
www.rcfp.org/reporters-recording-guide/state-state-guide

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Chapter 3

Divorce Pleadings

I. Suit

§ 3.1 General

A divorce suit is potentially five actions in one: (1) a suit for the dissolution of the marriage, (2) a suit to divide the property of the marriage, (3) a suit for spousal maintenance, (4) a suit affecting the parent-child relationship, and (5) a suit for any interspousal or third-party tort or contract actions. The suit for divorce, the suit to divide the property of the marriage, and the suit affecting the parent-child relationship must be joined and cannot be severed. *In re B.T.G.*, 494 S.W.3d 839, 842–43 (Tex. App.—Dallas 2016, no pet.).

To enter a valid order in a suit for divorce, except for a status determination, the court must have both personal jurisdiction over the parties and subject-matter jurisdiction. "Personal jurisdiction" refers to the court's power to render a valid and binding judgment against a party. *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 663 (Tex. App.—Dallas 2010, pet. dism'd) (See sections 3.4 and 3.12 below for further discussion.) "Subject-matter jurisdiction" refers to the power of a court, under the constitution and laws, to determine the merits of an action between the parties and to render judgment. *See Ysasaga v. Nationwide Mutual Insurance Co.*, 279 S.W.3d 858, 864 (Tex. App.— Dallas 2009, pet. denied). If the constitution or the laws deprive the court of the power to decide a matter, there is no subject-matter jurisdiction. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654.

Death of a party abates a divorce action and its incidental inquiries of property rights and child custody. *Whatley v. Bacon*, 649 S.W.2d 297, 299 (Tex. 1983). The death of either party to the divorce action leaves the trial court without jurisdiction to issue any orders based on the underlying divorce action. *See Garcia v. Daggett*, 742 S.W.2d 808, 809–10 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding [leave denied]). If one of the parties to a divorce action dies before a divorce is rendered, the proper procedural

disposition is dismissal of the divorce action. *Pollard v. Pollard*, 316 S.W.3d 246, 251 (Tex. App.—Dallas 2010, no pet.). Any claims against a third party in the divorce action must be dismissed with the divorce. *See In re Footman*, 03-15-00477-CV, 2015 WL 7164170, at *1 (Tex. App.—Austin Nov. 10, 2015, no pet.) (mem. op.). However, if the trial court has rendered an oral judgment held to be a final judgment, dispositive of the issues before the court, the court may proceed to enter the decree. *Dunn v. Dunn*, 439 S.W.2d 830, 834 (Tex. 1969).

The filing of a bankruptcy petition automatically stays the commencement or continuation of a suit for divorce, at least to the extent the proceeding seeks to divide the marital estate, even if a party or the court learns of the bankruptcy petition after acting in a divorce suit. The stay abates any judicial proceeding against the debtor, depriving state courts of jurisdiction over the debtor and his property until the stay is lifted or modified. Any action taken in violation of the stay is void, not merely voidable. A judgment or decree entered in violation of the stay is void for lack of jurisdiction and so constitutes fundamental error that can be raised for the first time on appeal, even sua sponte by the appellate court. *Adeleye v. Driscal*, 488 S.W.3d 498, 499 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Federal law contains exceptions to the automatic stay rule that affect family law cases, which are described in section 8.64 in this manual.

§ 3.2 Caption

The suit is to be styled "In the Matter of the Marriage of _____ and _____." Tex. Fam. Code § 6.401(a). If there is a child, the caption continues with "and in the Interest of _____, (a) Child(ren)." Tex. Fam. Code § 102.008(a).

§ 3.3 Citation

Citation is the same as in civil cases generally. *See generally* Tex. R. Civ. P. 99–107.

If a child is involved, the persons who are entitled to citation include—

1. any managing conservator;
2. any possessory conservator;
3. anyone having possession of or access to the child under an order;
4. anyone required by law or order to provide for the support of the child;

5. any guardian of the person of the child;

6. any guardian of the estate of the child;

7. each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Family Code chapter 161;

8. any alleged father unless there is attached to the petition an affidavit of waiver of interest executed by the alleged father under Family Code chapter 161 or unless the petitioner has complied with the provisions of section 161.002(b)(2), (b)(3), or (b)(4);

9. a man who has filed a notice of intent to claim paternity as provided by Family Code chapter 160;

10. the Texas Department of Family and Protective Services, if the petition requests that the department be appointed managing conservator of the child;

11. the title IV-D agency, if the petition requests termination of the parent-child relationship and support rights have been assigned to the agency under Family Code chapter 231;

12. a prospective adoptive parent to whom standing has been conferred under Family Code section 102.0035; and

13. a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Family Code chapter 161 or to whom consent to adoption has been given in writing under Family Code chapter 162.

Tex. Fam. Code § 102.009(a).

Citation may be served on any other person who has or who may assert an interest in the child. Tex. Fam. Code § 102.009(b). In an interstate custody case, citation should be served on any person who has physical custody of the child. *See* Tex. Fam. Code § 152.205(a). If the petition seeks to establish, terminate, modify, or enforce any support right assigned to the title IV-D agency under Family Code chapter 231, notice shall be given to the title IV-D agency in a manner provided by rule 21a of the Texas Rules of Civil Procedure. Tex. Fam. Code § 102.009(d). An incarcerated litigant has the right to personal service, and service of process delivered to an officer of the state correctional facility who is not designated as the agent for service of civil process under Tex. Civ. Prac. & Rem. Code § 17.029 is improper. *In re J.M. H.*, 414 S.W.3d 860 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by rule 103 of the Texas Rules of Civil Procedure by (1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed on it and with a copy of the petition attached or (2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached. Tex. R. Civ. P. 106(a).

A trial court's jurisdiction is dependent on citation issued and served in a manner provided for by law. Unless the record affirmatively shows an appearance by the defendant, proper service of citation on the defendant, or a written waiver of service at the time the default judgment is entered, the trial court does not have personal jurisdiction to render the default judgment against the defendant. For a default judgment to withstand direct attack, the record must establish strict compliance with the rules of civil procedure governing issuance, service, and return of citation. There are no presumptions in favor of valid issuance, service, or return of citation. If the record does not affirmatively show strict compliance with the rules, the attempted service of process is invalid, the trial court has no personal jurisdiction over the defendant, and the judgment is void. Virtually any deviation from the statutory requisites for service of process will destroy a default judgment. *Creaven v. Creaven*, 551 S.W.3d 865, 870 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *see McCoy v. McCoy*, No. 02-17-00275-CV, 2018 WL 5993547 (Tex. App.—Fort Worth Nov. 15, 2018, no pet.) (mem. op.) (where original return of service did not show that process server was sheriff, constable, or court clerk and was not notarized, it did not comply with Tex. R. Civ. P. 107, and service was insufficient).

The return of service must meet the requirements of rule 107 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 107. Rule 107 requires that the "return, together with any document to which it is attached," include several specific pieces of information, including a description of what was served, the date and time the process was received for service, and the person or entity served. Tex. R. Civ. P. 107(b)(3)–(5). There are no presumptions in favor of valid issuance, service, and return of citation in the face of a writ of error attack on a default judgment. *Primate Construction, Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam). The return of service is prima facie evidence of how service was performed. *Creaven*, 551 S.W.3d at 871. A court should give a return of service a fair, reasonable, and natural construction as to its plain intent and meaning. *Mandel v. Lewisville ISD*, 445 S.W.3d 469, 475 (Tex. App.—Fort Worth 2014, pet. denied). As long as the record as a whole—including the petition, citation, and return—shows that the citation was served on the defendant, service of process will

not be invalidated. *Williams v. Williams*, 150 S.W.3d 436, 444 (Tex. App.—Austin 2004, pet. denied); *see also In re S.C.*, No. 02-15-00191-CV, 2015 WL 9435937, at *2 (Tex. App.—Fort Worth Dec. 23, 2015, no pet.) (fair and reasonable construction of return of service combined with attached citation and certified mail return receipt containing wife's undisputed signature is that wife was served with citation).

COMMENT: When the process server returns the citation, check the return of citation carefully to ensure it contains the required information and is correct; is verified or signed under penalty of perjury if signed by a person other than a sheriff, a constable, or the clerk of the court; and otherwise meets all the requirements of rule 107 of the Texas Rules of Civil Procedure.

Texas Rule of Civil Procedure 118 allows for liberal amendment of the return of service to show the true facts of service. *Creaven*, 551 S.W.3d at 873. At any time in its discretion and on such notice and on such terms as it deems just, the court may allow any process or proof of service to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. Tex. R. Civ. P. 118.

Texas law prefers personal service over substituted service. When the plaintiff uses substituted service, Texas law places a burden on the plaintiff to prove that he served the defendant in the manner required by the applicable rule. *Creaven*, 551 S.W.3d at 870. On motion supported by affidavit stating the location of the respondent's usual place of business or usual place of abode or other place where the respondent can probably be found and stating specifically the facts showing that service has been attempted under rule 106(a)(1) or (a)(2) at the location named in the affidavit but has not been successful, the court may authorize service (1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in the affidavit or (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the respondent notice of the suit. Tex. R. Civ. P. 106(b). An affidavit is sufficient under rule 106 if it provides evidence of probative value that the location stated in the affidavit is the defendant's usual place of business or usual place of abode or other place where the respondent can probably be found. *In re C.L.W.*, 485 S.W.3d 537, 541 (Tex. App.—San Antonio 2015, no pet.).

For a default judgment to be sustained based on substituted service, the burden is on the plaintiff to prove that the defendant was served in the manner required by the applicable statute. Service of process must be performed in strict compliance with the appropriate

statutory provisions to support a default judgment. Strict compliance is especially important when substituted service under rule 106 is involved. *In re C.L.W.*, 485 S.W.3d at 540–41. When a trial court orders substituted service under rule 106, the only authority for the substituted service is the order itself. As a result, any deviation from the trial court's order necessitates a reversal of the default judgment based on service. *Creaven*, 551 S.W.3d at 870.

Caveat: When uncertain as to who the agent is for service of process for service on an incarcerated inmate, a rule 106 motion for alternative service may be appropriate.

Citation in a divorce suit may be by publication as in other civil cases, except that notice shall be published one time only. Tex. Fam. Code § 6.409(a). However, citation by publication is appropriate only after a diligent effort to locate the whereabouts of a party without success. *Curley v. Curley*, 511 S.W.3d. 131, 134 (Tex. App.—El Paso 2014, no pet.). The form of the notice is prescribed in the statute. *See* Tex. Fam. Code §§ 6.409(b), (c), 102.010(c). The citation must include the correct caption for the case, including reference to any minor children, if applicable. *Curley*, 511 S.W.3d. at 134. In personam jurisdiction can be acquired through service by publication unless the defendant resides outside Texas. *In re A.B.*, 207 S.W.3d 434 (Tex. App.—Dallas 2006, no pet.). If there is no suit affecting the parent-child relationship, service by publication may be completed by posting the citation at the courthouse door for seven days in the county in which the suit is filed. Tex. Fam. Code § 6.409(d).

Rule 244 of the Texas Rules of Civil Procedure requires that a trial court appoint an attorney ad litem to represent defendants served with citation by publication who fail to file an answer or appear before the court. *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992) (per curiam). In every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. Tex. R. Civ. P. 244. The purpose of the portion of rule 244 requiring the appointment of an attorney ad litem is to provide a nonappearing defendant effective representation. *Isaac v. Westheimer Colony Ass'n*, 933 S.W.2d 588, 591 (Tex. App.—Houston [1st Dist.] 1996, writ denied). Absent strict compliance with the essential requirements of rule 244, a trial court commits reversible error. *Isaac*, 933 S.W.2d at 591.

If the petitioner or the petitioner's attorney of record makes an oath that no child presently under eighteen years of age was born or adopted by the spouses and that no appreciable amount of property was accumulated by the spouses during the marriage, the court may dispense with the appointment of an attorney ad litem. In a case in which

citation was by publication, a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the suit as a part of the record. Tex. Fam. Code § 6.409(e).

If citation by publication is authorized, the court may, on motion, prescribe a different method of substituted service if the court finds and recites in its order that the method so prescribed would be as likely as publication to give the defendant actual notice. Tex. R. Civ. P. 109a.

Waiver of Service: A party may waive service after the suit is filed by filing a waiver acknowledging receipt of a copy of the citation. The waiver must contain the party's mailing address, and it must be sworn before a notary public who is not an attorney in the suit unless the party waiving is incarcerated. The Texas Rules of Civil Procedure do not apply to these waivers. The waiver may not be signed using a digitized signature. Tex. Fam. Code § 6.4035. *See Beard v. Uriostegui*, 426 S.W.3d 178, 182 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (letter to trial court constitutes pro se answer, not waiver of service).

Waiver of service of an original petition, however, does not also waive a respondent's right to receive service of any amended petitions unless it expressly contains such a waiver. *Garduza v. Castillo*, No. 05-13-00377-CV, 2014 WL 2921650, at *2–3 (Tex. App.—Dallas June 25, 2014, no pet.) (mem. op.).

§ 3.4 Long-Arm Jurisdiction

A Texas trial court may exercise jurisdiction only over those portions of the suit for which it has authority. *See* Tex. Fam. Code § 6.308. For example, a Texas court may render a decree of dissolution of the marriage of a Texas spouse without having personal jurisdiction over both spouses for purposes of property division. Tex. Fam. Code §§ 6.301–.304, 6.306–.307; *Dawson-Austin v. Austin*, 968 S.W.2d 319, 324–25 (Tex. 1998); *Mason v. Mason*, 321 S.W.3d 178 (Tex. App.—Houston [1st Dist] 2010, no pet.).

On the other hand, a spousal support order may be rendered against a nonresident obligor only if the court has personal jurisdiction over that party. Tex. Fam. Code § 8.051. Personal jurisdiction, unlike subject-matter jurisdiction, can be conferred by consent or waiver. Personal service is always necessary if a judgment in personam is to be rendered against a nonresident. *In re A.B.*, 207 S.W.3d 434 (Tex. App.—Dallas 2006, no pet.); *see Estin v. Estin*, 334 U.S. 541 (1948). The impact of this restriction of the trial

court's jurisdiction is mitigated by the expansive long-arm statute contained in Tex. Fam. Code § 6.305.

A party must plead in its petition facts that are sufficient for the court to exercise personal jurisdiction over a nonresident respondent. The failure of a petition to include these jurisdictional facts will cause a default judgment against the respondent to be reversed for all the purposes for which personal jurisdiction is required. *See Calvert v. Calvert*, 801 S.W.2d 217, 219 (Tex. App.—Fort Worth 1990, no writ).

If the petitioner is a resident or domiciliary of Texas at the time a divorce suit is filed, the court may exercise personal jurisdiction over the respondent or the respondent's personal representative although the respondent is not a resident of Texas if (1) Texas is the last marital residence of the petitioner and the respondent and the suit is filed before the second anniversary of the date on which marital residence ended or (2) there is any basis consistent with the constitutions of Texas and of the United States for the exercise of personal jurisdiction. Tex. Fam. Code § 6.305(a).

A court acquiring jurisdiction for a divorce under section 6.305(a) also acquires jurisdiction over the respondent in a suit affecting the parent-child relationship. Tex. Fam. Code § 6.305(b). Long-arm provisions for separate personal jurisdiction in suits affecting the parent-child relationship are discussed at section 3.49 below. See also section 3.50 concerning the Uniform Child Custody Jurisdiction and Enforcement Act.

Texas courts may exercise jurisdiction over a nonresident defendant if the Texas long-arm statute authorizes the exercise of jurisdiction and if the exercise of jurisdiction comports with due process. *Goodenbour v. Goodenbour*, 64 S.W.3d 69, 77 (Tex. App.—Austin 2001, pet. denied). In a suit for dissolution of a marriage, a Texas court may acquire jurisdiction over a nonresident spouse if Texas was the parties' last marital residence (if the suit is filed within two years of the date on which marital residence ended) or if there is any basis consistent with the state and federal constitutions for exercise of personal jurisdiction. Tex. Fam. Code § 6.305(a).

The Family Code does not define the term *last marital residence*, and case law interpreting section 6.305(a)(1) is sparse. *Goodenbour*, 64 S.W.3d at 76. The last marital residence requires more than one spouse's occasional visits with the partner and the children at the other spouse's residence during marital separation. The last marital residence implies "a permanent place of abode by the spouses." *Cossey v. Cossey*, 602 S.W.2d 591, 595 (Tex. App.—Waco 1980, no writ). Evidence that the couple had no intention of separating when the residence was acquired was one of three facts that the

trial court found established the parties' last marital residence, along with the fact that the husband had visited the wife in the Texas residence and had paid her money each month to pay the expenses of that residence. *Aduli v. Aduli*, 368 S.W.3d 805, 815 (Tex. App.—Houston [1st Dist.] 2012, no pet.). One court has held that marital cohabitation in Texas from November to February was sufficient to create a last marital residence, bringing the nonresident spouse within Texas long-arm jurisdiction. *Scott v. Scott*, 554 S.W.2d 274, 277 (Tex. App.—Houston [1st Dist.] 1977, no writ). *See also Nieto v. Nieto*, No. 04-11-00807-CV, 2013 WL 1850780 (Tex. App.—San Antonio May 1, 2013, pet. denied) (mem. op.) (affirming San Antonio as parties' residence for at least six months prior to divorce based on parties' owning marital residence and conducting business there).

In applying the term *last marital residence*, courts should acknowledge that more and more frequently one spouse may, by choice or necessity, work in a state or country apart from the family unit for a period of time. A work separation, in which spouses live apart to pursue professional opportunities, must be distinguished from a marital separation, in which spouses have decided to dissolve their marriage. Much as a military member may be on temporary assignment elsewhere, one spouse may, for a time, pursue a work assignment away from the other family members. The family decision to endure a work separation may include consideration of what schooling or other opportunities are best for the children. Because the family has made the decision to remain an intact unit, the fact that the spouses live apart does not mean that a marital residence no longer exists. As long as the parties choose to maintain a marriage, there will be a last marital residence somewhere. *Goodenbour*, 64 S.W.3d at 76–77.

Once the long-arm statute is satisfied, the court must next consider whether the exercise of personal jurisdiction over the respondent comports with federal due process. *Goodenbour*, 64 S.W.3d at 78. Federal due process protects a person's liberty interest from being subject to binding judgments in a forum with which he has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Under the federal constitutional test of due process, a state may assert personal jurisdiction over a nonresident defendant only if the defendant has purposefully established minimum contacts with the forum state and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476; *see also TeleVentures, Inc. v. International Game Technology*, 12 S.W.3d 900, 907 (Tex. App.—Austin 2000, pet. denied). Central to the issue of due process "is that the defen-

dant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Burger King*, 471 U.S. at 474.

The minimum-contacts analysis has been refined into two types of jurisdiction: general and specific. General jurisdiction exists if the defendant's contacts with the forum state are continuous and systematic, even if the cause of action does not arise from or relate to activities conducted within Texas. *TeleVentures*, 12 S.W.3d at 907. For general jurisdiction, the minimum-contacts analysis is more demanding, requiring a showing of substantial activities within the forum state. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990). Therefore, the court must determine that there are either minimum contacts sufficient to confer specific jurisdiction or continuous and systematic contacts sufficient to confer general jurisdiction. *Goodenbour*, 64 S.W.3d at 78. To establish specific jurisdiction, the cause of action must arise out of or relate to the nonresident defendant's contact with the forum state, and the conduct must have resulted from that defendant's purposeful conduct, not the unilateral conduct of the plaintiff or others. *TeleVentures*, 12 S.W.3d at 907. Therefore, in analyzing minimum contacts for the purpose of determining Texas courts' specific jurisdiction, the court must focus on the relationship among the defendant, the forum, and the litigation. *Goodenbour*, 64 S.W.3d at 79.

Under the minimum-contacts test for specific jurisdiction, the court must determine whether the defendant has had purposeful contacts with the forum state, thereby invoking the benefits and protections of its laws. This requirement ensures that a nonresident defendant will not be haled into a jurisdiction based solely on random or fortuitous contacts or the "unilateral activity of another party or a third person." *Goodenbour*, 64 S.W.3d at 79 (citation omitted). As long as the contact creates a substantial connection with the forum state, even a single act can support jurisdiction, but a single act or occasional acts may be insufficient to establish jurisdiction if their nature and quality and the circumstances of their commission create only an attenuated connection with the forum. *Burger King*, 471 U.S. at 475 n.18. In determining whether a nonresident defendant's contacts are random and fortuitous, the Texas Supreme Court has looked at whether the contacts are based on the unilateral acts of the plaintiff or whether the defendant participated in an act that resulted in a contact. *Dawson-Austin*, 968 S.W.2d at 326; *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996). Ownership of real property in Texas is an important consideration in any minimum-contacts analysis. *Goodenbour*, 64 S.W.3d at 79; *see also Shaffer v. Heitner*, 433 U.S. 186, 208 (1977).

Once it is determined that the defendant had sufficient minimum contacts with Texas, the court should next turn to whether the exercise of jurisdiction in Texas is reasonable. To determine whether jurisdiction is reasonable, the court evaluates the following fac-

tors: (1) the burden on the defendant, (2) Texas's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Goodenbour*, 64 S.W.3d at 80 (citing *Burger King*, 471 U.S. at 477).

Texas has exercised jurisdiction based on "minimum contacts" in a number of cases. *Goodenbour*, 64 S.W.3d at 69 (minimum contacts found—husband owned property in Texas, spent time in family home in Texas; residence in Texas listed on income tax return as family residence); *Reynolds v. Reynolds*, 2 S.W.3d 429, 431 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (Texas had personal jurisdiction over husband because he had previously resided in Texas, paid mortgage on jointly owned home in Texas, and paid car insurance on wife's car located in Texas); *see also In re Gonzalez*, 993 S.W.2d 147, 151–54 (Tex. App.—San Antonio 1999, no pet.) (personal service effected on alleged father, Mexican citizen, when his plane touched down in Texas to refuel while en route to Colorado from Mexico—prior minimum contacts, conception of child in Texas, property owned in Texas, residence periodically in Texas).

However, when no minimum contacts have been found, Texas has held that the trial court has jurisdiction only to grant the divorce, not to divide the marital estate. *Dawson-Austin*, 968 S.W.2d at 326 (wife found to have no "minimum, purposeful contacts" with Texas—she never lived in Texas; her only contact had been to attend business convention nine or ten years earlier).

§ 3.5 Jury Trial

Either party may demand a jury trial in a suit for divorce. Tex. Fam. Code § 6.703. The jury demand must be timely made in writing and the jury fee paid. Tex. R. Civ. P. 216; *In re Marriage of Crosby*, 322 S.W.3d 354 (Tex. App.—El Paso 2010, no pet.). Although the findings of the jury are only advisory in some aspects of the case, it has been held to be reversible error to fail to submit all disputed fact issues to a jury when a jury is timely demanded unless no material issues of fact exist and an instructed verdict would have been justified. *See Grossnickle v. Grossnickle*, 865 S.W.2d 211, 212 (Tex. App.—Texarkana 1993, no writ). The court may not submit jury questions on the issues of support under Family Code chapter 154 or 159, a specific term or condition of possession or access, or conservator rights and duties, except for a determination of which joint managing conservator has the exclusive right to designate the primary residence of the child. Tex. Fam. Code § 105.002(c)(2).

In a jury trial, division of the estate is properly determined by the court, not by the jury, although a jury's determination of the character or value of property is binding on the court. *Archambault v. Archambault*, 763 S.W.2d 50, 51 (Tex. App.—Beaumont 1988, no writ).

COMMENT: Suggested jury questions, instructions, and definitions for use in family law cases are contained in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate*. See also section 3.48 below for a discussion of issues that may be submitted in parent-child cases and whether they are binding or advisory.

§ 3.6 Trial before Associate Judge

The judge of a court having jurisdiction of suits under Family Code title 1, 4, or 5 or chapter 45 may appoint a full-time or part-time associate judge to perform specified duties if the commissioners court for a county in which the court has jurisdiction authorizes employment of an associate judge. Tex. Fam. Code § 201.001(a). The provisions of Family Code section 201.001 do not apply to an associate judge for title IV-D cases appointed under section 201.101 or to an associate judge for child protective cases appointed under section 201.201. Tex. Fam. Code § 201.001(e). The judge may refer to the associate judge any aspect of a suit under title 1, 4, or 5 or chapter 45, including, unless a party objects in writing within ten days of receiving notice of the referral to the associate judge, a trial on the merits. Tex. Fam. Code § 201.005(a)–(c). A court reporter is not required during a hearing held by an associate judge. However, a court reporter is required to be provided if the associate judge presides over a jury trial or a contested final termination hearing. Tex. Fam. Code § 201.009(a). A party, the associate judge, or the referring court may provide for a reporter during the hearing if one is not otherwise provided. Tex. Fam. Code § 201.009(b).

COMMENT: The local rules in some counties refer all cases for final trial to the associate judge, on filing, requiring that the objection to the referral be made in the initial pleading or be waived.

Failure to timely object to referral to an associate judge does not deprive a party of the right to appeal to the referring court. *See In re T.S.*, 191 S.W.3d 736, 740 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

A party's failure to request, or waiver of the right to request, a de novo hearing before the referring court does not deprive the party of the right to appeal or request other relief from the proper appellate court. Tex. Fam. Code § 201.016(a).

Pending a de novo hearing before the referring court, a proposed order or judgment of the associate judge is in full force and effect and is enforceable as an order or judgment of the referring court, except for an order providing for the appointment of a receiver. Except as provided by Texas Family Code section 201.007(c), if a request for a de novo hearing before the referring court is not timely filed, the proposed order or judgment of the associate judge becomes the order or judgment of the referring court only on the referring court's signing the proposed order or judgment. An order by an associate judge for the temporary detention or incarceration of a witness or party shall be presented to the referring court on the day the witness or party is detained or incarcerated. If the referring court is not immediately available, the associate judge may order the release of the party or witness, with or without bond, pending a de novo hearing or may continue the person's detention or incarceration for not more than seventy-two hours. Tex. Fam. Code § 201.013; *see also* Tex. Fam. Code § 201.007(c).

Associate judges appointed under Family Code chapter 201, subchapter A, have the judicial immunity of a district judge. Tex. Fam. Code § 201.017.

§ 3.7 Pleadings Generally

A petition in a divorce suit need not specify the underlying evidentiary facts if the petition alleges the grounds relied on substantially in the language of the statute. Allegations of grounds for relief, matters of defense, or facts relied on for a temporary order that are stated in short and plain terms are not subject to special exceptions because of form or sufficiency. The court shall strike an allegation of evidentiary fact from the pleadings on the motion of a party or on the court's own motion. Tex. Fam. Code § 6.402. The Family Code does not address the pleading of ancillary litigation. Therefore, in suits involving tracing, reimbursement, corporate alter egos, enhancement of one estate by the other, wasting of marital assets, third-party claims, and like situations, the property rights asserted should be specifically pleaded.

If the parties are parents of a child not under the continuing jurisdiction of any other court under Family Code section 155.001, the divorce suit must include a suit affecting the parent-child relationship. Tex. Fam. Code § 6.406(b). The petition must state whether there are children born or adopted of the marriage who are under eighteen years of age or otherwise entitled to support under Family Code chapter 154. Tex. Fam. Code § 6.406(a). If the parties are the intended parents under a gestational agreement that is in effect and that establishes a parent-child relationship between the parties as intended parents and an unborn child on the birth of the child, the petition must state that the parties have entered into such a gestational agreement, whether the gestational

mother is pregnant or a child who is the subject of the agreement has been born, and whether the agreement has been validated under Family Code section 160.756. Tex. Fam. Code § 6.406(a–1). The petition must include other information concerning the children that is described in Family Code section 102.008. *See* Tex. Fam. Code § 102.008. Unless each party resides in Texas, in a child custody proceeding, certain information must be presented to the court under oath in each party's first pleading or by an attached affidavit, unless a party alleges in an affidavit or in a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized. Tex. Fam. Code § 152.209(a), (e). See section 3.50 below concerning pleading requirements under the Uniform Child Custody Jurisdiction and Enforcement Act.

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

§ 3.8 Protective Order Statement

A petition for divorce must state whether, in regard to a party to the suit or a child of a party to the suit, there is in effect a protective order under Family Code title 4, a protective order under chapter 7A (subchapter A, chapter 7B, for suits filed on or after September 1, 2021) of the Code of Criminal Procedure, or an order for emergency protection under article 17.292 of the Code of Criminal Procedure. The petition also must state whether an application for any of these is pending. The petitioner must attach a copy of each such protective order in which a party to the suit or the child of a party to the suit was the applicant or victim of the conduct alleged in the application or order and the other party was the respondent or defendant of an action regarding the conduct alleged in the application or order without regard to the date of the order. If a copy of the order is not available at the time of filing, the petition must state that a copy will be filed with the court before any hearing. Tex. Fam. Code § 6.405.

§ 3.9 Special Exceptions

Either party may file special exceptions directed at the other party's pleadings. A special exception must not only point out the particular pleading excepted to but must also intelligibly and with particularity point out the defect, omission, obscurity, duplicity, generality, or other insufficiency. Tex. R. Civ. P. 91. The purpose of special exceptions is to furnish the adverse party a medium by which to force clarification of pleadings if they are not clear or sufficiently specific. *Villarreal v. Martinez*, 834 S.W.2d 450, 451 (Tex. App.—Corpus Christi–Edinburg 1992, no writ). Special exceptions should be

filed, a hearing set, and a ruling obtained either that the petition is sufficient as it stands or that the language excepted to should be stricken. *See Brooks v. Housing Authority of City of El Paso*, 926 S.W.2d 316, 322 (Tex. App.—El Paso 1996, no writ).

If the trial court sustains special exceptions, it must give the pleader an opportunity to amend the pleading. If a party refuses to amend or the amended pleading fails to state a cause of action, summary judgment may be granted. Summary judgment may also be proper if a pleading deficiency is of the type that could not be cured by an amendment. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998).

If there are no special exceptions filed to clarify a claim, a petitioner cannot later complain that a pleading is insufficient. *See Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988). Failure to have special exceptions ruled on may be deemed a waiver of the defect in pleading. Tex. R. Civ. P. 90; *see also Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 937 (Tex. 1992).

COMMENT: In divorce cases, special exceptions are appropriate if allegations such as fraud or alter ego are included in the pleadings or if the opposing party asserts specific property rights but does not clearly state what he will try to prove.

§ 3.10 Notice of Nonsuit and Dismissal for Want of Prosecution

Nonsuit: Any time before the petitioner has introduced all his evidence other than rebuttal evidence, the petitioner may dismiss a case or take a nonsuit. Notice of the dismissal or nonsuit is to be served under rule 21a on any party who has answered or been served with process. Tex. R. Civ. P. 162. A nonsuit renders the merits of the nonsuited case moot. *Villafani v. Trejo*, 251 S.W.3d 466, 468–69 (Tex. 2008). While the date on which the trial court signs an order dismissing the suit is the starting point for determining when a trial court's plenary power expires, a nonsuit is effective when it is filed. The trial court generally has no discretion to refuse to dismiss the suit, and its order doing so is ministerial. *University of Texas Medical Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam). Costs are taxed against the dismissing party unless the court orders otherwise. Tex. R. Civ. P. 162.

The trial court, however, need not immediately dismiss the suit when notice of nonsuit is filed. Rule 162 states that the plaintiff's right to nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk," and a dismissal "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal."

Tex. R. Civ. P. 162. Although plaintiffs have a right to nonsuit their claims and the trial court has no choice but to grant their nonsuit, plaintiffs do not have the absolute right to nonsuit someone else's claims they are trying to avoid. *Texas Mutual Insurance Co. v. Ledbetter*, 251 S.W.3d 31, 37–38 (Tex. 2008). A claim for affirmative relief must allege a cause of action, independent of the plaintiff's claim, on which the claimant could recover compensation or relief, even if the plaintiff abandons or is unable to establish his cause of action. *University of Texas Medical Branch at Galveston*, 195 S.W.3d at 101. A trial court's power to decide a motion for sanctions pertaining to matters occurring before judgment is no different than its power to decide any other motion during its plenary jurisdiction. Thus, the time during which the trial court has authority to impose sanctions on such a motion is limited to when it retains plenary jurisdiction and is not limited by rule 162. *Scott & White Memorial Hospital v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (per curiam). To that end, a trial court retains jurisdiction after a nonsuit and may delay signing an order of dismissal to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit. *In re Bagheri*, No. 05-18-00110-CV, 2018 WL 2126825, at *2 (Tex. App.—Dallas May 9, 2018, orig. proceeding) (mem. op.).

To qualify as a claim for affirmative relief, a defensive pleading must allege that the defendant has a cause of action, independent of the plaintiff's claim, on which he could recover benefits, compensation, or relief, even though the plaintiff may abandon his cause of action or fail to establish it. If a defendant does nothing more than resist a plaintiff's right to recover, the plaintiff has an absolute right to the nonsuit. *General Land Office of Texas v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990).

In an intervention for grandparent access under section 153.432 of the Texas Family Code, the appeals court found that the intervention is a request for independent affirmative relief and the intervenor becomes a party to the suit for all purposes. A nonsuit filed in the underlying suit does not prejudice the intervening party's claim for affirmative relief. *In re Schoelpple*, No. 14-06-01038-CV, 2007 WL 431877 (Tex. App.—Houston [14th Dist.] Feb. 8, 2007, orig. proceeding) (mem. op.).

Want of Prosecution: A matter may be dismissed for want of prosecution. In reviewing a dismissal for want of prosecution the court applies an abuse of discretion standard. A trial judge may dismiss a case for want of prosecution under rule 165a of the Texas Rules of Civil Procedure for failure to appear or failure to comply with supreme court time standards. Abuse of discretion exists if a party has diligently attempted to respond to a trial court's notice of dismissal and the court still dismisses the matter. A court's not acting on an indigent inmate's motion for appointment of counsel, for bench warrant, or

to conduct the hearing by telephone conference or other means is an abuse of discretion. *In re Marriage of Bolton*, 256 S.W.3d 832 (Tex. App.—Dallas 2008, no pet.); *Reese v. Reese*, 256 S.W.3d 898 (Tex. App.—Dallas 2008, no pet.).

§ 3.11 Respondent's Pleadings Generally

In responding to or answering a divorce action, careful consideration should be given to jurisdictional matters. A special appearance is used to object to the exercise of *in personam* jurisdiction. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998). The Uniform Child Custody Jurisdiction and Enforcement Act and the affirmative pleadings it requires, described at section 3.50 below, should be carefully reviewed before responding to any out-of-state jurisdictional actions.

§ 3.12 Special Appearance

The basic issue to be decided in filing a special appearance is whether, under the federal and state constitutions and applicable statutes and rules governing such proceedings, the court has in personam jurisdiction over the respondent.

The special appearance may be made by the respondent in person or by attorney. The basis for the special appearance is that "such party or property is not amenable to process issued by the courts of this State." Tex. R. Civ. P. 120a(1). The special appearance must be made by a sworn motion filed before any other plea, including a motion to transfer venue, a pleading, an answer, a motion, or special exceptions to the petition. Tex. R. Civ. P. 120a(1). However, an unverified special appearance may be amended to cure the defect, even after the trial court has overruled it, as long as the amendment is filed before the defendant enters a general appearance. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 322–23 (Tex. 1998). Other pleadings may be contained in the same instrument or filed after the filing of a special appearance but not before. Tex. R. Civ. P. 120a(1). It is not necessary for the answer and other motions filed in the same instrument to contain "subject to" language. *See Dawson-Austin*, 968 S.W.2d at 323. Any motion to challenge the jurisdiction shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. Tex. R. Civ. P. 120a(2). A defendant, however, does not waive his special appearance by using the discovery process to seek information pertaining to the merits of the case. *Case v. Grammar*, 31 S.W.3d 304, 311 (Tex. App.—San Antonio 2000, no pet.).

COMMENT: Every attempt should be made to negate all claims of jurisdiction of the court that are set out in the petitioner's pleadings. For example, the special appearance

should assert that the respondent is not a resident of the state of Texas and that the specific requirements of Family Code section 6.305 or 102.011 that were relied on by the petitioner are not satisfied. The special appearance should further assert that the assumption of jurisdiction over the respondent would offend the traditional notions of fair play and substantial justice and that the respondent has had insufficient contacts with Texas to warrant an assumption of jurisdiction.

The respondent has the burden of proof to show lack of amenability to long-arm process. *Carbonit Houston, Inc. v. Exchange Bank*, 628 S.W.2d 826, 829 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). A hearing should be held on the special appearance and a ruling obtained on the special appearance. There is a conflict between courts of appeals on whether a failure to do so may be construed as a waiver of the jurisdictional challenge. *Stegall & Stegall v. Cohn*, 592 S.W.2d 427, 429–30 (Tex. App.—Fort Worth 1979, no writ) (failure to set hearing does not waive special appearance); *Brown v. Brown*, 520 S.W.2d 571, 575 (Tex. App.—Houston [14th Dist.] 1975, no writ) (under facts of case, defendant's failure to set hearing on his special appearance and present facts construed as waiver of that special appearance).

The court shall determine the special appearance on the basis of the pleadings, any stipulations the parties make, any affidavits and attachments the parties file, discovery results, and any oral testimony. Any affidavits must be served at least seven days before the hearing, be made on personal knowledge, set forth specific facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify. If the opposing party shows by reasons stated in an affidavit that he cannot present by affidavit facts essential to justify his opposition, the court may order a continuance. Sanctions are to be imposed if affidavits are presented in violation of rule 13. Tex. R. Civ. P. 120a(3).

An order overruling a special appearance is interlocutory and not appealable. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(7); *see also Carpenter Body Works, Inc. v. McCulley*, 389 S.W.2d 331, 332 (Tex. App.—Houston 1965, writ ref'd), *cert. denied*, 382 U.S. 979 (1966). Additionally, a writ of mandamus will not issue for the trial court's denial of a special appearance. *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994) (orig. proceeding); *see also Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (orig. proceeding) (per curiam). *But see Knight Corp. v. Knight*, 367 S.W.3d 715, 723 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding). If the objection to jurisdiction is overruled, the respondent may thereafter appear generally for any purpose and present his defense to the case on the merits without waiver of the objection to jurisdiction. Tex. R. Civ. P. 120a(4). When a trial court rules

on a special appearance, the losing party should request findings of fact. *See* Tex. R. Civ. P. 296; *Goodenbour v. Goodenbour*, 64 S.W.3d 69, 75 (Tex. App.—Austin 2001, pet. denied).

Forum non conveniens is an equitable doctrine exercised by the courts to resist the imposition of an inconvenient jurisdiction on a litigant, even if the court could exercise jurisdiction under the long-arm statute without a violation of due process. *Sarieddine v. Moussa*, 820 S.W.2d 837, 839 (Tex. App.—Dallas 1991, writ denied). Before a court may invoke the doctrine of forum non conveniens, however, the court must first find that it has jurisdiction over the defendant. *Sarieddine*, 820 S.W.2d at 840. A trial court may dismiss a case under the doctrine of forum non conveniens if it determines that, for the convenience of the litigants and witnesses and in the interest of justice, the action should be instituted in another forum that also has jurisdiction. *Van Winkle-Hooker Co. v. Rice*, 448 S.W.2d 824, 826 (Tex. App.—Dallas 1969, no writ). In determining whether to dismiss a case under the doctrine of forum non conveniens, a trial court must weigh a number of factors, including—

1. the private interest of the litigants;
2. the relative ease of access to the sources of proof needed;
3. the availability of compulsory process for the attendance of unwilling witnesses;
4. the costs of obtaining the attendance of willing witnesses; and
5. any other practical factors that make trial of a case easy, expeditious, and inexpensive.

Cole v. Lee, 435 S.W.2d 283, 285 (Tex. App.—Dallas 1968, writ dism'd) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947)).

There must be some evidence in the record that allows the trial court to balance the forum non conveniens factors and determine whether they weigh strongly in favor of trying the case in another forum. Unsubstantiated, conclusory allegations in a motion or in argument by counsel are insufficient. *Lee v. Na*, 198 S.W.3d 492, 495 (Tex. App.—Dallas 2006, no pet.).

§ 3.13 Plea in Abatement

If spouses separate and live in different counties for ninety days or more, either spouse may file suit for divorce in the county in which that spouse or the other spouse resides.

See Tex. Fam. Code § 6.301. The court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974). Any subsequent suit involving the same parties and the same controversy must be dismissed if a party to that suit calls the second court's attention to the pendency of the prior suit by a plea in abatement. *Curtis*, 511 S.W.2d at 267. If the second court issues an order that actively interferes with the jurisdiction of the court with dominant jurisdiction, mandamus relief is available. *In re Benavides*, No. 04-14-00718-CV, 2014 WL 6979438 (Tex. App.—San Antonio Dec. 10, 2014, orig. proceeding) (mem. op.). As long as the forum is a proper one, it is the petitioner's privilege to choose the forum. The respondent is simply not at liberty to decline to do battle in the forum chosen by the petitioner. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988).

Grounds: Pleas in abatement used in divorce cases are normally based on one of two grounds: (1) that neither the petitioner nor the respondent has met the residency and domicile requirements or (2) that prior proceedings are pending in another court, involving the same parties, as well as additional similar matters that may be appropriate. Abatement of a lawsuit due to the pendency of a prior suit is based on the principles of comity, convenience, and the necessity for orderly procedures in the trial of contested issues. The plea in abatement must be raised in a timely manner or it is waived. There are three exceptions to the general rule that the court in which a suit is first filed acquires dominant jurisdiction: (1) conduct that estops a party from asserting prior active jurisdiction, (2) lack of persons to be joined if feasible or the power to bring them before the court, and (3) lack of intent to prosecute the first lawsuit. *Wyatt*, 760 S.W.2d at 248.

Pleading: The plea in abatement should contain both pertinent facts and conclusions of law regarding the "dominant" jurisdiction of a particular court for a plea on that ground to be successful. The plea must give adequate notice to the petitioner about the exact facts as well as any conclusions of law relied on by the movant in the plea. The plea itself must state sufficient facts to indicate to the court why the pending action should be abated. The plea should also suggest the correct manner in which the petitioner should have proceeded to obtain a hearing on his cause of action. *Bryce v. Corpus Christi Area Convention & Tourist Bureau*, 569 S.W.2d 496, 499 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.). A dominant jurisdiction complaint must be timely asserted and proven by a plea in abatement, or it is waived. *Wyatt*, 760 S.W.2d at 248.

The plea in abatement must be verified. *Sparks v. Bolton*, 335 S.W.2d 780, 785 (Tex. App.—Dallas 1960, no writ); *see also* Tex. R. Civ. P. 93(3).

Presentation of Plea and Evidence: The movant in the plea in abatement must present the plea to the court no later than the commencement of the trial or the plea is considered waived. The movant must present evidence to support the plea in abatement, and an affidavit or verified plea will not, by itself, support the plea. *Continental Oil Co. v. P.P.G. Industries*, 504 S.W.2d 616, 621–22 (Tex. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

If Plea Is Overruled: The Texas Supreme Court has held that, if the second court refuses to sustain a proper plea in abatement or attempts to interfere with the prior action, such refusal or interference may be challenged by mandamus or other appropriate writ to settle the conflict of jurisdiction. *Curtis*, 511 S.W.2d at 267; *see also Dallas Fire Insurance Co. v. Davis*, 893 S.W.2d 288, 291–92 (Tex. App.—Fort Worth 1995, orig. proceeding). The supreme court has also held that a trial court's ruling on a plea in abatement is not subject to mandamus. *See Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985) (orig. proceeding). The distinction made between these cases is that in *Curtis*, one of the courts had enjoined the other court from proceeding. *Abor*, 695 S.W.2d at 567. A general review of the case law indicates that under most fact situations a challenge of the trial court's ruling by mandamus will not be proper.

Defenses: The three defenses to a plea in abatement are—

1. fraud and deceit based on conduct of a party that would stop him or her from asserting the "dominant" jurisdiction of a court in which the suit was first filed;
2. the defense of bad faith; and
3. that the court did not have "dominant" jurisdiction, because at the time of the filing of the first suit the requirements of Family Code section 6.301 were not met and the later court had actually acquired "dominant" jurisdiction by being the first court with jurisdiction under section 6.301.

See Johnson v. Avery, 414 S.W.2d 441, 443 (Tex. 1966); *In re Marriage of Parr*, 543 S.W.2d 433, 434 (Tex. App.—Corpus Christi–Edinburg 1976, no writ); *see also Wyatt*, 760 S.W.2d at 248.

Estoppel: A party who files a counterpetition seeking affirmative relief is estopped from asserting that the county in which he had first filed has dominant jurisdiction.

Bonacci v. Bonacci, 420 S.W.3d 294 (Tex. App.—El Paso 2013, pet. denied), *cert. denied*, 135 S. Ct. 678 (2014).

§ 3.14 Respondent's Answer

The respondent shall file an answer to the proceedings. A general denial is sufficient to deny pleadings not required to be denied under oath. Tex. R. Civ. P. 92. The answer need not be made on oath or by verified petition. Tex. Fam. Code § 6.403.

Defense to Divorce Action: A request for divorce based on insupportability may be granted on the request of either party. Tex. Fam. Code § 6.001. It was the intent of the legislature to make a decree of divorce mandatory when a party to the marriage alleges insupportability and establishes the statutory elements, regardless of who is at fault. *Phillips v. Phillips*, 75 S.W.3d 564, 572 (Tex. App.—Beaumont 2002, no pet.). The defenses to a suit for divorce of recrimination and adultery are abolished. Tex. Fam. Code § 6.008(a). Condonation is a defense to a suit for divorce only if the court finds that there is a reasonable expectation of reconciliation. Tex. Fam. Code § 6.008(b). Condonation is an affirmative defense that must be specially pleaded. *Ferguson v. Ferguson*, 610 S.W.2d 559, 560 (Tex. App.—Beaumont 1980, no writ).

Denial of Paternity: A presumed father of a child may sign a denial of his paternity. The denial is valid only if (1) an acknowledgment of paternity signed or otherwise authenticated by another man is filed under section 160.305 of the Family Code; (2) the denial is in a record and is signed or otherwise authenticated under penalty of perjury; and (3) the presumed father has not previously acknowledged paternity of the child, unless the previous acknowledgment has been rescinded under section 160.307 or successfully challenged under section 160.308, or been adjudicated to be the father of the child. Tex. Fam. Code § 160.303. The issue of paternity is addressed in chapter 54 of this manual.

Affirmative Defense: An affirmative defense does not seek to defend by merely denying the opposing party's claims, but rather seeks to establish an independent reason why the other party should not recover. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 212 (Tex. 1996). A respondent or counterrespondent has the duty to plead and request jury instructions on an affirmative defense. *Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 481 (Tex. 2001). Specific affirmative defenses are set out in rule 94 of the Texas Rules of Civil Procedure and include estoppel, fraud, laches, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. *See* Tex. R. Civ. P. 94. In addition to these specific affirmative defenses, rule 94 also states that "a party

shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."

Verified Defense: Certain pleadings must be verified unless the truth of those matters appears of record. These verified pleadings are listed in rule 93 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 93. They include any other matter required by statute to be pleaded under oath. Tex. R. Civ. P. 93(16).

Compulsory Joinder: A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff. Tex. R. Civ. P. 39(a).

If such a person cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include the following: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or to those already parties; second, the extent to which by protective provisions in the judgment, by the shaping of relief, or by other measures the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; and fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Tex. R. Civ. P. 39(b).

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in rule 39(a) who are not joined and the reasons why they are not joined. Tex. R. Civ. P. 39(c).

COMMENT: If a nonparty, such as a parent of a spouse, owns an interest in real or personal property in which the spouses have an interest, it may be necessary to join the nonparty to the divorce suit in order to divide the spouses' interests. *See Walsh v. Walsh*, 255 S.W.2d 240, 243 (Tex. App.—Amarillo 1952, no writ).

Permissive Joinder: All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the

same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him and may order separate trials or make other orders to prevent delay or prejudice. Tex. R. Civ. P. 40.

Compulsory Counterclaim: The compulsory counterclaim rule is designed to avoid piecemeal or duplicative litigation. Its purpose is to provide that a potential counterclaimant with a justiciable interest arising out of the same transaction or occurrence at issue in the opposing party's claim bring the counterclaim in the same proceeding, or it will be deemed waived. The "compelling interest" underlying the compulsory counterclaim rule is solely in judicial economy; its purpose is to prevent multiple suits arising out of the same transactions or occurrences. *Bard v. Charles R. Myers Insurance Agency*, 839 S.W.2d 791, 796 (Tex. 1992).

A pleading shall state as a counterclaim any claim within the jurisdiction of the court not the subject of a pending action that at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Tex. R. Civ. P. 97(a). A claim meeting the requirements of rule 97(a) must be asserted in the initial action and cannot be asserted in later actions. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 207 (Tex. 1999). A counterclaim is compulsory if, in addition to rule 97(a)'s other requirements, it was not the subject of a pending action when the original suit was commenced. *In re J.B. Hunt Transport, Inc.*, 492 S.W.3d 287, 293 (Tex. 2016) (orig. proceeding). However, a judgment based on a settlement or compromise of a claim of one party to the transaction or occurrence before a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that the judgment shall operate as a bar. Tex. R. Civ. P. 97(a).

Permissive Counterclaim: A pleading may state as a counterclaim any claim against an opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. Tex. R. Civ. P. 97(b).

A claim that either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading. Tex. R. Civ. P. 97(d).

Torts: The issue of torts is addressed in part V. below.

Stay for Military Service: A stay may be granted under certain circumstances to a party who is in military service or has separated from service within ninety days. See the discussion at section 19.4 in this manual.

§ 3.15 Inmate's Participation at Trial

Although an inmate does not have an absolute right to appear personally in court in civil proceedings, he cannot be denied access to the courts simply because he is incarcerated. *See In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003). The right of a prisoner to have access to the court entails not so much his personal presence as the opportunity to present evidence or contradict the evidence of the opposing party. *In re R.C.R.*, 230 S.W.3d 423, 426 (Tex. App.—Fort Worth 2007, no pet.). When the trial judge determines an inmate should not be allowed to appear personally, the inmate should be allowed to proceed by affidavit, deposition, telephone, or other effective means. *In re Marriage of Bolton*, 256 S.W.3d 832 (Tex. App.—Dallas 2008, no pet.). A trial court abuses its discretion if it effectively bars the inmate from presenting his case. *Armstrong v. Randle*, 881 S.W.2d 53, 57 (Tex. App.—Texarkana 1994, writ denied). In order to attend trial, the inmate must request a bench warrant. Texas courts consider a number of factors when ruling on a motion for a bench warrant, including (1) the cost and inconvenience of transporting the inmate to the courtroom; (2) the security risk the inmate presents to the court and the public; (3) whether the inmate's claims are substantial; (4) whether the matter's resolution can reasonably be delayed until the inmate's release; (5) whether the inmate can and will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone, or some other means; (6) whether the inmate's presence is important in judging his demeanor and credibility; (7) whether the trial is to the court or a jury; and (8) the inmate's probability of success on the merits. *See In re Z.L.T.*, 124 S.W.3d 163; *In re A.W.*, 302 S.W.3d 925, 929 (Tex. App.—Dallas 2010, no pet.).

§ 3.16 Standing Orders

A standing order is a court order or set of rules that automatically takes effect when a divorce action or suit affecting the parent-child relationship is filed. Most large counties, with the exception of Harris and Tarrant counties, have implemented standing orders to protect the parties and children and to prevent the dissipation of the marital estate while the divorce is pending. Most courts with standing orders require that a copy be attached to the original petition for divorce. A standing order is effective until the court enters an order that either changes the standing order or eliminates it. The entry of a divorce decree will ordinarily suspend operation of the standing order.

[Sections 3.17 through 3.20 are reserved for expansion.]

II. Dissolution of Marriage

§ 3.21 Grounds

The Family Code assigns the divorce-ground determination to the discretion of the trial court. *Portillo v. Portillo*, No. 02-14-00124-CV, 2016 WL 1601113, at *4 (Tex. App.—Fort Worth Apr. 21, 2016, no pet.) (mem. op.). The court may grant a divorce on any of three no-fault grounds: insupportability (Tex. Fam. Code § 6.001), the spouses' living apart for three years (Tex. Fam. Code § 6.006), and the respondent's confinement in a mental hospital for three years (Tex. Fam. Code § 6.007). When insupportability is relied on as a ground for divorce by the complaining spouse and that ground is established by the evidence, a divorce must be granted the complaining party, without regard as to whether either, both, or neither of the parties is responsible for or caused the insupportability. It is not incumbent on the plaintiff who brings the divorce action on the ground of insupportability to show any misconduct on the defendant's part; it is incumbent on that spouse only to establish by the evidence that a state of insupportability exists regardless of whether it is anyone's or no one's fault. *Phillips v. Phillips*, 75 S.W.3d 564, 571 (Tex. App.—Beaumont 2002, no pet.).

Efforts to prevent a court from granting a divorce on religious grounds have not been successful. A trial court has subject-matter jurisdiction to dissolve a Christian marriage. Regardless of how a couple views their union—whether they see it primarily as religious or secular—the state governs all legal aspects of the union. *Waite v. Waite*, 150 S.W.3d 797, 802 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). The U.S.

Supreme Court's opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), does not either directly or by implication recognize what would effectively be an affirmative constitutional right of one spouse to compel an unwilling other spouse to remain married, in derogation of both the other spouse's liberty and state divorce laws. *Lecuona v. Lecuona*, No. 03-17-00138-CV, 2018 WL 2994587, at *1 (Tex. App.—Austin June 15, 2018, pet. denied) (mem. op.).

A divorce may be granted on any of these fault grounds: cruelty (Tex. Fam. Code § 6.002), adultery (Tex. Fam. Code § 6.003), the respondent's conviction of a felony (Tex. Fam. Code § 6.004), and the respondent's abandonment of the petitioner for one year (Tex. Fam. Code § 6.005).

Adultery means the "voluntary sexual intercourse of a married person with one not the spouse." Adultery is not limited to actions committed before separation and may be established by circumstantial evidence. However, there must be clear and positive proof, and mere suggestion and innuendo are insufficient. *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 383 (Tex. App.—Dallas 2013, no pet.). Even if there is evidence of an extramarital affair, the court does not abuse its discretion by not instead finding, or by not additionally finding, adultery as a ground for the divorce. *Portillo*, 2016 WL 1601113, at *4.

Cruel treatment as a ground for divorce must render the couple's living together insupportable, meaning incapable of being borne, unendurable, insufferable, or intolerable. *Kemp v. Kemp*, No. 11-11-00292-CV, 2013 WL 5891583, at *3 (Tex. App.—Eastland Oct. 31, 2013, no pet.) (mem. op.).

Even if fault has not been pleaded as a ground for divorce, factual or evidentiary matters that embrace issues that would support cruelty, adultery, or other fault-related issues may be introduced to support a request for a disproportionate division of property. *See Murff v. Murff*, 615 S.W.2d 696, 698–99 (Tex. 1981) (list of factors court may consider in making division); *see also Young v. Young*, 609 S.W.2d 758, 761–62 (Tex. 1980); *In re Marriage of Brown*, 187 S.W.3d 143, 146 (Tex. App.—Waco 2006, no pet.) (though divorce granted on no-fault ground, trial court should have discretion to consider proven fault in break-up of marriage when making just and right division of community estate). *But see Phillips*, 75 S.W.3d at 572 (when dissolution of marriage sought *solely* on ground of insupportability, evidence of "fault" becomes irrelevant as analytical construct and may not be considered by trial court in its "just and right" division of community estate).

See section 3.14 above on the respondent's pleadings regarding defenses.

§ 3.22 Residence Requirements

Residence requirements are met if either the petitioner or the respondent has been a domiciliary of Texas for the six months and a resident of the county of suit for the ninety days preceding the filing of the petition. Tex. Fam. Code § 6.301. Mere ownership of real property without physical presence or other significant connection to Texas will not satisfy the residency requirement. *In re Marriage of Lai*, 333 S.W.3d 645 (Tex. App.—Dallas 2009, no pet.). However, a petitioner does not lose the right to maintain a divorce suit in his county of residence if he has been temporarily absent from the county during the ninety-day period. *Posey v. Posey*, 561 S.W.2d 602, 605 (Tex. App.—Waco 1978, writ dism'd).

A domiciliary does not lose his domicile if he is absent from Texas for military service or other public service of the state or nation or while accompanying his spouse who is on such service. Tex. Fam. Code § 6.303. Although a military husband who had designated Texas as his residence and his family, who last resided in Bexar County, Texas, before his assignment to Germany, were stationed in Germany for a number of years at the time the husband filed for divorce in Bexar County, the husband was considered to be domiciled in Texas under section 6.303. *Vatcher v. Vatcher*, No. 04-12-00821-CV, 2014 WL 60917, at *2 (Tex. App.—San Antonio Jan. 8, 2014, no pet.) (mem. op.). One not previously a resident of Texas who is serving in the armed forces of the United States and has been stationed at one or more military installations in Texas for at least the last six months and at a military installation in a Texas county for at least the last ninety days, or who is accompanying his spouse during the spouse's military service in those locations and for those periods, is considered to have been a domiciliary of Texas and a resident of the county for those periods for the purpose of bringing a divorce suit. Tex. Fam. Code § 6.304. However, a military husband did not become a domiciliary of Texas while he was temporarily stationed in San Antonio for military training but never returned to Texas despite wife's claims that he changed his residence to Texas on military documents and that he intended to return to Texas once he retired. Mere intent to return is insufficient without an accompanying act to demonstrate that intent. *In re Green*, 385 S.W.3d 665, 670 (Tex. App.—San Antonio 2012, orig. proceeding).

If one spouse has been a domiciliary of Texas for at least the last six months, a spouse domiciled in another state or nation may file a suit for divorce in the Texas county in which the other spouse resides at the time the petition is filed. Tex. Fam. Code § 6.302.

Residence requirements are not jurisdictional. *Wilson v. Wilson*, 494 S.W.2d 609, 611 (Tex. App.—Houston [14th Dist.] 1973, writ dism'd); *Allen v. Allen*, 397 S.W.2d 99, 100 (Tex. App.—Amarillo 1965, no writ). A plea in abatement is the proper vehicle through which a failure to meet residency requirements should be attacked. *Harrison v. Harrison*, 543 S.W.2d 176, 177 (Tex. App.—Houston [14th Dist.] 1976, no writ); *Lutes v. Lutes*, 538 S.W.2d 256, 258 (Tex. App.—Houston [14th Dist.] 1976, no writ). On sustaining a plea in abatement on such grounds, the court should retain the case on the docket until the residency requirements are met rather than dismissing the case. *Svensen v. Svensen*, 629 S.W.2d 97, 98 (Tex. App.—Dallas 1981, no writ); *Beavers v. Beavers*, 545 S.W.2d 29, 30 (Tex. App.—Waco 1976, no writ). Judicial admission of residence and domicile in a divorce petition prevents a party from challenging the evidence as insufficient to show that residency requirements have been satisfied. *McCaskill v. McCaskill*, 761 S.W.2d 470, 473 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied).

Although the residence requirement is not jurisdictional, the residency and domiciliary requirements must be met before the court is authorized to grant a divorce. *Skubal v. Skubal*, 584 S.W.2d 45, 46 (Tex. App.—San Antonio 1979, writ dism'd); *Schreiner v. Schreiner*, 502 S.W.2d 840, 843 (Tex. App.—San Antonio 1973, writ dism'd). The elements of the legal concept of domicile are (1) an actual residence and (2) the intent to make it the permanent home. *Snyder v. Pitts*, 241 S.W.2d 136, 139 (Tex. 1951) (orig. proceeding). To establish domicile there must be more than mere physical presence in a particular place; there must be an intention to establish a permanent home. *Skubal*, 584 S.W.2d at 46.

Although domicile and residence are frequently used as if they had the same meaning, they are not identical terms and are not synonymous. "Residence" may be defined as the act or fact of living in a given place for some time. It is the place where one actually lives. Usually, residence just means bodily presence as an inhabitant in a given place, whereas domicile usually requires bodily presence plus an intention to make the place one's home. A person may have more than one residence at a time but only one domicile. *Black's Law Dictionary* 1502 (10th ed. 2014); *see also Stone v. Phillips*, 171 S.W.2d 156, 159 (Tex. App.—Amarillo 1943), *aff'd*, 176 S.W.2d 932 (Tex. 1944). Residence requires that a person be living and physically present in a particular locality, but domicile requires that a person live in that locality with the intention of making it a fixed, permanent home. *Nieto v. Nieto*, No. 04-11-00807-CV, 2013 WL 1850780 (Tex. App.—San Antonio May 1, 2013, pet. denied) (mem. op.) (trial court did not abuse its discretion in finding that parties, both Mexican nationals on investment visas, resided in

Bexar County, Texas, for at least six months before filing for divorce and owned the marital residence and conducted business in San Antonio, Texas). Domicile and residence are not convertible terms. Domicile is a larger term, of more extensive significance, whereas residence is of a more temporary character. *Stone*, 171 S.W.2d at 159.

§ 3.23 Waiting Period

With one exception, discussed in the next paragraph, the court may not grant a divorce before the sixtieth day after the date the suit is filed, but a decree entered in violation of this provision is not subject to collateral attack. Tex. Fam. Code § 6.702(a). A counterpetition shares the same waiting period as the petition. *See Coast v. Coast*, 135 S.W.2d 790, 793 (Tex. App.—El Paso 1939, no writ).

The waiting period is not required if the court finds that the respondent has been finally convicted of, or received deferred adjudication for, an offense involving family violence against the petitioner or a member of the petitioner's household or if the petitioner has an active protective order or magistrate's order for emergency protection based on a finding of family violence against the respondent because of family violence committed during the marriage. Tex. Fam. Code § 6.702(c).

§ 3.24 Remarriage

Generally, neither party to a divorce may marry a third party before the thirty-first day after the date the divorce is decreed. Tex. Fam. Code § 6.801(a). Although a written decree is not signed until later, a divorce is fully effective for all purposes, except calculation of times for appeal, at the time the trial court makes a noninterlocutory oral pronouncement of judgment of divorce. Thus, the thirty-day waiting period during which divorced spouses are prohibited from entering into a new marriage runs from the date of noninterlocutory oral pronouncement. *Herschberg v. Herschberg*, 994 S.W.2d 273, 276 (Tex. App.—Corpus Christi–Edinburg 1999, pet. denied).

The court may waive the prohibition against remarriage for either or both spouses if a record of the proceedings is made and preserved or if findings of fact and conclusions of law are filed by the court. Tex. Fam. Code § 6.802. The former spouses may remarry each other at any time. Tex. Fam. Code § 6.801(b).

§ 3.25 Change of Name

In a divorce decree, the court must change the name of a party specifically requesting the change to a name previously used by the party unless the court states in the decree a reason for denying the name change. The court may not deny the name change solely to keep last names of family members the same. A change of name does not release a person from liability incurred by the person under a previous name or defeat a right the person held under a previous name. Tex. Fam. Code § 6.706. To change a name in conjunction with a divorce to a name not previously used by the party, a party must follow the requirements and procedures set out in Family Code chapter 45. See section 61.3 in this manual.

A person whose name has been changed in a suit for divorce may apply for a change-of-name certificate from the clerk of the court as provided in Family Code section 45.106. Tex. Fam. Code §§ 6.706(d), 45.105(b); *see also* Tex. Fam. Code § 45.106. The certificate under section 45.106 constitutes proof of the change of name. Tex. Fam. Code § 45.106(d).

§ 3.26 Spousal Maintenance

Texas courts may order spousal maintenance at the time of divorce only if the spouse seeking maintenance will lack sufficient property, including his separate property, on dissolution of the marriage to provide for his minimum reasonable needs and if certain other conditions are met. See section 23.9 in this manual for a discussion of spousal maintenance.

§ 3.27 Informal Marriage

In Texas, to prove the existence of an informal marriage (more frequently called a common-law marriage), the proponent must establish by a preponderance of the evidence either (1) that a declaration of their marriage has been signed as provided by Family Code chapter 2, subchapter E, or (2) that the parties agreed to be married and thereafter lived together in Texas as spouses and represented to others in Texas that they were married. *Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex. App.—San Antonio 1987, no writ); Tex. Fam. Code § 2.401(a). The existence of a common-law marriage is a fact question with the burden of proof on the person seeking to establish existence of the marriage by a preponderance of the evidence. *See Weaver v. State*, 855 S.W.2d 116, 120 (Tex. App.—Houston [14th Dist.] 1993, no pet.); *Hightower v. State*, 629 S.W.2d 920, 924 (Tex. Crim. App. 1981).

A common-law divorce is unknown to Texas law. The marriage arises out of the state of facts. Once the common-law status exists, it, like any other marriage, may be terminated only by death or a court decree. Once the marriage exists, the spouses' subsequent denials of the marriage, if disbelieved, do not undo the marriage. *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 167 (Tex. 1981).

An agreement to create a common-law marriage must be specific and mutual. *Estate of Sinatra v. Sinatra*, No. 13-14-00565-CV, 2016 WL 4040290, at *2 (Tex. App.—Corpus Christi–Edinburg July 28, 2016, pet. denied) (mem. op.). There must be evidence that the parties intended to have a present, immediate, and permanent marital relationship and that they did in fact agree to be spouses. In other words, the agreement to be married must be a present agreement and not a future agreement. *Aguilar v. State*, 715 S.W.2d 645, 648 (Tex. Crim. App. 1986) (en banc); *see also Leal v. Moreno*, 733 S.W.2d 322, 323 (Tex. App.—Corpus Christi–Edinburg 1987, no writ). Until all elements of the statute are met, there is no common-law or informal marriage. *Bolash*, 733 S.W.2d at 699; *see also Flores v. Flores*, 847 S.W.2d 648, 650 (Tex. App.—Waco 1993, writ denied) (per curiam).

An agreement to be informally married, like any ultimate fact, may be established by direct or circumstantial evidence. Evidence of holding out must be particularly convincing to be probative of an agreement to be married. Occasional informal references to another as their spouse will not prove an agreement to be married. Circumstantial evidence can entirely fail to overcome direct evidence from both members of the alleged marriage that there is no agreement to be married. *Assoun v. Gustafson*, 493 S.W.3d 156, 160 (Tex. App.—Dallas 2016, pet. denied). Raising a family together may be evidence of an agreement to be married. *See Brooks v. Hancock*, 256 S.W. 296, 297 (Tex. App.—Texarkana 1923, no writ). Establishment of joint charge accounts naming the parties as spouses may also be evidence that the parties agreed to be married. *See Rosales v. Rosales*, 377 S.W.2d 661, 664 (Tex. App.—Corpus Christi–Edinburg 1964, no writ). The filing of joint tax returns is also considered evidence that the parties were married. *Day v. Day*, 421 S.W.2d 703, 705 (Tex. App.—Austin 1967, no writ). Another widely accepted situation that constitutes legally sufficient evidence of an informal marriage is the joint acquisition of property or the signing of secured transactions between the litigants. *See Rodriguez v. Avalos*, 567 S.W.2d 85, 86–87 (Tex. App.—El Paso 1978, no writ).

Representations made to governmental entities regarding marital status do not estop a party from later claiming in an unrelated suit the existence or nonexistence of an informal marriage, but trial courts may properly consider such representations as evidence

either supporting or refuting a claim of informal marriage. *Leyendecker v. Uribe*, No. 04-17-00163-CV, 2018 WL 442724, at *5 (Tex. App.—San Antonio Jan. 17, 2018, pet. denied) (mem. op.). Similarly, evidence of a joint tax return for only one year of an eleven-year relationship was insufficient to establish an informal marriage. *In re N.A.F.*, No. 05-17-00470-CV, 2019 WL 516715, at *5 (Tex. App.—Dallas Feb. 11, 2019, no pet. h.) (mem. op.).

A finding of no informal marriage was affirmed when one party controverted the other's circumstantial evidence pertaining to an agreement to be married and there was no direct evidence that the parties had actually agreed to be married. *Burden v. Burden*, 420 S.W.3d 305, 308–09 (Tex. App.—Texarkana 2013, no pet.). However, in another case, no informal marriage was found even though the wife was identified as the husband's spouse on their joint car insurance and on the husband's life insurance policies. *Castillon v. Morgan*, No. 05-13-00872-CV, 2015 WL 1650782 (Tex. App.—Dallas Apr. 14, 2015, no pet.) (mem. op.).

The statutory requirement of "represented to others" is synonymous with the judicial requirement of "holding out to the public." "Holding out" may be established by the conduct and actions of the parties. Spoken words are not necessary to establish representation to others. *Eris v. Phares*, 39 S.W.3d 708, 714–15 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). An occasional reference to a cohabitant as that person's spouse, standing alone, will not substantiate or prove a tacit agreement to be married without corroborative evidence. *Russell v. Russell*, 865 S.W.2d 929, 932 (Tex. 1993). A couple must have a reputation in the general community of being married. *Small v. McMaster*, 352 S.W.3d 280, 285 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). An occasional introduction as spouses does not establish the element of holding out. *Winfield v. Renfro*, 821 S.W.2d 640, 651 (Tex. App.—Houston [1st Dist.] 1991, writ denied). By contrast, where the parties lived together almost thirty years, they had three children, and numerous witnesses testified that they held themselves out as married and wife never corrected husband when he introduced her as his wife, the evidence supported a finding of informal marriage. *In re A.D.J.*, No. 05-17-01437-CV, 2019 WL 1467962, at *5–6 (Tex. App.—Dallas Apr. 3, 2019, no pet. h.) (mem. op.).

A common-law marriage is more than a contract; it is a public status. *Winfield*, 821 S.W.2d at 650.

A claim of informal marriage must be brought before the second anniversary of the date on which the parties separated and ceased living together or it is rebuttably presumed

that the parties did not enter into an agreement to be married. Tex. Fam. Code § 2.401(b).

§ 3.28 Putative Marriage

A putative marriage is one that was entered into in good faith by at least one of the parties but that is invalid by reason of an existing impediment on the part of one or both parties. *Garduno v. Garduno*, 760 S.W.2d 735, 738 (Tex. App.—Corpus Christi–Edinburg 1988, no writ); *Dean v. Goldwire*, 480 S.W.2d 494, 496 (Tex. App.—Waco 1972, writ ref'd n.r.e.). A putative marriage may arise out of either a ceremonial or informal marriage. *Garduno*, 760 S.W.2d at 738. The effect of a putative marriage is to give the putative spouse who acted in good faith the same right in property acquired during the marital relationship as if he were a lawful spouse. *Davis v. Davis*, 521 S.W.2d 603, 606 (Tex. 1975). However, there being no legally recognized marriage, property acquired during a putative marriage is not community property, but jointly owned separate property. *Garduno*, 760 S.W.2d at 739; *see also Mathews v. Mathews*, 292 S.W.2d 662, 665 (Tex. App.—Galveston 1956, no writ). Texas recognizes these rights for putative marriage in order to administer equity to those individuals who had a good-faith belief that they were lawfully married. *See Cameron v. Cameron*, 103 S.W.2d 464 (Tex. App.—Galveston 1937, writ ref'd).

When a legally married couple gets divorced, the Family Code gives the court the discretion to "order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." Tex. Fam. Code § 7.001. Although statutes that relate to the division of property do not expressly state that they are applicable to void marriages, it has been consistently held that this right to a just and right division of property also applies to putative marriages. *See Davis*, 521 S.W.2d at 606; *Garduno*, 760 S.W.2d at 739; *Padon v. Padon*, 670 S.W.2d 354, 356 (Tex. App.—San Antonio 1984, no writ); *Dean*, 480 S.W.2d at 496. Accordingly, a husband was not allowed to withdraw his consent to a mediated settlement agreement when the trial court impliedly found the wife was a putative spouse and they were not in a meretricious relationship. *Davis v. Davis*, No. 01-12-00701-CV, 2014 WL 890899, at *6–8 (Tex. App.—Houston [1st Dist.] Mar. 6, 2014, no pet.) (mem. op.).

If the relationship is merely meretricious, however, neither one of the individuals has a good-faith belief that they are entering into a marital relationship; therefore, there is no innocent party in need of equitable protection under the law. Thus, when a meretricious relationship ends, a party has an interest in only the property that he separately pur-

chased and acquired an interest in through an express trust, a resulting trust, or the existence of a partnership. *See Faglie v. Williams*, 569 S.W.2d 557, 566 (Tex. App.—Austin 1978, writ ref'd n.r.e.); *Hyman v. Hyman*, 275 S.W.2d 149, 151 (Tex. App.—Amarillo 1954, writ ref'd n.r.e.); *see also Hayworth v. Williams*, 102 Tex. 308, 116 S.W. 43, 46 (1909). In all other situations, the courts have refused to award anything to a pretended wife, who knows the nature of the relationship in which she is involved. *See Lawson v. Lawson*, 30 Tex. App. 43, 69 S.W. 246, 247 (1902, writ ref'd). Normally, in meretricious relationships, "the courts will leave the parties as they find them, on the same principle that they refuse to enforce any other contract which by reason of its objects, or the nature of the consideration upon which it rests, is violative of law or against public policy." *Lawson*, 69 S.W. at 247; *see also Meador v. Ivy*, 390 S.W.2d 391, 394 (Tex. App.—San Antonio 1965, no writ).

§ 3.29 Multiple Marriages

When two or more marriages of a person to different spouses are alleged, the presumption is that the most recent marriage is valid; the one asserting the validity of a prior marriage must prove its validity. Tex. Fam. Code § 1.102; *see In re A.M.*, 418 S.W.3d 830, 842–43 (Tex. App.—Dallas 2013, no pet.) (husband unable to overcome presumption of validity of his marriage when wife provided Pakistani divorce decree signed by her prior husband).

[Section 3.30 is reserved for expansion.]

III. Division of Property

Warning: The division of marital property may have serious tax consequences. Tax advice should be sought. See also the practice notes concerning tax considerations in chapter 23 of this manual.

§ 3.31 General Rule of Property Division

In a divorce decree, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. Tex. Fam. Code § 7.001. A trial court has wide discretion in dividing the estate of the parties, and that division should be corrected on appeal only when an abuse of discretion has been shown. *Murff v. Murff*, 615 S.W.2d 696, 698

(Tex. 1981). The community property of the marital estate need not be equally divided. *Murff*, 615 S.W.2d at 699. If a trial court chooses to divide the marital estate unequally, there must be some reasonable basis for doing so. *Howe v. Howe*, 551 S.W.3d 236, 253 (Tex. App.—El Paso 2018, no pet.). The trial court may consider such factors as the spouses' capacities and abilities, benefits that the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property. *Murff*, 615 S.W.2d at 699.

In deciding whether an unequal distribution is appropriate, a trial court can consider a spouse's fault in causing the divorce. But while fault may be considered in the property division, "[t]his does not mean that fault must be considered in all cases where a divorce is granted on fault grounds." A trial court is prohibited from using a spouse's fault and the property division to punish the errant spouse for his misdeeds. *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980).

A court may award one spouse an unequal division of the community estate based on the size of the spouses' separate estates. *See Mathis v. Mathis*, No. 12-17-00049-CV, 2018 WL 1324777, at *3 (Tex. App.—Tyler Mar. 15, 2018, no pet.) (mem. op.).

In a divorce case, a trial court may award attorney's fees as part of a just and right division of the marital estate. *Mandell v. Mandell*, 310 S.W.3d 531, 541 (Tex. App.—Fort Worth 2010, pet. denied). In a suit for dissolution of a marriage, the court also has statutory authority for awarding costs, reasonable attorney's fees, and expenses. Tex. Fam. Code § 6.708(a), (c). The court may order the fees and expenses and any postjudgment interest to be paid directly to the attorney, who may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 6.708(c).

In determining whether a trial court abuses its discretion in making a just and right division of the community estate, it is important to quantify the size of the community pie so the reviewing court can know just how large a slice each spouse was served. *Howe*, 551 S.W.3d at 253. Each party in a divorce proceeding has a responsibility to produce evidence of the value of various properties to provide the trial court with a basis on which to make the division. Generally, a party who does not provide the trial court with values for the property cannot complain on appeal of the trial court's lack of information in dividing the community estate. *Howe*, 551 S.W.3d at 254.

The general rule is that the value of community assets is determined as of the date of divorce or as close to that date as possible; however, nearness in time is a matter typically left to the trial court's discretion. *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 385 (Tex. App.—Dallas 2013, no pet.). The determination of whether to use the time of the divorce or the time of the division as the valuation date of an asset when the divorce and division of the property occur at different dates is in fact so specific that it should be left to the discretion of the trial judge to avoid the inequities that could result by making a bright-line rule. *Parker v. Parker*, 897 S.W.2d 918, 932 (Tex. App.—Fort Worth 1995, writ denied). There is a difference between the trial court's pronouncement of an interlocutory judgment granting the divorce and a final judgment of divorce that disposes of all issues in the case. *In re Marriage of Hammett*, No. 05-14-00613-CV, 2016 WL 3086126, at *4 (Tex. App.—Dallas June 1, 2016, no pet.) (mem. op.). A trial court is not required to value the community assets on the same date it orally rendered the interlocutory judgment of divorce. If the date of divorce and the date on which the property is divided are different, the trial judge has the discretion to decide which date to use. *Hammett*, 2016 WL 3086126, at *4.

COMMENT: If the court orally grants the divorce but takes any portion of the case under advisement, at that time the wise practitioner should ask the court to rule that no property acquired after the date of the oral pronouncement of divorce will be community property. Because the court will retain plenary power until after it signs the written decree, the court later can change that ruling, but the request may commit the court in its own mind and in its later property division to characterize and value the assets of the marriage as of the date the court orally granted the divorce, thus avoiding the issue in *Hammett*. As the court could take months to rule on the remaining issues, ending the growth (or diminution) of the community estate can make a substantial difference in the property division, particularly for retirement benefits.

The issues of divorce and property division may not be severed. *Biaza v. Simon*, 879 S.W.2d 349, 355 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *In re Marriage of Johnson*, 595 S.W.2d 900, 902 (Tex. App.—Amarillo 1980, writ dism'd w.o.j.); *see Garrison v. Mead*, 553 S.W.2d 25, 26 (Tex. App.—Houston [1st Dist.] 1977, orig. proceeding). If the court fails to deal with any community property, that property is owned by the ex-spouses as tenants in common. *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970). The property is subject to division under Family Code chapter 9, subchapter C (formerly sections 3.90 through 3.93). *Haynes v. McIntosh*, 776 S.W.2d 784, 786 (Tex. App.—Corpus Christi–Edinburg 1989, writ denied).

For a discussion of the division of various types of property, see chapter 23 of this manual.

§ 3.32 Separate Property

Separate property consists of (1) the property owned or claimed by a spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during the marriage, except any recovery for loss of earning capacity during marriage. Tex. Fam. Code § 3.001.

To overcome the community property presumption, a spouse claiming assets as separate property must establish their separate character by clear and convincing evidence. Tex. Fam. Code § 3.003(b); *Stavinoha v. Stavinoha*, 126 S.W.3d 604, 607 (Tex. App.—Houston [14th Dist.] 2004, no pet.). "Clear and convincing" evidence means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002); *see also* Tex. Fam. Code §§ 1.001(b), 101.007. As a general rule, the "clear and convincing" standard is not satisfied by testimony that property possessed at the time the marriage is dissolved is separate property when that testimony is contradicted or unsupported by documentary evidence tracing the asserted separate nature of the property. *Graves v. Tomlinson*, 329 S.W.3d 128, 139 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

The characterization of property as either community or separate is determined by the inception of title to the property. Inception of title occurs when a party first has a claim to the property by virtue of which title is finally vested. *Smith v. Smith*, 22 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

The spouse claiming certain property as "separate" must trace and clearly identify the property claimed to be separate. Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. *Zagorski v. Zagorski*, 116 S.W.3d 309, 316 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Once property is established as separate property, it remains separate property regardless of any mutations or changes in form; its separate character is not altered by the sale, exchange, or substitution of the property. *Barras v. Barras*, 396 S.W.3d 154, 167 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Any doubt as to the character of property should be resolved in favor of

the community estate. *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App.—Fort Worth 2004, no pet.).

A gift is a voluntary transfer of property to another made gratuitously and without consideration. *Magness v. Magness*, 241 S.W.3d 910, 912 (Tex. App.—Dallas 2007, pet. denied). To establish a gift, the donee must establish (1) the intent to make a gift, (2) the delivery of the property, and (3) its acceptance. *Magness*, 241 S.W.3d at 912. The donor's intent is the principal issue in determining whether a gift was made. *In re Marriage of Skarda*, 345 S.W.3d 666, 671 (Tex. App.—Amarillo 2011, no pet.). Generally, the burden of proving a gift is on the party claiming that a gift was made. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). However, when a parent conveys property to his or her child, a presumption arises that the parent intended to make a gift to the child. *Woodworth*, 660 S.W.2d at 564. This presumption can be rebutted by clear and convincing evidence showing the absence of donative intent. *Knowlton v. Knowlton*, No. 04-17-00257-CV, 2018 WL 2222621, at *3 (Tex. App.—San Antonio May 16, 2018, no pet.) (mem. op.). A donor may make a gift of encumbered property in which the donor agrees to discharge the debt, but the donor is not bound to pay off the indebtedness unless there is evidence that the donor intended to pay it. *Waring v. Waring*, No. 09-16-00030-CV, 2017 WL 4171336, at *5 (Tex. App.—Beaumont Sept. 21, 2017, no pet.) (mem. op.).

A spouse's separate property includes "recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage." Tex. Fam. Code § 3.001(3). In addition to the statutory exception for loss of earning capacity, courts have treated amounts recovered for medical expenses as community property. *See Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972). To the extent that the marital partnership has incurred medical or other expenses and has lost wages, both spouses have been damaged by the injury to the spouse, and both spouses have a claim against the wrongdoer. The recovery, therefore, is community in character. *Graham*, 488 S.W.2d at 396. In contrast, amounts recovered for disfigurement, past and future mental anguish, and past and future physical pain and suffering are considered separate property. *Harrell v. Hochderffer*, 345 S.W.3d 652, 657 (Tex. App.—Austin 2011, no pet.).

When a spouse receives a personal-injury settlement from a lawsuit during marriage, some of which could be separate property and some of which could be community property, it is that spouse's burden to demonstrate which portion of the settlement is his separate property. Clear and convincing evidence showing that the recovery is solely

for the personal injury of a particular spouse is necessary to overcome the presumption that the settlement proceeds represent community property. *Harrell*, 345 S.W.3d at 657.

Spouses may also set aside all or part of their community property as separate property by partition or exchange agreement. Tex. Const. art. XVI, § 15; Tex. Fam. Code §§ 4.102–.106. Although such property may undergo changes or mutations, as long as it is traced and properly identified it will remain separate property. *Norris v. Vaughan*, 260 S.W.2d 676, 679 (Tex. 1953). Problems of reimbursement are discussed at section 3.36 below. *See also Beck v. Beck*, 814 S.W.2d 745 (Tex. 1991), *cert. denied*, 503 U.S. 907 (1992); *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982); *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

§ 3.33 Community Property

Community property consists of the property, other than separate property, acquired by either spouse during marriage. Tex. Fam. Code § 3.002. Property possessed by either spouse during or on dissolution of marriage is presumed to be community property unless there is clear and convincing evidence that it is separate property. Tex. Fam. Code § 3.003. Any doubt as to the character of property should be resolved in favor of the community estate. *Sink v. Sink*, 364 S.W.3d 340, 345 (Tex. App.—Dallas 2012, no pet.). In the context of a divorce proceeding, characterization of property is determined by the time and circumstances of its acquisition. *Rivera v. Hernandez*, 441 S.W.3d 413, 420 (Tex. App.—El Paso 2014, pet. denied). Spouses may agree in writing that all or part of the separate property that either or both of them own is converted to community property. Tex. Const. art. XVI, § 15; Tex. Fam. Code § 4.202. One court found that property transferred to both spouses during marriage for a ten-dollar consideration was community property because the husband offered no evidence to rebut the presumption that the consideration was community property. *Saldana v. Saldana*, 791 S.W.2d 316, 320 (Tex. App.—Corpus Christi–Edinburg 1990, no writ). If a church is substantially involved in facilitating the collection of funds from its congregants for the benefit of a minister under a regularly conducted program, those contributions are income and community property to the minister and not gifts and separate property. *West v. West*, No. 01-14-00350-CV, 2016 WL 1719328, at *7 (Tex. App.—Houston [1st Dist.] Apr. 28, 2016, no pet.) (mem. op.). If a party lists an asset as community property in the party's inventory and appraisement, the court may find the asset to be community property,

even if the record title to the asset is in the name of the party's adult child. *Willis v. Willis*, 533 S.W.3d 547, 553 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

§ 3.34 Community Property Acquired While Domiciled outside Texas

The court shall divide in a just and right manner the property (and mutations thereof) acquired by either party while domiciled elsewhere if the property would have been community property if the party who acquired the property had been domiciled in Texas at the time of the acquisition. Tex. Fam. Code § 7.002(a); *Cameron v. Cameron*, 641 S.W.2d 210, 220 (Tex. 1982) (adopting predecessor of section 7.002 as part of substantive law of Texas); *see also Adams v. Adams*, 787 S.W.2d 619, 623 (Tex. App.—San Antonio 1990, no writ) (military retirement benefits accrued during residency in Tennessee were jointly owned by parties under Tennessee law and subject to division by Texas court).

This provision has been applied where only one spouse has migrated from a noncommunity-property-law jurisdiction to Texas. *Ismail v. Ismail*, 702 S.W.2d 216, 219 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

§ 3.35 Separate-Property Divestiture

Ownership of separate real property may not be divested in dividing the estate of the parties. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977). The prohibition extends to separate personal property. *Cameron v. Cameron*, 641 S.W.2d 210, 220 (Tex. 1982).

A lien, however, may be placed on one party's separate property to enforce a reimbursement claim but not simply to enforce a just and right division. *Heggen v. Pemelton*, 836 S.W.2d 145, 146 (Tex. 1992); *see Mullins v. Mullins*, 785 S.W.2d 5, 11 (Tex. App.—Fort Worth 1990, no writ) (deed-of-trust lien); *Kamel v. Kamel*, 760 S.W.2d 677, 679 (Tex. App.—Tyler 1988, writ denied) (equitable lien).

§ 3.36 Reimbursement

In a decree of divorce, the court must determine the rights of both spouses in a claim for reimbursement as provided by Family Code chapter 3, subchapter E, and apply equitable principles to determine whether to recognize the claim after taking into account all the relative circumstances of the spouses and to order a division of the claim for reimbursement, if appropriate, in a manner the court considers just and right, having due

regard for the rights of each party and any children of the marriage. Tex. Fam. Code § 7.007.

Since a trial court's judgment must conform to the pleadings, a party's pleadings must permit the trial court to ascertain a cause of action for reimbursement with reasonable certainty. *Trevino v. Garza*, No. 13-15-00241-CV, 2016 WL 1072627, at *2 (Tex. App.—Corpus Christi–Edinburg Mar. 17, 2016, no pet.) (mem. op.). The word *reimbursement* is presently considered to be a term of art, as are the terms *characterization* and *compensation*. A claim for reimbursement is distinct from a claim for compensation for waste of the community estate. *Trevino*, 2016 WL 1072627, at *2. A gift from one estate to another generally is not a proper basis for a reimbursement claim. *Sonnier v. Sonnier*, 331 S.W.3d 211, 217 (Tex. App.—Beaumont 2011, no pet.).

At common law, a reimbursement claim always arises when funds or assets of one marital estate are used to enhance and benefit the other marital estate. A reimbursement claim arises when one marital estate pays unsecured liabilities of another marital estate. Tex. Fam. Code § 3.402(a)(1). A reimbursement claim also arises when there is inadequate compensation to the community for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse. Tex. Fam. Code § 3.402(a)(2); *see Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984); *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982). A reimbursement claim may also arise from payment or reduction of debt secured by a lien on property or from capital improvements to property other than by incurring debt. Tex. Fam. Code § 3.402(a)(3)–(8). Existence of a lien requires more than an obligation to repay a debt; it requires some instrument, agreement, or act giving one creditor superior rights to collateral over all other unsecured creditors or creditors with a subsequently obtained judicial lien. *Nelson v. Nelson*, 193 S.W.3d 624, 628 (Tex. App.—Eastland 2006, no pet.). A reimbursement claim also arises from the reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses. Tex. Fam. Code § 3.402(a)(9).

A party claiming reimbursement must prove that the act giving rise to reimbursement occurred and that it is reimbursable. *Vallone*, 644 S.W.2d at 459. Although the Supreme Court of Texas has remanded such a cause in the interest of justice (*see Jensen*, 665 S.W.2d at 110), the safer practice is to plead the affirmative relief. *See Vallone*, 644 S.W.2d at 467.

A claim for reimbursement is to be resolved by using equitable principles, including the principle that claims for reimbursement may be offset against each other when appro-

priate. Tex. Fam. Code § 3.402(b). Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate, except that the separate estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate estate against contributions made by the community estate to the separate estate. Tex. Fam. Code § 3.402(c).

A claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by enhancement in value to the benefited estate. Tex. Fam. Code § 3.402(d). The amount of the enhanced value is determined at the time of partition or dissolution of the marriage. *In re Marriage of McCoy & Els*, 488 S.W.3d 430, 434 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The enhanced value is determined by the difference between the fair market value before and after improvements made during the marriage. To be reimbursable, a property's enhanced value must be attributable to the community expenditures. It is not sufficient for the party seeking reimbursement to prove that the value of property has simply increased over time; the party seeking reimbursement must prove that the enhanced value of the property was actually due to the renovations or other improvements. *In re Marriage of McCoy & Els*, 488 S.W.3d at 435.

The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset. Tex. Fam. Code § 3.402(e).

COMMENT: The benefited estate must be prepared not only to negate the claim for reimbursement but also to prove that the benefits received by the contributing estate exceed the amount expended.

Reimbursement may not be claimed for (1) the payment by one party of child support, alimony, or spousal maintenance during the marriage; (2) payments by one spouse for the living expenses of the other spouse or the other spouse's child; (3) contributions of property of a nominal value; (4) the payment of a liability of a nominal amount; or (5) the payment of a student loan owed by a spouse. Tex. Fam. Code § 3.409. A claim for reimbursement cannot be made when community funds pay a community obligation. *Dyer v. Dyer*, No. 03-16-00753-CV, 2018 WL 2994439, at *5 (Tex. App.—Austin June 15, 2018, no pet.) (mem. op.).

A claim for reimbursement does not create an ownership interest in property but, rather, creates a claim against the property of the benefited estate by the contributing estate.

The claim does not mature until dissolution of the marriage or the death of either spouse. Tex. Fam. Code § 3.404(b).

On dissolution of a marriage, the court may impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against that property by a contributing marital estate. Tex. Fam. Code § 3.406(a). The equitable lien may be imposed only on property benefited by the economic contribution and, because of constitutional protections, may not be imposed on homestead property. *Hinton v. Burns*, 433 S.W.3d 189, 199–201 (Tex. App.—Dallas 2014, no pet.).

§ 3.37 Proportional Ownership of Property by Marital Estates

If the community estate of the spouses and the separate estate of a spouse each have an ownership interest in an item of property, the respective ownership interests of the marital estates are determined by the rule of inception of title. Tex. Fam. Code § 3.006. Property purchased with separate and community funds is owned as tenants in common by the separate and community estates. *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975). Percentages of ownership are determined by the amount of funds contributed by each estate to the total purchase price. *Geich v. Bongio*, 99 S.W.2d 881, 883 (Tex. 1937). If the separate estates of each spouse own undivided interests in a property, including when a party gives her spouse an interest in property she owned before the marriage, the parties own that property as tenants in common. The trial court has the authority, under the general laws pertaining to partition suits between co-tenants, to order, concurrently with the divorce proceeding, that the residence be partitioned by sale. *Allen v. Allen*, No. 02-17-00031-CV, 2018 WL 547586, at *6 (Tex. App.—Fort Worth Jan. 25, 2018, no pet.) (mem. op.).

§ 3.38 Reconstituted Community Estate

On a finding that a spouse has committed actual or constructive fraud on the community, the court must calculate the value by which the community estate was depleted as a result of the fraud and calculate the amount of the reconstituted estate, which is the total value of the community estate that would exist if an actual or constructive fraud on the community had not occurred. Then the court must divide the value of the reconstituted estate between the parties in a manner the court deems just and right. The court may grant any legal or equitable relief necessary to accomplish a just and right division, including awarding to the wronged spouse an appropriate share of the community estate remaining after the fraud on the community, awarding a money judgment in favor of

the wronged spouse against the spouse who committed the fraud, or awarding to the wronged spouse both a money judgment and an appropriate share of the community estate. Tex. Fam. Code § 7.009.

§ 3.39 Frozen Embryos

In vitro fertilization agreements entered before the procedure that provide for the destruction of frozen embryos in the event of the parties' divorce are valid and enforceable agreements and are not against the public policy of the state of Texas. *Roman v. Roman*, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

[Section 3.40 is reserved for expansion.]

IV. Parent-Child Relationship

§ 3.41 Best Interest of Child

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child. Tex. Fam. Code § 153.002. Among the factors that the court should consider when determining the best interest of the child are (1) the desires of the child, (2) the emotional and physical needs of the child now and in the future, (3) the emotional and physical danger to the child now and in the future, (4) the plans for the child by the party seeking the change, and (5) the stability of the home or proposed placement. *Lenz v. Lenz*, 40 S.W.3d 111, 115 (Tex. App.—San Antonio 2000), *rev'd on other grounds*, 79 S.W.3d 10 (Tex. 2002) (citing *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). For an analysis of the best interest of the child, see also the dissent by Justice Keyes in *Patterson v. Brist*, 236 S.W.3d 238 (Houston [1st Dist.] 2006, pet. dism'd).

§ 3.42 Mandatory Joinder of Suit Affecting Parent-Child Relationship in Divorce Suit

If the parties to the divorce are parents of a child, and the child is not under the continuing jurisdiction of another court as provided by chapter 155 of the Texas Family Code, the divorce suit must include a suit affecting the parent-child relationship (SAPCR). Tex. Fam. Code § 6.406(b); *In re Morales*, 968 S.W.2d 508, 511 (Tex. App.—Corpus Christi–Edinburg 1998, no pet.). Thus, every divorce involving a minor child of the

parties must include a SAPCR as a second cause of action. A trial court may not sever a SAPCR from a divorce. *In re B.T.G.*, 494 S.W.3d 839, 843 (Tex. App.—Dallas 2016, no pet.). Similarly, a trial court may not properly sever property division from a divorce action. *In re B.T.G.*, 494 S.W.3d at 842. These rules apply even if the parties have no assets. *See In re B.T.G.*, 494 S.W.3d at 841.

The requirement that a SAPCR must be included together with the divorce does not, in itself, confer the requisite jurisdiction on the Texas trial court to decide all the issues that may be implicated in typical cases involving spouses who also have a child of the marriage. The possibility that a Texas court will have only partial jurisdiction over all issues in either or both the dissolution cause of action and the SAPCR when the parties or the child reside in different states is explicitly recognized in Family Code sections 6.308 and 102.012. These provisions state that a Texas trial court may exercise jurisdiction only over those portions of the suit for which it has authority. *See* Tex. Fam. Code §§ 6.308, 102.012. For example, a Texas court may render a decree of dissolution of the marriage of a Texas spouse without having personal jurisdiction over both spouses. Tex. Fam. Code §§ 6.301–.304, 6.306–.307.

On the other hand, a spousal support or child support order may be rendered against a nonresident obligor only if the court has personal jurisdiction over that party. Tex. Fam. Code §§ 8.051, 159.201; *see Estin v. Estin*, 334 U.S. 541 (1948) (alimony); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (child support). In 1980, the principle regarding child support was confirmed by federal statute to ensure universal understanding of the mandate. *See* 28 U.S.C. § 1738B(c). The impact of this restriction of the trial court's jurisdiction is mitigated by the expansive long-arm statute contained in the Uniform Interstate Family Support Act. *See* Tex. Fam. Code § 159.201. (Identical provisions are in effect in all states.) A complementary long-arm statute for dissolution suits is found in Tex. Fam. Code § 6.305.

Similarly, the court's authority to resolve all custody and visitation issues in controversy between the parties may be restricted because another state is the "home state" of the child, even if the Texas court has the requisite, albeit subordinate, jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (chapter 152 of the Texas Family Code). In *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005), the parents had moved from Texas and lived with their then-only child in another state for more than six months, thereby establishing it as the child's "home state." The mother returned to Texas with that child and gave birth to a second child. She then filed for divorce and for custody of and child support for both children. The Texas Supreme Court reversed the trial and appellate courts' determination that Texas had custody

jurisdiction over both children. The court held that the explicit terms of the UCCJEA, in effect in both states, mandate that the home state has jurisdictional priority regarding the father's subsequent custody suit for the first child, which prevails over the "significant-connection" jurisdiction of Texas; Texas has jurisdictional priority regarding custody of the second child.

Section 6.406(b) of the Texas Family Code does not vest the trial court with subject-matter jurisdiction if another state would have jurisdiction under the UCCJEA. The UCCJEA specifically provides that it is the "exclusive jurisdictional basis" for making a child custody determination. Tex. Fam. Code § 152.201(b). Moreover, the UCCJEA provides that if its provisions conflict with another Texas statute, the UCCJEA controls. Tex. Fam. Code § 152.002. *See Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 586 (Tex. App.—Dallas 2006, no pet.).

The shorthand terminology for the complexity of the jurisdictional rules governing divorce, child custody and visitation, and spousal and child support is "bifurcated jurisdiction," which in the Texas Family Code is labeled "partial jurisdiction." For a more detailed explanation of these jurisdictional rules, see chapter 43 of this manual. A more comprehensive explanation of these rules is found in Russell J. Weintraub, *Commentary on the Conflict of Laws* (5th ed., Foundation Press 2006).

If the parties to the divorce are parents of a child who is under the continuing jurisdiction of another Texas court, either party to the divorce suit may move that court for transfer of the suit affecting the parent-child relationship to the court having jurisdiction of the divorce suit. The court with continuing jurisdiction shall then transfer the proceeding as provided by Family Code chapter 155. On transfer of the proceedings, the court with jurisdiction of the divorce suit shall consolidate the suit affecting the parent-child relationship with the divorce suit. Tex. Fam. Code § 6.407(b).

§ 3.43 Continuing Jurisdiction

The general rule is that, when a court acquires jurisdiction of a suit affecting the parent-child relationship, that court retains continuing, exclusive jurisdiction over the parties and matters and no other court has jurisdiction of a suit affecting the parent-child relationship with regard to that child except on transfer as provided in Family Code chapter 155 or in child-protection proceedings under Family Code chapter 262. Tex. Fam. Code §§ 155.001, 155.002. Specific rules regarding continuing, exclusive jurisdiction are found in chapter 155.

A more thorough treatment of the matters concerning jurisdiction and court powers is contained in section 3.50 below relating to the Uniform Child Custody Jurisdiction and Enforcement Act.

§ 3.44 Denial of Paternity

Denial of paternity is discussed in chapter 54 of this manual.

§ 3.45 Conservatorship and Support

For a discussion of conservatorship, see chapter 40 of this manual. Child support is the subject of chapter 9. If grandparents or other nonparents are involved, see chapter 44.

§ 3.46 Health and Dental Insurance Information

In a suit affecting the parent-child relationship in which the court orders periodic payments of child support or determines that medical support of the child must be established, modified, or clarified, before a hearing on temporary orders (or a final order, if no hearing on temporary orders is held), the parties must disclose in a pleading or other statement one of the following: (1) if private health insurance is in effect for the child, the identity of the insurance company providing the coverage, the policy number, which parent is responsible for payment of any insurance premium for the coverage, whether the coverage is provided through a parent's employment, and the cost of the premium or (2) if private health insurance is not in effect for the child, whether the child is receiving medical assistance under chapter 32 of the Human Resources Code, whether the child is receiving health benefits coverage under chapter 62 of the Health and Safety Code and the cost of any premium, and whether either parent has access to private health insurance at a reasonable cost to the obligor. Tex. Fam. Code § 154.181(a), (b).

In a suit affecting the parent-child relationship, before a hearing on temporary orders (or a final order, if no hearing on temporary orders is held), the parties must disclose in a pleading or other statement whether the child is covered by dental insurance and, if so, the identity of the insurance company providing the coverage, the policy number, which parent is responsible for payment of any insurance premium for the coverage, whether the coverage is provided through a parent's employment, and the cost of the premium. Tex. Fam. Code § 154.1815(b), (c).

COMMENT: If the information is available at the time of filing the original petition or original answer, the better practice is to include health and dental insurance statements as attachments to the original pleading. See form 56-2 in this manual.

§ 3.47 Interview with Child

Section 153.009 of the Family Code regulates the court's interview of a child in chambers. See section 40.14 in this manual for a detailed discussion of this topic.

§ 3.48 Jury Questions

Any party in a divorce suit has a right to a jury trial on timely demand. Tex. Fam. Code §§ 6.703, 105.002(a). However, the right is limited.

In a jury trial in a suit affecting the parent-child relationship, a party is entitled to a jury verdict on (1) the appointment of a sole managing conservator; (2) the appointment of joint managing conservators; (3) the appointment of a possessory conservator; (4) the determination of which joint managing conservator has the exclusive right to designate the child's primary residence; and (5) any restrictions on, including a determination of, the geographic area where the residence may be located. The court may not contravene a jury verdict on any of these issues. Tex. Fam. Code § 105.002(c)(1). The court may not submit to the jury questions on the issues of (1) support under Family Code chapter 154 or 159; (2) a specific term or condition of possession of or access to the child; or (3) any right or duty of a conservator, other than determining which joint managing conservator has the exclusive right to designate the primary residence of the child. Tex. Fam. Code § 105.002(c)(2).

See also the suggested jury questions, instructions, and definitions for family law cases contained in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate*.

§ 3.49 Long-Arm Jurisdiction

A party must plead in its petition facts that are sufficient for the court to exercise personal jurisdiction over a nonresident respondent. The failure of a petition to include these jurisdictional facts will cause a default judgment against the respondent to be reversed for all the purposes for which personal jurisdiction is required. *See Calvert v. Calvert*, 801 S.W.2d 217, 219 (Tex. App.—Fort Worth 1990, no writ).

In a suit affecting the parent-child relationship, the court may exercise *personal* jurisdiction over a person on whom service of citation is required, although the person is not a resident or domiciliary of Texas, if—

1. the person is personally served with citation in Texas;
2. the person submits to the jurisdiction of Texas by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
3. the child resides in Texas as a result of the acts or directives of the person;
4. the person resided with the child in Texas;
5. the person resided in Texas and provided prenatal expenses or support for the child;
6. the person engaged in sexual intercourse in Texas and the child may have been conceived by that act of intercourse;
7. the person, as provided by Family Code chapter 160, registered with the paternity registry maintained by the vital statistics unit or signed an acknowledgment of paternity of a child born in Texas; or
8. there is any basis consistent with the constitutions of Texas and of the United States for the exercise of personal jurisdiction.

Tex. Fam. Code § 102.011(b).

The long-arm jurisdiction provisions parallel similar provisions found in the Uniform Interstate Family Support Act at Family Code section 159.201.

This subject is discussed in *May v. Anderson*, 345 U.S. 528 (1953); *Mitchim v. Mitchim*, 518 S.W.2d 362 (Tex. 1975); *Perry v. Ponder*, 604 S.W.2d 306 (Tex. App.—Dallas 1980, no writ); and *Spitzmiller v. Spitzmiller*, 429 S.W.2d 557 (Tex. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.).

In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), the Supreme Court held that the due process clause does not prohibit a state court from exercising in personam jurisdiction over a nonresident defendant based on personal service of process while the defendant was temporarily in the state.

For a discussion of similar provisions regarding the part of the suit concerned with dissolution of the marriage, see section 3.4 above.

Note that the fact that a Texas court may have personal jurisdiction over both parents in a suit affecting the parent-child relationship does not always mean that the court may decide all the issues that may be implicated in typical cases. The possibility that a Texas court will have only partial jurisdiction over all issues in the suit when the parties or the child reside in different states is explicitly recognized in Family Code section 102.012. This provision states that a Texas trial court may exercise jurisdiction only over those portions of the suit for which it has authority. *See* Tex. Fam. Code § 102.012. For example, the court's authority to resolve all custody and visitation issues in controversy between the parties may be restricted because another state is the "home state" of the child, even if the Texas court has the requisite, albeit subordinate, jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (chapter 152 of the Texas Family Code). *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005).

As noted above, the existence of federal and uniform state legislation has had significant effect on this area of the law. See the UCCJEA, Tex. Fam. Code §§ 152.001–.317, and the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A. The Texas version of the UCCJEA is discussed at section 3.50 below. For a more detailed explanation of these statutes, see chapter 43 of this manual. A more comprehensive explanation of these laws is found in Russell J. Weintraub, *Commentary on the Conflict of Laws* (5th ed., Foundation Press 2006).

§ 3.50 Uniform Child Custody Jurisdiction and Enforcement Act

In a suit affecting the parent-child relationship, the court may exercise status or subject-matter jurisdiction over the suit under Family Code sections 152.001 through 152.317 (known as the Uniform Child Custody Jurisdiction and Enforcement Act or UCCJEA). Tex. Fam. Code § 102.011(a). Note, however, that the filing of a divorce requires the joinder of the suit affecting parent-child relationship and will force the suit affecting the parent-child relationship to be tried in the same cause and location as the divorce. See section 3.42 above.

Required Information: Unless each party resides in Texas, in a child custody proceeding, sworn information *must* be supplied to the court in the first pleading of each party or in an affidavit attached to that pleading. *See* Tex. Fam. Code § 152.209(a). If the information is not furnished, the court, on its own motion or that of a party, may stay the proceeding until the information is furnished. Tex. Fam. Code § 152.209(b).

Required information, to be given under oath, concerns the child's present address or whereabouts, the places where the child has lived within the last five years, and the

names and present addresses of the persons with whom the child has lived during that period. Each party must further declare under oath whether he has participated as a party or witness or in any other capacity in any other proceeding concerning the custody of or visitation with the child (and, if so, identify the court, the case number, and the date of the child custody determination, if any); whether he knows of any proceeding that could affect the current proceeding (and, if so, identify the court, the case number, and the nature of the proceeding); and whether he knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child (and, if so, the names and addresses of those persons). Tex. Fam. Code § 152.209(a). For any affirmative declarations, the declarant must give additional information under oath as required by the court. Tex. Fam. Code § 152.209(c). Each party has a continuing duty to inform the court of any proceeding in Texas or any other state that could affect the current proceeding. Tex. Fam. Code § 152.209(d). If a party alleges on oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed except on court order after a hearing. Tex. Fam. Code § 152.209(e).

Additional Parties: The obligation to join a party and the right to intervene as a party in a child custody proceeding under Family Code chapter 152 are governed by Texas law as in child custody proceedings between Texas residents. Tex. Fam. Code § 152.205(c).

Exercise of Jurisdiction: If all contestants reside in Texas at the commencement of the divorce proceeding and the child is present with the parties, Texas may then proceed to exercise jurisdiction over the title 1 aspect of the divorce and the title 5 aspect of the suit affecting the parent-child relationship. Under the UCCJEA, the determination is based on where the child lives, and the child's physical presence is the "central factor" in making that determination. *C.H. v. S.L.*, No. 02-16-00386-CV, 2018 WL 4925318, at *5 (Tex. App.—Fort Worth Oct. 11, 2018, no pet.) (mem. op.).

In *Villareal v. Villareal*, No. 04-15-00551-CV, 2016 WL 4124067 (Tex. App.—San Antonio Aug. 3, 2016, no pet.) (mem. op.), the petitioner filed a divorce, coupled with a suit affecting the parent-child relationship, in state district court. When the trial court entered an order of conditional dismissal for failure to pay court costs, the petitioner filed a petition for divorce in a tribal court. The state district court case was never dismissed, nor was it stayed. The appellate court held that the Indian Child Welfare Act was not applicable to a custody case within a divorce proceeding. Accordingly, the appellate court held that the Indian tribe within which the tribal court was located

should be treated as a state of the United States under the UCCJEA. Because Texas was the home state of the children when the petitioner filed the divorce in state district court, the trial court had jurisdiction to make the initial child custody determination. *Villareal*, 2016 WL 4124067, at *3.

Unless all contestants and the child are residents of Texas at the commencement of the proceeding, the court must determine whether it has jurisdiction to proceed to enter an order in a suit affecting the parent-child relationship. If a court does not have subject-matter jurisdiction over the suit affecting the parent-child relationship, it has no authority to enter orders. A challenge to subject-matter jurisdiction can be raised at any time. *Alfonso v. Skadden*, 251 S.W.3d 52 (Tex. 2008). A detailed discussion of this topic is found in chapter 43 of this manual.

Notice: The provisions for notice and opportunity to be heard are set forth in Family Code sections 152.108 and 152.205. *See* Tex. Fam. Code §§ 152.108, 152.205. The primary requirement is that the absent party be given notice by personal service; in a manner prescribed by law in the place in which service is made; by mail, subject to the Texas Rules of Civil Procedure; or as directed by the court, subject to the requirements of the Texas Rules of Civil Procedure.

[Sections 3.51 through 3.60 are reserved for expansion.]

V. Additional Causes of Action

§ 3.61 General

Spouses can sue each other for intentional torts and for negligence. The doctrine of interspousal immunity, as it related specifically to intentional torts, was abolished in 1977. *Bounds v. Caudle*, 560 S.W.2d 925, 926–27 (Tex. 1977). Damages for a spouse's willful and intentional torts committed during the marriage are recoverable. *Mogford v. Mogford*, 616 S.W.2d 936, 939–40 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.). Since 1987, one spouse can sue the other for negligent conduct. *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987).

The statute of limitations begins to run on a tort action at the time the injury occurs. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967). An action for tort damages must generally be brought within two years of the injury. *See* Tex. Civ. Prac. & Rem. Code § 16.003.

A third party cannot be held liable in tort when community property is taken by one of the spouses. *Chu v. Hong*, 249 S.W.3d 441, 445 (Tex. 2008). Waste, fraudulent transfer, or other damage to community property are claims belonging to the community itself, so they must be included in the trial court's just and right division of community property on divorce. *Chu*, 249 S.W.3d at 444–45. In other words, if the claims belong to the community, they are to be addressed via the trial court's duty to make a just and right division of the community estate. If they are separate property, they remain not only the spouse's but also susceptible to prosecution by the spouse after divorce. *Kite v. King*, 492 S.W.3d 468, 475 (Tex. App.—Amarillo 2016, no pet.).

If a spouse disposes of community property in fraud of the other spouse's rights, the aggrieved spouse has a right of recourse first against the property or estate of the disposing spouse; if that proves to be of no avail, the aggrieved spouse may pursue the proceeds to the extent of that spouse's community interest into the hands of the party to whom the funds were conveyed. *Carnes v. Meador*, 533 S.W.2d 365, 371 (Tex. App.—Dallas 1975, writ ref'd n.r.e.).

Pleadings must give fair notice of the claim involved to the opposing party. *See* Tex. R. Civ. P. 45(b), 47(a). Even when not raised by the pleadings, if issues are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Tex. R. Civ. P. 67; *Gamboa v. Gamboa*, 383 S.W.3d 263, 271 (Tex. App.—San Antonio 2012, no pet.). Trial by consent is intended to cover only the exceptional case in which it clearly appears from the record as a whole that the parties tried the unpleaded issue; it should be applied with care and is not intended to establish a general rule of practice. *Guillory v. Boykins,* 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.). To determine whether an issue was tried by consent, the appellate court examines the record not for evidence pertaining to the issue, but rather for evidence that the issue was actually tried. *Guillory*, 442 S.W.3d at 690. A party's unpleaded issue may be deemed tried by consent when evidence on the issue is developed under circumstances indicating both parties understood the issue was present in the case and the other party failed to make an appropriate complaint. *Prize Energy Resources, L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 567 (Tex. App.—San Antonio 2011, no pet.). When evidence relevant to both a pleaded and an unpleaded issue has been admitted without objection, the doctrine of trial by consent should generally not be applied. *Johnston v. McKinney American, Inc.*, 9 S.W.3d 271, 281 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

§ 3.62 Assault

The definition of assault contained in the Texas Penal Code applies to a civil suit for damages. *Hogenson v. Williams*, 542 S.W.2d 456, 458 (Tex. App.—Texarkana 1976, no writ). Section 22.01(a) of the Texas Penal Code defines assault. It provides that a person commits an offense if the person—

1. intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
2. intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
3. intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Tex. Penal Code § 22.01(a).

Sexual assault is defined in Penal Code section 22.011. *See* Tex. Penal Code § 22.011.

If an assault is perpetrated by one person with the assistance or participation of another, both are principals, and each is jointly and severally liable for the damages. However, overt participation by one actor and some form of encouragement by the other are required to deem both persons as principals. *Francis v. Kane*, 246 S.W.2d 279, 281 (Tex. App.—Amarillo 1951, no writ).

Defenses: Affirmative defenses in civil actions for assault must be pleaded, or else they are waived. Defenses in a civil action for assault include defense of property and justification. *Cooper v. Boyar*, 567 S.W.2d 555, 558–59 (Tex. App.—Waco 1978, writ ref'd n.r.e.); *see also* Tex. R. Civ. P. 94. A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. Tex. Penal Code § 9.31(a); *Holmes v. Holmes*, 588 S.W.2d 674, 675–76 (Tex. App.—Beaumont 1979, no writ). A defendant in a civil cause of action for assault has no right to an affirmative defense of self-defense if, after being threatened by the plaintiff, the defendant approached the plaintiff and provoked a confrontation with him. *Hickman v. Durham*, 213 S.W.2d 569, 570 (Tex. App.—Eastland 1948, writ ref'd n.r.e.).

Damages: In cases of willful battery, damages for mental suffering are recoverable, with or without actual physical injury. *Fisher v. Carrousel Motor Hotel*, 424 S.W.2d

627, 630 (Tex. 1967). A petitioner may also recover exemplary damages if the trier of fact finds that the respondent acted in a malicious, willful, or wanton manner. *Lubbock Bail Bond v. Joshua*, 416 S.W.2d 523, 525–26 (Tex. App.—Amarillo 1967, no writ).

Although not a justification for assault, provocation is a mitigating factor in a suit for assault. Mitigating factors can be raised even if only a general denial is pleaded. *See Taylor v. Gentry*, 494 S.W.2d 243 (Tex. App.—Fort Worth 1973, no writ).

§ 3.63 Intentional Infliction of Emotional Distress

One spouse in a divorce proceeding can sue the other spouse for intentionally or recklessly causing severe emotional distress by extreme and outrageous conduct. *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993). The elements of the tort in the supreme court's plurality opinion in *Twyman* set forth are that—

1. the defendant acted intentionally or recklessly,

2. the conduct was extreme and outrageous,

3. the actions of the defendant caused the plaintiff emotional distress, and

4. the emotional distress suffered by the plaintiff was severe.

Twyman, 855 S.W.2d at 621.

The tort of intentional infliction of emotional distress is available only in those situations in which severe emotional distress is the intended consequence or primary risk of the actor's conduct. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 67 (Tex. 1998). Intentional infliction of emotional distress is a "gap-filler" tort that should not be extended to circumvent the limitations placed on the recovery of mental anguish damages under more established tort doctrines; its clear purpose is to supplement existing forms of recovery by providing a cause of action for egregious conduct that its more established neighbors in tort doctrine would technically fence out. *Standard Fruit*, 985 S.W.2d at 68. The fact that the conduct also caused physical harm does not preclude recovery for emotional distress. It is not a defense that the conduct happened during a troubled marriage. *Castro v. Castro*, No. 13-13-00186-CV, 2014 WL 3802613, at *7–9 (Tex. App.—Corpus Christi–Edinburg July 31, 2014, pet. dism'd) (mem. op.).

§ 3.64 Interference with Possessory Interest in Child

A cause of action for interference with a possessory interest in a child is found both in the Family Code and in common law. Tex. Fam. Code §§ 42.001–.009; *Silcott v. Oglesby*, 721 S.W.2d 290, 292–93 (Tex. 1986); *Smith v. Smith*, 720 S.W.2d 586, 597–98 (Tex. App.—Houston [1st Dist.] 1986, no writ).

A person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person. Tex. Fam. Code § 42.002(a).

A person who aids or assists in such conduct is jointly and severally liable for damages. One who was not a party to the suit in which an order was rendered providing for a possessory right is not liable unless at the time of the violation the person had actual notice of the existence and contents of the order or had reasonable cause to believe that the child was the subject of an order and that his actions were likely to violate the order. Tex. Fam. Code § 42.003. *See also A.H. Belo Corp. v. Corcoran*, 52 S.W.3d 375, 382 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (holding that Family Code section 42.003 does not create affirmative duty in third party to reveal child's whereabouts).

Damages may include the actual costs and expenses, including attorney's fees, incurred in locating the child, recovering possession of the child if the plaintiff is entitled to possession, and enforcing the order and prosecuting the suit. Damages may also include mental suffering and anguish incurred by the plaintiff because of a violation of the order. Exemplary damages may be awarded if a person liable for damages acted with malice or with an intent to cause harm to the plaintiff. Tex. Fam. Code § 42.006.

It is an affirmative defense that the defendant violated the order with the express consent of the plaintiff. Tex. Fam. Code § 42.007.

A person sued for damages under Family Code chapter 42 is entitled to recover attorney's fees and court costs if the claim is dismissed or judgment is awarded to the defendant and the court or jury finds that the claim for damages is frivolous, unreasonable, or without foundation. Tex. Fam. Code § 42.009.

The use of chapter 42 does not affect any other civil or criminal remedy available to any person. Tex. Fam. Code § 42.008.

Texas recognizes a cause of action for intentional infliction of emotional distress but does not recognize an independent cause of action for negligent infliction of emotional

distress within the context of a parental kidnapping case. *Weirich v. Weirich*, 796 S.W.2d 513, 515–16 (Tex. App.—San Antonio 1990), *rev'd on other grounds*, 833 S.W.2d 942 (Tex. 1992).

§ 3.65 Negligent Torts

As a general rule, spouses can sue each other for negligent conduct. Some exceptions exist, however.

Negligent Infliction of Emotional Distress: Texas does not recognize an independent right to recover for negligently inflicting emotional distress. *Massey v. Massey*, 867 S.W.2d 766, 766 (Tex. 1993); *Boyles v. Kerr*, 855 S.W.2d 593, 595–96 (Tex. 1993). There is no general duty not to negligently inflict emotional distress. *Boyles*, 855 S.W.2d at 597. Mental anguish damages should be compensated only in connection with the defendant's breach of some other duty imposed by law. *Boyles*, 855 S.W.2d at 596. "For many breaches of legal duties, even tortious ones, the law affords no right to recover for resulting mental anguish." *Temple-Inland Forest Products Corp. v. Carter*, 993 S.W.2d 88, 91 (Tex. 1999) (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997)).

Negligent Interference with Familial Relations: Texas does not recognize an independent cause of action for negligent interference with familial relations. *Helena Laboratories Corp. v. Snyder*, 886 S.W.2d 767, 768 (Tex. 1994) (per curiam). *Helena Laboratories* involved a cause of action against the employer of the plaintiffs' respective spouses, who were having an extramarital affair. The plaintiffs maintained that the employer negligently interfered with their familial relations by failing to take action to prevent the affair between their spouses. The plaintiffs argued that the employer had a duty to use reasonable means at its disposal to prevent any partner, vice principal, or employee from improperly using his position with the employer to work a tortious invasion of legally protected family interests. *See Snyder v. Helena Laboratories, Inc.*, 877 S.W.2d 35, 37 (Tex. App.—Beaumont), *rev'd*, 886 S.W.2d 767 (Tex. 1994). The supreme court disagreed, holding that the plaintiffs essentially alleged a cause of action for alienation of affection, which is barred by Family Code section 1.107. *Helena Laboratories*, 886 S.W.2d at 768 (citing repealed section 4.06 of the Family Code, now Tex. Fam. Code § 1.107).

§ 3.66 Actual Fraud

Actual fraud involves dishonesty of purpose or intent to deceive. *Horlock v. Horlock*, 533 S.W.2d 52, 55 (Tex. App.—Houston [14th Dist.] 1975, writ dism'd w.o.j.). The elements of actual fraud are that—

1. a material representation was made;
2. the representation was false;
3. when the speaker made the representation, he either knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion;
4. the speaker made the representation with the intent that it be acted on by the party;
5. the party acted in reliance on it; and
6. the party thereby suffered injury.

Stone v. Lawyers Title Insurance Corp., 554 S.W.2d 183, 185 (Tex. 1977). Fraud will not be presumed. If the facts are susceptible of contrary inferences, honest and fair dealing rather than fraud and deceit will be preferred. *Blanton v. Sherman Compress Co.*, 256 S.W.2d 884, 887 (Tex. App.—Dallas 1953, no writ).

If there is a duty to speak, silence may be as misleading as a positive misrepresentation of existing facts. *Hennigan v. Harris County*, 593 S.W.2d 380, 384 (Tex. App.—Waco 1979, writ ref'd n.r.e.). Fraud by nondisclosure is considered a subcategory of fraud. *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997). To establish fraud by nondisclosure, the plaintiff must prove that—

1. the defendant failed to disclose facts to the plaintiff;
2. the defendant had a duty to disclose those facts;
3. the facts were material;
4. the defendant knew the plaintiff was ignorant of the facts and the plaintiff did not have an equal opportunity to discover the facts;
5. the defendant was deliberately silent when it had a duty to speak;
6. by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting;
7. the plaintiff relied on the defendant's nondisclosure; and

8. the plaintiff was injured as a result of acting without that knowledge.

Blankinship v. Brown, 399 S.W.3d 303, 308 (Tex. App.—Dallas 2013, pet. denied).

No actionable fraud exists if each party is equally cognizant of the facts. *Roan v. Reynolds*, 364 S.W.2d 763, 766 (Tex. App.—Amarillo 1963, no writ). A representation that is literally true is actionable if it was made to create an impression that is substantially false. The false representation may consist of a deceptive answer or any other indirect but misleading language. Recovery cannot be had for a true statement that is misunderstood without any fault or design of the speaker. *Blanton*, 256 S.W.2d at 888.

Limitations: The statute of limitations for a cause of action based on fraud is four years. Tex. Civ. Prac. & Rem. Code § 16.004(a). The statute of limitations does not begin to run until the fraud is discovered or until the petitioner acquires such knowledge as would lead to discovery of the fraud if reasonable diligence were exercised. *Kelly v. Dorsett*, 581 S.W.2d 512, 513 (Tex. App.—Dallas 1979, writ ref'd n.r.e.); *Polk Terrace, Inc. v. Curtis*, 422 S.W.2d 603, 605 (Tex. App.—Dallas 1967, writ ref'd n.r.e.).

Damages: Damages for actual fraud are not recoverable against a party's spouse in a divorce action if the fraud involves the wrongful disposition of community property. In such a situation the wronged spouse is limited to relief under Tex. Fam. Code § 7.009 in division of the community estate. On a finding that a spouse has committed actual or constructive fraud on the community, the court must calculate the value by which the community estate was depleted as a result of the fraud and calculate the amount of the reconstituted estate, which is the total value of the community estate that would exist if an actual or constructive fraud on the community had not occurred. Then the court must divide the value of the reconstituted estate between the parties in a manner the court deems just and right. The court may grant any legal or equitable relief necessary to accomplish a just and right division, including awarding to the wronged spouse an appropriate share of the community estate remaining after the fraud on the community, awarding a money judgment in favor of the wronged spouse against the spouse who committed the fraud, or awarding to the wronged spouse both a money judgment and an appropriate share of the community estate. Tex. Fam. Code § 7.009.

If the fraud involves the wrongful disposition of the separate property of a spouse, damages for actual fraud may still be recoverable against that party's spouse with judgment against the opposing spouse's share of the community estate or the opposing spouse's separate estate, if any. *See Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

A person injured by fraud against the person's separate estate or fraud committed by a nonspouse third party may either accept the situation created by the fraud and seek to recover damages or repudiate the transaction and file a cause of action for rescission. *Talley v. Nalley*, 277 S.W.2d 739, 740 (Tex. App.—Waco 1955, writ ref'd n.r.e.); *Andrews v. Powell*, 242 S.W.2d 656, 660 (Tex. App.—Texarkana 1951, no writ). Proof of damages is essential to prove fraud itself. *Stone*, 554 S.W.2d at 185. The measure of damages is the amount of actual loss resulting from the fraud. *Morriss-Buick Co. v. Pondrom*, 113 S.W.2d 889, 890 (Tex. 1938). Exemplary damages are also recoverable if the fraud against the spouse's separate estate was intentionally committed for the purpose of injuring the defrauded party, *Dennis v. Dial Finance & Thrift Co.*, 401 S.W.2d 803, 805 (Tex. 1966), or with reckless disregard of the injurious consequences to others, *Kilgore Federal Savings & Loan Ass'n v. Donnelly*, 624 S.W.2d 933, 938 (Tex. App.—Tyler 1981, writ ref'd n.r.e.). Exemplary damages may also be recovered against a nonspouse third party. If damages are established as of a definite time and the amount is determinable by known standards of value, interest is also recoverable. *Crofford v. Armstrong*, 342 S.W.2d 607, 612 (Tex. App.—Dallas 1961, no writ). Attorney's fees are not recoverable as actual damages in fraud cases, *Morriss-Buick*, 113 S.W.2d at 891, but may be recoverable as exemplary damages against the third-party defendant; *see Fitz v. Toungate*, 419 S.W.2d 708, 710 (Tex. App.—Austin 1967, writ ref'd n.r.e.).

"[A] separate and independent tort action for actual fraud and accompanying exemplary damages against one's spouse do not exist in the context of a deprivation of community assets." *Schlueter*, 975 S.W.2d at 589. If actual fraud is proved, the trial court must consider this fraud in making a just and right division of the community estate under Tex. Fam. Code § 7.009, as described above.

The independent tort action for actual fraud can be asserted against a nonspouse third-party defendant as well as against a spouse if the actual fraud involved the deprivation of the other spouse's separate estate. *See Schlueter*, 975 S.W.2d at 590.

§ 3.67 Fraud on Community

In the absence of fraud on the rights of the other spouse, a spouse has the right to control and dispose of community property subject to his sole management. Each spouse owns an undivided one-half interest in all community assets and funds regardless of which spouse has management and control. *Massey v. Massey*, 807 S.W.2d 391, 401 (Tex. App.—Houston [1st Dist.] 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993). The managing spouse may make moderate gifts for just causes to persons outside the community. *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist.]

1987, no writ). Factors to be considered in determining the fairness of such a gift, transfer, or expenditure are—

1. the relationship between the spouse making the gift, transfer, or expenditure and the recipient;
2. whether there were any special circumstances tending to justify the gift, transfer, or expenditure; and
3. whether the community funds used for the gift, transfer, or expenditure were reasonable in proportion to the community estate remaining.

In re Marriage of DeVine, 869 S.W.2d 415, 422 (Tex. App.—Amarillo 1993, writ denied).

The relationship between spouses is a fiduciary relationship, and the spouses are bound by that fiduciary duty in dealing with the community estate. *Connell v. Connell*, 889 S.W.2d 534, 541 (Tex. App.—San Antonio 1994, writ denied). It is not necessary that one spouse approve or agree with the dispositions made by the other spouse of that spouse's special community property; however, a relationship of trust and confidence exists between spouses requiring that a spouse's disposition of his special community property be fair to the other spouse. *Massey*, 807 S.W.2d at 402. A spouse's disposition of the community property must be fair to the other spouse, and the managing spouse has the burden to show that his disposition of the property was fair. *Massey*, 807 S.W.2d at 402.

Spouses have also been held accountable for the disposing, wasting, or hiding of assets in order to defraud the other spouse of his interest in the property (*see Reaney v. Reaney*, 505 S.W.2d 338 (Tex. App.—Dallas 1974, no writ); *Pride v. Pride*, 318 S.W.2d 715 (Tex. App.—Dallas 1958, no writ); *Swisher v. Swisher*, 190 S.W.2d 382 (Tex. App.—Galveston 1945, no writ)), and for gifts and transfers to paramours (*see Mazique*, 742 S.W.2d at 805; *Morrison v. Morrison*, 713 S.W.2d 377 (Tex. App.—Dallas 1986, writ dism'd); *Spruill v. Spruill*, 624 S.W.2d 694 (Tex. App.—El Paso 1981, writ dism'd)).

The breach of a legal or equitable duty that violates the fiduciary relationship existing between spouses is termed *fraud on the community*, a judicially created concept based on the theory of constructive fraud. Any such conduct in the marital relationship is termed fraud on the community because, although not actually fraudulent, it has all the consequences and legal effects of actual fraud in that such conduct tends to deceive the

other spouse or violate confidences that exist as a result of the marriage. *In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.—Amarillo 1994, no writ).

Fraud on the community is not an independent tort but is instead a remedy for a deprivation of community assets to be considered as part of a just and right division of the community estate. *See* Tex. Fam. Code § 7.009(b)–(c); *Schlueter v. Schlueter*, 975 S.W.2d 584, 588 (Tex. 1998); *see also* Tex. Fam. Code § 7.001; *Chu v. Hong*, 249 S.W.3d 441, 444–45 (Tex. 2008).

A presumption of "constructive fraud," that is, waste, arises when one spouse disposes of the other spouse's interest in community property without the other's knowledge or consent. *Puntarelli v. Peterson*, 405 S.W.3d 131, 137–38 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The presumption may arise even when the other spouse has knowledge of the disposition, as long as that spouse did not also consent to the disposition. *Dyer v. Dyer*, No. 03-16-00753-CV, 2018 WL 2994439, at *6 (Tex. App.—Austin June 15, 2018, no pet.) (mem. op.). A finding of constructive fraud can be supported not only by evidence of specific transfers or gifts of community assets outside the community, but also by evidence that community funds are unaccounted for by the spouse in control of those funds. *Miller v. Miller*, No. 14-17-00293-CV, 2018 WL 3151241, at *6 (Tex. App.—Houston [14th Dist.] June 28, 2018, no pet.) (mem. op.). No dishonesty of purpose or intent to deceive must be established; such proof of subjective intent is required only for actual fraud on the community, as opposed to constructive fraud on the community. *Puntarelli*, 405 S.W.3d at 138. Once the presumption arises, the burden of proof then shifts to the disposing spouse to prove the fairness of the disposition of the other spouse's one-half community ownership. *Puntarelli*, 405 S.W.3d at 138. A claim of constructive fraud is evaluated by looking to several factors, "including the size of the gift in relation to the total size of the community estate; the adequacy of the estate remaining to support the wife, the gift notwithstanding; the relationship of the donor to the donee; and whether special circumstances existed to justify the gift." *Barnett v. Barnett*, 67 S.W.3d 107, 126 (Tex. 2001).

If fraud on the community is found, the trial court may accomplish a just and right division by awarding the wronged spouse an appropriate share of the community estate remaining after the actual or constructive fraud on the community, a money judgment in favor of the wronged spouse, or both. *See* Tex. Fam. Code § 7.009(c).

Although marriage may bring about a fiduciary relationship, such a relationship terminates in a contested divorce when the spouses each have independent attorneys and financial advisers. *Parker v. Parker*, 897 S.W.2d 918, 924 (Tex. App.—Fort Worth

1995, writ denied). *But see Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (fiduciary duty does not expire on filing of divorce). Courts have recognized fraud on the community when the wrongful disposition of community property occurred during the divorce. *Miller*, 2018 WL 3151241, at *11.

Third-Party Fraud on Community: Although the court in *Schlueter* held that fraud on the community was not an independent cause of action in a divorce, it specifically declined to address whether a cause of action existed as to fraud on the community committed by third parties. *Schlueter*, 975 S.W.2d at 592. Since that opinion, the Texas Supreme Court has not addressed this issue. However, various appellate courts have, with the majority of those courts holding in favor of such a cause of action. *See In re Burgett*, 23 S.W.3d 124, 127 (Tex. App.—Texarkana 2000, orig. proceeding) (third-party actions involving fraud on community should not be severed and should be tried with, or before, divorce action); *Mayes v. Stewart*, 11 S.W.3d 440, 447–48 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (divorce case—cause of action for third-party fraud on community); *Osuna v. Quintana*, 993 S.W.2d 201, 207–08 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.) (divorce case—cause of action for third-party fraud on community). *But see Harper v. Harper*, 8 S.W.3d 782, 783–84 (Tex. App.—Fort Worth 2000, pet. denied) (probate case—no cause of action for third-party fraud on community).

§ 3.68 Conversion

Nature of Cause of Action: An action for conversion of property is a tort. The tort grows out of the unlawful interference with possession of personal property, giving the owner a cause of action against the wrongdoer even though title to the property did not pass. *Owens v. Grimes*, 539 S.W.2d 387, 390 (Tex. App.—Tyler 1976, writ ref'd n.r.e.); *John Hancock Mutual Life Insurance Co. v. Howard*, 85 S.W.2d 986, 988 (Tex. App.—Waco 1935, writ ref'd).

The Supreme Court of Texas has defined conversion as unauthorized and wrongful assumption and exercise of dominion and control over another's property in denial of or inconsistent with the owner's rights. It is not necessary that there be a manual taking of the property in question. *Waisath v. Lack's Stores*, 474 S.W.2d 444, 446–47 (Tex. 1971).

There must be an intent on the part of the defendant to assert some right in the property. Because *wrongful* intent is not essential, however, one may not escape liability by showing that he acted in good faith or under a mistaken belief about his rights. *McVea v. Verkins*, 587 S.W.2d 526, 531 (Tex. App.—Corpus Christi–Edinburg 1979, no writ). It

is not necessary that the property be applied to the use of the wrongdoer or even to that of a third person. The controlling factor is the owner's loss and not the benefit to the wrongdoer. *American Surety Co. v. Hill County*, 254 S.W. 241, 246 (Tex. App.—Dallas 1923), *aff'd*, 267 S.W. 265 (Tex. Comm'n App. 1924, judgm't adopted). Conversion may also be direct or constructive. *McVea*, 587 S.W.2d at 530.

Generally, a demand for the return of the property and a refusal to return it are required to establish a conversion by a person who lawfully obtained possession of the involved property. However, a demand and refusal are not necessary (1) if possession was acquired wrongfully, (2) after the conversion has become complete, or (3) if it is shown that a demand would have been useless. An intent to do an act amounting to conversion of personal property is necessary in order to constitute a conversion. However, it is the act of conversion in and of itself and not the intention to convert that gives a right of action. Wrongful intent to convert another's property is not an essential element of conversion, nor is it material to any issue involved in a suit for conversion except on the issue of exemplary damages. *McVea*, 587 S.W.2d at 531.

Defenses: Good faith and mistake of fact are not defenses to conversion. *Adam v. Harris*, 564 S.W.2d 152, 155 (Tex. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.). Recovery for conversion is not barred even if the plaintiff was in debt to the defendant, *Jones v. City National Bank*, 166 S.W. 442, 443 (Tex. App.—Fort Worth 1914, writ granted), or by the plaintiff's authorizing the defendant to borrow money on the property, *Hooks v. Brown*, 348 S.W.2d 104, 120 (Tex. App.—Austin 1961, writ ref'd n.r.e.).

Conversion is an action for the protection of property rights. It has been held that a spouse may sue the other spouse when it is necessary for the protection of property rights. *Trimble v. Farmer*, 305 S.W.2d 157, 159 (Tex. 1957); *Letcher v. Letcher*, 421 S.W.2d 162, 166 (Tex. App.—San Antonio 1967, writ dism'd); *Pride v. Pride*, 318 S.W.2d 715, 722 (Tex. App.—Dallas 1958, no writ).

Damages: The measure of damages for conversion is the value of the property converted at the time of the conversion, with legal interest. If the conversion is attended with fraud, a willful wrong, or gross negligence, however, and the property converted is of changing or fluctuating value, the measure of damages is the highest market value of the property between the date of conversion and the filing of the suit. If the damages are definitely determinable, interest is recoverable as a matter of right from the date of the injury or loss. *Imperial Sugar Co. v. Torrans*, 604 S.W.2d 73, 74 (Tex. 1980) (per curiam). Additionally, a party requesting the return of converted property may recover

money damages for the loss of use of the property during the period of detention. *Adam*, 564 S.W.2d at 155.

Exemplary damages are not allowed in ordinary conversion or if the conversion is made in good faith or by honest mistake. However, exemplary damages are allowed if the conversion is accompanied with fraud or malice. In determining exemplary damages, expenses in bringing the suit, including attorney's fees, if properly pleaded and proved, may be recovered. *See Earthman's, Inc. v. Earthman*, 526 S.W.2d 192, 208 (Tex. App.—Houston [1st Dist.] 1975, no writ). The existence of malice to support exemplary damages may not be necessary if the defendant's acts are accompanied with fraud or other aggravating circumstances. *Lack's Stores v. Waisath*, 479 S.W.2d 406, 408 (Tex. App.—Waco 1972, no writ).

Conversion in Family Law: Although rare, allegations of conversion do arise in family law. *See Connell v. Connell*, 889 S.W.2d 534, 540 (Tex. App.—San Antonio 1994, writ denied). It has been argued that conversion can exist in the family law setting only if the converted property is the separate property of the complaining spouse. However, conversion has been found in a case in which friends of the wife helped her sell a community-property car in violation of temporary orders enjoining the sale or other disposal of community property. *Stevenson v. Koutzarov*, 795 S.W.2d 313, 322–23 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

§ 3.69 Cotenant

Nature of Cotenancy: A cotenancy exists whenever two or more persons become vested with a mutual right to undivided possession of the same property. *See Rippetoe v. Dwyer*, 49 Tex. 498 (1878); *McAllen v. Raphael*, 32 S.W. 449 (Tex. App. 1895, no writ). The present right of possession is an essential element of cotenancy. *Sparks v. Robertson*, 203 S.W.2d 622, 623 (Tex. App.—Austin 1947, writ ref'd). Each co-tenant has the right to be in possession of property in which he owns an interest. *Todd v. Bruner*, 365 S.W.2d 155, 160 (Tex. 1963).

To be a cotenant one must have title to the property in some manner, as by conveyance, inheritance, will, limitation, judgment, or by any other legal means. *Reed v. Turner*, 489 S.W.2d 373 (Tex. App.—Tyler 1972, writ ref'd n.r.e.). The relationship of co-tenancy does not exist among remaindermen or between them and the life tenant, because the present right of possession essential to cotenancy does not exist. *Sparks*, 203 S.W.2d at 624.

Rights and Duties: The rights and interests of cotenancy are equal unless a contrary intention appears in the instrument creating the cotenancy. *See Wooley v. West*, 391 S.W.2d 157, 159 (Tex. App.—Tyler 1965, writ ref'd n.r.e.). When two or more people join in the purchase of property, in the absence of an agreement to the contrary, they will hold titles in the proportion in which each furnished consideration for the purchase. *Jackson v. Jackson*, 258 S.W. 231, 232 (Tex. App.—Waco 1924, no writ). A cotenant who alleges a greater contribution than a proportionate share has the burden of showing the amount of the contribution. *Dessommes v. Dessommes*, 505 S.W.2d 673, 679 (Tex. App.—Dallas 1973, writ ref'd n.r.e.). Each cotenant is entitled to possession, and possession by one cotenant is usually not adverse to all other cotenants in the absence of some type of repudiation, notice, or ouster. *Horlock v. Horlock*, 614 S.W.2d 478, 481 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

All cotenants have a duty to preserve the common property. Additionally, all cotenants are liable for their proportionate shares of all necessary costs and expenses in defending title and possession and for care of the property. If one cotenant makes an outlay for proper and necessary preservation of the common property, he is entitled to be reimbursed by the other cotenants in accordance with their separate interests. *Allen v. Allen*, 363 S.W.2d 312, 316 (Tex. App.—Houston 1962, no writ).

Generally, and in the absence of express authority, a cotenant is neither a partner with nor an agent of another cotenant and cannot act for the other cotenant. *Horlock*, 614 S.W.2d at 485.

Actions by and against Cotenants: Actions by cotenants against third parties and by third parties against cotenants generally are governed by the principles applied to other actions. For example, one cotenant may seek injunctive relief to preserve the property. *See Baton v. Key Production Co.*, 315 S.W.2d 59 (Tex. App.—Texarkana 1958, writ ref'd n.r.e.). One cotenant may join the other cotenants as either parties plaintiff or parties defendant in order to determine all matters affecting the cotenancy. *See Arrington v. Southern Pine Lumber Co.*, 16 S.W.2d 166 (Tex. App.—Texarkana 1929, no writ).

However, in any action for an accounting and to recover costs and profits accruing to the common property or for damages to the common property, all cotenants must be joined in the suit. Failure to do so renders the suit abatable. *Scott v. Williams*, 607 S.W.2d 267, 271 (Tex. App.—Texarkana 1980, writ ref'd n.r.e.); *Hicks v. Southwestern Settlement & Development Corp.*, 188 S.W.2d 915, 930 (Tex. App.—Beaumont 1945, writ ref'd w.o.m.).

Termination: A cotenancy may be terminated in a variety of ways, such as by dividing the property in kind or by having the property sold if it is not subject to partition in kind. *Corn v. First Texas Joint Stock Land Bank*, 131 S.W.2d 752, 757 (Tex. App.—Fort Worth 1939, writ ref'd). A cotenant may even construct improvements and establish a homestead on land held in common, but these rights are subservient to the rights of the other cotenants to use the whole and to demand a partition. *Becker v. Becker*, 623 S.W.2d 757, 759 (Tex. App.—Houston [1st Dist.] 1981, no writ).

Application to Family Law Cases: When the community estate and one or both separate estates of the spouses contribute to the purchase of an asset initially, each estate owns the asset in proportion to each spouse's contribution to the purchase price. *Cook v. Cook*, 679 S.W.2d 581, 583 (Tex. App.—San Antonio 1984, no writ). This is different from the situation in which one estate makes the initial payment for purchase and the other estate makes payment on it. In that event, a claim exists for either economic contribution or reimbursement. When different estates hold title, the debt is charged against the community interest unless the creditor agrees to look only to the separate estate of one of the spouses.

§ 3.70 Orders against Financial Institution

Though Family Code section 6.503 governs the procedure for obtaining a temporary restraining order against a party to a divorce, rule 680 of the Texas Rules of Civil Procedure must be followed to obtain a restraining order against a financial institution during a divorce. The rule provides that it must clearly appear from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing held. Tex. R. Civ. P. 680.

Obtaining a temporary injunction against a third party in a divorce proceeding requires a supporting affidavit. Tex. R. Civ. P. 682. Each order granting an injunction and every restraining order must set forth the reason for its issuance, be specific in its terms, and describe in reasonable detail and not by reference to the pleadings or other documents the act or acts sought to be restrained. The restraining order or injunction binds only the parties to the action; their officers, agents, servants, employees and attorneys; and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Tex. R. Civ. P. 683.

Additionally, and contrary to the Family Code's provisions, a temporary restraining order or temporary injunction against a third party to a divorce proceeding requires the

posting of a bond with two or more good and sufficient sureties as security if the order or injunction is dissolved in whole or in part. Tex. R. Civ. P. 684.

The trial court has broad discretion in issuing a temporary restraining order and will generally do so if the pleadings and evidence present a probable right and probable injury. The applicant is not required to establish that he will finally prevail in the litigation. *Vargas v. Mott*, 499 S.W.2d 905, 906 (Tex. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

§ 3.71 Disregarding Corporate Fiction

Generally: A corporation is regarded as a separate legal entity, and courts will not disregard the corporate fiction and hold individual officers, directors, or stockholders liable for the obligations of the corporation except when it appears that the individuals are using the corporate entity as a sham to perpetrate fraud, avoid personal liability, or avoid the effect of statutes and in a few other exceptional situations. *Torregrossa v. Szelc*, 603 S.W.2d 803, 804 (Tex. 1980); *Pace Corp. v. Jackson*, 284 S.W.2d 340, 351 (Tex. 1955).

The Texas Business Organizations Code provides that, in the absence of an express agreement or an obligation based on statute, a shareholder is not liable to the corporation or its obligees with respect to (1) the shares except for the full amount of the consideration; (2) any contractual obligation of the corporation on the basis of alter ego or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or a similar theory unless the obligee shows that the shareholder caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the shareholder; or (3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality. Tex. Bus. Orgs. Code § 21.223(a), (b).

In certain defined circumstances, the courts will disregard the corporate fiction under either the doctrine of alter ego or another means of piercing the corporate veil. These doctrines are not substantive causes of action. *See In re Starflite Management Group, Inc.*, 162 S.W.3d 409, 414 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam). Rather, such doctrines are more in the nature of a remedy and operate to enlarge the potential sources for recovery.

Alter ego, which applies if there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable

would result in injustice, is one basis for disregarding the corporate fiction. Other situations in which the corporate fiction may be disregarded even though corporate formalities have been observed and corporate and individual properties have been kept separate include those in which the corporation is used as a means of perpetrating fraud; the corporate fiction is used to evade an existing legal obligation, to achieve or perpetrate monopoly, or to circumvent a statute; or the corporate fiction is invoked to protect crime or justify a wrong. *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986); *see also Zisblatt v. Zisblatt*, 693 S.W.2d 944, 950 (Tex. App.—Fort Worth 1985, writ dism'd).

In exceptional situations the alter ego doctrine and the doctrine of piercing the corporate veil have been used in divorce cases. A finding of alter ego sufficient to justify piercing in the divorce context requires the trial court to find (1) unity between the corporation and the spouse such that the separateness of the corporation has ceased to exist and (2) the spouse's improper use of the corporation damaged the community estate beyond that which might be remedied by a claim for reimbursement. In the divorce context, alter ego and piercing the corporate veil have been termed "reverse piercing." This "reverse piercing" allows the court to characterize corporate assets that would otherwise be the separate property of one spouse as community property. *Lifshutz v. Lifshutz*, 61 S.W.3d 511 (Tex. App.—San Antonio 2001, pet. denied).

The rationale that allows the corporate fiction to be disregarded is potentially applicable also to the trust context when a trustee conducts himself as his own alter ego or that of the settlor or beneficiary. See Jimmy Vaught, *Dealing with Unusual Trusts*, State Bar of Tex. Prof. Dev. Program, New Frontiers in Marital Property Course 2, 2.1 (2007) (citing *In re Marriage of Burns*, 573 S.W.2d 555, 557 (Tex. App.—Texarkana 1978, writ dism'd)).

A corporate veil may be pierced on the basis of alter ego only in extraordinary circumstances. If an individual controls and manages a corporation in such a manner that its affairs are indistinguishable from the individual's personal affairs and it has thus become inseparable from the individual, alter ego may be available to pierce the corporate veil. Such a situation may not be inferred simply because a person is a major stockholder or even the sole stockholder of the corporation. *Keith v. Woodul*, 616 S.W.2d 375, 377 (Tex. App.—Texarkana 1981, no writ). There must be such unity between the individual and the corporation that the separateness of the individual from the corporation has ceased to exist. *Humphrey v. Humphrey*, 593 S.W.2d 824, 826 (Tex. App.—Houston [14th Dist.] 1980, writ dism'd). Additionally, the party seeking relief must be able to demonstrate that the spouse's inappropriate use of the corporation resulted in

damage to the community estate that cannot be remedied by reimbursement. *Lifshutz*, 61 S.W.3d at 517; *Boyo v. Boyo*, 196 S.W.3d 409 (Tex. App.—Beaumont 2006, no pet.).

Pleadings and Burden of Proof: The alter ego theory must be pleaded and proved. *Keith*, 616 S.W.2d at 377. The party pleading alter ego has the burden of proof. *Torregrossa*, 603 S.W.2d at 804.

To meet the burden of proof in the divorce context, the evidence must establish (1) unity between the separate-property corporation and the spouse to the extent that there is no separateness, and (2) the spouse's use of the corporation has resulted in damage to the community that cannot be cured through reimbursement. *Lifshutz*, 61 S.W.3d at 517.

Characterization: If the corporate veil is pierced, the corporate assets will be presumed to be community property, subject to division by the court, if no separate-property claim has been preserved. *See Zisblatt*, 693 S.W.2d at 955.

COMMENT: The attorney defending an alter ego case in a jury trial should obtain a pretrial ruling on whether the trial will be bifurcated, with the possibility of a second trial on characterization of the underlying corporate assets. If the trial is not bifurcated, evidence not only about the alter ego claim but also about characterization of the underlying assets, possibly including a tracing claim, must be presented at the same time.

§ 3.72 Parentage

Parentage actions are the subject of chapter 54 of this manual.

§ 3.73 Invasion of Privacy

Nature of Cause of Action: Invasion of privacy is a willful tort, and the unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted. *Billings v. Atkinson*, 489 S.W.2d 858, 861 (Tex. 1973).

The right of privacy has been defined as the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. *Billings*, 489 S.W.2d at 859; *see*

also Moore v. Charles B. Pierce Film Enterprises, 589 S.W.2d 489, 490 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.).

The right of privacy may be violated in any one of three ways: (1) intrusion on the plaintiff's solitude or seclusion or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; and (3) appropriation, to the defendant's advantage, of the plaintiff's name or likeness. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 578 (Tex. 1994).

The elements for intrusion on a person's seclusion, solitude, and private affairs require that there be an intentional intrusion on the solitude or seclusion of the person or into his private affairs or concerns that is highly offensive to a reasonable person. This type of invasion of privacy is associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps or microphones or by spying. *Gill v. Snow*, 644 S.W.2d 222, 224 (Tex. App.—Fort Worth 1982, no writ), *overruled on other grounds by Cain*, 878 S.W.2d 577; *Gonzales v. Southwestern Bell Telephone Co.*, 555 S.W.2d 219, 221 (Tex. App.—Corpus Christi–Edinburg 1977, no writ); *see also* Tex. Civ. Prac. & Rem. Code § 123.002.

To show an invasion of privacy by the public disclosure of embarrassing private facts, the matters publicized must be those that would be highly offensive to a reasonable person and not of legitimate concern to the public. *Gill*, 644 S.W.2d at 224.

To prove invasion of privacy involving the appropriation, to the defendant's advantage, of the plaintiff's name or likeness, it must be shown that the plaintiff's personal identity has been appropriated by the defendant for some advantage, usually of a commercial nature, to the defendant. *See National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980); *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719 (Tex. App.—Eastland 1975, writ ref'd n.r.e.).

Any of the above three types of invasion of privacy will give rise to a cause of action. However, the publicizing of information that was part of a public record will not give rise to a cause of action for invasion of privacy. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 684 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *Gill*, 644 S.W.2d at 224.

Parties: The right of privacy is purely personal and therefore terminates on the death of the person whose privacy is invaded. An action for the invasion of privacy cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity. *Moore*, 589 S.W.2d at 491.

Defenses: The defenses to an action for the invasion of privacy are consent and waiver. *See In re Bates*, 555 S.W.2d 420, 430 (Tex. 1977); *Kimbrough*, 521 S.W.2d at 723.

Damages: Invasion of privacy is a willful tort that constitutes a legal injury, and damages for mental suffering are recoverable without the necessity of showing actual physical injury, because the injury for the willful invasion of the right of privacy is essentially mental and subjective, not actual harm done to the plaintiff's body. *Billings*, 489 S.W.2d at 861.

Exemplary damages are also recoverable in an action for invasion of privacy. *National Bonding Agency v. Demeson*, 648 S.W.2d 748, 751 (Tex. App.—Dallas 1983, no writ).

Family Law Application: It is not uncommon for a party in a family law case to wiretap, audiotape, or videotape the party's spouse, the spouse's significant other, or their children. This area is fraught with exposure to civil and criminal liability for both the client and the attorney. The attorney should review (1) title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, codified at title 18 of the United States Code sections 2510 through 2521; (2) Texas Penal Code article 16.02; (3) Texas Code of Criminal Procedure article 18.20; and (4) Texas Civil Practice and Remedies Code chapter 123. In summary, any use of an electronic, mechanical, or other device to intentionally intercept a wire, oral, or electronic communication or to use or disclose such interception is prohibited. Some commentators have opined that it is unlawful for attorneys to even listen to a tape given to them by a client. Generally, the interception is legal if one party to the communication has consented and both parties are located in Texas. See **www.rcfp.org/reporters-recording-guide/state-state-guide** for the laws in other jurisdictions regarding the taping of telephone conversations. A continuing controversy exists about whether one spouse has immunity to intercept the other spouse's communications if they reside in the same home. At least two Texas appellate courts have held that there is no immunity and that interspousal interceptions violate both federal and Texas statutes. *Collins v. Collins*, 904 S.W.2d 792, 796–97 (Tex. App.—Houston [1st Dist.] 1995), *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996); *Turner v. PV International Corp.*, 765 S.W.2d 455, 470 (Tex. App.—Dallas 1988), *writ denied per curiam*, 778 S.W.2d 865 (Tex. 1989). See the discussion at section 2.8:8 in this manual.

There are no federal or state statutes that regulate video surveillance. However, if the tape has audio, the same rules detailed above probably apply. Additionally, there may be a common-law right of recovery for willful invasion of privacy or intentional inflic-

tion of emotional distress. *See Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993) (citing *Billings*, 489 S.W.2d at 860–61).

In this area, attorneys are held to a higher standard. A Texas attorney may make an undisclosed recording of the attorney's telephone conversations with clients or third parties only if certain requirements are met. *See* State Bar of Texas, Op. 575 (2006). See the discussion at section 2.8:8.

§ 3.74 Uniform Fraudulent Transfer Act

Generally: The Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013, protects creditors with a claim against a debtor from the debtor's transfer of assets to third parties and applies to transfers made or debts incurred on or after September 1, 1987. "Claim" means a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. Tex. Bus. & Com. Code § 24.002(3). The term *transfer* is broadly defined to include a wide variety of methods by which a debtor may dispose of an asset. *See* Tex. Bus. & Com. Code § 24.002(12).

Transfer Made with Intent to Avoid Creditors: A transfer made or obligation incurred by a debtor is fraudulent if he made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor. Tex. Bus. & Com. Code § 24.005(a)(1). Such a transfer is not voidable against a person who took the transfer in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. Tex. Bus. & Com. Code § 24.009(a).

Transfer Made without Receiving Reasonably Equivalent Value: A transfer made or obligation incurred by a debtor is fraudulent if he made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation *and* he was engaged or was about to engage in a business or transaction for which his remaining assets were unreasonably small in relation to the business or transaction or he intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due. Tex. Bus. & Com. Code § 24.005(a)(2). Such a transfer is not voidable if it results from the enforcement of a security interest. Tex. Bus. & Com. Code § 24.009(e)(2).

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if he made the transfer or incurred the obliga-

tion without receiving a reasonably equivalent value in exchange for the transfer or obligation and he was insolvent at that time or became insolvent as a result of the transfer or obligation. Tex. Bus. & Com. Code § 24.006(a). A debtor is "insolvent" if his debts are greater than his assets; he is presumed to be insolvent if he is generally not paying his debts as they become due. Tex. Bus. & Com. Code § 24.003(a), (b). Such a transfer is not voidable if it results from the enforcement of a security interest. Tex. Bus. & Com. Code § 24.009(e)(2).

Preferential Transfer to Insider: A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent. Tex. Bus. & Com. Code § 24.006(b). An "insider" includes a relative of the debtor or a corporation controlled by the debtor. Tex. Bus. & Com. Code § 24.002(7)(A). Such a transfer is not voidable if it results from the enforcement of a security interest or if it is made in the ordinary course of business of the debtor and the insider. Tex. Bus. & Com. Code § 24.009(e)(2), (f)(2). The term *insider* is defined by the Act in circumstances when a debtor is an individual, a corporation, a partnership, an affiliate, or a managing agent of the debtor. *See* Tex. Bus. & Com. Code § 24.002(7). A finding of the debtor as an "insider" is not limited to the statutory definition in the Act, as the definition is provided for purposes of exemplification. *Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson*, 805 S.W.2d 16, 18–19 (Tex. App.—Dallas 1991, no writ) (person found to have been "insider" although he did not fit strictly within statutory definition of term because of personal knowledge of business, financial, and personal affairs of spouses).

Transfers falling under section 24.005 may be challenged by a creditor whose claim arose before or within a reasonable time after the transfer. Tex. Bus. & Com. Code § 24.005(a). Transfers falling under section 24.006 may be challenged only by a creditor whose claim arose before the transfer. Tex. Bus. & Com. Code § 24.006. Because a spouse's community-property rights are vested when property is acquired, it would seem that a spouse challenging a transfer of community property would be a present creditor and could challenge both section 24.005 and 24.006 transfers.

Creditor: A "creditor" is a person, including a spouse, who has a claim. Tex. Bus. & Com. Code § 24.002(4). Such a claim may presumably be a spouse's interest in the marital estate. *See* Tex. Bus. & Com. Code § 24.002(3). Although the definition of "creditor" in the Act includes a spouse who has a claim for property fraudulently transferred by the other spouse, the transfer must be made to intentionally defraud the spouse, cause the transferor to become insolvent, or leave the transferor with "unrea-

sonably small" assets or debts beyond his ability to pay. In the absence of such evidence, the Act does not apply. *Thomas v. Casale*, 924 S.W.2d 433, 437 (Tex. App.—Fort Worth 1996, writ denied).

Remedies: In an action for relief against a transfer or obligation, a creditor may obtain (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim, (2) an attachment of the asset transferred or other property of the transferee, (3) an injunction against further disposition by the debtor or the transferee, (4) appointment of a receiver to take charge of the asset transferred or of other property of the transferee, or (5) any other relief the circumstances may require. If a creditor has obtained a judgment against the debtor, the creditor may levy execution on the asset transferred or its proceeds if the court so orders. Tex. Bus. & Com. Code § 24.008. An award of the entire community interest in real property, free of the outstanding obligation, to a "creditor" spouse is proper as "any other relief the circumstances may require." *Putman*, 805 S.W.2d at 19–20.

The court may award costs and reasonable attorney's fees as are equitable and just. Tex. Bus. & Com. Code § 24.013.

Limitations: A cause of action on behalf of a spouse, minor, or ward with respect to a fraudulent transfer or obligation is extinguished unless the action, if brought under section 24.005(a) or 24.006(a), is brought within two years after the cause of action accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. If the action is brought under section 24.006(b), it is extinguished unless it is brought within one year after the date the transfer was made. Tex. Bus. & Com. Code § 24.010(b).

A cause of action *not* on behalf of a spouse, minor, or ward with respect to a fraudulent transfer or obligation is extinguished unless brought (1) under section 24.005(a)(1) within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant; (2) under section 24.005(a)(2) or 24.006(a) within four years after the transfer was made or the obligation was incurred; or (3) under section 24.006(b) within one year after the transfer was made. Tex. Bus. & Com. Code § 24.010(a).

A creditor's disabilities that toll the statute if existing when the period begins are the creditor's being under the age of eighteen years, regardless of marital status, and the creditor's being of unsound mind. Tex. Bus. & Com. Code § 24.010(c).

§ 3.75 Third-Party Trustee

Generally: Trusts may be divided into two classes: express or implied. *Hereford Land Co. v. Globe Industries*, 387 S.W.2d 771, 775 (Tex. App.—Tyler 1965, writ ref'd n.r.e.). An express trust is a fiduciary relationship with respect to property that arises as a manifestation by the settlor of an intention to create the relationship and that subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person. Tex. Prop. Code § 111.004(4). A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. A trust consisting of personal property, however, is enforceable if created by (1) a transfer of the trust property to a trustee who is neither settlor nor beneficiary if the transferor expresses simultaneously with or before the transfer the intention to create a trust or (2) a declaration in writing by the owner of property that the owner holds the property as trustee for another person or for the owner and another person as a beneficiary. Tex. Prop. Code § 112.004.

Resulting and constructive trusts are classified as trusts created by operation of law or implied trusts imposed to prevent unjust enrichment. *Mills v. Gray*, 210 S.W.2d 985, 987 (Tex. 1948); *Davis v. Sheerin*, 754 S.W.2d 375, 387 (Tex. App.—Houston [1st Dist.] 1988, writ denied). If title to property is taken in the name of someone other than the person who advances the purchase price, a resulting trust is created in favor of the payor. *Tricentral Oil Trading, Inc. v. Annesley*, 809 S.W.2d 218, 220 (Tex. 1991) (per curiam). It is an "intent trust" employed if trust property has been used for a special purpose that has terminated or become frustrated so that the law implies a trust for the equitable owner of the property. The trustee of a resulting trust stands in a fiduciary relationship with the beneficiary insofar as the trust property is concerned. *Tricentral Oil Trading*, 809 S.W.2d at 220. The doctrine of resulting trust is invoked to prevent unjust enrichment, and equitable title will rest with the party furnishing the consideration. *Nolana Development Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984).

A resulting trust differs from an express trust in the manner of its creation and the nature and extent of the duties of the trustee and is a form of an implied trust—one that arises from what the parties did, not from what they said. *Hereford Land Co.*, 387 S.W.2d at 775. A resulting trust arises not from an agreement between the parties but as a matter of law. *Equitable Trust Co. v. Roland*, 644 S.W.2d 46, 51 (Tex. App.—San Antonio 1982, no writ).

Creation of Resulting Trust: A resulting trust can be created in several ways. First, it can arise if the purchase money for property is paid by one person but legal title is

placed in another. *See Crume v. Smith*, 620 S.W.2d 212 (Tex. App.—Tyler 1981, no writ). Specifically, a resulting trust arises by operation of law if title is conveyed to one person but the purchase price or a portion thereof is paid by another. The parties are presumed to have intended that the grantee hold title to the use of the party who paid the purchase price and whom equity deems to be the true owner. The trust arises out of the transaction and must arise at the time title passes. *Cohrs v. Scott*, 338 S.W.2d 127, 130 (Tex. 1960). There can be no purchase-money resulting trust if there is no showing that a party seeking to be the beneficiary of such a trust paid any consideration for the purchase of the property. *Dorbandt v. Bailey*, 453 S.W.2d 205, 208–09 (Tex. App.—Tyler 1970, writ ref'd n.r.e.).

A resulting trust can arise if property is taken in trust for some special purpose that later fails or is frustrated; the law will imply a trust for the equitable owner of the property, rather than the legal titleholder. A resulting trust must arise from the transaction itself and at the very time the deed is taken and legal title vested in the grantee. *Uriarte v. Petro*, 606 S.W.2d 22, 24–25 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

The rule that a purchase-money resulting trust must arise at the time of passage of title to the resulting trustee refers to the passage of the legal title, as distinguished from the equitable title. As long as the purchase price of the land remains unpaid, the purchaser has only an equitable right with regard to the land contract; the purchaser obtains equitable title only when he has fully performed under the contract. *Atkins v. Carson*, 467 S.W.2d 495, 500 (Tex. App.—San Antonio 1971, writ ref'd n.r.e.).

A resulting trust can also arise if a grantor, without consideration, conveys property to a grantee under circumstances that do not constitute a gift. Under such circumstances, equity presumes an intention of the parties that the beneficial title is to remain in the grantor and that the grantee holds the property for the grantor's benefit. *Murphy v. Johnson*, 439 S.W.2d 440, 444 (Tex. App.—Houston [1st Dist.] 1969, no writ); *Hereford Land Co.*, 387 S.W.2d at 775. However, a presumption of gift arises in such a situation if the conveyance is by a parent to a child or similar grantee. *See Somer v. Bogart*, 749 S.W.2d 202, 204 (Tex. App.—Dallas), *writ denied per curiam*, 762 S.W.2d 577 (Tex. 1988).

A trust results in favor of the community if property is purchased with community funds and title is taken in the name of one spouse only or in the name of some third person. *Miller v. Miller*, 285 S.W. 837 (Tex. App.—San Antonio 1926, writ dism'd w.o.j.).

If separate funds of one spouse are used to purchase property in the other spouse's name only, a resulting trust arises, *Ford v. Simpson*, 568 S.W.2d 468, 470 (Tex. App.—Waco 1978, no writ), absent some agreement to the contrary.

Creation of Constructive Trust: In contrast, a constructive trust is implied irrespective of, and even contrary to, any implied intention of the parties. *Mills*, 210 S.W.2d at 987; *Davis*, 754 S.W.2d at 387. A constructive trust is imposed by law because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. *Omohundro v. Matthews*, 341 S.W.2d 401, 405 (Tex. 1960); *Davis*, 754 S.W.2d at 387. The equitable remedy of constructive trust is broad and flexible. Because it is an equitable remedy, a court has discretion whether to impose a constructive trust. *Hoggett v. Brown*, 971 S.W.2d 472, 494 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

A constructive trust arises "where a conveyance is induced on the agreement of a fiduciary or confidant to hold in trust for a reconveyance or other purpose, where the fiduciary or confidential relationship is one upon which the grantor justifiably can and does rely and where the agreement is breached." *Mills*, 210 S.W.2d at 988. Because the breach of the agreement is an abuse of the confidence, it is not necessary to show fraud or intent not to perform the agreement when made. The tendency of the courts is to construe the term *confidence* or *confidential relationship* liberally in favor of the confider and against the confidant, for the purpose of raising a constructive trust on a violation or betrayal thereof. A parent and child, grandparent and child, or brother and sister relationship is not intrinsically one of confidence but, under certain circumstances, involves a confidence the abuse of which gives rise to a constructive trust in accordance with the terms of an agreement. *Mills*, 210 S.W.2d at 988.

Statute of Frauds and Burden of Proof: The statute of frauds is not a barrier to the use of parol evidence to establish a purchase-money resulting trust. *Atkins*, 467 S.W.2d at 500.

The burden of proof rests on the party who pleads a resulting trust. Proof of a resulting or constructive trust must be clear, certain, and conclusive. *Uriarte*, 606 S.W.2d at 24. If a transfer of property is made to one person and another person seeks to enforce a resulting trust in his favor on the ground that he paid the purchase price, the person alleging the resulting trust has the burden of proving by clear and convincing evidence that he paid the purchase price. *Carson v. White*, 456 S.W.2d 212, 215 (Tex. App.—San Antonio 1970, writ ref'd n.r.e.).

Statute of Limitations: The statute of limitations begins to run only from the date of repudiation by the trustee. *See Sohio Petroleum Co. v. Jurek*, 248 S.W.2d 294, 297 (Tex. App.—Fort Worth 1952, writ ref'd n.r.e.). A beneficiary of a resulting trust is not barred from enforcing the trust merely by the lapse of time. It is only when the trustee under a resulting trust repudiates the trust to the beneficiary's knowledge that the beneficiary may be barred by laches from enforcing the trust. *Atkins*, 467 S.W.2d at 501.

If the trustee of a resulting trust in breach of the trust transfers trust property to a bona fide purchaser, however, the transferee takes the property free of the resulting trust. *Equitable Trust*, 644 S.W.2d at 52.

§ 3.76 Breach-of-Contract and Rescission Claims

Generally, in Texas, courts interpret premarital agreements like other written contracts. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d 119, 122 (Tex. 2018). A party who entered into a premarital agreement or other property agreement may sue for breach of contract against the spouse if the spouse fails to satisfy the terms of the agreement. *See In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 123.

A party may also seek rescission of the agreement if the agreement provides that a breach of a term would nullify the entire agreement and result in property distribution under the normal rules. *See In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 123–24. Rescission is not a separate cause of action; it "is an equitable remedy that extinguishes legally valid contracts that must be set aside because of fraud, mistake, or other reasons in order to avoid unjust enrichment." *In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 125 (J. Lehrman concurring, quoting *Cantu v. Guerra & Moore, Ltd.*, 328 S.W.3d 1, 8 (Tex. App.—San Antonio 2009, no pet.)). Rescission is typically available as a substitute for monetary damages when such damages would be inadequate. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 125 (J. Lehrman concurring, citing *Lauret v. Meritage Homes of Texas, LLC*, 455 S.W.3d 695, 700 (Tex. App.—Austin 2014, no pet.)). A petition for rescission of the agreement can trigger penalty clauses in an agreement set up to discourage a party from seeking to invalidate the agreement, even if pleaded as alternative relief and even if the other party has breached the contract. *See In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 124–25. Texas law disfavors equitable exceptions to the enforcement of contracts as written. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 124. Courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 124.

[Sections 3.77 through 3.80 are reserved for expansion.]

VI. Intervenor's Pleadings

§ 3.81 Intervention Generally

Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party. Tex. R. Civ. P. 60. Filing, notice, and service on other parties are controlled by the general provisions in rules 21 and 21a.

§ 3.82 Conservatorship

Although a grandparent or other person may not file an original suit requesting possessory conservatorship, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit affecting the parent-child relationship filed by a person authorized to do so under Family Code chapter 102 if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 102.004(b). Intervention in a suit affecting the parent-child relationship is discussed in section 44.8 in this manual. For discussion of who may file an original suit, see chapter 40.

§ 3.83 Attorney's Fees

An attorney may seek to recover attorney's fees by intervening in the title 1 or title 5 suit. See section 20.32 in this manual.

§ 3.84 General Creditor

Third parties, creditors, or other persons asserting a claim against the petitioner or the respondent may intervene in the suit. *See* Tex. R. Civ. P. 60.

[Sections 3.85 through 3.90 are reserved for expansion.]

VII. Useful Websites

§ 3.91 Useful Websites

The following website contains information relating to the topic of this chapter:

State-by-state guide to taping phone calls and in-person conversations (§ 3.73)
www.rcfp.org/reporters-recording-guide/state-state-guide

Chapter 4

Divorce—Temporary Orders

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Chapter 4

Divorce—Temporary Orders

§ 4.1 Temporary Orders Generally

If the domicile and residency requirements are not met, any temporary orders the court renders will fail an appellate challenge. Section 6.301 of the Texas Family Code provides that a suit for divorce may not be maintained in Texas unless at the time the suit is filed either the petitioner or the respondent has been (1) a domiciliary of Texas for the preceding six-month period and (2) a resident of the county in which the suit is filed for the preceding ninety-day period. *See* Tex. Fam. Code § 6.301.

Numerous courts have held that Code section 6.301 is not jurisdictional, but it controls a petitioner's right to sue for divorce; in other words, it is a mandatory requirement that cannot be waived. *In re Paul*, No. 10-16-00004-CV, 2016 WL 2609599, at *2 (Tex. App.—Waco May 5, 2016, orig. proceeding) (mem. op.). Because section 6.301 is mandatory and cannot be waived, if a court abuses its discretion in determining that the ninety-day residency requirement was met, any judgment, including temporary orders, the court renders would eventually be reversed. To avoid the waste of public and private resources invested into the proceedings, an appellate court may grant a petition for mandamus that effectively vacates all the trial court's findings and temporary orders. *See In re Paul*, 2016 WL 2609599, at *4.

Property and Parties: During the pendency of a suit for divorce, the parties may request many types of relief relating to the property of the parties and protection of the parties from the court, and the court may grant such relief as deemed equitable and necessary. On the motion of a party or on the court's own motion after notice and hearing, the court may render an appropriate order, including:

1. Temporary injunctions for the preservation of assets and protection of the parties.
2. Temporary orders for spousal support.
3. Temporary orders for the payment of community debt.
4. Orders for interim attorney's fees and expenses.

5. Discovery orders and an order setting the deadline for the filing of the parties' sworn inventories.

6. Orders for appraisal of assets.

See Tex. Fam. Code § 6.502(a).

Children: In a suit affecting the parent-child relationship, the court may make or modify a temporary order for the safety and welfare of the child, including orders—

1. for the temporary conservatorship of the child,

2. for the temporary support of the child,

3. restraining a party from disturbing the peace of the child or another party,

4. prohibiting a person from removing the child beyond a geographical area identified by the court, or

5. for payment of reasonable attorney's fees and expenses.

Tex. Fam. Code § 105.001(a).

In addition, the court may make orders for—

1. psychological evaluation of the parties, relative to the issues of conservatorship and possession of the children (*see* Tex. R. Civ. P. 204.4);

2. preparation of a child custody evaluation relative to the issues of conservatorship of, possession of, and access to the children (*see* Tex. Fam. Code § 107.103); and

3. appointments of representatives for children in a conservatorship dispute (*see* Tex. Fam. Code § 107.001 *et seq.*).

An order may not be entered for temporary conservatorship of a child (except in an emergency order sought by a governmental entity under chapter 262), for temporary support of a child, or for payment of reasonable attorney's fees and expenses, except after notice and hearing. Tex. Fam. Code § 105.001(b), (h). Absent a finding supported by evidence that the safety and welfare of a child will be significantly impaired by the appointment of a parent as the child's managing conservator, the parent's decision regarding whether the child will have any contact with third parties is a fundamental right of a parent, and it is unconstitutional for the trial court to enter temporary orders appointing third parties as temporary possessory conservators. *In re Aubin*, 29 S.W.3d 199, 203–04 (Tex. App.—Beaumont 2000, orig. proceeding).

A temporary order in a suit affecting the parent-child relationship rendered in accordance with Family Code section 105.001 is not required to include a temporary parenting plan. The court may not require the submission of a temporary parenting plan in any case or by local rule or practice. Tex. Fam. Code § 153.602.

Child Custody Evaluation: In a suit affecting the parent-child relationship, the court may order the preparation of a child custody evaluation regarding (1) the circumstances and conditions of the child, a party to the suit, and, if appropriate, the residence of any person requesting conservatorship of, possession of, or access to the child and (2) any issue or question relating to the suit at the request of the court before or during the evaluation process. Tex. Fam. Code § 107.103(a).

Child custody evaluations are discussed in section 40.19 in this manual.

Parent Education and Family Stabilization Course: In a suit affecting the parent-child relationship, the court may order the parties to attend a parent education and family stabilization course if the court determines that the order is in the best interest of the child. Tex. Fam. Code § 105.009(a). For additional information on this topic, see section 40.24 in this manual.

Counseling: While a divorce suit is pending, the court may, in its discretion, direct the parties to counsel with a person named by the court. Tex. Fam. Code § 6.505(a). If the parties ordered to counseling are the parents of a child under eighteen years of age, the counseling shall include counseling on issues that confront children who are the subject of a suit affecting the parent-child relationship. Tex. Fam. Code § 6.505(e).

Mental Health Evaluation: Additionally a party may request mental health evaluations of the parties, relative to the issues of conservatorship and access to children. *See* Tex. R. Civ. P. 204.4. For additional information on discovery, see chapter 5 of this manual.

Appointments in Suits Affecting the Parent-Child Relationship: In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint one of the following: an amicus attorney, an attorney ad litem, or a guardian ad litem. Tex. Fam. Code § 107.021(a). For additional information on such appointments, see chapter 13 of this manual.

Appeal of Temporary Orders: An order issued under Family Code chapter 6, subchapter F, except an order appointing a receiver, is not subject to interlocutory appeal.

Tex. Fam. Code § 6.507. Temporary orders in suits affecting the parent-child relationship entered under section 105.001 are not subject to interlocutory appeal. Tex. Fam. Code § 105.001(e). Matters relating to receiverships and injunctions against third parties have special rules and, in certain instances, can be appealed. *See Querner v. Querner*, 668 S.W.2d 801, 802 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (per curiam). Since temporary orders are not subject to an interlocutory appeal, mandamus is an appropriate remedy when a court abuses its discretion. *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (orig. proceeding) (per curiam); *In re Cooper*, 333 S.W.3d 656 (Tex. App.—Dallas 2009, orig, proceeding); *In re Lemons*, 47 S.W.3d 202, 203–04 (Tex. App.—Beaumont 2001, orig. proceeding) (per curiam). For additional information on mandamus issues, see chapter 27 of this manual.

Transfer: During the transfer of a suit affecting the parent-child relationship from a court with continuing, exclusive jurisdiction, the transferring court retains jurisdiction to render temporary orders. Jurisdiction terminates when the transferee court dockets the case. Tex. Fam. Code § 155.005; *see also Bigham v. Dempster*, 901 S.W.2d 424, 430 (Tex. 1995) (orig. proceeding). The definition of "docketing" should be consistent with the purpose of expediting the transfer process. A transfer case is "docketed" when the traditional legal meaning of the event has occurred, rather than when all certified document copies have been ministerially sent (expressly by the clerk, not someone else). The jurisdiction of the court does not turn on whether, or with what diligence, a clerk performs a ministerial duty to forward court documents. *Bigham*, 901 S.W.2d at 430–31.

Stay for Military Service: A stay may be granted under certain circumstances to a party who is in military service or has separated from service within ninety days. See the discussion at section 19.4 in this manual.

§ 4.2 Temporary Restraining Orders and Temporary Injunctions

After a suit for divorce is filed, on the motion of a party or on the court's own motion, the court may grant a temporary restraining order without notice to the adverse party for the preservation of the property and for the protection of the parties as necessary. Tex. Fam. Code § 6.501(a).

A temporary restraining order may not include a provision concerning a requirement, appointment, award, or other order listed in section 64.104 of the Texas Civil Practice and Remedies Code (concerning receiverships) *or* include a provision that excludes a spouse from occupying the residence where that spouse is living (except as provided in

a protective order under title 4), prohibits a party from spending funds for reasonable and necessary living expenses, or prohibits a party from engaging in acts reasonable and necessary to conduct that party's usual business and occupation. Tex. Fam. Code § 6.501(b). Only in the context of a temporary ex parte protective order under Family Code section 83.006 may the court exclude a spouse from the marital residence. *See* Tex. Fam. Code § 83.006. For additional information about protective orders, see chapter 17 of this manual.

COMMENT: Although not mandated by statute, many courts have local rules requiring that restraining orders be mutual, restraining both the petitioner and the respondent from the enumerated acts pending a hearing. Because these requirements vary by county, and even by court within the same county, the local rules should be checked before a temporary restraining order is requested.

A temporary restraining order or temporary injunction may be granted in a divorce case without an affidavit or verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result before notice and hearing. Tex. Fam. Code § 6.503(a)(1).

Temporary restraining orders may likewise be issued without notice and hearing in suits affecting the parent-child relationship restraining any party from disturbing the peace of the child or another party or prohibiting a person from removing the child beyond a geographical area identified by the court. Tex. Fam. Code § 105.001(a)(3), (a)(4), (b).

A temporary restraining order or temporary injunction need not define the injury, state why it is irreparable, state why the order was granted without notice, or include an order setting the cause for trial on the merits with respect to the ultimate relief sought and in most situations may be granted without an affidavit or verified pleading. Tex. Fam. Code §§ 6.503(a), 105.001(b). However, a verified pleading or an affidavit in accordance with the Texas Rules of Civil Procedure is required to obtain an order attaching the body of a child, taking a child into the possession of the court or of a person designated by the court, or excluding a parent from possession of or access to a child. Tex. Fam. Code § 105.001(c). A parent's rights to the companionship, care, custody, and management of a child are constitutional interests far more precious than any property right, and the trial court must strictly comply with the Family Code when restricting a parent's access to the child. *In re Barrera*, No. 03-18-00271-CV, 2018 WL 1916023, at *2 (Tex. App.—Austin Apr. 23, 2018, orig. proceeding) (mem. op.).

A typical temporary injunction can result in a criminal violation of federal law by a person subject to the injunction who possesses firearms or ammunition. If applicable, the federal law makes it unlawful for the person to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(g). The statute applies to a person who is subject to a court order that—

1. was issued after a hearing of which the person received actual notice and at which the person had an opportunity to participate;

2. restrains the person from harassing, stalking, or threatening an intimate partner of the person or a child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

3. either includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child *or* by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

18 U.S.C. § 922(g)(8).

While a suit for dissolution of a marriage is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may render an appropriate order, including the granting of a temporary injunction for the preservation of the property and protection of the parties as deemed necessary and equitable, including prohibiting an act described in Family Code section 6.501(a). Tex. Fam. Code § 6.502(a)(9). Section 6.501(a), dealing with temporary restraining orders in divorce proceedings, authorizes orders prohibiting one or both parties from threatening the other, by telephone or in writing, to take unlawful action against any person, intending by this action to annoy or alarm the other; intentionally, knowingly, or recklessly causing bodily injury to the other or to a child of either party; or threatening the other or a child of either party with imminent bodily injury. Tex. Fam. Code § 6.501(a)(2), (a)(4), (a)(5). The federal firearms and ammunition possession prohibition can apply to a person who is the subject of a Texas temporary injunction including any of those prohibitions. *United States v. Emerson*, 270 F.3d 203, 263–64 (5th Cir. 2001). The temporary injunction must still meet the standards of section 922(g)(8). Section 922(g)(8)(A) requires an actual hearing with prior notice and an opportunity to participate, and section 922(g)(8)(C)(ii) requires that the order "explicitly" prohibit the use (actual, threatened,

or attempted) of physical force that would reasonably be expected to cause bodily injury. *Emerson*, 270 F.3d at 261–62. Texas law regarding these temporary injunctions meets the general minimum standards for the application of section 922(g)(8)(C)(ii). *Emerson*, 270 F.3d at 262.

A temporary injunction prohibiting allegedly defamatory speech is an unconstitutional prior restraint. *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (per curiam). Although a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint on free speech, an injunction prohibiting future speech based on that adjudication is an infringement on free-speech rights. *Kinney v. Barnes*, 443 S.W.3d 87, 101 (Tex. 2014).

A court may not prohibit a person from executing a new will or a codicil to an existing will or from revoking an existing will or codicil in whole or in part. Any part of a court order that purports to do so is void. Tex. Est. Code § 253.001.

§ 4.3 Extension and Expiration of Temporary Restraining Order

Every temporary restraining order granted without notice shall expire, by its terms, within such time after signing, not to exceed fourteen days, as the court fixes. Before the temporary restraining order expires, the court for good cause shown may extend the order for a like period. Also, if the party against whom the order is directed consents, the order may be extended for a longer period. The reasons for any extension must be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. Tex. R. Civ. P. 680. Thus, if service on the respondent or the person sought to be restrained is not had within fourteen days of the date of the signing of the restraining order, the order will ordinarily expire by operation of law, unless the court has fixed an earlier date for its expiration.

§ 4.4 Hearing on Temporary Injunction

If a temporary restraining order is granted without notice, the application for a temporary injunction shall be set for a hearing at the earliest possible date and takes precedence over all matters except older matters of the same character. Tex. R. Civ. P. 680.

Every restraining order must include an order setting a certain date for hearing on the temporary or permanent injunction sought. When the application for a temporary injunction comes on for a hearing, the party who obtained the restraining order shall

proceed with the application for temporary injunction and, if he does not do so, the court will dissolve the temporary restraining order. Tex. R. Civ. P. 680.

§ 4.5 Dissolution or Modification of Temporary Restraining Order

On two days' notice to the party who obtained the temporary restraining order without notice (or on such shorter notice to that party as the court may prescribe), the adverse party may appear and move for dissolution or modification of the temporary restraining order. In that event, the court will hear and determine the motion as expeditiously as the ends of justice require. Tex. R. Civ. P. 680.

§ 4.6 Form and Scope of Injunction or Restraining Order

Every order granting an injunction and every restraining order—

1. must state the order is necessary and equitable (*see* Tex. Fam. Code §§ 6.501, 6.502);
2. must set forth the reasons for its issuance;
3. must be specific in its terms;
4. must describe in reasonable detail (not by reference to the complaint or other document) the act or acts sought to be restrained; and
5. is binding only on the parties to the action; on their officers, agents, servants, employees, and attorneys; and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Tex. R. Civ. P. 683.

Every temporary restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought. Tex. R. Civ. P. 680. Every order granting a temporary injunction must contain an order setting the cause for trial on the merits with respect to the ultimate relief sought. Tex. R. Civ. P. 683. However, the Family Code provides that temporary injunctions issued under section 105.001 or sections 6.501 through 6.507 need not include an order setting the cause for trial on the merits with respect to the ultimate relief requested. *See* Tex. Fam. Code §§ 6.503(a)(2)(C), 105.001(b)(3).

§ 4.7 Bond

Before the issuance of a temporary restraining order or temporary injunction, the applicant ordinarily must execute and file with the clerk a bond to the adverse party. Tex. R. Civ. P. 684.

In a suit for divorce, however, the court may dispense with the issuance of a bond between the spouses in connection with temporary orders for the protection of the parties and their property. Tex. Fam. Code § 6.503(b); Tex. R. Civ. P. 693a.

The court also may dispense with the necessity of a bond in connection with temporary orders in behalf of the child. Tex. Fam. Code § 105.001(d).

The Texas Family Code does *not* create a statutory exception to the bond requirement for nonparties to a family law case as it does for parties pursuant to Code sections 6.503(b) and 105.001(d).

§ 4.8 Contempt Punishment for Disobedience

The violation of any temporary restraining order, temporary injunction, or other temporary order is punishable as contempt. Tex. Fam. Code §§ 6.506, 105.001(f). However, use of the phrases "intent to obstruct the authority of the Court" and "in a manner that the Court deems just and right" in a temporary order stated in the exact terms of section 6.501(a)(6) (formerly section 3.58(a)(6)) was found too vague to support enforcement by contempt. *Ex parte Higginbotham*, 768 S.W.2d 4, 5 (Tex. App.—Fort Worth 1989, orig. proceeding).

See chapters 31 through 34 of this manual for discussions of contempt powers and procedures.

§ 4.9 Temporary Support of Spouse

While a suit for divorce is pending, on the motion of a party or on the court's own motion and after notice and hearing, the court may order payments to be made for the support of either spouse until a final decree is entered, including pending appeal. Tex. Fam. Code §§ 6.502(a)(2), 6.709(a)(1). *See generally Herschberg v. Herschberg*, 994 S.W.2d 273 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.); *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App.—Texarkana 1996, writ denied). The temporary support order must be based on evidence that such support is necessary and equitable. *Ex parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993) (orig. proceeding). However, the

trustee of a spendthrift trust may not be ordered to make mandatory distributions to the spouse of a beneficiary as temporary spousal support. *In re BancorpSouth Bank*, No. 05-14-00294-CV, 2014 WL 1477746, at *3 (Tex. App.—Dallas Apr. 14, 2014, orig. proceeding) (mem. op.).

§ 4.10 Transfer of Property and Incurring of Debt Pending Decree

A court may grant temporary restraining orders or temporary injunctions prohibiting a party from transferring property of either or both parties. Tex. Fam. Code §§ 6.501(a)(6), 6.502(a)(9).

A transfer of real or personal community property or a debt incurred by a spouse while a divorce suit is pending that subjects the other spouse or the community property to liability is void with respect to the other spouse if the transfer was made or the debt was incurred with the intent to injure the rights of the other spouse. Tex. Fam. Code § 6.707(a). A transfer or debt is not void if the person dealing with the transferor or debtor spouse did not have notice of the intent to injure the rights of the other spouse. Tex. Fam. Code § 6.707(b); *see Thomas v. Casale*, 924 S.W.2d 433, 437–38 (Tex. App.—Fort Worth 1996, writ denied) (wife did not establish that husband's paramour knew about husband's intent to defraud community estate).

§ 4.11 Inventory and Appraisement

While a divorce suit is pending and on a party's motion or on the court's own motion after notice and hearing, the court may render an order requiring each party to file a sworn inventory and appraisement of the real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities. Tex. Fam. Code § 6.502(a)(1). See chapter 7 of this manual for a discussion of inventory and appraisement.

§ 4.12 Interim Attorney's Fees and Expenses

While a suit for divorce is pending, on the motion of a party or on the court's own motion after notice and hearing, the court may order payment of reasonable attorney's fees and expenses. Tex. Fam. Code §§ 6.502(a)(4), 105.001(a)(5). The court must give notice and an opportunity to participate in an adversarial hearing before awarding interim fees against such party. *Post v. Garza*, 867 S.W.2d 88, 90 (Tex. App.—Corpus Christi–Edinburg 1993, orig. proceeding). The trial court has broad, though not unlim-

ited, discretion in making temporary orders for attorney's fees during the course of divorce proceedings, and the trial court's order will not be disturbed absent an abuse of that discretion. *Herschberg v. Herschberg*, 994 S.W.2d 273, 277–78 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.).

Payment of the interim attorney's fees and expenses is enforceable by contempt and by imprisonment if the fees are characterized as spousal or child support. Tex. Fam. Code §§ 6.506, 105.001(f); *In re Bielefeld*, 143 S.W.3d 924, 928–29 (Tex. App.—Fort Worth 2004, orig. proceeding). The procedure for enforcement of an order by a motion for contempt is described in chapter 33 of this manual.

In *Baluch v. O'Donnell*, 763 S.W.2d 8, 10–11 (Tex. App.—Dallas 1988, orig. proceeding), the trial court was directed to set aside its order for sanctions under Tex. R. Civ. P. 215, entered for violation of an order to pay interim attorney's fees that were unrelated to discovery. *Baluch* was found inapplicable, however, in *Shirley v. Montgomery*, 768 S.W.2d 430, 433 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding), in which payment had been ordered made to the child's guardian ad litem as security for costs and in which the evidence showed that the order was to allow the ad litem to conduct discovery. In *TransAmerican Natural Gas Corp. v. Mancias*, 877 S.W.2d 840, 844 (Tex. App.—Corpus Christi–Edinburg 1994, orig. proceeding), the court interpreted Texas Rule of Civil Procedure 143 to apply only to costs already accrued and disallowed a deposit for costs to be accrued in the future. In *Saxton v. Daggett*, 864 S.W.2d 729, 734–36 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding), the court discussed sanctions imposed for failure to pay interim attorney's fees.

§ 4.13 Other Temporary Orders

For a discussion of other items of ancillary relief that may be sought, through the appointment of a master in chancery, an auditor, a receiver, or a mental health evaluator, see chapter 8 of this manual.

§ 4.14 Associate Judge

The judge of a court having jurisdiction of suits under title 1, 4, or 5 or chapter 45 of the Family Code may appoint a full-time or part-time associate judge if the commissioners court of a county in which the court has jurisdiction has authorized employment of an associate judge. Tex. Fam. Code § 201.001(a). The judge may refer to the associate judge any aspect of a suit involving a matter in the court's jurisdiction under title 1, 4,

or 5 or chapter 45, including any matter ancillary to the suit. Tex. Fam. Code § 201.005(a).

Except as limited by the order of referral, an associate judge has the power to render and sign a temporary order, and such an order constitutes an order of the referring court. Tex. Fam. Code § 201.007(a), (c).

Hearing before Judge: Any party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request not later than the third working day after the date the party receives notice of the substance of (1) the associate judge's report or (2) the rendering of the temporary order, if the request concerns a temporary order rendered by an associate judge. Tex. Fam. Code § 201.015(a). In calculating the period, the first day is excluded and the last day is included. *See* Tex. Gov't Code § 311.014; *Peacock v. Humble*, 933 S.W.2d 341, 342 (Tex. App.—Austin 1996, orig. proceeding) (per curiam).

Caveat: Tex. Fam. Code § 201.015(a) does not apply if the case is heard by a master in a court designated under Tex. Gov't Code § 23.001 as a juvenile court. The Government Code does not provide for a mandatory de novo hearing of a master's recommendation. *In re Smith*, 260 S.W.3d 568 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

A request for a de novo hearing must specify the issues that will be presented to the referring court. Tex. Fam. Code § 201.015(b). Notice must be given to opposing counsel. Tex. Fam. Code § 201.015(d). The referring court, after notice to the parties, must hold the de novo hearing within thirty days of the filing of the initial request. Tex. Fam. Code § 201.015(f). However, a referring court's failure to hold a de novo hearing within thirty days, as required by the Family Code, does not deprive the referring court of jurisdiction. *See Lopez v. Lopez*, 995 S.W.2d 896, 897 (Tex. App.—El Paso 1999, no pet.).

Pending a de novo hearing before the referring court, a proposed order of the associate judge is in full force and effect and is enforceable as an order of the referring court, except for an order providing for the appointment of a receiver. Tex. Fam. Code § 201.013(a). Section 201.013(c) concerns orders by an associate judge for the temporary detention or incarceration of a witness or party. *See* Tex. Fam. Code § 201.013(c).

§ 4.15 Motion to Modify Temporary Orders

A motion to modify temporary orders may be filed at any time during the pendency of a suit. *See* Tex. Fam. Code §§ 6.501(a), 6.502(a), 6.505(a), 105.001(a). Unless presented during a hearing or trial, any pleading, plea, motion, or application to the court for an order, whether in the form of a motion, plea, or other form of request, shall be filed with the court clerk in writing, shall state the grounds therefor, shall set forth the relief or order sought, shall be at the same time served on all other parties, and shall be noted on the court's docket. An application to the court for an order and notice of any hearing on the request that is not presented during a hearing or trial shall be served on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by the Texas Rules of Civil Procedure or shortened by the court. Tex. R. Civ. P. 21(b).

Pursuant to section 105.001(a) of the Family Code, before modifying a temporary order, a court must consider whether the requested modification is necessary for "the safety and welfare" of the child. *In re McPeak*, 525 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (citing *In re Casanova*, No. 05-14-01166-CV, 2014 WL 6486127, at *3 (Tex. App.—Dallas Nov. 20, 2014, orig. proceeding) (mem. op.)). A party who seeks to modify *temporary* orders, not *final* orders, is not required to file an affidavit that complies with Family Code section 156.102, as section 156.102 applies only to a modification of final orders. *McPeak*, 525 S.W.3d at 314.

COMMENT: Some courts greatly restrict the ability to modify temporary orders, requiring affidavits to support a request before granting a hearing. Before filing a motion to modify temporary orders, the attorney should check the local rules of the county and the policy of the particular court.

§ 4.16 Motion to Extend Temporary Orders

A temporary order may be extended on written motion of any party. *See* Tex. Fam. Code §§ 6.501(a), 6.502(a), 105.001(a). The most common request for extension of temporary orders is to extend financial support beyond the period originally specified by the court order.

If the request for an extension pertains to a restraining order or injunction, the Texas Rules of Civil Procedure generally apply. *See* Tex. R. Civ. P. 680.

§ 4.17 Orders Protecting against Family Violence

On the motion of a party to a suit for divorce, the court may render a protective order as provided by Family Code title 4, subtitle B. Tex. Fam. Code § 6.504. If the application for protective order is filed as a motion in a divorce suit, notice is given in the same manner as in any other motion. Tex. Fam. Code § 82.043(e). Such an order must be a separate document entitled "PROTECTIVE ORDER." Tex. Fam. Code § 85.004. Protective orders are discussed in chapter 17 of this manual.

§ 4.18 Temporary Orders Pending Appeal

In a suit for dissolution of marriage, on the motion of a party or on the court's own motion and after notice and hearing, the court may render a temporary order as considered equitable and necessary for the preservation of the property and for the protection of the parties during an appeal. In addition to other matters, an order may require the support of either spouse, require the payment of reasonable and necessary attorney's fees and expenses, appoint a receiver for the preservation and protection of the parties' property, award one spouse exclusive occupancy of the parties' residence pending the appeal, enjoin a party from dissipating or transferring the property awarded to the other party in the trial court's property division, or suspend the operation of all or part of the property division that is being appealed. Tex. Fam. Code § 6.709(a).

A motion seeking an original temporary order under section 6.709 may be filed before trial and may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(h). The trial court retains jurisdiction to conduct a hearing and sign an original temporary order until the sixtieth day after the date any eligible party has filed a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(i). The trial court retains jurisdiction to modify and enforce a temporary order unless the appellate court, on a proper showing, supersedes the trial court's order. Tex. Fam. Code § 6.709(j).

On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the preservation of the property or for the protection of the parties during the appeal. Tex. Fam. Code § 6.709(k). A party may seek review of the trial court's temporary order by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case, proper assign-

ment in the party's brief, or petition for writ of mandamus. Tex. Fam. Code § 6.709(*l*). A temporary order rendered under section 6.709 is not subject to interlocutory appeal. Tex. Fam. Code § 6.709(m).

A temporary order pending appeal enjoining a party from dissipating or transferring the property awarded to the other party in the trial court's property division may be rendered without the issuance of a bond between the spouses or an affidavit or a verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result. The temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. The temporary order may not prohibit a party's use, transfer, conveyance, or dissipation of the property awarded to the other party in the trial court's property division if the use, transfer, conveyance, or dissipation of the property is for the purpose of suspending the enforcement of the property division that is the subject of the appeal. Tex. Fam. Code § 6.709(b).

A temporary order that suspends the operation of all or part of the property division that is the subject of the appeal may not be rendered unless the trial court takes reasonable steps to ensure that the party awarded property in the trial court's property division is protected from the other party's dissipation or transfer of that property. Tex. Fam. Code § 6.709(c). In considering a party's request to suspend the enforcement of the property division, the trial court shall consider whether any relief granted under section 6.709(a) is adequate to protect the party's interest in the property awarded to the party or the party who was not awarded the property should also be required to provide security for the appeal in addition to any relief granted under section 6.709(a). Tex. Fam. Code § 6.709(d).

If the trial court determines that the party awarded the property can be adequately protected from the other party's dissipation of assets during the appeal only if the other party provides security for the appeal, the trial court shall set the appropriate amount of security, taking into consideration any relief granted under section 6.709(a) and the amount of security that the other party would otherwise have to provide by law if relief under section 6.709(a) was not granted. Tex. Fam. Code § 6.709(e).

In rendering a temporary order that suspends enforcement of all or part of the property division, the trial court may grant any relief under section 6.709(a), in addition to requiring the party who was not awarded the property to post security for that part of the property division to be suspended. The trial court may require that the party who

was not awarded the property post all or only part of the security that would otherwise be required by law. Tex. Fam. Code § 6.709(f).

Section 6.709 does not prevent a party who was not awarded the property from exercising that party's right to suspend the enforcement of the property division as provided by law. Tex. Fam. Code § 6.709(g).

Similarly, the court may make any order necessary to preserve and protect the safety and welfare of a child. In addition to other matters, the court may appoint temporary conservators for the child and provide for possession of the child, make orders for temporary support, enter restraining orders, prohibit a person from removing the child beyond a certain geographical area, require payment of reasonable and necessary attorney's fees and expenses, or suspend the operation of the order or judgment that is being appealed. Tex. Fam. Code § 109.001(a).

A temporary order pending appeal enjoining a party from molesting or disturbing the peace of the child or another party may be rendered without the issuance of a bond between the parties or an affidavit or a verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result. The temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. Tex. Fam. Code § 109.001(b).

A motion seeking an original temporary order under section 109.001 may be filed before trial and may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.001(b–1). The trial court retains jurisdiction to conduct a hearing and sign a temporary order until the sixtieth day after the date any eligible party has filed a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.001(b–2).

The trial court also retains jurisdiction to modify and enforce a temporary order unless the appellate court, on a proper showing, supersedes the court's order. Tex. Fam. Code § 109.001(b–3). On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the safety and welfare of the child. Tex. Fam. Code § 109.001(b–4).

The temporary orders rendered by the trial court pending appeal are not subject to interlocutory appeal. Tex. Fam. Code § 109.001(c). A party may seek review of the trial court's temporary order under section 109.001 by petition for writ of mandamus or proper assignment in the party's brief. Tex. Fam. Code § 109.001(b–5).

Chapter 5
Discovery

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Chapter 5

Discovery

I. Discovery in General

§ 5.1 Forms of Discovery Generally

The permissible forms of discovery are (1) requests for disclosure, (2) requests for production and inspection of documents and tangible things, (3) requests and motions for entry on and examination of real property, (4) interrogatories to a party, (5) requests for admission, (6) oral or written depositions, and (7) motions for mental or physical examinations. Tex. R. Civ. P. 192.1. These forms may be combined in one document and may be taken in any order or sequence. Tex. R. Civ. P. 192.2. The forms of discovery and related procedures are discussed in parts III. through VI. below.

§ 5.2 Discovery Control Plan

A discovery control plan governs all cases. A petitioner must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under level 1, 2, or 3 of rule 190. Tex. R. Civ. P. 190.1.

The initial pleading required by rule 190.1 is merely to notify the court and the other parties of the petitioner's intention and does not determine the applicable discovery level or bind the court or other parties. A petitioner's failure to include this statement is subject to special exception. *See* Tex. R. Civ. P. 190 cmt. 1.

COMMENT: Virtually every family law case except the simplest or the most complex will fall under level 2.

Discovery Control Levels:

Level 1: Level 1 applies to any suit that is governed by the expedited actions process in rule 169 and any divorce action not involving children in which a party pleads that

the value of the marital estate is more than zero but $50,000 or less. Tex. R. Civ. P. 190.2(a)(2). Level 1 rules will not apply if the parties agree that level 2 rules should apply or the court orders a level 3 plan. If the filing of a pleading renders level 1 no longer applicable, the discovery period reopens, and discovery must be completed within the limitations set by level 2 or 3, whichever applies. Tex. R. Civ. P. 190.2(c).

Level 2: Level 2 applies to all other cases except level 3 cases. Tex. R. Civ. P. 190.3(a).

Level 3: Level 3 applies to those cases for which the court orders discovery conducted according to a discovery plan tailored to the circumstances of the specific suit. The court must make such an order on a party's motion and may do so on its own initiative. The parties may submit an agreed order for the court's consideration. The court should act on a party's motion or agreed order as promptly as reasonably possible. Tex. R. Civ. P. 190.4(a).

Discovery Limitations: Level 1 and level 2 cases are subject to discovery limitations provided elsewhere in the rules, as well as to additional limitations (described below) specified in rule 190. Tex. R. Civ. P. 190.2(b), 190.3(b).

A level 3 plan may address any discovery issue or matter listed in rule 166 and may change any limitation on the timing or amount of discovery provided by the discovery rules. The level 1 or level 2 limitations apply unless they are specifically changed in the court-ordered plan. Tex. R. Civ. P. 190.4(b).

Level 1: The discovery period for level 1 begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party. Unless the total time permitted is expanded by agreement or court order, each party may have only six hours in total to examine and cross-examine all witnesses in oral depositions. Each party may serve no more than fifteen interrogatories on any other party. Interrogatories asking only for identification or authentication of specific documents are not included in this fifteen-interrogatory limit. Each discrete subpart of an interrogatory is considered a separate interrogatory. Tex. R. Civ. P. 190.2(b)(1)–(3). A discrete subpart of an interrogatory is counted as a single interrogatory, but not every separate factual inquiry is a discrete subpart. Although not susceptible of precise definition, a discrete subpart is, in general, one that calls for information that is not logically or factually related to the primary interrogatory. Tex. R. Civ. P. 190 cmt. 3. *See In re SWEPI L.P.*, 103 S.W.3d 578, 589 (Tex. App.—San Antonio 2003, orig. proceeding) (no "discrete subparts" found where each question related to particular claim and asked

plaintiff to provide certain details about facts underlying that claim and "subparts" simply identified types of facts defendant would like to have had disclosed so that it could understand parameters of claims and prepare defenses).

Any party may serve on any other party no more than fifteen written requests for production and no more than fifteen written requests for admissions. Each discrete subpart of a request for production or request for admissions is considered a separate request. Tex. R. Civ. P. 190.2(b)(4), (b)(5).

In addition to the content subject to disclosure under Tex. R. Civ. P. 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Such a request for disclosure is not considered a request for production. Tex. R. Civ. P. 190.2(b)(6).

Level 2: Level 2 discovery begins when the suit is filed and, in cases under the Family Code, continues until thirty days before the date set for trial. Each side is limited to fifty hours of oral depositions to examine and cross-examine parties on the opposing side, those parties' experts, and persons subject to those parties' control. Each party may serve no more than twenty-five interrogatories on any other party. Interrogatories asking only for identification or authentication of specific documents are not included in this twenty-five-interrogatory limit. Each discrete subpart of an interrogatory is considered a separate interrogatory. Tex. R. Civ. P. 190.3(b).

Level 3: A level 3 discovery control plan must include a date for trial or for a conference to determine a trial date; a discovery period for the entire case or an appropriate phase of it; appropriate limits on the amount of discovery; and deadlines for joinder, amendments or supplements to pleadings, and designation of expert witnesses. Tex. R. Civ. P. 190.4(b).

Exceptions: Rule 190 discovery limitations do not apply to discovery conducted under rule 202 (before suit) or rule 621a (after judgment), although rule 202 may not be used to circumvent rule 190. Tex. R. Civ. P. 190.6.

Modification of Discovery Control Plan: The court may modify a discovery control plan at any time and must do so when justice requires. Tex. R. Civ. P. 190.5. Rule 190.5(a) and (b) sets out the circumstances under which the court must allow additional discovery.

§ 5.3 Modification of Discovery Procedures

Except where specifically prohibited, the parties may modify the procedures and limitations of the discovery rules by agreement. An agreement of the parties is enforceable if it complies with rule 11 or, as it affects an oral deposition, if it is made a part of the deposition record. The procedures and limitations may also be modified by court order for good cause. Tex. R. Civ. P. 191.1. *See John H. Carney & Associates v. Ahmad*, No. 07-15-00252-CV, 2016 WL 368527 (Tex. App.—Amarillo Jan. 28, 2016, pet. denied) (mem. op.).

§ 5.4 Certificate for Discovery Motions

Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request stating that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and that the effort failed. Tex. R. Civ. P. 191.2. A court may hear a discovery motion or request even if the movant has failed to include a certificate of conference. The failure of a court to require the certificate of conference cannot justify mandamus relief. *Tjernagel v. Roberts*, 928 S.W.2d 297, 300–01 (Tex. App.—Amarillo 1996, orig. proceeding).

§ 5.5 Signature Required

Every disclosure, request for discovery, notice, response, and objection must be signed by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any. If the party is not represented by an attorney, the item must be signed by the party and must show the party's address, telephone number, and fax number, if any. Tex. R. Civ. P. 191.3(a).

The signature on a disclosure certifies that, to the best of the signer's knowledge, information, and belief, which was formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. Tex. R. Civ. P. 191.3(b). The signature on a discovery request, notice, response, or objection certifies that, to the best of the signer's knowledge, information, and belief, which was formed after a reasonable inquiry, the item (1) is consistent with the rules and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; (2) has a good-faith factual basis; (3) is not interposed for an improper purpose; and (4) is not unreasonable

or unduly burdensome or expensive. Tex. R. Civ. P. 191.3(c). If the certification required under rule 191.3 is false without substantial justification, the court may, on motion or on its own initiative, impose on the person who made the certification or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading under chapter 10 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 191.3(e). See section 5.116 below.

A request, notice, response, or objection that is not signed must be stricken unless it is signed promptly after the omission is brought to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed. Tex. R. Civ. P. 191.3(d).

§ 5.6 Filing, Retention, and Service of Discovery Materials

Filing: The following discovery materials must be filed with the court: (1) discovery requests, deposition notices, and subpoenas required to be served on *nonparties*; (2) motions and responses to motions pertaining to discovery matters; and (3) agreements concerning discovery matters, to the extent necessary to comply with rule 11. Tex. R. Civ. P. 191.4(b).

With certain exceptions, the following discovery materials must not be filed: (1) discovery requests, deposition notices, and subpoenas required to be served only on parties; (2) responses and objections to discovery requests and deposition notices; (3) documents and tangible things produced in discovery; and (4) statements prepared under rule 193.3(b) or (d). Tex. R. Civ. P. 191.4(a). However, the court may order discovery materials to be filed, a person may file discovery materials in support of or opposition to a motion or for other use in a court proceeding, and a person may file discovery materials necessary for an appellate proceeding. Tex. R. Civ. P. 191.4(c).

Retention: A person required to serve discovery materials that are not required to be filed must retain the original or an exact copy during pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless the trial court provides otherwise. Tex. R. Civ. P. 191.4(d).

COMMENT: To avoid this requirement, the practitioner should include a provision in the final order excusing each party from the obligation to retain these documents. The forms for final orders in this manual contain this provision as an option. The wise practitioner will want to omit this provision if there is a reasonable possibility of an appeal.

Service: Every disclosure, discovery request, notice, response, and objection that is required to be served on a party or person must be served on all parties of record. Tex. R. Civ. P. 191.5.

§ 5.7 Orders for Protection from Discovery

Motion: A person from whom discovery is sought, and any other person affected by the discovery, may move for an order protecting the person from such discovery. The motion must be brought within the time permitted for response to the subject discovery. A person should not move for protection when an objection to written discovery or assertion of privilege is appropriate, although the motion does not waive the objection or assertion of privilege. A person seeking protection regarding the time or place of discovery must state a reasonable time and place for compliance. A person must comply with any part of a request from which protection is *not* sought unless it would be unreasonable under the circumstances to do so before obtaining a ruling. Tex. R. Civ. P. 192.6(a).

Order: The court may make any order necessary to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, including but not limited to the orders listed in rule 192.6(b). Tex. R. Civ. P. 192.6(b).

COMMENT: Often documents are requested in a family law case, such as a divorce, that are of a highly confidential nature. If there is a concern that documents may cause harm if improperly disclosed to third persons, a confidentiality order may be considered to prevent disclosure. *See* Tex. R. Civ. P. 192.6 (discussed above). If sensitive material will be produced in the trial, it may be preferable to enter into a confidentiality agreement with opposing counsel and to request that the court's file be sealed after trial instead of filing a formal motion for a protective order. *See* Tex. R. Civ. P. 76a. *But see* Tex. R. Civ. P. 76a(1) ("No court order or opinion issued in the adjudication of a case may be sealed."), 76a(2)(a)(3) (other documents filed in action originally arising under Family Code are exempted from requirements of rule 76a). See also forms 5-8 (confidentiality order), 26-24 (motion to seal court records), and 26-25 (order on motion to seal court records) in this manual.

§ 5.8 Discovery from Nonparties

A nonparty for purposes of discovery is defined as a person who is not a party or subject to a party's control. Tex. R. Civ. P. 205.1.

COMMENT: Depending on the facts of the case, it is possible that persons such as a party's employee, private investigator, accountant, stockbroker, expert, etc., would not be considered nonparties for purposes of discovery if they are subject to the party's control.

A party may compel discovery from nonparties without the necessity of a motion or deposition. Tex. R. Civ. P. 205.1, 205.3. A party seeking discovery by subpoena from a nonparty must serve a copy of the form of notice that the rules require for the particular form of discovery. The party must serve this notice on the nonparty and on all other parties. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. Tex. R. Civ. P. 205.2.

A party may compel production of documents and tangible things from a nonparty by serving, a reasonable time before the response is due but no later than thirty days before the end of any applicable discovery period, the required notice and a subpoena compelling production or inspection of documents or tangible things. Tex. R. Civ. P. 205.3(a). A notice to produce documents or tangible things under rule 205.3 must be served at least ten days before the subpoena compelling production is served. Tex. R. Civ. P. 205.2.

The notice must state the person from whom production or inspection is sought, a reasonable time and place for production or inspection, and the items to be produced or inspected. Tex. R. Civ. P. 205.3(b). If a nonparty's health-care records are sought from another nonparty, the nonparty whose records are being sought must be notified of the request. Tex. R. Civ. P. 205.3(c).

The nonparty must respond to the notice and subpoena requesting production in accordance with rule 176.6. Tex. R. Civ. P. 205.3(d). The material obtained must be made available for inspection by any other party on reasonable notice, and copies must be furnished to any party at the requesting party's expense. Tex. R. Civ. P. 205.3(e). The nonparty's cost of producing records must be reimbursed by the party requesting the records from the nonparty. Tex. R. Civ. P. 205.3(f).

COMMENT: The practitioner may send the nonparty a business records affidavit or declaration for its custodian of records to complete and return with the requested records. The practitioner should include a letter asking for the execution of this affidavit or declaration to avoid having to depose the business records custodian or having to compel the testimony of the custodian at trial. In many cases the nonparty will gladly

complete the affidavit or declaration to avoid further involvement in the suit. See form 5-95 in this manual. *See also* Tex. Civ. Prac. & Rem. Code § 22.004 (fees party must pay custodian of records).

The nonparty has standing to seek a protective order under rule 192.6. *See* Tex. R. Civ. P. 192.6; *In re Shell E & P, Inc.*, 179 S.W.3d 125, 130 (Tex. App.—San Antonio 2005, orig. proceeding). See also section 5.7 above.

§ 5.9 Discovery of Customer Records from Financial Institution

To obtain discovery of a record of a financial institution relating to one or more of that institution's customers, the requesting party must comply with section 59.006 of the Texas Finance Code. With some exceptions that generally will not apply to a family lawsuit, section 59.006 is the exclusive method to compel this discovery. Tex. Fin. Code § 59.006(a). Subject to these exceptions, a financial institution is required to produce a record in response to a request only if it is served with the record request not later than the twenty-fourth day before the date that compliance with the record request is required and the requesting party pays the financial institution's reasonable costs of complying with the record request before the institution complies with the request. Tex. Fin. Code § 59.006(b)(1), (b)(2).

If the customer is not a party to the proceeding in which the request was issued, in addition to serving the financial institution with a record request, the requesting party must satisfy the following conditions:

1. The requesting party must give the customer a notice stating the rights of the customer under Finance Code section 59.006(e) and give the customer a copy of the request in the manner and within the time provided by Texas Rule of Civil Procedure 21a.
2. The requesting party must file a certificate of service indicating that the requesting party has given the customer both this notice and a copy of the record request.
3. The requesting party must request the customer's written consent authorizing the financial institution to comply with the record request.

Tex. Fin. Code § 59.006(c).

If the customer is not a party to the proceeding, the financial institution does not have to provide the requested records until the requesting party completes each of these steps

and the financial institution receives the customer's written consent to release the record or the tribunal takes further action based on action initiated by the requesting party under section 59.006(d). Tex. Fin. Code § 59.006(b)(3).

If the customer is not a party to the proceeding and the customer does not execute a written consent on or before the date compliance is required, the requesting party may by written motion seek an in camera inspection of the requested record as its sole means of obtaining access to the requested record. In response to a motion for in camera inspection, the tribunal may inspect the requested record to determine its relevance to the matter before the tribunal. The tribunal may order redaction of portions of the records that the tribunal determines should not be produced and shall enter a protective order preventing the record that it orders produced from being disclosed to a person who is not a party to the proceeding before the tribunal and from being used by a person for any purpose other than resolving the dispute before the tribunal. Tex. Fin. Code § 59.006(d).

A customer that is a party to the proceeding bears the burden of preventing or limiting the financial institution's compliance with a record request subject to section 59.006 by seeking an appropriate remedy, including filing a motion to quash the record request or a motion for a protective order. Any motion filed shall be served on the financial institution and the requesting party before the date that compliance with the request is required. A financial institution is not liable to its customer or another person for disclosure of a record in compliance with section 59.006. Tex. Fin. Code § 59.006(e). An order to quash or for protection or other remedy entered or denied by the tribunal under section 59.006(d) or (e) is not a final order, and an interlocutory appeal may not be taken. Tex. Fin. Code § 59.006(g).

A financial institution may not be required to produce a record under section 59.006 before the later of the twenty-fourth day after the date of receipt of the record request, the fifteenth day after the date of receipt of a customer consent to disclose a record, or the fifteenth day after the date a court orders production of a record after an in camera inspection of a requested record. Tex. Fin. Code § 59.006(f).

§ 5.10 Mandamus as Remedy

A party is entitled to full, fair discovery within a reasonable period of time. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam). Mandamus is available in some circumstances to protect a party against an order compelling a response to a discovery request or to require a trial court to compel a party to

respond. In the discovery context, there are at least three situations in which a remedy by appeal will be inadequate:

1. The appellate court would not be able to cure the trial court's discovery error; for example, the trial court erroneously orders the disclosure of privileged information that will materially affect the rights of the aggrieved party.
2. The party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error.
3. The trial court disallows discovery, and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make the discovery part of the record, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it.

Walker v. Packer, 827 S.W.2d 833, 843–44 (Tex. 1992, orig. proceeding).

If the discovery goes to the heart of the case there is not adequate remedy at law. *See In re Colonial Pipeline*, 968 S.W.2d at 942. Mandamus is the only remedy if a protective order shields the witnesses from deposition and thereby prevents the evidence from being part of the record. *See Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 558 (Tex. 1990) (orig. proceeding). The blanket denial of all discovery from a witness in a civil case, if that witness is also a defendant in a pending criminal case arising out of the same facts and the witness is also expected to testify in the criminal case, is subject to mandamus. *See In re R.R.*, 26 S.W.3d 569, 574 (Tex. App.—Dallas 2000, orig. proceeding). If the trial court fails to rule on discovery objections, the judge is subject to mandamus. *In re Belton*, No. 10-05-00285-CV, 2005 WL 2300366 (Tex. App.—Waco Sept. 25, 2005, orig. proceeding) (per curiam) (mem. op.).

Mandamus is discussed at length in chapter 27 of this manual.

[Sections 5.11 through 5.20 are reserved for expansion.]

II. Scope of Discovery

§ 5.21 Scope of Discovery Generally

Information is subject to discovery if it is not privileged and is relevant to the subject matter of the litigation or appears reasonably calculated to lead to the discovery of

admissible evidence. Tex. R. Civ. P. 192.3(a). Discovery is not limited to what may be admissible at trial. Tex. R. Civ. P. 192.3(a); *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155, 160 (Tex. 1993) (orig. proceeding); *Lindsey v. O'Neill*, 689 S.W.2d 400, 402 (Tex. 1985) (orig. proceeding) (per curiam); *see also* Tex. R. Evid. 401 (definition of "relevant evidence"). The Texas Supreme Court, however, has repeatedly emphasized that discovery may not be used as a fishing expedition. Rather, requests must be reasonably tailored to include only matters relevant to the case. *In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam).

The court should limit the discovery methods permitted by the rules if it determines that the discovery sought is unreasonably cumulative or duplicative or may be obtained from another source that is more convenient, less burdensome, or less expensive, or that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. Tex. R. Civ. P. 192.4. A party resisting discovery may not make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order. *In re Energas Co.*, 63 S.W.3d 50, 54 (Tex. App.—Amarillo 2001, orig. proceeding).

§ 5.22 Documents and Tangible Things

§ 5.22:1 Documents and Tangible Things Generally

A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control. Tex. R. Civ. P. 192.3(b).

"Possession, custody, or control of an item" means that the person either has physical possession of the item or has a right to possession that is equal to or superior to that of the person who has physical possession. Tex. R. Civ. P. 192.7(b); *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *7 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.) (objection that information sought is equally available is invalid objection; discovery request ensures that parties have same basic

documents and allows party to activate automatic authentication rights provided by rule 193.7). A party's mere access to the relevant item does not constitute "physical possession" under this definition if the item is owned or otherwise controlled by someone else. *In re Kuntz*, 124 S.W.3d 179, 184 (Tex. 2003) (orig. proceeding).

§ 5.22:2 Medical Records and Authorizations

Records related to physical, mental, or emotional condition may be admissible under the provisions of rules 509(e)(4) and 510(d)(5) of the Texas Rules of Evidence, as construed by the Texas Supreme Court. *R.K. v. Ramirez*, 887 S.W.2d 836, 842–43 (Tex. 1994) (orig. proceeding). The rules provide that a privilege does not apply to a communication or record relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies on the condition as a part of the party's claim or defense. Tex. R. Evid. 509(e)(4), 510(d)(5). The records sought must be relevant to the condition at issue, and the condition must be relied on as part of a party's claim or defense, "meaning that the condition itself is a fact that carries some legal significance." *R.K.*, 887 S.W.2d at 843. The court must ensure that the need for the information is not outweighed by legitimate privacy interests protected by the privilege; the exception to the privilege does not extend to information about a nonparty patient who is or may be a consulting or testifying expert in the suit. Tex. R. Evid. 509 cmt., 510 cmt. See also section 5.28 below.

The test is not simply whether the condition is relevant, because any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist. *See In re Morgan*, 507 S.W.3d 400, 404 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding). The test is not satisfied if the patient's condition is merely an evidentiary or intermediate issue of fact, rather than an ultimate issue for a claim or defense, or if the condition is merely tangential to a claim rather than central to it. *R.K.*, 887 S.W.2d at 843.

§ 5.22:3 Mental Health Records

Chapter 611 of the Texas Health and Safety Code governs the confidentiality of mental health records and their disclosure. A parent's right of access to a child's psychological records is not absolute. Although Family Code section 153.073 grants a parent who is divorced and who has been named a conservator the same rights of access to a child's psychological records as a parent who is not divorced, this right is subject to the provi-

sions of chapter 611 of the Texas Health and Safety Code. *Abrams v. Jones*, 35 S.W.3d 620, 624 (Tex. 2000).

Communications between a patient and a professional, as well as records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential. Tex. Health & Safety Code § 611.002(a). A "professional" is a person authorized to practice medicine in any state or nation; a person licensed or certified by Texas to diagnose, evaluate, or treat any mental or emotional condition or disorder; or a person the patient reasonably believes is authorized, licensed, or certified as provided by Health and Safety Code section 611.001(2). Tex. Health & Safety Code § 611.001(2). Confidential communications or records may not be disclosed except as provided by Health and Safety Code section 611.004 or 611.0045. Tex. Health & Safety Code § 611.002(b). The privilege of confidentiality may be claimed by—

1. the patient;
2. if acting on the patient's behalf, a person who has the written consent of the patient, a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs;
3. if acting on the patient's behalf, the patient's representative if the patient is deceased; or
4. the professional, on behalf of the patient.

See Tex. Health & Safety Code § 611.003(a); *see also* Tex. Health & Safety Code § 611.004(a)(4), (a)(5).

A professional may disclose confidential information only in the limited circumstances set forth in Health and Safety Code section 611.004. *See* Tex. Health & Safety Code § 611.004. A professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health. Tex. Health & Safety Code § 611.0045(b). A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. This restriction does not apply to, among others, a person who has the written consent of the patient, or a parent if the patient is a minor, if the person is acting on the patient's behalf. Tex. Health & Safety Code § 611.004(d). A mental health professional is not required to provide access to a child's confidential records if a parent who requests them is not acting on behalf of the child. *Abrams*, 35 S.W.3d at 625–26. When a parent *is* acting on behalf of

a child, the question that then arises is whether, under section 611.0045(b), a professional may nevertheless deny access to a portion of a child's records if their release would be harmful to the patient's physical, mental, or emotional health. *Abrams*, 35 S.W.3d at 626.

A person aggrieved by the improper disclosure of or failure to disclose confidential communications or records in violation of Health and Safety Code chapter 611 may petition the district court of the county in which the person resides for appropriate relief, including injunctive relief. A person may petition a district court of Travis County if the person is not a resident of Texas. Tex. Health & Safety Code § 611.005(a). In a suit contesting the denial of access under Health and Safety Code section 611.0045, the burden of proving that the denial was proper is on the professional who denied the access. Tex. Health & Safety Code § 611.005(b); *see also Abrams*, 35 S.W.3d at 627 (citing Health and Safety Code section 611.0045(b)). The aggrieved person also has a civil cause for damages. Tex. Health & Safety Code § 611.005(c). In addition, a parent denied access to a child's records has judicial recourse and may petition a district court for appropriate relief. *Abrams*, 35 S.W.3d at 626–27 (citing Health and Safety Code section 611.0045(a)).

§ 5.22:4 Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104–191, 110 Stat. 1936 (1996), went into effect on April 14, 2001, with compliance required of all health plans by April 14, 2004. *See* 45 C.F.R. § 164.534.

Under HIPAA, a "covered entity" means a health plan, a health-care clearinghouse, and a health-care provider who transmits any health information in electronic form in connection with a transaction covered by 45 C.F.R. subchapter C. "Health-care provider" means a provider of medical or health services and any other person or organization that furnishes, bills, or is paid for health care in the normal course of business. "Health information" means any information, whether oral or recorded in any form or medium, that (1) is created or received by a health-care provider, health plan, public health authority, employer, life insurer, school, university, or health-care clearing house and (2) relates to the past, present, or future physical or mental health or condition of an individual, to the provision of health care to an individual, or to the past, present, or future payment for the provision of health care to an individual. 45 C.F.R. § 160.103.

"Individually identifiable health information" is information that is a subset of health information, including demographic information that is collected from the individual,

(1) that is created or received by a health-care provider, health plan, employer, or health-care clearinghouse; (2) that relates to the past, present, or future physical or mental health of an individual, to the provision of health care to an individual, or to the past, present, or future payment for the provision of health care to an individual; and (3) that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual. "Protected health information" means individually identifiable health information that is transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form or medium. However, protected health information excludes individually identifiable health information in education records covered by the Family Educational Rights and Privacy Act, records described at 20 U.S.C. § 1232g(a)(4)(B)(iv), and employment records held by a covered entity in its role as employer. 45 C.F.R. § 160.103.

45 C.F.R. § 164.508 permits disclosure of protected health information when a covered entity obtains or receives a valid authorization. A valid authorization must contain at least the following core elements:

1. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
2. The name or other specific identification of the person(s) or class of persons authorized to make the requested use or disclosure.
3. The name or other specific identification of the person(s) or class of persons to whom the covered entity may make the requested use or disclosure.
4. A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
5. An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure.
6. The signature of the individual and the date. If the authorization is signed by a personal representative of the individual, a description of the representative's authority to act for the individual must also be provided.

45 C.F.R. § 164.508(c)(1).

The authorization must contain statements adequate to place the individual on notice of (1) the individual's right to revoke the authorization in writing, (2) the ability or inabil-

ity to condition treatment on the authorization if the covered entity is requesting the authorization, and (3) the potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by the rule. 45 C.F.R. § 164.508(c)(2).

The authorization must be written in plain language. 45 C.F.R. § 164.508(c)(3).

A personal representative must attach legal documentation that permits him to act on the patient's behalf. *See* 45 C.F.R. § 164.508(c)(1)(vi).

COMMENT: A personal representative for a child is a parent, a guardian, or someone legally acting as a parent or guardian with authority to make health-care decisions on behalf of the minor. A personal representative for an adult or an emancipated minor is a person with a medical power of attorney or a health-care proxy or who has been given authority under a court order or has been appointed a legal guardian. A patient's lawyer may never be the patient's personal representative for HIPAA privacy purposes.

Generally stated, there are three ways to obtain copies of a person's individually identifiable health information from a covered entity: (1) the patient may personally request the information, (2) the patient may sign an authorization in favor of a third party that contains prescribed statements and information, and (3) the party seeking the information may obtain an order made in a judicial or administrative proceeding pursuant to 45 C.F.R. § 164.512(e).

A covered entity may disclose protected health information (PHI) in the course of any judicial proceeding in response to a court order, provided the covered entity discloses only the PHI expressly authorized by the order. 45 C.F.R. § 164.512(e)(1)(i). A covered entity may also disclose PHI in response to a subpoena, discovery request, or lawful process not accompanied by a court order if the covered entity receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by that party to ensure that the individual who is the subject of the requested PHI has been given notice of the request or that the requesting party has made reasonable efforts to secure a qualified protective order that meets the requirements of 45 C.F.R. section 164.512(e)(1)(v). 45 C.F.R. § 164.512(e)(1)(ii)(A), (e)(1)(ii)(B). "Satisfactory assurance" is defined by the regulations. *See* 45 C.F.R. § 164.512(e)(1)(iii), (e)(1)(iv).

Depending on the severity of the offense, the criminal penalties for wrongful disclosure of individually identifiable health information can range from a fine of $50,000, imprisonment for up to one year, or both to a fine of $250,000, imprisonment for up to ten years, or both. The higher penalties are reserved for offenses committed with the intent

to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm. 42 U.S.C. § 1320d–6.

§ 5.22:5 Substance-Abuse Patient Records

Records of the identity, diagnosis, prognosis, or treatment of any patient that are maintained in connection with the performance of any program or activity relating to substance-abuse education, training, treatment, rehabilitation, or research that is conducted, regulated, or directly or indirectly assisted by any federal department or agency are generally confidential and may be disclosed only for specified purposes. 42 U.S.C. § 290dd–2. Among the means of authorized disclosure are a written consent of the patient and a court order. The content of any record described above may be disclosed in accordance with a prior written consent of the patient but only in accordance with federal regulations. *See* 42 U.S.C. § 290dd–2(b)(1). Records may also be disclosed if authorized by an appropriate order of a court of competent jurisdiction if the order is granted after an application showing good cause. In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. On granting the order, the court, in determining the extent to which any disclosure of all or any part of the record is necessary, shall impose appropriate safeguards against unauthorized disclosure. *See* 42 U.S.C. § 290dd–2(b)(2)(C).

A written consent to a disclosure of substance use disorder patient records covered by the federal regulations must include—

1. the name of the patient;
2. the specific name or general designation of the program, entity, or individual permitted to make the disclosure;
3. how much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed;
4. the name of the individual to whom disclosure is to be made;
5. the purpose of the disclosure;
6. a statement that the consent is subject to revocation at any time except to the extent that the program or person that is permitted to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third-party payer;

7. the date, event, or condition on which the consent will expire if not revoked before. This date, event, or condition must ensure that the consent will last no longer than reasonably necessary to serve the purpose for which it is provided;

8. the signature of the patient and, when required for a patient who is a minor, the signature of an individual authorized to give consent under 42 C.F.R. section 2.14 or, when required for a patient who is incompetent or deceased, the signature of an individual authorized to sign under 42 C.F.R. section 2.15; and

9. the date on which the consent is signed.

42 C.F.R. § 2.31(a).

COMMENT: It may be advisable also to include in the written consent the address, Social Security number, and birth date of the patient, as well as the approximate dates of treatment. The attorney should contact the substance-abuse program administrator before preparing the consent to learn if the program requires any other specific information before it will honor the consent.

A disclosure may not be made on the basis of a consent that (1) has expired; (2) on its face substantially fails to conform to any of the requirements set forth in 42 C.F.R. section 2.31(a); (3) is known to have been revoked; or (4) is known, or through reasonable diligence could be known, by the individual or entity holding the records to be materially false. 42 C.F.R. § 2.31(b).

An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure that is sought. The application may be filed separately or as part of a pending civil action in which the applicant asserts that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of the regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny. 42 C.F.R. § 2.64(a). The patient and the person holding the records from whom disclosure is sought must be given adequate notice in a manner that does not disclose patient identifying information to other persons and an opportunity to file a written response to the application or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order. 42 C.F.R. § 2.64(b). Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers

or in some manner that ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner that meets the written consent requirements of the regulations. The proceeding may include an examination by the judge of the patient records referred to in the application. 42 C.F.R. § 2.64(c). An order under section 2.64 may be entered only if the court determines that good cause exists. To make this determination the court must find that other ways of obtaining the information are not available or would not be effective and that the public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the treatment services. 42 C.F.R. § 2.64(d).

A court order under the regulations may authorize disclosure of confidential communications made by a patient to a program in the course of diagnosis, treatment, or referral for treatment only if (1) the disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties; (2) the disclosure is necessary in connection with the investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one that directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or (3) the disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. 42 C.F.R. § 2.63(a).

An order authorizing a disclosure must (1) limit disclosure to those parts of the patient's record that are essential to fulfill the objective of the order; (2) limit disclosure to those persons whose need for information is the basis for the order; and (3) include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship, and the treatment services (for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered). 42 C.F.R. § 2.64(e). An order of a court of competent jurisdiction entered under 42 C.F.R. part 2, subpart E, to disclose confidential substance-abuse treatment records authorizes only a disclosure or use of patient information that would otherwise be prohibited by 42 U.S.C. section 290dd–2 and the regulations relating to the confidentiality of substance-abuse treatment records. The order does not compel disclosure. A subpoena or similar legal mandate must be issued to compel disclosure. The mandate may be entered at the same time as and accompany an authorizing court order entered under the regulations. 42 C.F.R. § 2.61(a).

Any person who violates any provisions of 42 U.S.C. section 290dd–2 or the regulations relating to the confidentiality of substance-abuse treatment records shall be fined in accordance with title 18 of the U.S. Code. 42 U.S.C. § 290dd–2(f); 42 C.F.R. § 2.3.

§ 5.23 Potential Parties and Witnesses

A party may obtain discovery of the name, address, and telephone number of any potential party. Tex. R. Civ. P. 192.3(i).

The same information may be obtained for persons having knowledge of relevant facts, as well as a brief statement of each such person's connection with the action. A person has knowledge of relevant facts when the person has or may have knowledge of any discoverable matter; the person need not have admissible information or personal knowledge. An expert is a "person with knowledge of relevant facts" only if the knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation. Tex. R. Civ. P. 192.3(c).

A party may obtain discovery of the name, address, and telephone number of any person expected to be called to testify at trial. This discovery does not extend to rebuttal or impeaching witnesses the necessity of whose testimony cannot be reasonably anticipated before trial. Tex. R. Civ. P. 192.3(d).

§ 5.24 Testifying and Consulting Experts

Testifying Experts: A testifying expert is an expert who may be called to testify as an expert witness at trial. Tex. R. Civ. P. 192.7(c).

If a party intends to call an expert at trial, the opposing party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert: (1) the expert's name, address, and telephone number; (2) the subject matter of expected testimony; (3) the facts known by the expert that relate to, or form the basis of, the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, regardless of when and how the factual information was acquired; (4) the mental impressions and opinions of the expert formed or made in connection with the case in which discovery is sought and any methods used to derive them; (5) evidence of bias; (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; and (7) the expert's current resume and

bibliography. Tex. R. Civ. P. 192.3(e). Although rule 192.3(e)(5) permits discovery of bias evidence, a court generally may not require a nonparty witness to produce personal financial records and appointment books for that reason. *See In re Doctors' Hospital of Laredo*, 2 S.W.3d 504, 506–07 (Tex. App.—San Antonio 1999, orig. proceeding).

A testifying expert may be "re-designated" as long as it is not part of a bargain between adversaries to suppress testimony or for some other improper purpose. The party may use the "re-designated" testifying expert as a consulting expert. *In re Doctors' Hospital of Laredo*, 2 S.W.3d at 506.

Consulting Experts: A consulting expert is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial but who is not a testifying expert. Tex. R. Civ. P. 192.7(d). The identity, mental impressions, and opinions of an expert used for consultation only are not discoverable unless the consulting expert's opinions or impressions have been reviewed by a testifying expert. Tex. R. Civ. P. 192.3(e).

§ 5.25 Witness Statements

Any person may obtain, on written request, his or her own statement concerning the lawsuit that is in the possession, custody, or control of any party. A party may obtain discovery of the statement of any person with knowledge of relevant facts—a "witness statement"—regardless of when the statement was made. A witness statement is a written statement signed or otherwise adopted or approved in writing by the person making it or a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Tex. R. Civ. P. 192.3(h).

§ 5.26 Other Topics of Discovery

A party may obtain discovery of any other party's legal contentions and the factual bases for these contentions. Tex. R. Civ. P. 192.3(j). However, a marshaling of the evidence is not required for a request for disclosure or interrogatories. Tex. R. Civ. P. 194.2(c), 197.1. The rules regarding requests for production do not contain any prohibition on marshalling of evidence. *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *7 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.). A party may also obtain discovery concerning indemnity and insuring agreements

and settlement agreements as described in rule 192.3(f) and 192.3(g). *See* Tex. R. Civ. P. 192.3(f), (g).

§ 5.27 Work Product

Work Product Defined: The rules define the term *work product* as (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents, or (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. Tex. R. Civ. P. 192.5(a).

Protection of Work Product: Rule 192.5(b) provides two classifications for work product—core work product and other work product.

"Core work product" is defined as the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Core work product is not discoverable. Tex. R. Civ. P. 192.5(b)(1).

Any other work product is discoverable only on a showing that the party seeking discovery has substantial need of the materials in preparing the party's case and that the party is unable, without undue hardship, to obtain the substantial equivalent of the material by other means. Tex. R. Civ. P. 192.5(b)(2). If a court orders discovery of "other work product" the court must, insofar as possible, protect against disclosure of the core work product. Tex. R. Civ. P. 192.5(b)(4). It is not a violation of rule 192.5(b)(1) if ordered disclosure of "other work product" incidentally discloses by inference an attorney's mental processes that are otherwise protected under the rule. Tex. R. Civ. P. 192.5(b)(3). The privilege "is not an umbrella for protecting materials gathered in the ordinary course of business." *In re Maher*, 143 S.W.3d 907, 912 (Tex. App.—Fort Worth 2004, orig. proceeding).

An assertion that material or information is work product is an assertion of privilege. Tex. R. Civ. P. 192.5(d). See section 5.28 below.

Work Product Not Protected from Discovery: Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery: (1) information discoverable under rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under rule 166

or rule 190.4; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying facts or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in rule 503(d) of the Texas Rules of Evidence. Tex. R. Civ. P. 192.5(c); *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *6 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.).

§ 5.28 Privileged Matters

Information otherwise discoverable may be protected from disclosure by privilege. Privileges exist by way of court rules (procedural and evidentiary), statutes (including the Family Code), constitutional provisions, and case law. If not properly raised, privileges and other laws affecting discovery may be waived. See section 5.29 below. Procedures for asserting privileges to written discovery are described in section 5.47 below, and procedures for asserting privileges during an oral deposition are discussed in section 5.84 below.

The following is a brief summary of the privileges and laws affecting discovery that are most often encountered in family law cases.

1. *Attorney Work Product Exemption.* Rule 192.5 provides for protection of certain attorney work product, which is discussed fully in section 5.27 above. Core work product (that is, the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories) is not discoverable. Tex. R. Civ. P. 192.5(b)(1).

   A request for a party to produce "a description and/or photograph of each and every exhibit that you intend to introduce in evidence" at trial was improper because it was directed at the attorney's mental process and trial strategy. *Texas Tech University Health Sciences Center v. Schild*, 828 S.W.2d 502, 503–04 (Tex. App.—El Paso 1992, orig. proceeding).

2. *Consulting Expert Privilege.* Tex. R. Civ. P. 192.3(e).

3. *Attorney-Client Privilege.* Tex. R. Evid. 503. *But see* Tex. Fam. Code § 261.101 (duty to report child abuse or neglect overrides privilege).

4. *Spousal Privilege.* Tex. R. Evid. 504. *But see, e.g.*, Tex. Fam. Code § 6.704; Tex. R. Evid. 504(a)(4)(B) (exceptions to privilege in proceedings between

spouses). *See also* Tex. Code Crim. Proc. art. 38.10 (eliminating spouse's right to refuse to testify against his or her spouse in suits relating to family violence or bigamy). In addition, in actions under the Uniform Interstate Family Support Act, the spousal privilege under rule 504 of the Texas Rules of Evidence is not applicable. Tex. Fam. Code § 159.316(h).

5. *Clergyman Communications Privilege.* Tex. R. Evid. 505. *But see* Tex. Fam. Code § 261.101 (duty to report child abuse or neglect overrides privilege).

6. *Trade Secrets Privilege.* Tex. R. Evid. 507.

7. *Physician-Patient Privilege.* Tex. R. Evid. 509. An exception is provided in rule 509(e)(4) of the Texas Rules of Evidence for a communication or record relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies on the condition as a part of the party's claim or defense. *See* Tex. Fam. Code § 261.101 (duty to report child abuse or neglect overrides privilege). See section 5.22 above.

8. *Mental Health Information Privilege.* Tex. R. Evid. 510. An exception to the privilege is provided in rule 510(d)(4) of the Texas Rules of Evidence for court-ordered exams and in rule 510(d)(5) for a communication or record relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies on the condition as a part of the party's claim or defense. *See also Subia v. Texas Department of Human Services*, 750 S.W.2d 827, 830–31 (Tex. App.—El Paso 1988, no writ) ("court-ordered exams" exception applies only if the person examined has "been previously informed that communications would not be privileged"). See section 5.22 above.

9. *Self-Incrimination Privilege.* U.S. Const. amend. V; Tex. Const. art. I, § 10; *see also* Tex. R. Evid. 513(c) (certain rules that apply to other privileges—that the claim of privilege is neither a proper subject of comment by the judge or counsel nor basis for an inference and that, to the extent practicable, the proceedings shall be conducted so as to facilitate the making of a claim without the jury's knowledge—do not apply to a party's claim of the privilege against self-incrimination in the present civil proceeding). A court can allow a civil jury to make a negative inference from the assertion of the privilege against self-incrimination. *Texas Department of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995).

10. *Court-Ordered Marital Counseling.* Reports and information arising from court-ordered marital counseling in divorce cases are privileged. Tex. Fam. Code § 6.705.

11. *Department of Family and Protective Services Records.* With several exceptions, including court orders or for good cause shown, adoption records kept by the Texas Department of Family and Protective Services and the district clerk are confidential. Tex. Fam. Code §§ 108.002, 162.022; *see also* Tex. Fam. Code § 261.201.

12. *Child Abuse Records.* Reports required to be filed regarding allegations of child abuse or neglect are generally confidential. Tex. Fam. Code § 261.201. However, in any proceeding regarding the abuse or neglect of a child or the cause of any abuse or neglect, evidence may not be excluded on the ground of privileged communication except in the case of communications between attorney and client. Tex. Fam. Code § 261.202.

13. *Family Code Provisions for Juvenile Proceedings.* Numerous provisions of the Family Code address immunities, confidentialities, privileges, and/or evidence in juvenile proceedings. *See, e.g.*, Tex. Fam. Code §§ 51.095, 51.13, 53.03, 54.01(g), 54.031, 54.0406(c).

14. *Family Violence.* Confidentiality is imposed under some provisions of the Family Code concerning family violence. *See, e.g.*, Tex. Fam. Code § 85.007.

15. *Expunction.* If a person is arrested and charged with a crime but the charges are dropped (and other criteria are met), the person is entitled to have the criminal charges expunged from his record. Tex. Code Crim. Proc. arts. 55.01–.06. When the order of expunction is final the records cannot be used for any purpose and the party may deny the occurrence of the arrest and the existence of the expunction order. Tex. Code Crim. Proc. art. 55.03.

16. *ADR Proceedings.* The statute providing for alternative dispute resolution procedures, including mediation, provides that communications and records involving such matters are confidential and protected from disclosure. Tex. Civ. Prac. & Rem. Code § 154.073.

17. *Collaborative Law Proceedings.* Title 1–A of the Family Code contains provisions for confidentiality and privilege for certain family law collaborative communications. *See* Tex. Fam. Code §§ 15.113–.115.

§ 5.29 Waiving Objections to Discovery or Assertions of Privilege

Objections to discovery and assertions of privilege may be waived in numerous ways, including the following:

1. Failing to timely or properly object, unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(e); *see also Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989) (failure to object to evidence controverting deemed admission). See sections 5.47 and 5.84 below for discussion of asserting privilege.

2. Obscuring the objection with numerous unfounded objections, unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(e).

3. Failing to get an agreed extension of time in writing. *See London Market Cos. v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991) (orig. proceeding) (per curiam).

4. Voluntarily disclosing a significant part of a privileged matter, which may waive the privilege. *See* Tex. R. Evid. 511; *see also Tilton v. Moyé*, 869 S.W.2d 955, 957 (Tex. 1994) (orig. proceeding); *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644, 648–49 (Tex. 1985) (orig. proceeding). If a party produces material or information without intending to waive a claim of privilege, the producing party may, within ten days (or shorter time ordered by the court) of discovering that the production was made, amend the response, identifying the material or information produced and stating the privilege. The requesting party must then promptly return the specified material or information and copies, pending any ruling by the court denying the privilege. Tex. R. Civ. P. 193.3(d).

5. Using documents to refresh memory before or during deposition or trial testimony. *See, e.g., City of Denison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App.—Dallas 1986, orig. proceeding).

6. Using privileges offensively. *See Republic Insurance Co. v. Davis*, 856 S.W.2d 158, 160–64 (Tex. 1993) (orig. proceeding) (waiver applies to lawyer-client privilege); *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107–08 (Tex. 1985) (orig. proceeding).

[Sections 5.30 through 5.40 are reserved for expansion.]

III. Written Discovery

§ 5.41 Written Discovery Defined

The term *written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. Tex. R. Civ. P. 192.7(a).

§ 5.42 Requests for Disclosure

Rule 194 provides for categories of discovery to which no objection can be made. Such discovery may be sought by letter request merely referencing rule 194.2 or the identifying number of the request category as set out in the rule. Tex. R. Civ. P. 194.1.

Subjects of Disclosure: The categories of items for which disclosure is mandated are listed in rule 194.2. In addition to the matters concerning testifying experts and medical records and authorizations discussed below, these include (1) the correct names of the parties to the lawsuit; (2) the names, addresses, and telephone numbers of any potential parties; (3) the legal theories and general factual bases of the responding party's claims or defenses; (4) the amount and any method of calculating economic damages; (5) the names, addresses, and telephone numbers of persons with knowledge of relevant facts and a brief statement of each person's connection with the case; (6) indemnity and insuring agreements; (7) settlement agreements; and (8) witness statements. Tex. R. Civ. P. 194.2(a)–(e), (g)–(i).

COMMENT: The requirement of a brief statement of each person's connection with the case is satisfied with a few words, such as "treating physician," "chief financial officer," "director," "plaintiff's mother and eyewitness to accident," "social worker," "Petitioner's father," or "Petitioner's sister." *See Van Heerden v. Van Heerden*, 321 S.W.3d 869, 876 (Tex. App.—Houston [14th Dist.] 2010, no pet.). *See also* Tex. R. Civ. P. 192 cmt. 3.

Rule 194.2(c) (the legal theories and general factual bases of the responding party's claims or defenses) and rule 194.2(d) (the amount and any method of calculating economic damages) permit a party further inquiry into another party's legal theories and factual claims than is available through notice pleadings. The rules are designed to require disclosure of a party's basic assertions. Tex. R. Civ. P. 194 cmt. 2.

Through a request for disclosure under rule 194, a party may obtain disclosure of the name, address, and telephone number of any testifying expert; the subject matter on which the expert will testify; and the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them or, if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting that information. Tex. R. Civ. P. 194.2(f)(1)–(3). If the expert is retained by, employed by, or otherwise subject to the control of the responding party, the requesting party may also discover all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony and the expert's current resume and bibliography. Tex. R. Civ. P. 194.2(f)(4).

If a party fails to respond or timely supplement a request for disclosure to provide the party's expert's mental impressions and opinions, a brief summary of the basis for the expert's opinions, or any of the tangible information reviewed by the expert in anticipation of the expert's testimony, the testimony of the expert is automatically excluded under rule 193.6, absent a showing of good cause or lack of surprise or prejudice. *Ving-Card A.S. v. Merrimac Hospitality Systems, Inc.*, 59 S.W.3d 847, 856 (Tex. App.—Fort Worth 2001, pet. denied). *See also In re D.W.*, No. 02-13-00293-CV, 2015 WL 1262820 (Tex. App.—Fort Worth Mar. 19, 2015, no pet.) (mem. op.) (expert should not have been allowed to testify when only expert's name and subject matter of his testimony were disclosed, but not his opinions or any underlying documents he had reviewed). The burden of showing good cause or the lack of surprise or prejudice is on the party seeking to introduce the evidence. *In re M.H.*, 319 S.W.3d 137 (Tex. App.—Waco 2010, no pet.).

If damages are sought for physical or mental injury from the occurrence that is the subject of the case, the party alleging the injury must, on written request for disclosure, produce or authorize disclosure of all medical records and bills reasonably related to the injury or damages asserted. Tex. R. Civ. P. 194.2(j). The responding party must produce all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party if disclosure is requested under Tex. R. Civ. P. 194.2(k).

A party may also obtain disclosure of the name, address, and telephone number of any person who may be designated a responsible third party. Tex. R. Civ. P. 194.2(*l*).

Response: Written response must be made within thirty days after service of the request, except that a respondent served with the request before answer date has fifty

days after service in which to respond. Responses regarding testifying experts are governed by rule 195. Tex. R. Civ. P. 194.3.

Production: Copies of documents and other tangible items must be served with the response unless the documents to be produced are voluminous. In that case, the responding party may state a reasonable time and place for the production of the documents, must produce the documents at the time and place stated (unless there is agreement or court order otherwise), and must provide the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 194.4.

Privilege: Any applicable privilege other than assertion of work product may be asserted using rule 193.3 procedures. *See* Tex. R. Civ. P. 194 cmt. 1. No objection or assertion of work product is permitted to a request for disclosure. Tex. R. Civ. P. 194.5.

Changed Response: A response under rule 194(c) and (d) (regarding legal theories, factual bases, and economic damages) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment. Tex. R. Civ. P. 194.6.

§ 5.43 Requests for Production and Inspection of Documents and Tangible Things

Request: A party may serve on another party a request for production or for inspection, to inspect, sample, test, photograph, and copy documents or tangible things within the scope of discovery. The request must be served no later than thirty days before the end of the discovery period. Tex. R. Civ. P. 196.1(a). See section 5.8 above concerning requests for production from nonparties.

The request must specify the items to be produced or inspected, either by individual item or by category, and describe each item or category with reasonable particularity. The request must also specify a reasonable time and place for production. The time must be on or after the date the response is due. If the request is for sampling or testing, the means, manner, and procedure must be described with sufficient specificity to inform the producing party. Tex. R. Civ. P. 196.1(b).

If a party requests another party to produce medical or mental health records about a nonparty, the nonparty must be served with the request for production. There is an exception if the nonparty signs an effective release, the nonparty's identity will not be disclosed by production of the records, or the court orders for good cause that service is

not required. Rule 196.1 does not excuse compliance with laws about the confidentiality of medical or mental health records. Tex. R. Civ. P. 196.1(c). *See In re Christus Health Southeast Texas*, 167 S.W.3d 596, 601 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam).

Response: A response must be served on the requesting party within thirty days after service of the request, except that a respondent served with a request before the date the respondent's answer is due has fifty days after service in which to respond. Tex. R. Civ. P. 196.2(a).

With respect to each item or category of items requested, the responding party must state objections and assert privileges in accordance with the rules and must state the following as appropriate: (1) that production, inspection, or other requested action will be permitted as requested; (2) that the requested items are being served with the response; (3) that production, inspection, or other requested action will take place at an alternate specified time and place; or (4) that, after a diligent search, no responsive items have been identified. Tex. R. Civ. P. 196.2(b).

See section 5.47 below for procedures for objecting to written discovery requests.

Production: Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things that are in the party's possession, custody, or control at the time and place requested or the time and place stated in the response, unless otherwise agreed or ordered, and must give the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 196.3(a). The responding party may produce copies in place of originals unless the authenticity of the original is questioned or it would be unfair in the circumstances to produce copies. A responding party who produces originals is entitled to retain the originals while the requesting party inspects and copies them. Tex. R. Civ. P. 196.3(b). The documents and tangible things must either be produced as they are kept in the usual course of business or be organized and labeled to correspond with the categories in the request. Tex. R. Civ. P. 196.3(c).

The rules do not permit the trial court to force a party to create documents that do not exist solely to comply with a request for production. *McKinney v. National Union Fire Insurance Co.*, 772 S.W.2d 72, 73 n.2 (Tex. 1989). For example, a party may not be compelled by a request for production to complete and sign consent forms permitting the release of information to the requestor since the completed, executed forms did not exist. *See In re Guzman*, 19 S.W.3d 522, 523–25 (Tex. App.—Corpus Christi–Edinburg 2000, orig. proceeding).

Other Provisions: Special rules that apply to electronic or magnetic data are provided in Tex. R. Civ. P. 196.4. Except with prior court authorization, testing, sampling, or examination may not destroy or materially alter an item. Tex. R. Civ. P. 196.5. Unless the court orders otherwise for good cause, the responding party bears the expense of production and the requesting party bears the expense of inspecting, sampling, testing, photographing, and copying. Tex. R. Civ. P. 196.6.

§ 5.44 Request or Motion for Entry on Property

Request or Motion: A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on the property in one of two manners, depending on whether the property belongs to a party or to a nonparty. Entry may be gained by serving a request on all parties if land or property belongs to a party or by motion and notice of hearing on all parties and the nonparty if the land or property belongs to a nonparty. Service of the request or motion and hearing notice must be no later than thirty days before the end of any applicable discovery period. Tex. R. Civ. P. 196.7(a). Method of service on the nonparty is prescribed in rule 196.7(a)(2).

The request for entry on a party's property or the order for entry on a nonparty's property must state the time, place, manner, conditions, and scope of the inspection; specifically describe any desired means, manner, and procedure for testing or sampling; and designate the person who will make the inspection, testing, or sampling. Tex. R. Civ. P. 196.7(b).

Response: A response must be served on the requesting party within thirty days after service of the request, except that a respondent served with a request before the date the respondent's answer is due has fifty days after service in which to respond. Tex. R. Civ. P. 196.7(c)(1). The responding party must state any objections or assertions of privilege and further state that the entry or other requested action either will be permitted as requested, will take place at an alternate specified time and place, or cannot be permitted for reasons stated in the response. Tex. R. Civ. P. 196.7(c)(2).

Order: An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object on it is relevant to the subject matter of the action. Tex. R. Civ. P. 196.7(d). Generally, good cause is shown if the movant establishes that the discovery sought is relevant and material—that is, that the information will in some way help the movant prepare or defend the case—and that the substantial

equivalent of the material cannot be obtained through other means. *In re SWEPI L.P.*, 103 S.W.3d 578, 584 (Tex. App.—San Antonio 2003, orig. proceeding).

§ 5.45 Interrogatories to Parties

Interrogatories: Written interrogatories may be served on a party inquiring about any matter within the scope of discovery except for matters regarding testifying expert witnesses. An interrogatory may ask whether a party makes a specific legal or factual contention. It also may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses. However, interrogatories may not require the responding party to provide all its available proof or the proof the party intends to offer at trial. Interrogatories may ask a party to identify facts of which the party is specifically aware that the party contends establish, demonstrate, or prove specific allegations made by the party in its pleadings; such requests do not require a marshaling of evidence. *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *5 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.). The interrogatories must be served no later than thirty days before the end of the discovery period. Tex. R. Civ. P. 197.1.

The number of interrogatories a party may serve is set by the discovery control plan. Under a level 1 or level 2 discovery control plan, a party may serve no more than twenty-five interrogatories on another party, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory. Tex. R. Civ. P. 190.2(b)(3), 190.3(b)(3). A discrete subpart of an interrogatory is counted as a single interrogatory, but not every separate factual inquiry is a discrete subpart. Although not susceptible of precise definition, a discrete subpart is, in general, one that calls for information that is not logically or factually related to the primary interrogatory. Tex. R. Civ. P. 190 cmt. 3. *See In re Sting Soccer Group, LP*, 2017 WL 5897454, at *6; *In re SWEPI L.P.*, 103 S.W.3d 578, 589 (Tex. App.—San Antonio 2003, orig. proceeding) (no "discrete subparts" found where each question related to particular claim and asked plaintiff to provide certain details about facts underlying that claim and "subparts" simply identified types of facts defendant would like to have had disclosed so that it could understand parameters of claims and prepare defenses).

The number of interrogatories permitted under a level 3 discovery control plan is the same as that in a level 1 or 2 discovery control plan unless altered by the court in the level 3 discovery control plan. *See* Tex. R. Civ. P. 190.4(b). A party can send as many

sets of interrogatories as it wishes, as long as the maximum number of interrogatories is not exceeded. *See* Tex. R. Civ. P. 190 cmt. 3. See section 5.2 above.

Response: A response must be served on the requesting party within thirty days after service of the interrogatories, except that a respondent served with interrogatories before the date the respondent's answer is due has fifty days after service in which to respond. Tex. R. Civ. P. 197.2(a). Responses must include answers to the interrogatories, but objections and assertions of privilege may be included in the response or in a separate document. Tex. R. Civ. P. 197.2(b). *See also* Tex. R. Civ. P. 193.2(a), 193.3(a).

If the answer to an interrogatory may be derived or ascertained from public records or from the responding party's business records (or a compilation, abstract, or summary of the business records) and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by specifying and, if applicable, producing the records or compilation, abstract, or summary of the records. The answer must specify the records in sufficient detail to enable the requesting party to locate and identify the records as readily as can the responding party. If business records are involved, the responding party must state a reasonable time and place that the requesting party may examine the records, must produce them at that time and place unless otherwise agreed or ordered, and must provide the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 197.2(c).

Responses to interrogatories must be signed under oath (or pursuant to a declaration under section 132.001 of the Texas Civil Practice and Remedies Code) by the responding party—not an agent or attorney—with two exceptions. If the answers are based on information obtained from other persons, the party may so state. Additionally, the responding party is not required to sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions. Tex. R. Civ. P. 197.2(d).

See section 5.47 below for procedures for objecting to written discovery requests.

Use: Answers to interrogatories may be used only against the responding party. Tex. R. Civ. P. 197.3; *Palmer v. Espey Huston & Associates, Inc.*, 84 S.W.3d 345, 356 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied). An answer to an interrogatory inquiring about matters under rule 194.2(c) and (d) (legal theories, factual bases, and economic damages) that has been amended or supplemented is not admissible and may not be used for impeachment. Tex. R. Civ. P. 197.3.

§ 5.46 Requests for Admissions

Request: At any time following commencement of the action, and no later than thirty days before the end of the discovery period, a party may serve on any other party a written request to admit the truth of any matters within the scope of discovery, including statements of opinion or fact or of the application of law to fact, or the genuineness of documents served with the request or made available for inspection and copying. Each matter for which an admission is requested must be stated separately. Tex. R. Civ. P. 198.1.

Response: A response must be served on the requesting party within thirty days after service of the request, except that a respondent served with a request before the date the respondent's answer is due has fifty days after service in which to respond. Tex. R. Civ. P. 198.2(a). If a response is not timely served, the request is considered admitted without the necessity of a court order. Tex. R. Civ. P. 198.2(c). Deemed admissions constitute judicial admissions, and a party may not introduce testimony to controvert them. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989).

Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. Qualified answers or partial denials are allowed only when good faith requires. Lack of information or knowledge is not a proper response unless it is stated that reasonable inquiry has been made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny the request. An assertion that the request presents an issue for trial is not a proper response. Tex. R. Civ. P. 198.2(b).

See section 5.47 below for procedures for objecting to written discovery requests and section 5.114 below concerning the failure to comply with rule 198.

Withdrawal or Amendment: Matters admitted under rule 198 are conclusively established as to the admitting party unless the court permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment if the admitting party shows good cause and the court finds that the parties relying on the responses and deemed admissions will not be unduly prejudiced and that the merits of the action will be promoted. Tex. R. Civ. P. 198.3.

Good cause is the threshold issue. *City of Houston v. Riner*, 896 S.W.2d 317, 319 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Boone v. Texas Employers' Insurance*

Ass'n, 790 S.W.2d 683, 688 (Tex. App.—Tyler 1990, no writ). A party can establish good cause by showing that its failure to answer was accidental or the result of mistake, rather than intentional or the result of conscious indifference. *Darr v. Altman*, 20 S.W.3d 802, 808 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Genuine confusion, rather than conscious disregard or deliberate neglect, can be good cause to authorize withdrawal or amendment of responses and deemed admissions under rule 198.3. *See Lewis v. Mundy Construction Co.*, 781 S.W.2d 333, 336 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd w.o.j.) (regarding predecessor rule 169). *But see Steffan v. Steffan*, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (husband's status as pro se litigant when served with requests for admissions and his claim that he did not know or understand consequences of failing to timely answer found not to be good cause because pro se litigant must comply with applicable laws and rules of procedure and legal consequences of noncompliance were written on face of requests).

Effect: Any admission made under rule 198 is for the purpose of the pending action *only*. Tex. R. Civ. P. 198.3. *See John H. Carney & Associates v. Ahmad*, No. 07-15-00252-CV, 2016 WL 368527 (Tex. App.—Amarillo Jan. 28, 2016, pet. denied) (mem. op.).

A court is not bound by deemed admissions from requests that are "inappropriate," because they pertain to matters about which the responding party could not have any personal knowledge, or that concern matters solely within the court's discretion. *Satterfield v. Huff*, 768 S.W.2d 839, 840–41 (Tex. App.—Austin 1989, writ denied). "Deemed admissions under Rule 169 are . . . not of controlling effect in a child custody case when they conflict with an independent finding of fact as to a child's best interests." *Erwin v. Erwin*, 505 S.W.2d 370, 372 (Tex. App.—Houston [14th Dist.] 1974, no writ).

§ 5.47 Responses and Objections to Written Discovery

A party must respond to written discovery in writing within the time provided by the rules or by court order. Responses must be complete, based on all the information that is reasonably available to the responding party or the responding party's attorney at the time the response is made. All answers, objections, and other responses must be preceded by the request to which they apply. Tex. R. Civ. P. 193.1.

Objections: Objections to written discovery must be made in writing and within the time for response. A party must specifically state the legal or factual basis for the objection and the extent to which compliance with the request is refused. Objections may be

made in the response or in a separate document. Tex. R. Civ. P. 193.2(a). A party must comply with all requests not objected to unless it would be unreasonable under the circumstances to do so before a ruling on the objections. If an objection is made to the time or place of production, the objecting party must state a reasonable alternative and comply at that alternative time and place without further request or order. Tex. R. Civ. P. 193.2(b).

A party may object to written discovery only if a good-faith factual and legal basis for the objection exists at the time the objection is made. Tex. R. Civ. P. 193.2(c). An objection or response may be amended or supplemented to state an objection or basis that was, at the time the objection or response was first made, inapplicable or unknown after reasonable inquiry. Tex. R. Civ. P. 193.2(d).

An objection may be waived if not timely made or if obscured by numerous unfounded objections. Tex. R. Civ. P. 193.2(e).

Assertion of Privilege: A party should not *object* to a request for written discovery on the grounds of privilege; instead, the party should comply with rule 193.3(a), which outlines the procedure for preserving a privilege. Tex. R. Civ. P. 193.2(f). Material or information for which a privilege is claimed may be withheld from the response. However, the responding party must state in the response or in a separate document that responsive information or material has been withheld, the request to which the information or material relates, and the privilege asserted. Tex. R. Civ. P. 193.3(a). Additional information describing the withheld material and asserting specific privileges may be requested of the responding party under rule 193.3(b). *See* Tex. R. Civ. P. 193.3(b).

The Office of the Attorney General may withhold as privileged all files and records of services provided, including information concerning a custodial parent, a noncustodial parent, a child, or an alleged or presumed father. Tex. Fam. Code § 231.108; *In re Office of Attorney General*, No. 02-13-00455-CV, 2014 WL 491684 (Tex. App.—Fort Worth Feb. 6, 2014, orig. proceeding) (mem. op.).

A party may withhold a privileged communication to or from a lawyer or a lawyer's representative or a privileged document of a lawyer or a lawyer's representative without complying with rule 193.3(a) or (b) if the communication or document was created or made from the point at which a party consults a lawyer with a view to engage the lawyer's services for the litigation in which the discovery is requested and if the communication or document concerns the same litigation. Tex. R. Civ. P. 193.3(c).

If a party inadvertently produces privileged material or information, the privilege is not waived if, within ten days (or a shorter time ordered by the court) after discovery of the error, the party amends the response, identifying the material or information and asserting the privilege. The identified material or information and any copies must be returned on receipt of the amended response, pending ruling on the objection. Tex. R. Civ. P. 193.3(d).

Hearing: A request for a hearing on an objection or a claim of privilege must be presented at a reasonable time. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by oral testimony or by affidavits served at least seven days before the hearing. Tex. R. Civ. P. 193.4(a). The mere listing of a specific privilege in a response or a privilege log does not prove that privilege. The response and log are the vehicles by which the privilege is claimed. Proof of the facts that justify the claim of privilege is necessary. *In re Monsanto Co.*, 998 S.W.2d 917, 926 (Tex. App.—Waco 1999, orig. proceeding). To establish a prima facie case for the claim of privilege, an affidavit should set out "the factual basis for the applicability of the attorney-client and/or work product privileges to the documents at issue." *See In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 224 (Tex. 2004) (orig. proceeding) (per curiam). If the party asserting a privilege has made a prima facie case for its claim, the requesting party has the burden to point out to the court which specific documents or groups of documents it believes require inspection. Otherwise, trial judges will be required to inspect untold numbers of documents. The requesting party should be in a position to do so based on (1) the contents of the privilege log, (2) other discovery and documents, (3) discovery specifically designed to test the claim of privilege, and (4) the evidence at the hearing. *In re Monsanto Co.*, 998 S.W.2d at 925. If the court finds that an in camera review is necessary, the material must be presented in a sealed wrapper for inspection, segregated from the material for which no privilege is claimed. Tex. R. Civ. P. 193.4(a).

A party need not request a ruling on the party's own objection or assertion of privilege to preserve the objection or privilege. If the claim of privilege with regard to written discovery is overruled, the responding party has thirty days to produce the material. To the extent that the objection or claim of privilege is sustained, the responding party has no further duty to respond. Tex. R. Civ. P. 193.4(b). A party may not use material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery. Tex. R. Civ. P. 193.4(c).

Authenticity of Documents: In most cases, production of a document in response to a written discovery request authenticates the document for use against the party producing it in any pretrial proceeding or at trial. However, after the producing party has had actual notice that the document will be used, the party can object to the authenticity of the document. The objection must be made within ten days or a longer or shorter time ordered by the court. Tex. R. Civ. P. 193.7. *But see Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117, 131 (Tex. App.—Texarkana 2008), *rev'd on other grounds*, 313 S.W.3d 837 (Tex. 2010). The objection must state the specific basis for the objection, must be either on the record or in writing, and must have a good-faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If an objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity. Tex. R. Civ. P. 193.7. Authenticity is not synonymous with admissibility.

§ 5.48 Amending or Supplementing Responses to Written Discovery

There is a duty to supplement a written discovery response if a party learns that the party's response to written discovery was incomplete or incorrect when made or that, although the response was complete and correct when made, it is no longer complete and correct. The party must amend or supplement the response regarding (1) identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses and (2) other information requested, *unless* the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. Tex. R. Civ. P. 193.5(a).

An amended or supplemental response must be made reasonably promptly after the party discovers the necessity to make such a response. Unless otherwise provided under the discovery rules, it is presumed that an amended or supplemental response that is made less than thirty days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be so verified. The failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out. Tex. R. Civ. P. 193.5(b); *see also State Farm Fire & Casualty Co. v. Morua,* 979 S.W.2d 616, 620 (Tex. 1998) (although supplemental interrogatory responses must be verified, requesting party waited thirteen months before objecting to defect at trial, thereby waiving its objection).

The requirements and procedures of rule 193.5 apply to a party's duty to amend and supplement written discovery regarding a testifying expert. Tex. R. Civ. P. 195.6. The duties to designate an expert witness and make the expert available for deposition are triggered when the expert is retained, employed, or otherwise in the control of the party. Tex. R. Civ. P. 195.3(b), 195.6. Unlike under the former discovery rules, the duty to designate the expert may not be delayed until the party expects to call the person as an expert witness. *Snider v. Stanley*, 44 S.W.3d 713, 716–17 (Tex. App.—Beaumont 2001, pet. denied). The discovery rules do not prevent experts from refining calculations and perfecting reports through the time of trial. The testimony of an expert should not be barred because a change in some minor detail of the person's work was not disclosed a month before trial. The additional supplementation requirement does require that opposing parties have sufficient information about an expert's opinion to prepare a rebuttal with their own experts and cross-examination and that they be promptly and fully advised if further developments render past information incorrect or misleading. *See Exxon Corp. v. West Texas Gathering Co.*, 868 S.W.2d 299, 305 (Tex. 1993) (addressing former rule 166b(6)); *see also* Tex. R. Civ. P. 193.5, 195.6.

If the trial is reset and the discovery deadlines are governed by rule 190.3, the deadlines are reset to conform to the deadlines set out in the rule. *See* Tex. R. Civ. P. 190.3(b)(1)(A). However, by its own terms, this rule does not apply when a docket control order has been entered by the court. Tex. R. Civ. P. 190.3(a). If the court has issued a docket control order, a continuance does not reset the dates in that order. *Sprague v. Sprague*, 363 S.W.3d 788, 800 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

§ 5.49 Effect of Failure to Timely Respond

Failure to respond to written discovery, including amending or supplementing discovery, will result in exclusion from evidence of the material or information not timely disclosed or the testimony of a witness not timely identified, unless the court determines that there was good cause for the failure to timely respond, amend, or supplement or that the failure will not unfairly prejudice or unfairly surprise the other parties. Tex. R. Civ. P. 193.6(a). Lack of surprise, inadvertence of counsel, and the uniqueness of the evidence are not in themselves good cause. *Alvarado v. Farah Manufacturing Co.*, 830 S.W.2d 911, 915 (Tex. 1992); *Sprague v. Sprague*, 363 S.W.3d 788, 800 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). However, these factors, taken together or in some combination, may constitute good cause. *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992). The burden of proof on this issue is on the party seeking to introduce the evidence or call the witness. A finding of good cause or lack of unfair

surprise or unfair prejudice must be supported by the record. Tex. R. Civ. P. 193.6(b). Even if the party fails to carry the burden, the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented and to allow opposing parties to conduct discovery about any new information thus disclosed. Tex. R. Civ. P. 193.6(c). Because the exclusion of evidence under rule 193.6 is automatic and not discretionary, a trial court's imposition of the automatic exclusions mandated by the rule is not a death-penalty sanction subject to review under a *Trans-American* analysis. *Amudo v. Amudo*, No. 01-17-00318-CV, 2018 WL 3059729, at *5 (Tex. App.—Houston [1st Dist.] June 21, 2018, no pet.) (mem. op.).

Thus, the general rule is that if a party fails to timely and properly respond to or supplement a discovery request, order, or agreement, the undisclosed or improperly disclosed evidence must be excluded at trial. *Rainbo Baking Co. v. Stafford*, 787 S.W.2d 41, 41–42 (Tex. 1990) (per curiam); *Sharp v. Broadway National Bank*, 784 S.W.2d 669, 670–71 (Tex. 1990) (per curiam); *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 646 (Tex. 1989); *McKinney v. National Union Fire Insurance Co.*, 772 S.W.2d 72, 74 (Tex. 1989); *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986) (per curiam).

[Sections 5.50 through 5.60 are reserved for expansion.]

IV. Discovery Regarding Testifying Experts

§ 5.61 Permitted Means of Discovery

Any discoverable information concerning testifying expert witnesses that cannot be obtained through a request for disclosure under rule 194 (see section 5.42 above) must be obtained by oral deposition or by a report prepared by the expert under rule 195. No other means of discovery regarding testifying experts is permissible. Tex. R. Civ. P. 195.1.

§ 5.62 Designation of Experts

A party is not required to designate expert witnesses except in response to a request for disclosure or a court order. Tex. R. Civ. P. 195.1. Unless otherwise ordered by the court, a party must furnish the information requested under rule 194.2(f) (request for disclosure of expert witnesses) by the later of the following dates: (1) thirty days after the request is served or (2) for all experts testifying for a party seeking affirmative relief

(which will be virtually every party to a family law case), ninety days before the end of the discovery period, and for all other experts, sixty days before the end of the discovery period. Tex. R. Civ. P. 195.2.

COMMENT: Remember that, barring a court order or agreement between the parties to the contrary, the discovery period in cases under the Family Code ends thirty days before the date of trial. Tex. R. Civ. P. 190.3(b)(1)(A). Therefore, the duty to disclose experts in response to a request for disclosure may occur 120 days before trial. *See Gutierrez v. Gutierrez*, 86 S.W.3d 729, 732 (Tex. App.—El Paso 2002, no pet.) (because former wife was seeking affirmative relief by requesting attorney's fees in custody case, she was required to designate her expert ninety days before end of discovery period).

§ 5.63 Depositions

Oral Deposition: In addition to discovery under a request for disclosure, a party may obtain discovery about the subject matter of an expert's expected testimony, the expert's mental impressions and opinions, the facts known to the expert that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under rule 195. Tex. R. Civ. P. 195.4.

Making Expert Available for Deposition: A party seeking affirmative relief, which will likely be every party to a family law action, must make all experts retained or employed by the party or otherwise in the party's control available for depositions in the manner prescribed in rule 195.3(a). In general, the party must make the expert available reasonably promptly after the expert is designated, if a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated; if the report is produced on designation, the party need not make the expert available until reasonably promptly after all other experts have been designated. Tex. R. Civ. P. 195.3(a). A party not seeking affirmative relief must make his experts available for deposition reasonably promptly after the expert is designated and experts testifying for the other party on the same subject have been deposed. Tex. R. Civ. P. 195.3(b).

Cost of Expert Witness for Deposition Time: When a party takes the oral deposition of an expert witness retained by the opposing party, the party who retained the expert must pay all reasonable fees charged by the expert for preparing for, giving, reviewing, and correcting the deposition. Tex. R. Civ. P. 195.7.

§ 5.64 Reports of Experts

The court may order the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert reduced to tangible form and produced in addition to the deposition if they have not been recorded and reduced to tangible form. Tex. R. Civ. P. 195.5.

§ 5.65 Amendment and Supplementation of Discovery

Written discovery regarding a testifying expert must be amended and supplemented as required by rule 193.5. If the expert witness is retained by, employed by, or otherwise under the control of a party, the party must also amend or supplement any deposition testimony or written report by the expert, but only as to the expert's mental impressions or opinions and the basis for them. Tex. R. Civ. P. 195.6.

[Sections 5.66 through 5.70 are reserved for expansion.]

V. Mental or Physical Examinations

§ 5.71 Motion and Order for Mental or Physical Examination

A party may, no later than thirty days before the end of the applicable discovery period, move for an order compelling another party to submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist or to produce for such examination a person in the other party's custody, conservatorship, or legal control. Tex. R. Civ. P. 204.1(a). The motion and notice of hearing must be served on the person to be examined and on all parties. Tex. R. Civ. P. 204.1(b). The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Tex. R. Civ. P. 204.1(d).

The court may issue an order for such an examination under rule 204.1 only for good cause shown and only in specified circumstances. *In re Transwestern Publishing Co., L.L.C.*, 96 S.W.3d 501, 506 (Tex. App.—Fort Worth 2002, orig. proceeding). *But see* Tex. R. Civ. P. 204.4 (mental examinations and paternity testing in cases arising under title 2 or title 5 of the Family Code). An order may be issued if the mental or physical condition, including the blood group, of a party or a person in the custody, conservator-

ship, or legal control of a party is in controversy. Except as provided in rule 204.4 (pertaining to suits under title 2 or title 5 of the Family Code), an examination by a psychologist may be ordered if the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. Tex. R. Civ. P. 204.1(c). For the purpose of rule 204, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist. Tex. R. Civ. P. 204.5.

A mental examination cannot be ordered if the party is merely seeking damages for "emotional distress" typically accompanying severe physical injury. *Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex. 1988) (orig. proceeding). However, if a party intends to call a medical expert to prove an alleged mental condition, an examination is authorized. *Sherwood Lane Associates v. O'Neill*, 782 S.W.2d 942, 945 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

Rules 509 and 510 of the Texas Rules of Evidence should be taken into consideration in a proceeding under rule 204. See sections 5.22 and 5.28 above.

§ 5.72 Cases Arising under Title 2 or Title 5 of Family Code

In cases arising under title 2 or title 5 of the Family Code, on a party's or on the court's own motion, the court may appoint one or more psychologists or psychiatrists to make the appropriate mental examinations of the children the subject of the suit or any other parties, regardless of whether a psychologist or psychiatrist has been listed by any party as a testifying expert, and may appoint one or more experts qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court. Tex. R. Civ. P. 204.4. For purposes of rule 204, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist. Tex. R. Civ. P. 204.5.

§ 5.73 No Examination

If no examination is sought, the party whose condition is in controversy may not comment to the court or the jury about the party's willingness to be examined or the other party's right or failure to seek an examination. Tex. R. Civ. P. 204.3.

§ 5.74 Selection and Report of Examining Professional

Selection of the examining doctor, psychiatrist, or psychologist is generally left to the sound discretion of the court. *May v. Lawrence*, 751 S.W.2d 678, 679 (Tex. App.—Tyler 1988, orig. proceeding [leave denied]) (per curiam); *Employers Mutual Casualty Co. v. Street*, 707 S.W.2d 277, 278 (Tex. App.—Fort Worth 1986, orig. proceeding). However, it may be error for a court to refuse to order an independent examination by a doctor, psychiatrist, or psychologist if only one party's experts have had an opportunity to perform an examination. *See Sherwood Lane Associates v. O'Neill*, 782 S.W.2d 942, 945 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

Provisions regarding copies of the report of the examining physician or psychologist are contained in rule 204.2 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 204.2.

[Sections 5.75 through 5.80 are reserved for expansion.]

VI. Depositions

§ 5.81 Oral Depositions

Oral depositions are governed by rule 199. A party may depose any person or entity on oral examination before an authorized officer. The testimony, objections, and any other statements must be recorded when they are given or made. Tex. R. Civ. P. 199.1(a). Telephone depositions and deposition by remote electronic or nonstenographic means are authorized under rule 199.1(b) and (c). See the discussion in section 5.86 below.

Section III(14) of the Texas Lawyer's Creed provides that a lawyer will not arbitrarily schedule a deposition until a good-faith effort has been made to schedule it by agreement.

Notice: A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. The deposition may be taken outside the discovery period only if the parties agree or with leave of court. Tex. R. Civ. P. 199.2(a). Reasonable notice must be given of the identity of any nonparties who might be attending the deposition. Tex. R. Civ. P. 199.5(a)(3).

The notice must state the name of the witness, state a reasonable time and place for the deposition, and state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. Tex. R. Civ. P. 199.2(b)(1)–(3). It may include the notice required by rule 199.1(c) concerning nonstenographic means, the notice required by rule 199.5(a)(3) about additional attendees, and a request for production. Tex. R. Civ. P. 199.2(b)(3)–(6).

If the witness named is a public or private corporation, partnership, association, governmental agency, or other organization, the notice for deposition must describe with reasonable particularity the matters on which the examination is requested. In response, the organization named in the notice must, a reasonable time before the deposition, designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify about matters that are known or reasonably available to the organization. Tex. R. Civ. P. 199.2(b)(1). A litigant seeking to depose an organization is not precluded from specifically designating the exact officer(s) of an entity who shall be deposed. *Hospital Corp. of America v. Farrar*, 733 S.W.2d 393, 395 (Tex. App.—Fort Worth 1987, orig. proceeding).

A deposition may be conducted in the county of the witness's residence; the county where the witness is employed or regularly transacts business in person; the county of the suit, if the witness is a party or a person designated by a party under rule 199.2(b)(1) for testimony on behalf of an organization; the county in which the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or any other convenient place directed by the court. Tex. R. Civ. P. 199.2(b)(2).

The notice may include a request for production of documents or tangible things within the scope of discovery that are within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with rule 205, and a designation of the materials must be included or attached to the notice. Tex. R. Civ. P. 199.2(b)(5). A nonparty for purposes of discovery is defined as a person who is not a party or subject to a party's control. Tex. R. Civ. P. 205.1. (The nonparty's response is governed by rules 176 and 205.) If the witness is a party or subject to a party's control, document requests are governed by rules 193 and 196. Tex. R. Civ. P. 199.2(b)(5).

Objection to Time or Place: A party or witness may object to the time and place designated for an oral deposition by a motion for protective order or motion to quash the notice. An objection to the time or place of the deposition filed by the third business

day after service of the notice stays the oral deposition until the motion can be heard. Tex. R. Civ. P. 199.4. The trial court has broad powers and discretion to control the time, place, and manner of taking depositions. *Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 111 (Tex. App.—Houston [14th Dist.] 1996, no writ).

Examination: The witness must stay in attendance until the deposition is begun and completed. Tex. R. Civ. P. 199.5(a)(1). Rules for attendance by telephone or other remote electronic means are provided in rule 199.5(a)(2). *See* Tex. R. Civ. P. 199.5(a)(2).

Answers must be given under oath, and the deponent may be examined and cross-examined by all parties, either orally or by written questions served in a sealed envelope on the party noticing the deposition. Tex. R. Civ. P. 199.5(b). No side may examine or cross-examine a witness for more than six hours, excluding breaks. Tex. R. Civ. P. 199.5(c).

§ 5.82 Compelling Appearance; Production of Documents and Things at Oral Deposition

A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under rule 176. If the witness is a party or subject to a party's control, however, service of the notice of oral deposition on the party's attorney is sufficient. Tex. R. Civ. P. 199.3.

A person who is properly served with a subpoena in accordance with rule 176 must comply with the command stated in the subpoena. Tex. R. Civ. P. 176.6(a). This includes attendance at the deposition and remaining at the place of the deposition until the deposition is begun and completed. Tex. R. Civ. P. 199.5(a)(1).

The subpoena may include a command for the witness to produce at the deposition designated documents or tangible things in the witness's possession, custody, or control. Tex. R. Civ. P. 176.2(b). If the subpoenaed witness is a nonparty, the request must comply with rule 205. If the witness is a party, or subject to the control of a party, the document requests for depositions are governed by rule 196. Tex. R. Civ. P. 176.3(b), 176 cmt. 2.

If the witness is a party, the subpoena may be served on the party's attorney of record in the proceeding. Tex. R. Civ. P. 176.5(a).

§ 5.83 Written Questions at Oral Deposition

Any party may, instead of attending the oral deposition, propound written questions to be asked at the oral deposition. Any such questions are to be served in a sealed envelope on the party noticing the deposition, who must deliver the written questions to the deposition officer, who must open the envelope and propound the questions to the witness. Tex. R. Civ. P. 199.5(b).

§ 5.84 Conduct and Objections during Oral Deposition

Parties and counsel are expected to be courteous and professional to one another and to the witness during the course of the deposition. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences are permitted during agreed recesses and adjournments. If the lawyers and witnesses fail to comply with this rule, the court may allow in evidence at trial the statements, objections, discussions, and other occurrences during the oral deposition that reflect on the credibility of the witness or the testimony. Tex. R. Civ. P. 199.5(d).

Objections: Objections to questions asked in the deposition are limited to "objection, leading" and "objection, form." Objections to testimony during the deposition are limited to "objection, nonresponsive." Objections not phrased in this manner are waived. All other objections need not be made or recorded during the deposition to be raised later with the court. The objecting party must clearly and concisely explain an objection if requested by the party taking the deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition. The officer taking the deposition does not rule on objections but must record them for ruling by the court. The officer must record testimony even though an objection has been made. Tex. R. Civ. P. 199.5(e).

Instruction Not to Answer: An attorney may not instruct a witness to refuse to answer questions unless it is necessary to preserve a privilege, comply with a court order or the discovery rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling regarding the suspension of the deposition. If a witness is instructed not to answer, the attorney must state on the record a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested to do so by the party who asked the question. Tex. R. Civ. P. 199.5(f).

Suspending Deposition: If the rules regarding conduct of oral depositions are being violated or the time limitations for the deposition have expired, a party or witness may suspend the deposition for the time necessary to obtain a ruling from the court. Tex. R. Civ. P. 199.5(g).

Good Faith Required: An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good-faith legal basis at the time. A good-faith factual and legal basis is required for objecting, instructing the witness not to answer, and suspending the deposition. Tex. R. Civ. P. 199.5(h).

Sanctions: See section 5.115 below regarding sanctions for the noticing party's failure to attend the deposition or serve a subpoena.

§ 5.85 Hearing on Objection or Privilege

At any reasonable time a party may request a hearing on an objection or a privilege asserted by an instruction not to answer or suspension of an oral deposition, but a party's failure to obtain a ruling before trial does not waive the objection or privilege. The party must present any evidence necessary to support the objection or privilege, either by testimony or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an in camera review is needed, the answers may be made in camera, to be transcribed and sealed if the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper. Tex. R. Civ. P. 199.6.

§ 5.86 Nonstenographic Recording; Deposition by Telephone

Nonstenographic Recording: Any party may cause a deposition on oral examination to be recorded by nonstenographic means, including videotape. However, five days' written notice must be served on the witness and all parties. The notice must state the method of nonstenographic recording and whether the deposition will also be recorded stenographically. On written notice, any other party may designate an additional method of recording the deposition, at that party's expense unless the court orders otherwise. The party requesting the nonstenographic recording is responsible for obtaining a person authorized by law to administer the oath and for ensuring that the recording will be intelligible, accurate, and trustworthy. Tex. R. Civ. P. 199.1(c). See the discussion at section 5.90 below concerning requirements of delivery, certification, and use of the nonstenographic recording.

Deposition by Telephone: A party may take a deposition by telephone or other remote electronic means on reasonable prior written notice. The deposition is considered to be taken in the district and at the place where the witness is located when answering the questions. The deposition officer may be located with the witness or with the party who noticed the deposition. If the deposition officer is not at the same location as the witness, the witness must be placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction. Tex. R. Civ. P. 199.1(b).

§ 5.87 Depositions on Written Questions

A deposition on written questions may be taken of any person or entity with twenty days' written notice served on the witness and all parties. The deposition may be taken outside the discovery period only by agreement or with leave of court. Tex. R. Civ. P. 200.1(a).

Notice: The notice must comply with the requirements of rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must also comply with those requirements. The notice may also include a request for production under rule 199.2(b)(5). Tex. R. Civ. P. 200.1(b).

Questions and Objections: The direct questions to be asked must be attached to the notice. Tex. R. Civ. P. 200.3(a). Within ten days of service of the notice, any party may object to the direct questions attached to the notice and serve cross-questions on all other parties. Within five days after the cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after the redirect questions are served, any party may object to the redirect questions and serve recross questions on all other parties. Any objections to the recross questions must be served within five days after the day they are served or at the time of the deposition, whichever occurs first. Tex. R. Civ. P. 200.3(b). Objections to the form of the questions are waived if this procedure is not followed. Tex. R. Civ. P. 200.3(c).

Conducting Deposition: The person noticing the deposition provides the deposition officer with a copy of the notice and of all the questions to be asked. Tex. R. Civ. P. 200.1(a). The deposition officer must conduct the deposition at the time and place designated and record the testimony of the witness under oath in response to the questions. If necessary, the deposition officer may summon and swear an interpreter. The deposition officer must prepare, certify, and deliver the deposition transcript in accordance with rule 203 (as discussed in section 5.90 below). Tex. R. Civ. P. 200.4.

Compelling Attendance: A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under rule 176; see section 5.82 above. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice on the party's attorney has the same effect as a subpoena served on the witness. Tex. R. Civ. P. 200.2.

§ 5.88 Depositions in Foreign Jurisdictions

A party may take a deposition on oral examination or written questions of any person or entity located in another state or foreign country for use in Texas proceedings. The deposition may be taken by notice; by letter rogatory, letter of request, or other such device; by agreement of the parties; or by court order. Tex. R. Civ. P. 201.1(a).

The deposition may be taken by notice in accordance with the discovery rules as if it were taken in Texas, except that the deposition officer may be a person authorized to administer oaths in the foreign jurisdiction. Tex. R. Civ. P. 201.1(b).

Deposition by letter rogatory, letter of request, or other such device is allowed only after motion filed with the court. Tex. R. Civ. P. 201.1(c), (d). The court must set a time for objection to the form of the device, and the objecting party must object in writing served on all other parties within that time or the objection is waived. Tex. R. Civ. P. 201.1(e). Evidence obtained in response to such a device is not inadmissible merely because of formal departures from the deposition requirements of Texas discovery rules. Tex. R. Civ. P. 201.1(f).

A deposition in another jurisdiction may be taken by electronic means in accordance with rule 199. Tex. R. Civ. P. 201.1(g).

COMMENT: The mere fact that the procedure is authorized by the Texas Rules of Civil Procedure does not necessarily mean that it is permitted or recognized by the law of the state or foreign jurisdiction in which the witness is located. The parties should first determine what procedures are permitted by the jurisdiction in which the witness is located and apply the appropriate procedure. Tex. R. Civ. P. 201 cmt. 1.

§ 5.89 Depositions before Suit or to Investigate Claims

A person may petition the court for an order authorizing a deposition to be taken before the filing of a suit to perpetuate or obtain testimony for use in an anticipated suit or to investigate a potential claim or suit. Tex. R. Civ. P. 202.1. The petition and notice of the

hearing must be served at least fifteen days before the date of hearing on all persons to be deposed and, if suit is anticipated, on all potential adverse parties. Tex. R. Civ. P. 202.3(a). Provisions regarding the petition, notice and service, the order, the manner of taking such a deposition, and its permitted use are contained in rules 202.2 through 202.5. *See* Tex. R. Civ. P. 202.2–.5.

§ 5.90 Signing, Certification, and Use of Depositions

Signature by Witness: The deposition officer must provide the original deposition transcript directly to the witness to examine and sign. If the witness is represented by an attorney at the deposition, the transcript is sent to the attorney. Tex. R. Civ. P. 203.1(a). All the witness's changes to the transcript must be done in writing on a separate sheet of paper and include a reason for the change. No erasures or obliterations may be made to the original transcript. The transcript must be signed by the witness, under oath (or pursuant to a declaration under section 132.001 of the Texas Civil Practice and Remedies Code), and returned to the deposition officer within twenty days, or the witness will be deemed to have waived the right to make the changes. Tex. R. Civ. P. 203.1(b). These requirements do not apply if the signature requirement is waived by the witness and all parties, to depositions on written questions, or to nonstenographic recordings of oral depositions. Tex. R. Civ. P. 203.1(c).

Deposition Certificate: The deposition officer files a sworn deposition certificate with the court and serves a copy on all parties; the certificate must also be attached as part of the deposition transcript or nonstenographic recording. Tex. R. Civ. P. 203.2.

Originals: The original transcript is returned to the party who asked the first question; the original nonstenographic recording is returned to the party who requested it. Tex. R. Civ. P. 203.3(a). The deposition officer must serve notice of delivery on all other parties. Tex. R. Civ. P. 203.3(b).

The party who has the original transcript or recording must make it available for inspection and copying by any other party. A party or the witness may obtain a copy of the transcript or recording from the deposition officer on payment of a reasonable fee. Tex. R. Civ. P. 203.3(c).

Exhibits: On request of a party, the original documents and things produced for inspection during the witness's examination must be marked for identification by the deposition officer and annexed to the transcript or nonstenographic recording. Tex. R. Civ. P. 203.4.

Objections: A party may object to errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the officer complies with rule 203.3 (concerning delivery) at least one day before the case is called to trial, with regard to a deposition transcript, or thirty days before the case is called to trial, with regard to a nonstenographic recording, the party must file and serve the motion to suppress before the trial begins to preserve the objections. Tex. R. Civ. P. 203.5.

Use: A nonstenographic recording, or a written transcription of all or a portion of the recording, may be used to the same extent as a stenographic deposition. However, for good cause shown, the court may require that the party seeking to use the nonstenographic record or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. Tex. R. Civ. P. 203.6(a).

All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. A deposition is admissible against a party joined after the deposition is taken if it is admissible under rule 804(b)(1) of the Texas Rules of Evidence or if the later-joined party has had a reasonable opportunity to redepose the witness but has not done so. Tex. R. Civ. P. 203.6(b). Depositions taken in other proceedings may be used as permitted by the Texas Rules of Evidence. Tex. R. Civ. P. 203.6(c); *see also* Tex. R. Evid. 801(e)(2) (prior deposition testimony of party not hearsay if offered against party), 804 (prior deposition of unavailable witness).

§ 5.91 Amending or Supplementing Deposition Testimony

If an expert witness is under a party's control, that party must amend or supplement any deposition testimony by the expert but only with regard to the expert's mental impressions or opinions and the basis for them. Tex. R. Civ. P. 195.6. This rule provides the only duty to supplement deposition testimony. *See* Tex. R. Civ. P. 193 cmt. 5.

[Sections 5.92 through 5.100 are reserved for expansion.]

VII. Subpoenas

§ 5.101 Subpoenas

A subpoena may be issued by an attorney authorized to practice in Texas, by the clerk's office, or by an officer authorized to take depositions in Texas. Tex. R. Civ. P. 176.4. (*See* Tex. Civ. Prac. & Rem. Code § 20.001 regarding authority to take depositions.) The subpoena may be served by a sheriff or constable or any nonparty person over eighteen years of age. Tex. R. Civ. P. 176.5(a). Proof of service must be documented either by memorandum signed by the witness acknowledging acceptance of the subpoena or by a statement by the person serving, which must include the date, time, and manner of service and the name of the person served. Tex. R. Civ. P. 176.5(b).

All subpoenas must be issued in the name of "The State of Texas" and contain these elements: the style; the cause number; the court; the date of issuance; identification of the subpoenaed person; the time, place, and nature of the action required by the subpoenaed person; the name of the party causing the subpoena to be issued (and the party's attorney, if any); the text contained in rule 176.8(a); and the signature of the issuing person. Tex. R. Civ. P. 176.1.

Properly issued subpoenas are generally valid within a radius of 150 miles from the county in which the subpoenaed person resides or is served. Tex. R. Civ. P. 176.3(a). Subpoenas may be served on witnesses who reside 150 miles or less from the county in which the suit is pending or who may be found within that distance at the time of trial. Tex. Civ. Prac. & Rem. Code § 22.002. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record. Tex. R. Civ. P. 176.5(a).

A subpoena must command the person to attend and give testimony at a deposition, hearing, or trial; produce and permit inspection and copying of designated documents or tangible things in the person's possession, custody, or control; or both. Tex. R. Civ. P. 176.2. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the discovery rules. Tex. R. Civ. P. 176.3(b).

Witnesses and custodians of records are entitled to the payment of fees before they must appear to testify or produce or certify records, as applicable. A witness is entitled to $10 for each day the witness attends court. This fee includes the entitlement for travel, and the witness is not entitled to any reimbursement for mileage traveled. Tex. Civ. Prac. & Rem. Code § 22.001(a). The party who summons the witness must pay that witness's

fee for one day at the time the subpoena is served on the witness. Tex. Civ. Prac. & Rem. Code § 22.001(b). Witnesses summoned by a state agency are entitled to different fees. *See* Tex. Civ. Prac. & Rem. Code § 22.003.

A custodian of records who produces or certifies a record in response to a request for production or certification of a record under a subpoena, a request for production, or other instrument issued under the authority of a tribunal that compels production or certification of a record is entitled to $1 for production or certification of the record. If more than one record is produced or certified, the custodian of the records is entitled to only one fee under section 22.004 of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 22.004(a). Note, however, that other laws may require the payment of additional fees for the production of these records. The fee required by section 22.004 is in addition to any other fee imposed by law for the production or certification of a record. Tex. Civ. Prac. & Rem. Code § 22.004(e). The party requesting the production or certification of the records must pay the $1 fee at the time the subpoena, request, or other instrument is served. Tex. Civ. Prac. & Rem. Code § 22.004(c). If the custodian of records produces or certifies a record but is not required to appear in court, the custodian is not entitled to the $10 per day witness fee under section 22.001. Tex. Civ. Prac. & Rem. Code § 22.004(b).

A party causing a subpoena to issue must take reasonable steps to avoid undue burden and expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship. Tex. R. Civ. P. 176.7. In determining whether a deposition notice or subpoena duces tecum is unreasonable and oppressive, the following factors are relevant: (1) the quantity of materials subpoenaed, (2) the ease or difficulty of collecting and transporting the materials, (3) the length of time before the deposition, (4) the availability of the information from other sources, and (5) the relevance of the materials. *St. Luke's Episcopal Hospital v. Garcia*, 928 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding).

§ 5.102 Enforcement of Subpoenas

Failure by a subpoenaed person to obey the subpoena, without adequate excuse, may be deemed a contempt of court. (Requirements related to the response, objections, and pro-

tective orders are detailed in rule 176.6.) On a finding of contempt, the court may punish the violating party by fine, confinement, or both. Tex. R. Civ. P. 176.8(a).

Before a fine may be imposed on a person who has failed to comply with a subpoena, there must be filed an affidavit of the party requesting the subpoena, or of the attorney of record, that all fees due the witness by law were paid or tendered. Tex. R. Civ. P. 176.8(b).

[Sections 5.103 through 5.110 are reserved for expansion.]

VIII. Abuse of Discovery and Sanctions

§ 5.111 Motion for Sanctions or Order Compelling Discovery

A party may apply for sanctions, an order compelling discovery, or both on reasonable notice to other parties and to all other persons affected thereby as described below. Tex. R. Civ. P. 215.1. The imposition of an available sanction must be "just." Whether a sanction is "just" is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. The sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party. In addition, the sanction should be directed against the offender. Therefore, the trial court must attempt to determine whether the conduct in question is attributable to counsel only, to the party only, or to both. Second, for a punishment to be "just," it must not be excessive. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. Thus, the courts must first consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance and deterrence and discourage further abuse. A trial court exceeds its discretion if the sanction it imposes exceeds the purposes that discovery sanctions are intended to further. *Best Industrial Uniform Supply Co. v. Gulf Coast Alloy Welding, Inc.*, 41 S.W.3d 145, 148 (Tex. App.—Amarillo 2000, pet. denied).

Appropriate Court: An application for an order must be made to the court in which the action is pending, except in two circumstances: (1) on matters relating to the deposition of a party, an application for an order to the party may be made to the court in which the action is pending or to any district court in the district in which the deposition is being taken and (2) an application for an order related to a nonparty deponent shall be

made to the court in the district in which the deposition is being taken. Tex. R. Civ. P. 215.1(a).

Motion: The party seeking discovery may move for an order compelling discovery or apply for the imposition of sanctions (without the necessity of first having obtained a court order compelling the discovery) if one of the following occurs:

1. A party or other deponent that is a corporation or other entity fails to designate a person for deposition and state the matters on which the person will testify.
2. A party, other deponent, or person designated to testify on behalf of a party or other deponent fails to appear before the officer who is to take his deposition (after being served with a proper notice) or to answer a question propounded or submitted on oral examination or written questions.
3. A party fails to serve answers or objections to properly served interrogatories, fails to answer an interrogatory, fails to serve a written response to a properly served request for inspection, or fails to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection under rule 196.

Tex. R. Civ. P. 215.1(b).

For purposes of rule 215.1, an evasive or incomplete answer is treated as a failure to answer. Tex. R. Civ. P. 215.1(c).

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. Tex. R. Civ. P. 215.1(b).

If the court denies the motion in whole or in part, it may make such discovery protective order as it would have been empowered to make on a motion under rule 192.6. Tex. R. Civ. P. 215.1(b).

Rule 215.1(d) provides for the awarding of expenses, including attorney's fees, following a hearing on a motion to compel. *See* Tex. R. Civ. P. 215.1(d).

If a party fails to comply with any person's written request for the person's own statement as provided in rule 192.3(h), the person making the request may move for an order compelling compliance and, if the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney's fees, that are reasonable in relation to the amount of work reasonably expended in obtaining the order. Tex. R. Civ. P. 215.1(e).

§ 5.112 Failure to Comply with Order or Discovery Request

Sanctions by Court in District in Which Deposition Is Taken: If a deponent fails to appear, fails to be sworn, or fails to answer after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. Tex. R. Civ. P. 215.2(a).

Sanctions by Court in Which Case Is Pending: For failure to comply with a proper discovery request or to obey an order to provide or permit discovery, the court in which the action is pending may, after notice and hearing, enter such orders "as are just." Tex. R. Civ. P. 215.2(b). The Supreme Court of Texas said in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991) (orig. proceeding):

> In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. . . .
>
> Second, just sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.

TransAmerican Natural Gas Corp., 811 S.W.2d at 917; *see In re Marriage of Mize*, 558 S.W.3d 187, 195–96 (Tex. App.—Texarkana 2018, no pet.) (when client claims Fifth Amendment privilege to questions in deposition that are not connected to criminal charges, court should try to determine if offensive conduct is attributable to party, counsel, or both and must consider lesser sanctions if appropriate). Possible sanctions include, but are not limited to—

1. an order disallowing any further discovery of any kind or of a particular kind by the disobedient party (*see Thompson v. Davis*, 901 S.W.2d 939, 940 (Tex. 1995) (orig. proceeding) (per curiam));
2. an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising the party;

3. an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

4. an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence;

5. an order striking out pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party (*see Salomon v. Lesay*, 369 S.W.3d 540, 557 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Weimer v. Weimer*, 788 S.W.2d 647, 648–50 (Tex. App.—Corpus Christi–Edinburg 1990, no writ); *Monaghan v. Crawford*, 763 S.W.2d 955, 956–59 (Tex. App.—San Antonio 1989, no writ));

6. in lieu of or in addition to any of the foregoing orders, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; and

7. when a party has failed to comply with an order under rule 204 requiring him to appear or produce another person for examination, such orders as are listed in items 1.–5. above, unless the person failing to comply shows that he is unable to appear or to produce the person for examination.

In lieu of or in addition to any of the foregoing orders, the court shall require the party failing to obey the order or the attorney advising the party, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Tex. R. Civ. P. 215.2(b).

This is a nonexclusive list of available sanctions. For example, although the rule does not specifically authorize the imposition of punitive monetary sanctions, these may be justified under the "as are just" language of the rule. *See Ismail v. Ismail*, 702 S.W.2d 216, 224–25 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) ($15,000 fine for failure to file court-ordered inventory and appraisement). Note that some courts have limited monetary sanctions available for abuse of discovery to reasonable expenses, including attorney's fees, caused by the abuse. *Clone Component Distributors of America, Inc. v. State*, 819 S.W.2d 593, 597 (Tex. App.—Dallas 1991, no writ); *Owens-Corning Fiberglas Corp. v. Caldwell*, 807 S.W.2d 413, 415 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied]). Sanctions striking a party's pleadings and

deeming the party's net monthly resources to be $6,000 have been upheld. *See In re J.D.N.*, 183 S.W.3d 128 (Tex. App.—Dallas 2006, no pet.). However, there are limitations on a trial court's ability to impose sanctions; the reviewing court must consider whether (1) a direct relationship exists between the offensive conduct and the sanctions imposed and (2) the sanctions are excessive. *TransAmerican Natural Gas Corp.*, 811 S.W. 2d at 917.

The trial court must consider the availability of lesser sanctions and state a reasoned explanation as to the appropriateness of the greater sanction before imposing the death penalty sanction. An order merely listing instances where the party failed to comply with discovery orders, with no indication why the death penalty sanctions were warranted, will not be upheld. *Mullins v. Mullins*, No. 02-16-00449-CV, 2017 WL 3184676 (Tex. App.—Fort Worth July 27, 2017, no pet.) (mem. op.); *see also Young v. Young*, No. 03-14-00720-CV, 2016 WL 7339117 (Tex. App.—Austin Dec. 15, 2016, no pet.) (mem. op.).

To obtain sanctions for nonproduction of documents, the requesting party has the burden to prove that the other party has possession of the requested documents. *GTE Communications Systems Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding).

Sanctions against Nonparty: If a nonparty fails to comply with an order under rule 196.7 or rule 205.3, the court that made the order may treat the failure to obey as contempt of court. Tex. R. Civ. P. 215.2(c).

§ 5.113 Abuse of Discovery Process

The court in which an action is pending may, after notice and hearing, impose any appropriate sanction listed in paragraphs 1–5 and paragraph 8 of rule 215.2(b) if the court finds that a party is abusing the discovery process in seeking, making, or resisting discovery; that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing; or that a response or answer is unreasonably frivolous or made for purposes of delay. Tex. R. Civ. P. 215.3.

The rules permit the suspension of a deposition based on events that occur during the deposition—specifically, the expiration of time limits or violation of applicable rules governing taking depositions. Tex. R. Civ. P. 199.5(g). However, counsel for one of the parties cannot unilaterally suspend the deposition before it commences without incurring a finding of an abuse of discovery. For a deponent not wanting to be deposed, the

proper avenue is to file a motion to quash. A finding of bad faith is not necessarily a factor when a trial court imposes a sanction, other than a death penalty sanction, under rule 215.2(b). *Wilson v. Shamoun & Norman, LLP*, 523 S.W.3d 222, 229–31 (Tex. App.—Dallas 2017, pet. denied).

§ 5.114 Failure to Comply with Rule 198

A party who has requested an admission under rule 198 may move to determine the sufficiency of the answer or objection. An evasive or incomplete answer may be treated as a failure to answer. The court shall order that an answer be served, unless it determines that an objection is justified. If the court determines that an answer does not comply with the requirements of rule 198, it may order either that the matter is admitted or that an amended answer be served. Rule 215.1(d) provisions apply to the award of expenses incurred for the motion. Tex. R. Civ. P. 215.4(a).

If a party proves the genuineness of a document or the truth of a matter after another party fails to admit the genuineness or truth as requested under rule 198, the proving party may apply to the court for an order for the other party to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees. The court shall order the expenses paid unless it finds that the request was held objectionable under rule 193, the admission sought was not of substantial importance, the party failing to admit had a reasonable ground to believe he might prevail on the matter, or there was other good reason for the failure to admit. Tex. R. Civ. P. 215.4(b).

§ 5.115 Failure to Attend or Serve Subpoena

If a party who gives notice of an oral deposition fails to attend and proceed and another party attends in person or by attorney, the court may order the party giving the notice to pay the other party's reasonable expenses, including attorney's fees, incurred in attending. Those expenses may also be ordered paid if a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice (for example, failure to subpoena a nonparty witness). Tex. R. Civ. P. 215.5.

In a parentage determination or child support proceeding under title 5 of the Family Code, a court or the title IV-D agency may issue an order suspending license if a parent or alleged parent has failed, after receiving appropriate notice, to comply with a subpoena. Tex. Fam. Code §§ 232.001(4), 232.003(b); *see also* Tex. Fam. Code §§ 232.004–.016.

§ 5.116 False Certification

If the certification required under rule 191.3 is false without substantial justification, the court may, on motion or on its own initiative, impose on the person who made the certification or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading under chapter 10 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 191.3(e).

Chapter 6
Information Gathering and Third-Party Notices

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Chapter 6

Information Gathering and Third-Party Notices

I. Useful Websites

§ 6.1 Useful Websites

The following is a list of websites useful to the family law practitioner:

American Academy of Matrimonial Lawyers
www.aaml.org

Car title history
www.carfax.com

Children's Health Insurance Program
https://www.texaschildrenshealthplan.org/

Credit report
www.equifax.com
www.experian.com
www.transunion.com

English language and translation
www.wordsmyth.net
www.freetranslation.com
http://translate.google.com/

Family education and advocacy
www.puttingkidsfirst.org

Internal Revenue Service
www.irs.gov

Legal resources and links
www.texasbar.com
www.texasbarbooks.net
www.texasbarcle.com
www.virtualchase.justia.com
www.findlaw.com

Maps
maps.google.com
www.mapquest.com

National Association of Bar Executives
www.nabenet.org

National Drug Code Directory
www.fda.gov/Drugs/InformationOnDrugs/ucm142438.htm

Pension Benefit Guaranty Corporation
www.pbgc.gov

Search engines, fee-based
www.accurint.com
https://legal.thomsonreuters.com/en/products/westlaw
www.publicdata.com
www.westlawnext.com

Social Security
www.ssa.gov

State Bar of Texas Family Law Section
www.sbotfam.org

Telephone taping/recording guidelines
www.rcfp.org/taping/index.html

Texas Academy of Family Law Specialists
www.tafls.org

Texas Comptroller of Public Accounts
http://comptroller.texas.gov/taxinfo/proptax/

Texas courts
www.txcourts.gov

Texas legislature online
https://capitol.texas.gov/

Texas sex offender registry
https://records.txdps.state.tx.us/SexOffenderRegistry

Used car values
www.kbb.com
www.edmunds.com
www.nada.com

[Sections 6.2 through 6.10 are reserved for expansion.]

II. Third-Party Notices

§ 6.11 Lis Pendens

A lis pendens notice is filed in the real property records to give notice that there is a lawsuit pending that may affect the title to real property. The lis pendens should be filed with the office of the county clerk in each county in which any part of the affected real estate is located, and it must state the style, number, and kind of proceeding, the court in which the proceeding is pending, the names of the parties, the kind of proceeding, and a description of the property affected. Tex. Prop. Code § 12.007(a), (b).

The notice of lis pendens may be filed before service is obtained in the lawsuit. *See* Tex. Prop. Code § 13.004(a). A transfer or encumbrance of real property involved in a proceeding by a party to the proceeding to a third party who has paid a valuable consideration and who does not have actual or constructive notice of the proceeding is effective, even though the judgment is against the party transferring or encumbering the property, unless a notice of the pendency of the proceeding has been recorded and indexed under that party's name as provided in section 12.007(c) of the Texas Property Code in each county in which the property is located. Tex. Prop. Code § 13.004(b).

The lis pendens does not give notice of issues not appearing on the face of the pleadings of the case. *Kropp v. Prather*, 526 S.W.2d 283, 287 (Tex. App.—Tyler 1975, writ ref'd

n.r.e.). Therefore, specific reference to the real estate should be made in the pleadings on file.

The notice of lis pendens may be signed by the party to the suit, his agent, or his attorney of record in the case. Tex. Prop. Code § 12.007(b). No later than three days after the notice is filed for record, the party filing it must serve a copy of the notice on each party to the action who has an interest in the real property. Tex. Prop. Code § 12.007(d). Because the lis pendens creates a cloud on the title to the real estate concerned, it should be released as soon as the case terminates or when the restraint on alienation is no longer needed.

Expunction: A party to the action may apply to the court to expunge the lis pendens notice. Notice of the motion to expunge must be served on each affected party at least twenty days before the hearing on the motion. Failure of the party filing the lis pendens notice for record to serve the notice required under Property Code section 12.007(d) is one of the bases on which the court may expunge the notice. Tex. Prop. Code § 12.0071. Other provisions regarding the expunction process are set out in the statute.

§ 6.12 Notice to Pension Trustees

Payment or refund by an employer or trustee under a written plan discharges that employer or trustee unless, before payment or refund is made, notice that some other person claims to be entitled to all or part of the payment or refund has been received by the employer at his principal Texas business address or by the trustee at his home office. If payment or refund is composed of stock in any corporation, the corporation must be notified at its home office. Tex. Lab. Code §§ 82.002–.004.

§ 6.13 Information for Suits Affecting Parent-Child Relationship

Certain information must be obtained to be included in the final order if the suit involves children except in a proceeding involving termination of the parent-child relationship or adoption.

A final order in a suit affecting the parent-child relationship must contain the Social Security number and driver's license number of each party to the suit, including the child, except that the child's Social Security number or driver's license number is not required if such a number has not been assigned. Tex. Fam. Code § 105.006(a)(1).

The final order must also contain each party's current residence address, mailing address, home telephone number, employer's name, employment address, and work telephone number, unless providing the information is likely to cause the child or conservator harassment, abuse, serious harm, or injury. Tex. Fam. Code § 105.006(a)(2), (c).

Rule 21c of the Texas Rules of Civil Procedure provides rules for filing documents that have sensitive data, which includes any part of a Social Security number or other taxpayer identification number, bank account or other financial account numbers, and other identification numbers. Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation, this information must be redacted. If the document must contain sensitive data, it should be designated as containing sensitive data if it is e-filed; if it is not e-filed, it must include, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

§ 6.14 Affidavit Concerning Costs and Necessity of Services

Section 18.001 of the Civil Practice and Remedies Code permits use of affidavits to establish reasonableness of charges and necessity of services. Unless controverted, an affidavit that the amount a person was charged for a service was reasonable at the time and place the service was provided and that the service was necessary is sufficient to support a fact finding by the judge or jury. Tex. Civ. Prac. & Rem. Code § 18.001(b). Such an affidavit can often be used to establish health-care expenses in paternity litigation and attorney's fees in all family law cases.

The affidavit must be made by the person who provided the service or by the person in charge of records showing the service provided and charge made and must include an itemized statement of the service and charge. Tex. Civ. Prac. & Rem. Code § 18.001(c).

The affidavit must be served on each other party by the earlier of (1) ninety days after the date the defendant files an answer; (2) the date the offering party must designate any expert witness under a court order; or (3) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(d). If services are provided for the first time by a provider after the answer is filed, the affidavit must be served by the earlier of (1) the date the offering party must designate any expert witness under a court order or (2) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(d–1). When the affidavit is served, notice

must be filed with the clerk that the affidavit was served in accordance with section 18.001. Except as provided by the Texas Rules of Evidence, the affidavit is not required to be filed with the clerk before the trial begins. Tex. Civ. Prac. & Rem. Code § 18.001(d–2).

The party opposing a claim in the affidavit must serve a counteraffidavit made by a person "qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." It must give reasonable notice of the basis on which the serving party intends to controvert the claim at trial, and it may not be used to controvert the causation element of the cause of action. Tex. Civ. Prac. & Rem. Code § 18.001(f).

The counteraffidavit must be served on the party or the party's attorney by the earlier of (1) 120 days after the date the defendant files its answer; (2) the date the party offering the counteraffidavit must designate expert witnesses under a court order; or (3) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(e). If service of the affidavit was made under section 18.001(d–1), the counteraffidavit must be served by the later of (1) thirty days after the affidavit was served; (2) the date the party offering the counteraffidavit must designate any expert witness under a court order; or (3) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(e–1). When the counteraffidavit is served, written notice must be filed with the clerk that the counteraffidavit was served in accordance with section 18.001. Tex. Civ. Prac. & Rem. Code § 18.001(g).

If continuing services are provided after a relevant deadline, affidavits may be supplemented on or before the sixtieth day before the trial begins, and counteraffidavits may be supplemented on or before the thirtieth day before the trial begins. Tex. Civ. Prac. & Rem. Code § 18.001(h). Deadlines may be altered by agreement of all parties or with leave of court. Tex. Civ. Prac. & Rem. Code § 18.001(i).

The affidavit or counteraffidavit must be taken before an officer with authority to administer oaths. Tex. Civ. Prac. & Rem. Code § 18.001(c)(1), (f). An unsworn declaration comporting with section 132.001 of the Civil Practice and Remedies Code may be submitted instead of an affidavit. *See* Tex. Civ. Prac. & Rem. Code § 132.001.

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Chapter 7

Inventory and Appraisement

§ 7.1 Court Order

While a suit for dissolution of a marriage is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may grant temporary orders requiring one or both parties to prepare a sworn inventory and appraisement of the real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities. Tex. Fam. Code § 6.502(a)(1). Failure to comply with temporary orders ordering the preparation and filing of the sworn inventory and appraisement by a certain date is punishable by contempt. *See* Tex. Fam. Code § 6.506; *see also Ismail v. Ismail*, 702 S.W.2d 216, 224 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

In order for the court to determine, with some degree of accuracy, the true nature and extent of the estates of the parties (whether community or separate), an accurate inventory of all the assets and liabilities of the parties should be required by the court. Requiring an accurate inventory and appraisement will increase the probability of the court's dividing the property of the parties in a manner the court deems just and right, having due regard for the rights of each party and any children of the marriage, in accordance with section 7.001. *See* Tex. Fam. Code § 7.001. It is also helpful for each party to attach supporting documents to the party's inventory and appraisement, including financial account statements and other documents evidencing the character and value of assets and liabilities.

Additionally, an inventory and appraisement should be the starting point for the preparation of any requested findings of fact and conclusions of law concerning the characterization and value of all assets, liabilities, claims, and offsets on which disputed evidence has been presented. *See* Tex. Fam. Code § 6.711.

Local rules of the county in which the case is filed govern the form of the inventory, the degree of particularity required in its preparation, the time within which it must be filed, and the sanctions a court may impose for a party's failure to comply with those local rules.

§ 7.2 All Property Included

Notwithstanding the court's requirement of the preparation of inventories, counsel must ensure that all property is accounted for and listed in the inventory. If a party asserts the existence of property not listed in an inventory, the burden of proof lies with that party. *See Deane v. Deane*, 298 S.W.2d 282, 284 (Tex. App.—Eastland l957, no writ). Community property not divided by the decree of divorce, whether listed on an inventory or not, is subject to postdecree division. *See* Tex. Fam. Code § 9.201 *et seq.*

Counsel should exercise caution to identify accurately the character and value of property listed in the inventory, including whether any property is of mixed character and the basis for any claim of separate property. A party's uncontroverted testimony regarding the value of her own property is sufficient to sustain a finding as to value. *See Espronceda v. Espronceda*, No. 13-15-00081-CV, 2016 WL 3225860 (Tex. App.—Corpus Christi–Edinburg June 9, 2016, no pet.) (mem. op.).

See the practice notes in chapter 3 of this manual for a discussion of the characterization and division of property.

§ 7.3 Discovery Procedures

Counsel should use all appropriate and necessary discovery procedures available for preparation of an accurate inventory. The court may require the production of books, papers, documents, and tangible things by a party. Tex. Fam. Code § 6.502(a)(3). Discovery procedures aid counsel in preparing an accurate inventory and ensure that the opposing party has been candid in disclosing all assets and liabilities of the parties. See the practice notes in chapter 5 of this manual and the rules of civil procedure discussed there.

§ 7.4 Judicial Admission

A sworn inventory and appraisement that is filed with the court constitutes a judicial admission about the characterization of the items listed and will be accepted as true and binding on the party. *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.—El Paso 1985, writ dism'd); *see also Dutton v. Dutton*, 18 S.W.3d 849, 852–53 (Tex. App.—Eastland 2000, pet. denied). If a party attempts to offer evidence about characterization of an asset contrary to a sworn inventory and appraisement filed with the court by that party, the evidence would not be admissible on proper objection, because the inventory is a judicial admission. *Roosevelt*, 699 S.W.2d at 374. In *Dutton*, the husband filed a

sworn inventory and appraisement with the trial court and listed certain real estate as community property. The husband did not introduce his inventory and appraisement into evidence. The wife filed a sworn inventory and appraisement with the trial court, listing the same real estate as her separate property. The wife's inventory and appraisement was introduced into evidence. The trial court found the real estate to be community property and awarded it all to the wife. On appeal, the husband contended that the real estate was one-half his separate property and one-half the wife's separate property. The appellate court held that the husband's inventory and appraisement, characterizing the real estate as community property, constitutes a judicial admission that bars him from asserting on appeal that the real estate is other than community property. The appellate court in *Dutton* further stated:

> Judicial admissions estop the party who made them from challenging their truth. Five conditions must occur before a party's admission is conclusive against him: (1) the declaration relied upon must have been made in the course of a judicial proceeding; (2) the declaration was contrary to an essential fact embraced in the theory of recovery or defense asserted by the party; (3) the statement was deliberate, clear, and unequivocal; (4) giving conclusive effect to the declaration would not run contrary to public policy; and (5) the declaration related to a fact upon which a judgment for the opposing party was based.

Dutton, 18 S.W.3d at 853.

The effect of a judicial admission in an inventory and appraisement can be muted when (1) a litigant pleads separate property, (2) a litigant tenders requests for admission related to a claim for separate property, (3) a litigant discloses during discovery the documentary evidence to support the claim of separate property, (4) the party opposite files responsive pleadings concerning equitable reimbursement demonstrating a recognition of a separate-property claim, (5) the litigant seeks leave of court to amend an inventory to correct an error, (6) the trial court grants leave to amend an inventory, and (7) there is no objection to the admission of contradictory evidence. *Rivera v. Hernandez*, 441 S.W.3d 413, 424 (Tex. App.—El Paso 2014, pet. denied).

However, merely asserting in a sworn inventory and appraisement that certain property is the separate property of a party is not sufficient to establish that fact. A sworn inventory is simply another form of testimony. Additional evidence is required to rebut the presumption that all property possessed by either party is community property. *Warriner v. Warriner*, 394 S.W.3d 240, 248–49 (Tex. App.—El Paso 2012, no pet.).

COMMENT: Because a sworn inventory and appraisement constitute a form of testimony, and a judicial admission if filed with the court, one should exercise caution in preparing such an inventory and appraisement. Unless otherwise required by court order or the local rules of the court, it may be prudent to submit to opposing counsel a preliminary, unsworn inventory and appraisement in the early stages of a divorce case, so that the party's inventory and appraisement may be amended, if necessary, after further information is obtained but before the party has sworn to the contents of the inventory and appraisement.

§ 7.5 Spreadsheets

It is very helpful for settlement preparation and trial presentation to convert the inventory and appraisement of both parties into either separate spreadsheets or a combined spreadsheet, showing husband's values, wife's values, and a blank column for the court to insert its values. The value assigned by the court for a particular asset or liability, to which husband and wife have assigned different values, can aid in the preparation of findings of fact and conclusions of law under Texas Family Code section 6.711.

§ 7.6 On Appeal

An appellate court may not consider an inventory and appraisement on appeal if it is not formally admitted into evidence at trial. *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508–09 (Tex. App.—Austin 1994, no writ).

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Chapter 8

Ancillary Motions and Proceedings

Note: While this chapter discusses in general many of the motions a family law attorney will file, many of the other chapters of this manual contain specific discussion of specialized motions. Some of these include discovery motions (chapter 5), motions in limine (chapter 19), establishment of parentage (chapter 54), and motions regarding a child (chapter 56).

I. General Considerations

§ 8.1 Requisites of Motion; Service; Electronic Filing

All motions, unless made during a hearing or trial, must be filed in writing with the clerk of the court and state the grounds and relief requested. At the same time, a true copy must be served on all other parties. The motion must be noted on the docket. Tex. R. Civ. P. 21(a). Any plea or pleading mistakenly designated shall, if justice so requires, be treated by the court as if it had been properly designated. Tex. R. Civ. P. 71; *In re J.Z.P.*, 484 S.W.3d 924, 925 (Tex. 2016) (per curiam). An application for an order and notice of any hearing, not presented during a trial or hearing, must be served on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by the rules or shortened by the court. Tex. R. Civ. P. 21(b). The party or attorney of record must certify compliance in writing over signature on the filed motion. Tex. R. Civ. P. 21(d).

Attorneys must electronically file documents in courts where electronic filing has been mandated. Electronic filing is not required by unrepresented parties or by attorneys practicing in courts where electronic filing is not mandated. Tex. R. Civ. P. 21(f)(1). The e-mail address of an attorney or unrepresented party who electronically files must be included on the document. Tex. R. Civ. P. 21(f)(2).

Documents are timely filed if they are filed before midnight. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider unless the document is transmitted on a Saturday, Sunday, or legal holiday,

and then it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday. If a document requires a motion and an order allowing its filing, the document is deemed filed on the date the motion is granted. Tex. R. Civ. P. 21(f)(5). If a document is untimely due to a technical failure or system outage, a party may seek appropriate relief from the court, including a reasonable extension of time to complete the filing. Tex. R. Civ. P. 21(f)(6).

An electronic document that is electronically served, filed, or issued by a court or clerk is considered signed if the document contains (1) a "/s/" and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or (2) an electronic image or scanned image of the signature. Tex. R. Civ. P. 21(f)(7).

A document filed electronically under rule 21 must be served electronically through the electronic filing manager if the e-mail address of the party or attorney to be served is on file with the electronic filing manager. If an e-mail address is not on file with the electronic filing manager or the document is not electronically filed, rule 21a allows for service by commercial delivery service, by mail, by e-mail, or by fax as well as in person. Tex. R. Civ. P. 21a(a)

Service by mail or commercial delivery service shall be complete on deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service. Service by fax is complete on receipt. Service by fax completed after 5:00 P.M. local time of the recipient is deemed served the next day. Electronic service is complete on transmission of the document to the serving party's electronic filing provider. Tex. R. Civ. P. 21a(b).

The rule also provides that whenever a party has the right or is required to do some act within a prescribed period after service of notice or other paper on him and the notice or paper is served on him by mail, three days are added to the prescribed period. Tex. R. Civ. P. 21a(c). Service may be on the party or the party's duly authorized agent or attorney of record, as the case may be. Tex. R. Civ. P. 21a(a).

§ 8.2 Copies of Motions

If there is more than one other party represented by different attorneys, one copy of the motion must be served on each attorney in charge. Tex. R. Civ. P. 21(c). A party may obtain another copy of the same pleading by paying for the copying and delivery. Tex. R. Civ. P. 21(e). If a party fails to serve on or deliver to the other parties a copy of a

motion in accordance with rules 21 and 21a, the court has discretion, after notice and hearing, to order a sanction under rule 215.2(b). Tex. R. Civ. P. 21b.

[Sections 8.3 through 8.10 are reserved for expansion.]

II. Attorneys and Judges

§ 8.11 Attorney in Charge

Any party may prosecute or defend his rights either in person or by attorney. Tex. R. Civ. P. 7. When a party first appears through an attorney, the attorney whose signature first appears on the initial pleadings for any party is the attorney in charge, unless another attorney is specifically designated in those pleadings. That attorney in charge is responsible for the suit as to that party until the designation is changed by written notice to the court and all other parties in accordance with rule 21a. All communications from the court or from other attorneys about the suit are to be sent to that attorney in charge. Tex. R. Civ. P. 8.

§ 8.12 Withdrawal of Attorney

An attorney may withdraw from representing a party only on written motion for good cause shown. Contents of the motion vary depending on whether another attorney is to be substituted. If there will be a substitution, the motion must state the substitute attorney's name, address, telephone number, fax number, and State Bar identification number; that the party approves the substitution; and that the withdrawal is not sought for delay only. If there will be no substitution, the motion must state that a copy of the motion has been delivered to the party, that the party has been notified in writing of his right to object to the motion to withdraw, whether the party consents to the motion, the party's last known address, and all pending settings and deadlines. Tex. R. Civ. P. 10.

COMMENT: It is advisable to include in this information whether discovery has been requested, whether it was responded to, and a list of any deadlines for responding to or supplementing responses to requested discovery. If these matters are not contained in the motion, the client should be informed in writing.

If the motion is granted, the withdrawing attorney shall immediately give the party written notification of any additional settings or deadlines the attorney knows about at the

time of withdrawal but of which he has not notified the party. The court may impose other conditions if withdrawal is granted. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and first-class mail. If the attorney in charge withdraws and another attorney remains or is substituted, a new attorney in charge must be designated and notice given to all other parties in accordance with rule 21a. Tex. R. Civ. P. 10.

The withdrawal of an attorney from a case is governed by Tex. Disciplinary Rules Prof'l Conduct R. 1.15 (1989), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9). That rule describes several situations in which withdrawal may be permitted—for example, in which withdrawal can be accomplished without material adverse effect on the client's interests; and in which the client fails substantially to fulfill an obligation to the attorney regarding the attorney's services, including an obligation to pay the agreed fee, and has been given reasonable warning that the attorney will withdraw unless the obligation is fulfilled. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b). Even if cause exists to withdraw, the attorney must continue the representation if ordered to do so by the court. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(c). If withdrawal is granted, the attorney must take steps to a reasonably practicable extent to protect the client's interests. These steps include giving the client reasonable notice, allowing time for employment of another attorney, surrendering papers and property to which the client is entitled, and refunding any unearned advance fee payments. The attorney may keep papers relating to the client to the extent permitted by other law only if their retention will not prejudice the client in the subject matter of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d).

The client should be notified of the motion to withdraw and of the date, time, and place of any hearing in which the court is requested to take action. An order authorizing the withdrawal should be signed by the court. If the attorney fails to give notice of his motion to withdraw and there is no evidence that the client had notice or was aware of the attorney's withdrawal, no negligence or fault is attributed to the client as cause for failure to be represented at a later hearing. *See Robinson v. Risinger*, 548 S.W.2d 762, 765 (Tex. App.—Tyler 1977, writ ref'd n.r.e.).

It is reversible error to refuse to allow withdrawal if there is a serious conflict of interest, regardless of whether the motion is tardy, the granting of the motion would cause a continuance, or the attorney is at fault for helping to create the situation. *See J.W. Hill & Sons v. Wilson*, 399 S.W.2d 152, 153–54 (Tex. App.—San Antonio 1966, writ ref'd n.r.e.) (citing previously enacted Canons of Ethics).

COMMENT: The filing of a withdrawal and substitution of an attorney may expose the new attorney to liability for the actions of all preceding attorneys. The better practice is to file an appearance and designation of lead attorney.

§ 8.13 Disqualification of Attorney

A motion to disqualify an attorney should state the reasons for disqualification, and, if the motion is based on a disciplinary rule or ethical consideration, the specific rule should be cited. After notice and hearing, an order should be entered reflecting the court's ruling. *See generally In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341 (5th Cir. 1981).

Disciplinary Rules Provide Guidelines: The Texas Disciplinary Rules of Professional Conduct provide guidelines for a court to review when making its determination regarding disqualification. *See In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998) (orig. proceeding). In spite of the fact that "the disciplinary rules are merely guidelines—not controlling standards—for disqualification motions," *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (per curiam), "it would be injudicious for this court to employ a rule of disqualification that could not be reconciled with the Texas Rules of Professional Conduct." *Ayres v. Canales*, 790 S.W.2d 554, 556 n.2 (Tex. 1990) (orig. proceeding). Because the comments to the rules illustrate and explain applications of the rules, they, in addition to case law and the rules themselves, are relevant. *In re Robinson*, 90 S.W.3d 921, 925 (Tex. App.—San Antonio 2002, orig. proceeding); *see also* Tex. Disciplinary Rules Prof'l Conduct preamble ¶¶ 7, 10. The Texas Supreme Court has disqualified counsel based on rule 1.09 (*see In re Epic Holdings*, 985 S.W.2d at 52), even absent a disciplinary violation (*see National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996) (orig. proceeding), discussed in *In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998) (orig. proceeding)).

Disqualification is a severe remedy. *See Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding); *NCNB Texas National Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding). The courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory trial tactic. *See Spears*, 797 S.W.2d at 656. The reviewing court must determine whether the trial court abused its discretion in disqualifying or refusing to disqualify a party's counsel. *See Henderson v. Floyd*, 891 S.W.2d 252, 253 (Tex. 1995) (orig. proceeding) (per curiam). The injury to the legal profession from representation of a party by a lawyer who should have been disqualified is presumed harmful. *See In re Epic Holdings*, 985 S.W.2d at 54; *National Medical Enterprises*, 924 S.W.2d at 133.

Motion to Disqualify Must Be Timely Made: A party who fails to file its motion to disqualify opposing counsel in a timely manner waives the complaint, unless reasonable explanation is given. *See In re Users System Services, Inc.*, 22 S.W.3d 331, 337 (Tex. 1999) (orig. proceeding) (explanation given for seven-month delay); *In re Epic Holdings*, 985 S.W.2d at 52; *see also In re Taylor*, 67 S.W.3d 530, 534 (Tex. App.—Waco 2002, orig. proceeding) (motion to disqualify filed approximately two months after divorce filed not untimely).

Attorney as Fact Witness: To prevent such misuse of the rule, the trial court should require the party seeking disqualification to demonstrate actual prejudice to itself resulting from the opposing attorney's service in the dual roles. *See Ayres*, 790 S.W.2d at 558 (citing Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10). Under rule 3.08, the moving party must also present evidence that the testimony of the attorney is "necessary" and that it goes to an "essential fact" of the nonmovant's case. *See In re A.M.*, 974 S.W.2d 857, 864 (Tex. App.—San Antonio 1998, no pet.); *see also Gilbert McClure Enterprises v. Burnett*, 735 S.W.2d 309, 311 (Tex. App.—Dallas 1987, orig. proceeding) (stating disqualification not appropriate under this rule when opposing counsel merely announces intention to call attorney as fact witness; there must be genuine need for attorney's testimony that is material to opponent's client). Further, if the attorney *promptly* notifies opposing counsel of his dual role and advises him that disqualification would work a substantial hardship on his client, he may serve as counsel. *See In re A.M.*, 974 S.W.2d at 864; *Ayres*, 790 S.W.2d at 557.

Rule 3.08 does not prohibit the attorney who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 8. Accordingly, an attorney who is disqualified from representation at trial can continue to participate in the client's case until trial commences; he may continue to assist in pretrial matters such as drafting pleadings, engaging in settlement negotiations, and assisting in trial strategy. *See Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422 (Tex. 1996). To minimize the possibility of unfair prejudice to an opposing party, the rule only prohibits any testifying lawyer who could not serve as an advocate from taking an active role before the tribunal in the presentation of the matter. *In re Bahn*, 13 S.W.3d 865, 873 (Tex. App.—Fort Worth 2000, orig. proceeding).

Finally, the testifying attorney's law firm can continue to represent the client even though the attorney will testify, as long as the client gives informed consent. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 8; *see also Anderson Producing*, 929 S.W.2d at 424; *Spears*, 797 S.W.2d at 658. The issue of informed consent is not a mat-

ter to be decided by the court at a disqualification hearing but is a matter to be decided between the client and the attorneys. *See Anderson Producing*, 929 S.W.2d at 424; *see also* Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10 ("[A] lawyer should not seek to disqualify an opposing lawyer under this Rule merely because the opposing lawyer's dual roles *may* involve an improper conflict of interest with respect to the opposing lawyer's client, for that is a matter to be resolved between lawyer and client or in a subsequent disciplinary proceeding." (emphasis added)).

Representation of Another Party in Matter Adverse to Former Client: Disciplinary rule 1.09 prohibits a lawyer, without the consent of his former client, from representing another party in a matter adverse to the former client if the lawyer represented the former client in the same matter or a substantially related matter. Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a)(3); *In re Cap Rock Electric Co-op, Inc.*, 35 S.W.3d 222, 230 (Tex. App.—Texarkana 2000, orig. proceeding). Rule 1.09(b) prohibits all lawyers in a firm from representing a client that any one of them could not represent because of rule 1.09(a). Tex. Disciplinary Rules Prof'l Conduct R. 1.09(b); *In re Epic Holdings*, 985 S.W.2d at 52.

It is not necessary to show that a lawyer personally and substantially participated in the matter. *Henderson*, 891 S.W.2d at 254. A conclusive presumption arises that lawyers in the same law firm share confidential secrets, and members of a law firm cannot disavow access to confidential information of any one attorney's client. *See In re Epic Holdings*, 985 S.W.2d at 49; *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295, 300–301 (Tex. App.—Dallas 1988, orig. proceeding) (erection of Chinese wall did not rebut presumption of shared confidences). The reason for this presumption is that it would always be virtually impossible for a former client to prove that attorneys in the same firm had not shared confidences. *In re Epic Holdings*, 985 S.W.2d at 49; *National Medical Enterprises*, 924 S.W.2d at 131; *Henderson*, 891 S.W.2d at 254. In addition, the presumption helps guard the integrity of the legal practice by removing undue suspicion that clients' interests are not being fully protected. *In re Epic Holdings*, 985 S.W.2d at 49.

The movant for disqualification must establish a substantial relationship between the two representations. *NCNB Texas National Bank*, 765 S.W.2d at 400; *In re Cap Rock*, 35 S.W.3d at 230. Two matters are "substantially related" within the meaning of rule 1.09 when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar. *In re Epic Holdings*, 985 S.W.2d at 51.

The movant need not prove an actual disclosure of confidences. The issue is the existence of a genuine threat of disclosure because of the similarity of the matters. *In re Epic Holdings*, 985 S.W.2d at 51; *see also Henderson*, 891 S.W.2d at 253–54.

Where knowledge of a client's confidences has been only imputed to an attorney, that attorney's departure from a firm will normally remove the imputation of knowledge, and the attorney is free to undertake representation adverse to that client. Tex. Disciplinary Rules Prof'l Conduct R. 1.09 cmt. 7. Comment 7, however, should not be interpreted to suddenly permit the use of confidential information to the disadvantage of a former client in violation of rule 1.05(b)(3) after an attorney departs from a firm. *Pollard v. Merkel*, 114 S.W.3d 695, 701 (Tex. App.—Dallas 2003, pet. denied) (trial court abused discretion when it failed to disqualify wife's attorney after she revealed information learned from husband's former lawyer and wife's attorney's former employer in her opening argument to jury).

For additional case law on attorney representation of another party in a matter adverse to a former client, see *In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

Joint Defense: An attorney has a duty under a joint-defense agreement to protect the codefendant's confidences. *See National Medical Enterprises*, 924 S.W.2d at 129–32. A written joint-defense agreement is not necessary. Participation in a joint defense could be cause for counsel's disqualification. This determination is in keeping with the joint-defense privilege found in rule 503(b)(1)(C) of the Texas Rules of Evidence, which does not require that written agreement exist in order for confidential communications to be protected under the rule. *See In re Skiles*, 102 S.W.3d 323, 326 (Tex. App.—Beaumont 2003, orig. proceeding) (per curiam); *see also* Tex. R. Evid. 503(b)(1)(C).

Legal Assistant Who Has Worked for Opposing Counsel: The presumption that a legal assistant obtained confidential information is not rebuttable; the presumption that information was shared with a new employer may be overcome. In this regard, the courts have recognized a distinction between lawyers and nonlawyers. The courts were motivated to create this distinction by a concern that the mobility of a nonlawyer could be unduly restricted.

The only way the rebuttable presumption can be overcome is (1) to instruct the legal assistant "not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former

employer's representation" and (2) to "take other reasonable steps to ensure that the paralegal does not work in connection with matters on which the paralegal worked during the prior employment, absent client consent." These precautions minimize the danger that a legal assistant will convey inappropriate information, even inadvertently. *In re American Home Products Corp.*, 985 S.W.2d 68, 74–75 (Tex. 1998) (orig. proceeding) (disqualification of firm required because plaintiffs did not rebut presumption that legal assistant shared confidential information received while previously working on underlying litigation at opposing counsel's firm with members of their firm); *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 467–68 (Tex. 1994) (orig. proceeding) (per curiam) (law firm disqualified because it temporarily employed legal secretary who had previously worked for opposing counsel); *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994) (orig. proceeding) (paralegal or legal assistant who has worked on case "must be subject to . . . a conclusive presumption that confidences and secrets were imparted").

Receipt of Privileged Documents: To determine whether an attorney who received an opponent's privileged documents by means other than discovery should be disqualified, the trial court should consider—

1. whether the attorney knew or should have known that the material was privileged;
2. the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
3. the extent to which the attorney reviews and digests the privileged information;
4. the significance of the privileged information—the extent to which its disclosure may prejudice the movant's claim or defense and the extent to which return of the documents will mitigate that prejudice;
5. the extent to which the movant may be at fault for the unauthorized disclosure; and
6. the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

In re Meador, 968 S.W.2d at 351–52; *In re Marketing Investors Corp.*, 80 S.W.3d 44, 51 (Tex. App.—Dallas 1998, orig. proceeding) (trial court abused discretion in not disqualifying attorney for not returning privileged documents).

Anticontact Rule: Rule 4.02(a) prohibits a lawyer from initiating or even orchestrating through another individual any contact with a represented person unless that per-

son's attorney consents to the contact. Tex. Disciplinary Rules Prof'l Conduct R. 4.02(a). This rule does not apply, however, when the represented person is seeking a second opinion from another lawyer. Tex. Disciplinary Rules Prof'l Conduct R. 4.02(d).

Any person represented by counsel may terminate that representation. When this occurs, the lawyer is free to communicate with the now-unrepresented person within the guidelines of rule 4.03. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.03. However, the communicating attorney is obligated to resist the temptation to give advice in this situation, other than to advise the unrepresented party to obtain independent counsel. *See* Tex. Comm. on Professional Ethics, Op. 461 (1989); Tex. Disciplinary Rules Prof'l Conduct R. 4.03 cmt. 1; Barbara Hanson Nellermoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 St. Mary's L.J. 443, 496 (1997).

As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether he has been informed of the discharge. The communicating lawyer may also choose to inform the person that he does not wish to communicate further until he gets another lawyer. *See In re News America Publishing, Inc.*, 974 S.W.2d 97, 103 (Tex. App.—San Antonio 1998, orig. proceeding) (trial court abused discretion in not disqualifying law firm for violating anticontact rule).

Collaborative Agreement: A final basis of disqualification of an attorney exists when a collaborative law agreement has been entered into by the parties. With a few exceptions, a collaborative lawyer and a lawyer in a firm with which the collaborative lawyer is associated are disqualified from appearing in court to represent a party in a proceeding related to the collaborative family law matter. This disqualification generally does not apply to the lawyer's making a request that the court approve an agreement resulting from the collaborative family law process or his seeking or defending an emergency order to protect a party or family. *See* Tex. Fam. Code §§ 15.106–.108.

§ 8.14 Attorney's Authority

If a party files a sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, the attorney for the other party will be cited to appear before the court and show his authority to act. Notice of the motion must

be served on the challenged attorney at least ten days before the hearing. The burden of proof is on the challenged attorney to show sufficient authority to prosecute or defend the suit. If he fails to do so, the court shall refuse to permit him to appear in the case and shall strike the pleadings if no one authorized to prosecute or defend the suit appears. The motion may be heard any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing. Tex. R. Civ. P. 12.

§ 8.15 Motion to Recuse or Disqualify Judge

Rule 18a governs motions to recuse or disqualify a trial court judge. *See* Tex. R. Civ. P. 18a.

A motion to recuse is to be filed as soon as practicable after the movant knows of the ground stated in the motion and must be filed at least ten days before the date set for trial or hearing unless, before that day, the movant neither knew nor reasonably should have known that the judge would preside at the trial or hearing or that the ground stated in the motion existed. Tex. R. Civ. P. 18a(b)(1); *see Byars v. Evans*, No. 07-14-00064-CV, 2016 WL 105671, at *3–4 (Tex. App.—Amarillo Jan. 8, 2016, no pet.) (mem. op.). A motion to disqualify should be filed as soon as practicable after the movant knows of the ground stated in the motion. Tex. R. Civ. P. 18a(b)(2).

The motion must state one or more of the grounds for removal listed in rule 18b and may not be based solely on the judge's rulings in the case. It must be verified and must state the grounds with particularity. The motion is to be made on personal knowledge and must set forth facts that would be admissible in evidence and that, if proved, would be sufficient to justify removal, provided that facts may be stated on information and belief if the basis for the belief is specifically stated. Tex. R. Civ. P. 18a(a).

A party may waive recusal if it is not raised in a proper motion. *McElwee v. McElwee*, 911 S.W.2d 182, 185–86 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111, 114 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). The procedural requirements for recusal set out in rule 18a of the Texas Rules of Civil Procedure are mandatory, and a party who fails to follow these requirements waives his right to complain of a judge's failure to recuse himself. *Pena v. Pena*, 986 S.W.2d 696, 701 (Tex. App.—Corpus Christi–Edinburg 1998), *pet. denied per curiam*, 8 S.W.3d 639 (Tex. 1999).

Any party may file a response before the motion is heard, but the judge should not file a response. Tex. R. Civ. P. 18a(c). A party who files a motion or response must serve a copy on every other party; the method of service must be the same as the method of filing, if possible. Tex. R. Civ. P. 18a(d). The clerk of the court must immediately deliver a copy of the motion or response to the judge and to the presiding judge of the administrative judicial district (the regional presiding judge). Tex. R. Civ. P. 18a(e)(1).

Within three business days after the motion is filed, and regardless of whether the motion complies with the rule, the judge shall either recuse or disqualify himself or refer the motion to the regional presiding judge. Tex. R. Civ. P. 18a(f)(1). When the judge signs an order of recusal or referral, the clerk must immediately deliver a copy to the regional presiding judge. Tex. R. Civ. P. 18a(e)(2). If the motion was filed before evidence has been offered at trial, the judge may take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record. Tex. R. Civ. P. 18a(f)(2)(A). If the motion was filed after evidence has been offered, the judge may proceed, subject to stay by the regional presiding judge. Tex. R. Civ. P. 18a(f)(2)(B). If the judge fails to comply with a duty imposed by rule 18a, the movant may notify the regional presiding judge. Tex. R. Civ. P. 18a(f)(3).

The regional presiding judge must rule on a referred motion or assign a judge to rule. The ruling must be by written order. A motion to recuse that does not comply with rule 18a may be denied without an oral hearing, but a motion to disqualify may not be denied on the ground that it was not filed or served in compliance with the rule. Interim or ancillary orders in the pending case may be issued. Discovery may not be required of the respondent judge except on order of the regional presiding judge or assigned judge. The motion must be heard as soon as practicable and may be heard immediately after it is referred. Notice of the hearing must be given to all parties. The hearing may be conducted by telephone on the record, and documents submitted by fax or e-mail may be considered. If the motion is granted, the regional presiding judge must transfer the case to another court or assign another judge to the case. Tex. R. Civ. P. 18a(g).

After notice and hearing, the judge who hears the motion may order the party or attorney who filed the motion, or both, to pay the reasonable attorney's fees and expenses incurred by other parties if the judge finds that the motion was groundless and filed in bad faith or for the purpose of harassment or that it was clearly brought for unnecessary delay and without sufficient cause. Tex. R. Civ. P. 18a(h).

A "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court or statutory county court judge by the same party in

a case. Tex. Civ. Prac. & Rem. Code § 30.016(a); *see Gonzalez v. Guilbot*, 315 S.W.3d 533, 541 (Tex. 2010) (text of statute does not mean third recusal motion against same judge).

A judge who declines recusal after a tertiary recusal motion is filed shall comply with applicable rules of procedure for recusal and disqualification, except that the judge shall continue to preside over the case, sign orders in the case, and move the case to final disposition as though a tertiary recusal motion had not been filed. Tex. Civ. Prac. & Rem. Code § 30.016(b).

A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and that party's attorney are jointly and severally liable for the award of fees and costs, which must be paid before the thirty-first day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded. Tex. Civ. Prac. & Rem. Code § 30.016(c).

The denial of a tertiary recusal motion is reviewable only on appeal from final judgment. Tex. Civ. Prac. & Rem. Code § 30.016(d). If a tertiary recusal motion is finally sustained, the new judge assigned to the case shall vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion. Tex. Civ. Prac. & Rem. Code § 30.016(e).

Denial of a motion to recuse may be reviewed only for abuse of discretion on appeal from the final judgment, but an order granting the motion is final and not reviewable by any means. An order granting or denying a motion to disqualify may be reviewed by mandamus and may be appealed. Tex. R. Civ. P. 18a(j).

The Texas Constitution prescribes disqualification if a judge has an interest, is related to a party within the third degree of consanguinity or affinity, or has previously been an attorney in the case. *See* Tex. Const. art. V, § 11. The Texas Government Code prescribes disqualification if the judge is related to either party within the third degree of consanguinity or affinity, as determined under Government Code chapter 573. *See* Tex. Gov't Code § 21.005.

The Texas Rules of Civil Procedure provide that a judge must disqualify himself in all proceedings in which he has served as an attorney in the matter in controversy or an attorney with whom he previously practiced law served during their association as an attorney concerning the matter, or if the judge knows that he has an interest in the subject matter in controversy either individually or as a fiduciary, or if either of the parties

may be related to him by affinity or consanguinity within the third degree. Tex. R. Civ. P. 18b(a). A judge must recuse himself in proceedings in which (1) his impartiality might reasonably be questioned; (2) he has a personal bias or prejudice concerning the subject matter or a party or has personal knowledge of disputed evidentiary facts concerning the proceeding; (3) he or an attorney with whom he previously practiced has been a material witness concerning the proceeding; (4) he participated in the matter in controversy as attorney, adviser, or material witness or expressed an opinion concerning its merits while a government attorney; (5) he knows that he (individually or as a fiduciary) or his spouse or minor child living in his household has a financial interest in the subject matter or in a party or has any other interest that could be substantially affected by the outcome of the proceeding; (6) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, is a party or an officer, director, or trustee of a party, is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding, or is to the judge's knowledge likely to be a material witness in the proceeding; or (7) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is an attorney in the proceeding. Tex. R. Civ. P. 18b(b).

Rule 16 of the Texas Rules of Appellate Procedure covers recusal or disqualification of appellate judges. *See* Tex. R. App. P. 16. A motion must be filed promptly after the filing party has reason to believe the justice or judge should not participate in deciding the case. Tex. R. App. P. 16.3(a). The justice must either recuse himself or certify the matter to the entire court for consideration, during which the challenged justice shall not sit. Tex. R. App. P. 16.3(b). An order of recusal is not appealable; a denial of a recusal motion is appealable. Tex. R. App. P. 16.3(c).

A justice or judge must recuse on grounds provided in the Texas Rules of Civil Procedure, as well as in a proceeding that presents a material issue that the justice or judge participated in deciding while serving on another court in which the proceeding was pending. Tex. R. App. P. 16.2.

§ 8.16 Trial before Assigned Judge

The Court Administration Act, chapter 74 of the Government Code, divides the state into nine administrative judicial regions and empowers the presiding judge of each region to assign visiting judges to the courts in the region. *See* Tex. Gov't Code ch. 74; *In re Canales*, 52 S.W.3d 698, 701 (Tex. 2001) (orig. proceeding). Section 74.053 of the Act allows the parties to a civil case to object to an assigned judge and sets out the procedure for doing so:

> (a) When a judge is assigned to a trial court under this chapter:
>
> (1) the order of assignment must state whether the judge is an active, former, retired, or senior judge; and
>
> (2) the presiding judge shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or part by the assigned judge.
>
> (b) If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d), each party to the case is only entitled to one objection under this section for that case.
>
> (c) An objection under this section must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier. The presiding judge may extend the time to file an objection under this section on written motion by a party who demonstrates good cause.
>
> (d) An assigned judge or justice who was defeated in the last primary or general election for which the judge or justice was a candidate for the judicial office held by the judge or justice may not sit in a case if either party objects to the judge or justice.
>
> (e) An active judge assigned under this chapter is not subject to an objection.
>
> (f) For purposes of this section, notice of an assignment may be given and an objection to an assignment may be filed by electronic mail.
>
> (g) In this section, "party" includes multiple parties aligned in a case as determined by the presiding judge.

Tex. Gov't Code § 74.053. *See also Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436 (Tex. 1997) (orig. proceeding).

A party may not object to an assigned judge before the assignment is made, and a pro forma blanket objection in the party's initial pleading is not sufficient. *In re Carnera*, No. 05-16-00055-CV, 2016 WL 323654, at *2 (Tex. App.—Dallas Jan. 27, 2016, orig. proceeding) (mem. op.).

If an objection is timely, the assigned judge's disqualification is automatic. Tex. Gov't Code § 74.053(b). When an assigned judge overrules a timely objection to his assignment, all of the judge's subsequent orders are void, and the objecting party is entitled to mandamus relief. *In re Canales*, 52 S.W.3d at 701.

The assigned judge must have a valid assignment. When an assigned judge's action exceeds the scope of the assignment, the judgment is void. *Ex parte Eastland*, 811 S.W.2d 571, 572 (Tex. 1991) (orig. proceeding) (per curiam); *In re B.F.B.*, 241 S.W.3d 643, 647 (Tex. App.—Texarkana 2007, no pet.) (after denying motion to recuse, assigned judge went forward with trial on merits although assignment order limited assignment "for the purpose of the assigned judge hearing a Motion to Recuse").

§ 8.17 Associate Judge

The judge of a court having jurisdiction of suits under title 1, 4, or 5 or chapter 45 of the Texas Family Code may appoint a full-time or part-time associate judge if the commissioners court of a county in which the court has jurisdiction has authorized employment of an associate judge. Tex. Fam. Code § 201.001(a). The judge may refer to the associate judge any aspect of a suit involving a matter in the court's jurisdiction under title 1, 4, or 5 or chapter 45, including any matter ancillary to the suit. Tex. Fam. Code § 201.005(a).

A party must file an objection to an associate judge hearing a trial on the merits or presiding at a jury trial not later than the tenth day after the date the party receives notice that the associate judge will hear the trial. If an objection is filed, the referring court must hear the trial on the merits or preside at a jury trial. Tex. Fam. Code § 201.005(c).

Hearing before Judge: Any party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request not later than the third working day after the date the party receives notice of the substance of (1) the associate judge's report or (2) the rendering of the temporary order, if the request concerns a temporary order rendered by an associate judge appointed under subchapter A, chapter 201, of the Family Code. Tex. Fam. Code § 201.015(a). Request for a de novo hearing under subchapter B of chapter 201 of the Family Code (title IV-D associate judges) must be filed not later than the third working day after the associate judge signs the proposed order or judgment. Tex. Fam. Code § 201.1042(b). *See In re R.A.O.*, 561 S.W.3d 704, 710 (Tex. App.—Houston [14th Dist.] 2018, no pet.). In calculating the period, the Code Construction Act rather than rule 4 of the Texas Rules of Civil Procedure applies in cases involving the appeal of an associate judge's report. *See Peacock v.*

Humble, 933 S.W.2d 341, 343 (Tex. App.—Austin 1996, orig. proceeding) (per curiam). In calculating the period under the applicable Code Construction Act provisions, the first day is excluded, and the last day is included. Tex. Gov't Code § 311.014. The right to a de novo hearing before the referring court may be waived. However, any waiver must be made in writing or on the record before the start of a hearing by an associate judge. Tex. Fam. Code § 201.015(g); *see In re J.A.P.*, 510 S.W.3d 722, 724 (Tex. App.—San Antonio 2016, no pet.) (nothing in record indicated right to de novo hearing was waived before start of hearing, and waiver of any objection to associate judge hearing case was not waiver of de novo hearing).

A request for a de novo hearing must specify the issues that will be presented to the referring court. Tex. Fam. Code § 201.015(b). Notice must be given to the opposing attorney. Tex. Fam. Code § 201.015(d). The referring court, after notice to the parties, must hold the de novo hearing within thirty days of the filing of the initial request. Tex. Fam. Code § 201.015(f). The requirement of a de novo hearing within thirty days is not jurisdictional and does not prohibit a referring court from conducting such a hearing more than thirty days after the filing of the request. *See Harrell v. Harrell*, 986 S.W.2d 629, 631 (Tex. App.—El Paso 1998, no pet.). Even if timely filed, if the notice of appeal did not contain the appealing party's objections to any specific findings or conclusions, that party is not entitled to a de novo hearing of the appeal of the associate judge's recommendation. *In re E.M.*, 54 S.W.3d 849, 851–52 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.) (party not entitled to de novo hearing because his request, though timely filed, failed to state specific findings or conclusions of associate judge to which he objected); *In re H.F.*, No. 02-16-00347-CV, 2016 WL 6706324 (Tex. App.—Fort Worth Nov. 14, 2016, orig. proceeding) (mem. op.).

At the de novo hearing the parties may present witnesses and the referring court may also consider the record from the hearing before the associate judge. Tex. Fam. Code § 201.015(c); *In re N.V.*, 554 S.W.3d 217, 221 (Tex. App.—Amarillo 2018, pet. denied). The court may not limit the evidence at the de novo hearing to only the transcript of the hearing in front of the associate judge. The referring court must hold a hearing in which the parties may present witnesses, should they choose to do so. *In re R.R.*, 537 S.W.3d 621, 624 (Tex. App.—Austin 2017, orig. proceeding). If a jury trial was waived at the trial in front of the associate judge the court may, but is not required to, grant a jury trial at the de novo hearing. *In re A.L.M.-F.*, 593 S.W.3d 271 (Tex. 2019).

Except as provided by Family Code section 201.007(c) (default, agreed, or temporary orders or final order where notice, appearance, or right to de novo hearing is waived), if

a request for a de novo hearing before the referring court is not timely filed, the proposed order or judgment of the associate judge becomes the order or judgment of the referring court only on the referring court's signing the proposed order or judgment. Tex. Fam. Code § 201.013(b); *see also* Tex. Fam. Code § 201.007(c). Pending a de novo hearing before the referring court, a proposed order or judgment of the associate judge is in full force and effect and is enforceable as an order or judgment of the referring court, except for an order providing for the appointment of a receiver. Tex. Fam. Code § 201.013(a). Section 201.013(c) concerns orders by an associate judge for the temporary detention or incarceration of a witness or party. *See* Tex. Fam. Code § 201.013(c). A party's failure to request, or a party's waiver of the right to request, a de novo hearing before the referring court does not deprive the party of the right to appeal to or seek other relief from an appellate court. Tex. Fam. Code § 201.016(a).

The denial of relief to a party after a de novo hearing under section 201.015 or a party's waiver of the right to a de novo hearing before the referring court does not affect a party's right to file a motion for new trial, motion for judgment notwithstanding the verdict, or other posttrial motion. A party may not demand a second jury in a de novo hearing before the referring court if the associate judge's proposed order or judgment resulted from a jury trial. Tex. Fam. Code § 201.015(h), (i).

[Sections 8.18 through 8.20 are reserved for expansion.]

III. Service of Citation

§ 8.21 Substituted Service—Rule 106

If personal service, service by registered mail, or service by certified mail has been unsuccessful, substituted service may be allowed. An affidavit must be attached to a motion for substituted service stating the defendant's usual place of business or usual place of abode or any other place he can probably be found and specific facts showing that service has been unsuccessfully attempted by personal delivery or by registered or certified mail at this location. The affidavit must "positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge." *In re M.M.M.A.*, 583 S.W.3d 632, 636 (Tex. App.—El Paso 2018, no pet.). The court may then authorize service by leaving a true copy of the citation, with a copy of

the petition attached, with anyone over age sixteen at the location specified in the affidavit or in any other manner that the affidavit or other evidence shows will be reasonably effective to give the defendant notice. Tex. R. Civ. P. 106(b).

The object of process is to give a person to be affected by a judgment notice and an opportunity to defend. Whether due process of law has been accorded depends on whether or not the form of service is reasonably calculated to give the defendant actual notice and an opportunity to be heard. *See Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 146–48 (1951). An officer's affidavit stating that service has been "difficult or impractical" is not sufficient to sustain the granting of a motion for substituted service. *Stylemark Construction, Inc. v. Spies*, 612 S.W.2d 654, 656–57 (Tex. App.—Houston [14th Dist.] 1981, no writ); *see also Harrison v. Dallas Court Reporting College*, 589 S.W.2d 813, 815–16 (Tex. App.—Dallas 1979, no writ) (sheriff's affidavit stating that he had "made several attempts" to serve defendant but not showing how many attempts or at what time they were made was insufficient to establish that personal service was impractical; therefore, substituted service was unauthorized, and no personal jurisdiction over defendant was acquired). *See also Cancino v. Cancino*, No. 03-14-00115-CV, 2016 WL 234514 (Tex. App.—Austin Jan. 13, 2016, no pet.) (mem. op.). An affidavit showing three attempts at service to an address where the appellant's car was present and a young woman told the process server the appellant was not home was held to be sufficient to sustain service under rule 106. *In re C.L.W.*, 485 S.W.3d 537, 542 (Tex. App.—San Antonio 2015, no pet.). An affidavit was held sufficient where the process server stated that he talked to the respondent, his mother, and his brother, and all three said the respondent was in Mexico and that they did not know when he would be back but that the process server could leave the papers with the mother or brother. *In re Marriage of Sandoval*, 589 S.W.3d 267, 276–77 (Tex. App.—Waco 2019, pet. filed).

§ 8.22 Other Substituted Service—Rule 109a

The court may, on motion, prescribe a different method of substituted service whenever citation by publication is authorized. Tex. R. Civ. P. 109a. (Regarding citation by publication, see Tex. R. Civ. P. 109; Tex. Fam. Code §§ 3.305, 6.409, 102.010; Tex. Civ. Prac. & Rem. Code § 17.032. The Texas Supreme Court is to adopt rules by January 1, 2021, for substituted service by an electronic communication sent to a defendant through a social media presence. *See* Tex. Civ. Prac. & Rem. Code § 17.033.) To prescribe a different method of substituted service, the court must find and recite in its order that the prescribed method would be as likely as publication to give the defendant actual notice. The officer's return shall state particularly the manner in which service is

accomplished, and any return receipt or other evidence showing the result of service must be attached. The defendant's failure to respond shall not render the service invalid. If the defendant does not appear, provisions of rule 244, which require appointment of an attorney to defend the suit on the defendant's behalf and a statement of evidence approved and signed by the judge, apply; rule 329, which deals with motions for new trials and judgments following citation by publication, also applies. Tex. R. Civ. P. 109a; *see* Tex. R. Civ. P. 244, 329.

§ 8.23 Amending Citation—Rule 118

If there is a defect in the process or proof of service, a motion may be brought to amend the process or proof of service. At any time in its discretion and on such notice and terms as it deems just, the court may allow any process or proof of service to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. Tex. R. Civ. P. 118.

[Sections 8.24 through 8.30 are reserved for expansion.]

IV. Judicial Notice and Joinder of Causes

§ 8.31 Judicial Notice

Rule 203 of the Texas Rules of Evidence provides a method by which a party may request the trial court to determine the law of a foreign country. The requesting party must give notice in the pleadings or by other reasonable written notice and, at least thirty days before trial, provide all parties copies of any written materials or sources intended for use as proof of the foreign law. Tex. R. Evid. 203(a). If the materials are in a language other than English, the party intending to rely on them must supply all parties copies of both the foreign language text and the English translation. Tex. R. Evid. 203(b). (Subsections (a) and (b) of rule 203 do not apply to an action to which rule 308b of the Texas Rules of Civil Procedure (Determing the Enforceability of a Judgment or Arbitration Award Based on Foreign Law in Certain Suits under the Family Code) applies. Tex. R. Evid. 203(e).)

In determining the foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party,

it must give all parties notice and reasonable opportunity to comment and submit additional materials. Tex. R. Evid. 203(c).

A court may on its own, or must if a party requests it and the court is supplied with the necessary information, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other U.S. state, territory, or jurisdiction and of the ordinances of Texas municipalities and counties, the contents of the *Texas Register*, and agency rules published in the Texas Administrative Code. The court may require the requesting party to notify all other parties of the request so they may respond to it. Tex. R. Evid. 202(a), (b), (c)(1), 204(a), (b), (c)(1).

The court, not the jury, must determine the law of which it is taking judicial notice, and the court's determination must be treated as a ruling on a question of law. Tex. R. Evid. 202(e), 203(d), 204(d).

§ 8.32 Severance

Actions improperly joined may be severed. Each ground of recovery that has been improperly joined may be docketed as a separate suit between the same parties by court order on the motion of any party or on the court's own initiative. Severance may occur at any stage of the action before submission to the jury or to the court and on such terms as the court deems just. Any claim against a party may be severed. Tex. R. Civ. P. 41.

Severance is proper if a suit involves two or more separate and independent causes of action, each of which may be tried as a separate claim. *See Rose v. Baker*, 183 S.W.2d 438, 441 (Tex. 1944). Severance divides lawsuits into two or more independent causes of action, and a judgment that disposes of all parties and issues in one of the severed causes is final and appealable. *Hall v. City of Austin*, 450 S.W.2d 836, 837–38 (Tex. 1970). A trial court may not sever property issues from a cause of action for divorce. *Garrison v. Texas Commerce Bank*, 560 S.W.2d 451, 453 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). The issue of parties' property rights is part of the divorce suit itself and cannot be severed from it. *Angerstein v. Angerstein*, 389 S.W.2d 519, 520–21 (Tex. App.—Corpus Christi–Edinburg 1965, no writ). In *Mogford v. Mogford*, 616 S.W.2d 936, 941 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.), a husband who failed to request that the trial court sever the divorce from a personal injury claim waived his right to appellate review of the propriety of the trial court's judgment for personal injuries. If a motion for severance is granted, an order should be entered and a new docket number assigned to the cause or causes severed.

§ 8.33 Consolidation

When actions involve a common question of law or of fact, the trial court may order a joint hearing or trial on any or all the matters, order all the actions consolidated, and make such other orders as may tend to avoid unnecessary costs or delay. Tex. R. Civ. P. 174(a); *see Alice National Bank v. Corpus Christi Bank & Trust*, 431 S.W.2d 611, 624 (Tex. App.—Corpus Christi–Edinburg 1968), *aff'd*, 444 S.W.2d 632 (Tex. 1969) (where both cases involved same subject matter and parties, motion to consolidate granted).

Because the Texas Rules of Civil Procedure provide the courts with broad discretion in the matter of consolidation, agreements of counsel to consolidate causes are not binding on the court. *Hamilton v. Hamilton*, 280 S.W.2d 588, 591 (Tex. 1955). The court's decision to consolidate causes will not be disturbed on appeal except for abuse of discretion. *See Ruthart v. First State Bank*, 431 S.W.2d 366, 368 (Tex. App.—Amarillo 1968, writ ref'd).

§ 8.34 Separate Trial

The court may, for convenience or to avoid prejudice, order a separate trial of any claim, cross-claim, counterclaim, or third-party claim or issue or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Tex. R. Civ. P. 174(b).

Rule 174(b) should not be confused with rule 41, which deals with severance. *See* Tex. R. Civ. P. 41. Severance divides a case into two or more separate and independent causes, with each cause resulting in its own final, appealable judgment. When separate trials are ordered, the lawsuit is not severed, but the court can hear and determine one or more issues without trying all controverted issues at the same hearing. Generally, until all matters are disposed of, orders entered at the conclusion of a separate trial are interlocutory and not appealable. *Hall v. City of Austin*, 450 S.W.2d 836, 838 (Tex. 1970) (per curiam).

Separate trials may be sought to avoid delay and expense. For example, in cases where resolution of one issue, such as the existence of an informal marriage, may end the entire litigation, a separate trial may be desirable. *See Chatman v. Ferd Staffel Co.*, 362 S.W.2d 173, 174 (Tex. App.—Waco 1962, writ ref'd n.r.e.) (plea of release); *Meridith v. Massie*, 173 S.W.2d 799, 800 (Tex. App.—Amarillo 1943, writ ref'd) (limitations).

The application of rule 174(b) rests in the court's discretion. *See Bolin v. Smith*, 294 S.W.2d 280, 284 (Tex. App.—Fort Worth 1956, writ ref'd n.r.e.) (court did not abuse discretion in overruling motion for separate trials). The court has a duty to order a separate trial when all the facts and circumstances of a case unquestionably require it to prevent injustice, no fact or circumstance supports a contrary conclusion, and the parties' legal rights will not be prejudiced. *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding). At the conclusion of all the separate trials, a single final judgment should be entered. This final judgment is appealable. *See Grossenbacher v. Burket*, 427 S.W.2d 595, 597 (Tex. 1968).

[Sections 8.35 through 8.40 are reserved for expansion.]

V. Ancillary Relief

§ 8.41 Master in Chancery

The court may, in exceptional cases, for good cause, appoint a master in chancery. Tex. R. Civ. P. 171. Court congestion in itself is not an exceptional circumstance that will warrant referral to a master, nor is the length of time a trial will take. *See Bell v. Bell*, 540 S.W.2d 432, 437 (Tex. App.—Houston [1st Dist.] 1976, no writ). "The 'exceptional condition' requirement of rule 171 cannot be met by showing that a case is complicated or time-consuming or that the trial court is busy." *In re King*, No. 01-13-00434-CV, 2013 WL 4007798, at *2 (Tex. App.—Houston [1st Dist.] Aug. 6, 2013) (orig. proceeding) (mem. op.). Further, rule 171 states that the master shall be a citizen of Texas and not an attorney for or related to either party. The parties' consent is not required for appointment of a master. Appointment and assessment of fees for a master in chancery are within the trial court's discretion, and the court will be reversed only for clear abuse of discretion. The fact that a party requests a jury trial does not preclude appointment of a master. Either party is entitled to a jury trial after the master has filed his report. *Mann v. Mann*, 607 S.W.2d 243, 246 (Tex. 1980).

Powers and Duties: A master derives authority in each particular case from the order of appointment. *Fowzer v. Huey & Philp Hardware Co.*, 99 S.W.2d 1100, 1102 (Tex. App.—Dallas 1936, writ dism'd). This order of reference to the master may specify or limit his powers; may direct him to report only on particular issues, to do or perform particular acts, or to receive and report evidence only; and may fix the time and place

for beginning and closing the hearings and for filing the master's report. Tex. R. Civ. P. 171.

Subject to the limitations and specifications in the order, the master has the power to regulate all proceedings in hearings before him and to do everything necessary or proper for the efficient performance of his duties under the order, including requiring the production of evidence on matters embraced in the reference and, unless the order specifies otherwise, ruling on the admissibility of evidence. He can examine witnesses and the parties on oath. When a party requests it, the master shall make a record of the evidence offered and excluded. The parties may procure the attendance of witnesses before the master by the usual issuance and service of process. Tex. R. Civ. P. 171.

Master's Report: In the absence of exception or objection, a master's report will be regarded as conclusive. *Richardson v. McCloskey*, 276 S.W. 680, 684–85 (Tex. Comm'n App. 1925, judgm't adopted). However, a master's report is not conclusive with respect to one not a necessary party to the suit into whose interest the master is without authority to inquire. *See generally Arlington Heights Realty Co. v. Citizens' Railway & Light Co.*, 160 S.W. 1109 (Tex. App.—Amarillo 1913, no writ). When the report is approved, it is equivalent to a special verdict of a jury and is given the force and effect of a final judgment. *Lloyds Investment Co. v. State*, 158 S.W.2d 98, 102 (Tex. App.—Galveston 1941, writ ref'd w.o.m.).

The court may also confirm, modify, correct, reject, reverse, or recommit the report after it is filed, as the court may deem proper and necessary in the particular circumstances of the case. Tex. R. Civ. P. 171. A party dissatisfied with the report has the burden to make specific objections before the report is adopted by the court. When exceptions to a master's report have been filed, the parties are entitled to present evidence on the issues specified in the objections and have the court or jury decide those issues on the basis of the evidence presented in court. Thus, on appeal, the judgment cannot be attacked on the ground that the evidence before the master was insufficient to support the master's findings. *Whitehead v. Perie*, 15 Tex. 7, 11–15 (1855); *Cameron v. Cameron*, 601 S.W.2d 814, 815 (Tex. App.—Dallas 1980, no writ).

Litigants are entitled to a trial by jury when demanded, and this right may not be denied by the court's referring the case to a master. *Garrison v. Garrison*, 568 S.W.2d 709, 710 (Tex. App.—Beaumont 1978, no writ).

§ 8.42 Auditor

When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make a report to the court as soon as possible. Tex. R. Civ. P. 172. Rule 172 does not limit the appointment to any particular types of actions. Auditors' reports have been found necessary in different types of actions involving the settling of accounts between parties, including divorce suits involving the division of community property and determination of separate property. *See, e.g., Daniel v. Daniel*, 30 S.W.2d 801 (Tex. App.—Fort Worth 1930, no writ).

Whether an auditor should be appointed is within the trial court's discretion, and its action is revised only on a showing of gross abuse. *See Padon v. Padon*, 670 S.W.2d 354, 360 (Tex. App.—San Antonio 1984, no writ). Request for an auditor must be made in a timely fashion. *See Dudley Hodgkins Co. v. Grant*, 261 S.W.2d 229, 231 (Tex. App.—Fort Worth 1953, writ ref'd n.r.e.) (motion made after parties rested case without any reservation properly overruled).

Report: The auditor shall verify his report by affidavit stating that he has carefully examined the state of the account between the parties and that the report contains a true statement thereof, as far as the same has come within his knowledge. Exceptions to the report or any item in it must be filed within thirty days of its filing. Tex. R. Civ. P. 172.

Verified auditors' reports prepared under rule 172 are admissible in trial, notwithstanding any other evidence rule. If exceptions to the report have been filed, a party may present controverting evidence. Tex. R. Evid. 706.

§ 8.43 Receiverships

Rule 695 of the Texas Rules of Civil Procedure provides that no receiver shall be appointed without notice to take charge of property that is fixed and immovable, except when otherwise provided by statute. (See Tex. Civ. Prac. & Rem. Code ch. 64 concerning receivership.) When application for appointment of a receiver to take possession of property of this type is filed, the court shall set it down for hearing and notify the adverse party of the hearing not less than three days before it is to be held. Tex. R. Civ. P. 695.

If the defendant is a nonresident or his whereabouts are unknown, notice may be served by affixing the notice in a conspicuous manner and place on the property or in such other manner as the court may require. Tex. R. Civ. P. 695.

A receiver for property located entirely or partly in Texas is required to be a bona fide citizen and qualified voter of Texas. If this requirement is not met, his appointment is void as to property in Texas. He must maintain actual residence in Texas throughout the receivership. No party, attorney, or person interested in any way in an action for the appointment of a receiver will be qualified for the position. Tex. Civ. Prac. & Rem. Code § 64.021. The receiver must take an oath to faithfully perform his duties and post a bond. Tex. Civ. Prac. & Rem. Code §§ 64.022, 64.023. The court may dispense with a bond in a divorce case. Tex. R. Civ. P. 695a.

While a suit for divorce or annulment or to declare a marriage void is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may appoint a receiver for the preservation and protection of the property of the parties. Tex. Fam. Code § 6.502(a)(5). Such an order may also be made to preserve and protect the parties' property during pendency of an appeal. Tex. Fam. Code § 6.709(a)(3). The trial court retains jurisdiction to enforce such an order unless the appellate court supersedes the order. Tex. Fam. Code § 6.709(b). In *Mussina v. Morton*, 657 S.W.2d 871, 874 (Tex. App.—Houston [1st Dist.] 1983, no writ), the court stated that the predecessor to these provisions, former Texas Family Code section 3.58, "is limited to an order directed to one or both 'parties', which we hold to mean 'spouses'." The pendency of a divorce does not diminish or limit a creditor's right to proceed against either or both spouses for payment of community debts incurred before the divorce decree. *Mussina*, 657 S.W.2d at 874; *Commonwealth Mortgage Corp. v. Wadkins*, 709 S.W.2d 679, 680 (Tex. App.—Houston [14th Dist.] 1985, no writ) (per curiam).

A court may not appoint a receiver for an individual on the petition of the individual. Tex. Civ. Prac. & Rem. Code § 64.002. However, nothing in section 64.002 prevents a spouse in a suit filed under title 1 or title 5 of the Family Code from having a receiver appointed over all or part of the marital estate. Tex. Civ. Prac. & Rem. Code § 64.002(c).

The appointment of a receiver transfers rights in property from the owner to the court. The receiver acts as the court's agent, and the property in the receivership remains in the custody of the law. *Texas Trunk Railway v. Lewis*, 16 S.W. 647, 648–49 (Tex. 1891). The appointment does not permanently affect the owner's rights in the property but merely preserves the status quo. The enforcement of third-party liens or other rights is

suspended until their enforcement is approved by the court. *See First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 343 (Tex. 1976). The order appointing the receiver must be directly attacked in the cause in which the appointment was made, if the order is allegedly voidable. *Helton v. Kimbell*, 621 S.W.2d 675, 678 (Tex. App.—Fort Worth 1981, no writ). The trial court is authorized to order, concurrently with a divorce proceeding, a partition of a residence jointly owned by husband and wife by sale through a receiver. *Allen v. Allen*, No. 02-17-00031-CV, 2018 WL 547586, at *6 (Tex. App.—Fort Worth Jan. 25, 2018, no pet.) (mem. op.). If a homestead is sold by a receiver, the proceeds have the same protection from creditors as the homestead itself. *Delaney v. Delaney*, 562 S.W.2d 494, 495–96 (Tex. App.—Houston [14th Dist.] 1978, writ dism'd).

Although an order appointing an ancillary receiver is usually interlocutory, it is appealable. *See* Tex. Civ. Prac. & Rem. Code § 51.014; *see also* Tex. R. App. P. 28, 29. Orders under Family Code chapter 6, subchapter F, appointing a receiver are subject to interlocutory appeal, although other orders under that subchapter are not. *See* Tex. Fam. Code § 6.507.

Appointment of a receiver may amount to abuse of discretion. For example, appointing a receiver to file tax returns and to sell a residence on a contingency that may occur in the future was held an abuse of discretion in *Whitehill v. Whitehill*, 628 S.W.2d 148, 151 (Tex. App.—Houston [14th Dist.] 1982, no writ). The terms of the order appointing the receiver may not modify the terms of the decree. *Shultz v. Shultz*, No. 05-18-00876-CV, 2019 WL 2511245, at *3 (Tex. App.—Dallas June 18, 2019, no pet. h.) (mem. op.) (order appointing receiver allowed receiver to set price, but decree said parties must agree on price).

A receiver has derived judicial immunity for all acts done under the authority granted by the order appointing the receiver. *Logsdon v. Owens*, No. 02-15-00254-CV, 2016 WL 3197953, at *4 (Tex. App.—Fort Worth June 9, 2016, no pet.) (mem. op.).

Lis Pendens by Receiver: When the court appoints a receiver, the property is placed in custodia legis. *Moody v. State*, 538 S.W.2d 158, 160–61 (Tex. App.—Waco 1976, writ ref'd n.r.e.). No one has the authority, even under a prior deed of trust or execution, to sell property held in custodia legis by a duly appointed receiver, unless the sale is authorized by the court in which the receivership is pending. *Vallone*, 533 S.W.2d at 341. Compliance with statutes modifying the common law of lis pendens (old Tex. Rev. Civ. Stat. arts. 6640–6642, now repealed and replaced with Tex. Prop. Code § 12.007) is not required to prevent lands in receivership from being acquired under attempted

sales by third parties acting under powers not conferred or approved by the court having custody of the property. Nor do such statutes have the intent or effect of ousting courts of their exclusive custody and jurisdiction of receivership property or of creating innocent purchasers of such property without court approval when the receiver does not file a lis pendens notice. However, to lessen controversy and inconvenience, the recommended practice is to file a notice of receivership and designation of the land and litigants in the deed or lis pendens records of the county or counties wherein the property is located. *Vallone*, 533 S.W.2d at 343.

Receiver's Sales Report and Confirmation: A receiver may sell or transfer estate property only with court approval on terms specified by the court. *Mergenthaler Linotype Co. v. McClure*, 16 S.W.2d 280, 282 (Tex. Comm'n App. 1929, judgm't affirmed). The rules of equity govern all matters relating to receivers. Tex. Civ. Prac. & Rem. Code § 64.004. In conformity with the rules of equity, before a receiver's sale is approved there should be an application for sale pertaining to a specific buyer, notice to all interested parties, and a hearing conducted on the sale. *See Harrington v. Schuble*, 608 S.W.2d 253, 256 (Tex. App.—Houston [14th Dist.] 1980, no writ).

In a receivership proceeding regarding sale of a homestead, an application for sale, complete with definite terms, price, and parties, should be filed. After sufficient notice has been given to all interested parties, a hearing should be held on the application, with a court order of approval or disapproval of the sale following the hearing. After reasonable notice to all interested parties, the report of the approved sale should be filed, and, before the distribution of any funds, the sale should be confirmed to ensure that it complied with the original approved order and to authorize the distribution of proceeds. Finally, customary and reasonable expenses should be paid. *Harrington*, 608 S.W.2d at 256–57.

Final Accounting and Discharge: On completing his duties, the receiver should file an accounting with the court and apply for an order discharging him and directing the disposition of the funds or property in his custody. The accounting should be sufficiently detailed to allow the parties to the action to determine whether to object to the receiver's stewardship of the estate. *See Mid-Continent Supply Co. v. Conway*, 240 S.W.2d 796, 808 (Tex. App.—Texarkana 1951, writ ref'd n.r.e.).

§ 8.44 Mental or Physical Examination

No later than thirty days before the end of the applicable discovery period, a party may move for an order compelling another party or a child the subject of the suit to submit to

a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist. Tex. R. Civ. P. 204.1(a). The motion and notice of hearing must be served on the person to be examined and on all parties. Tex. R. Civ. P. 204.1(b). The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Tex. R. Civ. P. 204.1(d).

The court may issue an order for such an examination under rule 204.1 only for good cause shown and only in specified circumstances. Tex. R. Civ. P. 204.1(c). In cases arising under title 2 and title 5 of the Family Code, the court may on its own motion or on the motion of a party appoint a psychologist or psychiatrist to make a mental examination of the children who are the subject of the suit or of any other parties. Tex. R. Civ. P. 204.4(a). The court may also appoint an expert who is qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests. Tex. R. Civ. P. 204.4(b).

Selection of the examining doctor, psychiatrist, or psychologist is generally left to the discretion of the court. *May v. Lawrence*, 751 S.W.2d 678, 679 (Tex. App.—Tyler 1988, orig. proceeding [leave denied]) (per curiam); *Employers Mutual Casualty Co. v. Street*, 707 S.W.2d 277, 278 (Tex. App.—Fort Worth 1986, orig. proceeding). However, it may be error for a court to refuse to order an independent examination by a doctor, psychiatrist, or psychologist if only one party's experts have had an opportunity to perform an examination. *See Sherwood Lane Associates v. O'Neill*, 782 S.W.2d 942, 945 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

§ 8.45 Child Custody Evaluation

In a suit affecting the parent-child relationship, the court may order the preparation of a child custody evaluation regarding (1) the circumstances and conditions of the child, a party to the suit, and, if appropriate, the residence of any person requesting conservatorship of, possession of, or access to the child and (2) any issue or question relating to the suit at the request of the court before or during the evaluation process. Tex. Fam. Code § 107.103(a).

Child custody evaluations are discussed in section 40.19 in this manual.

[Sections 8.46 through 8.50 are reserved for expansion.]

VI. Motions for Summary Judgment

§ 8.51 Basics of Summary Judgment

Two types of motions for summary judgment may be filed: a traditional motion for summary judgment and a no-evidence motion for summary judgment.

§ 8.51:1 Traditional Motion for Summary Judgment

In General: A court may render a summary judgment only if the pleadings, depositions, admissions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c). The movant has the burden of demonstrating the lack of any genuine issues of material fact. The court must take all evidence favoring the nonmovant as true, must indulge every reasonable inference therefrom in favor of the nonmovant, and must resolve any doubts in the nonmovant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

A defendant who moves for a traditional summary judgment assumes the burden of showing as a matter of law that the plaintiff has no cause of action against the defendant. *Citizens First National Bank v. Cinco Exploration Co.*, 540 S.W.2d 292, 294 (Tex. 1976). Traditional summary judgment for a defendant is proper only if the defendant negates at least one element of each of the plaintiff's theories of recovery or pleads and conclusively establishes each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

The court may grant a motion for summary judgment that shows that the nonmovant has no viable cause of action or defense based on the nonmovant's pleadings. *See, e.g., National Union Fire Insurance Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) (per curiam). In this type of motion, the court must allow the nonmovant adequate opportunity to plead a viable cause of action. *See In re B.I.V.*, 870 S.W.2d 12, 13–14 (Tex. 1994) (per curiam).

Requirements: The motion must be in writing. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 677 (Tex. 1979). It may be filed at any time after the adverse party answers the lawsuit or, in the case of a defendant, at any time. Tex. R. Civ. P. 166a(a), (b). The motion must state the specific grounds on which it is made. *McConnell v. Southside ISD*, 858 S.W.2d 337, 341 (Tex. 1993). A trial court may not grant a summary judgment for more relief than was requested in the motion. *See Sci-*

ence Spectrum, Inc., 941 S.W.2d at 912. The trial court shall render summary judgment based on the pleadings on file at the time of the hearing if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c). A party may file an amended pleading during the pendency of the summary judgment. *See Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 825–26 (Tex. App.—Dallas 1992, writ denied). For the order to be final, as opposed to being merely a partial summary judgment, the motion must ask the court to dispose of all issues and all parties. *See Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276–77 (Tex. 1996). On appeal, the summary judgment may not be affirmed on a ground not presented to the trial court in the motion. *Haase v. Glazner*, 62 S.W.3d 795, 799–800 (Tex. 2001); *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993).

§ 8.51:2 No-Evidence Motion for Summary Judgment

A court may grant a no-evidence motion for summary judgment if the movant can show that an adequate time for discovery has passed and the nonmovant has no evidence to support one or more essential elements of his claim or defense. Tex. R. Civ. P. 166a(i).

Burden of Proof: A party seeking a no-evidence summary judgment must assert that no evidence exists as to one or more of the essential elements of the nonmovant's claims on which it would have the burden of proof at trial. *Holmstrom v. Lee*, 26 S.W.3d 526, 530 (Tex. App.—Austin 2000, no pet.). Once the movant specifies the elements on which there is no evidence, the burden shifts to the nonmovant to raise a fact issue on the challenged elements. The nonmovant is not required to marshal its proof, but it must point out evidence that raises a fact issue. *See* Tex. R. Civ. P. 166a cmt.

To raise a genuine issue of material fact, the nonmovant must set forth more than a scintilla of probative evidence as to an essential element of the nonmovant's claim or defense on which the nonmovant would have the burden of proof at trial. *See* Tex. R. Civ. P. 166a(i); *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

When a nonmovant presents summary judgment evidence in response to a no-evidence motion, that party must specifically identify the supporting proof it seeks to have considered by the trial court. General citation to voluminous records is not a proper response to a no-evidence motion for summary judgment, and the trial court is not required to search the record for evidence raising a material fact issue without more specific guidance from the nonmovant. *In re A.J.L.*, No. 14-16-00834-CV, 2017 WL 4844479, at *4 (Tex. App.—Houston [14th Dist.] Oct. 26, 2017, no pet.) (mem. op.).

Conclusory declarations are not competent summary judgment proof. *See* Tex. R. Civ. P. 166a(f); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (affidavits consisting of conclusions do not raise genuine issue of material fact; facts must be stated with sufficient specificity to allow perjury to be assigned to false representations); *Tran v. Ngo*, No. 01-17-00138-CV, 2018 WL 4126577, at *3 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.).

If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists. *Havner*, 953 S.W.2d at 711. Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of fact, and the legal effect is that there is no evidence. *Jackson v. Fiesta Mart*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

If the nonmovant fails to present evidence raising a genuine issue of material fact as to the challenged element, the trial court must grant the motion. Tex. R. Civ. P. 166a(i). A no-evidence summary judgment is essentially a directed verdict granted before trial, to which is applied a legal sufficiency standard of review. *Jackson*, 979 S.W.2d at 70.

Requirements: Like the traditional motion for summary judgment, the no-evidence motion must be in writing. Unlike the traditional motion, it does not require supporting evidence. The no-evidence motion should not be filed until after an "adequate time for discovery" has passed. *See* Tex. R. Civ. P. 166a(i).

§ 8.52 Use of Summary Judgment to Dispute Existence of Marriage Relationship

Summary judgment may be used to dispose of a divorce action entirely if the existence of the marriage relationship is disputed at the outset. If a party alleges an informal marriage, the party must allege that (1) the parties agreed to be married, (2) after the agreement, they lived together in Texas as spouses, and (3) after the agreement, they represented to others in Texas that they were married. Tex. Fam. Code § 2.401(a)(2). Although the elements may occur at different times, there is no informal marriage until all three exist. *Flores v. Flores*, 847 S.W.2d 648, 650 (Tex. App.—Waco 1993, writ denied) (per curiam); *Winfield v. Renfro*, 821 S.W.2d 640, 646 (Tex. App.—Houston [1st Dist.] 1991, writ denied). In a traditional motion for summary judgment, a movant respondent would need to disprove at least one element of informal marriage. In a no-evidence motion for summary judgment, a movant respondent need only assert that an

adequate time for discovery has passed and that the petitioner has no evidence to support one or more essential elements of informal marriage.

Agreement to Be Married: To prove the first element of an informal marriage, there must be evidence of a present agreement between the parties to be married. *Shelton v. Belknap*, 282 S.W.2d 682, 684 (Tex. 1955). Proof of cohabitation and representations to others that the couple is married may constitute circumstantial evidence of an agreement to be married. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993).

Cohabitation: Subsequent to an agreement to be married, the couple must live together in Texas as spouses. Tex. Fam. Code § 2.401(a)(2). This has been interpreted to mean that the couple must live together under the same roof, maintain a household, and otherwise conduct themselves as spouses. *See Grimsby v. Reib*, 153 S.W. 1124, 1129–30 (Tex. 1913); *Claveria v. Estate of Claveria*, 597 S.W.2d 434, 438 (Tex. App.—Dallas 1980), *rev'd on other grounds*, 615 S.W.2d 164 (Tex. 1981).

"Cohabitation" does not encompass mere frequent overnight visits or even a storage of personal property at the home in question. *Allen v. Allen*, 966 S.W.2d 658, 661 (Tex. App.—San Antonio 1998, pet. denied). Further, living together as spouses involves more than merely having sexual relations with one another. *See Ex parte Threet*, 333 S.W.2d 361, 364 (Tex. 1960) (orig. proceeding).

Purchasing property and executing secured transactions jointly (*see Rodriguez v. Avalos*, 567 S.W.2d 85, 86 (Tex. App.—El Paso 1978, no writ)) and filing joint tax returns (*see Day v. Day*, 421 S.W.2d 703, 705 (Tex. App.—Austin 1967, no writ)) are examples of the type of evidence to which Texas courts look to determine whether a couple is functioning as spouses for purposes of establishing an informal marriage. The designation of one member of the couple as the beneficiary of the other member's life insurance policy is also relevant evidence. *See Grigsby v. Grigsby*, 757 S.W.2d 163, 164 (Tex. App.—San Antonio 1988, no writ); *Ortiz v. Santa Rosa Medical Center*, 702 S.W.2d 701, 704 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

"Holding Out" Requirement: The final element in proving an informal marriage is that after agreeing to be married, the couple represented to others, in Texas, that they are married. Tex. Fam. Code § 2.401(a)(2). This element is commonly referred to as "holding out." The Texas Supreme Court has stated that under Texas law "there can be no secret common law marriage." *Ex parte Threet*, 333 S.W.2d at 364–65. Consequently, evidence of a casual holding out, such as occasional introductions in public as spouses, will not suffice to establish this element. *Flores*, 847 S.W.2d at 653; *Winfield*,

821 S.W.2d at 651. If a couple's agreement to be married is shared only with close relatives or friends, while the couple acts to conceal the agreement from the community at large, no informal marriage exists. *Winfield*, 821 S.W.2d at 649–50.

COMMENT: If a party prevails on a motion for summary judgment related to the existence of the marriage relationship, the rest of the issues related to the divorce action become moot. Issues may still exist regarding children. It may be wise to sever these issues out if there are children involved. Additionally, if the motion for summary judgment will dispose of all issues of the cause, attorney's fees should be pleaded in the motion and included in the order granting summary judgment; otherwise, they are waived. A motion for summary judgment that is intended to dispose of all issues does just that—disposes of all issues related to the divorce, including attorney's fees. Accordingly, the moving party must attach summary judgment evidence regarding attorney's fees in the form of an affidavit, usually with the attorney's invoices attached.

§ 8.53 Marital Property Agreements

§ 8.53:1 Summary Judgment and Enforceability of Marital Property Agreements

Summary judgment may also be used to determine the enforceability of marital property agreements. Often parties enter into marital property agreements to simplify matters in the event of a dissolution of their marriage. This "simplification" can be defeated if one party decides to challenge the enforceability of a marital property agreement. A divorce that should have been clear-cut can become even more complex than if the parties had not entered into an agreement at all. To limit the damage brought on by a challenge to a marital property agreement, a motion for partial summary judgment may be filed. However, if a motion for partial summary judgment is granted on the enforceability of a marital property agreement, the case is not necessarily disposed of in its entirety. The actual interpretation of the agreement and division of the estate still remains. Additionally, if children are involved, there may be additional litigation, even if the motion for partial summary judgment is granted.

§ 8.53:2 Types of Agreements

Three types of marital property agreements are sanctioned by the Texas Family Code: (1) premarital agreements (including property agreements affirming premarital agreements), (2) partition or exchange agreements, and (3) agreements to convert separate

property to community property. For a discussion of the enforceability of these agreements, see the practice notes in chapter 63 of this manual.

§ 8.54 Characterization of Property: Separate or Community

A spouse's separate property consists of (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during the marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during the marriage, except any recovery for loss of earning capacity during marriage. Tex. Fam. Code § 3.001. Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. Tex. Fam. Code § 3.003(a).

COMMENT: If there is a dispute between the parties as to the separate character of certain items of property, a motion for partial summary judgment may be in order to establish the separate nature of that property. However, if a motion for partial summary judgment regarding alleged separate property is not granted, that does not mean that the property is not separate property. It merely means that there may not be enough summary judgment evidence to prove as a matter of law that it is, in fact, separate property. The burden for a motion for partial summary judgment is not exactly the same as the burden for proving the separate character of certain property. If there is a fact issue to be determined, the trier of fact may still consider character on final hearing. This type of motion is most helpful if the court makes a specific ruling that property is either community or separate.

§ 8.55 Children's Issues

§ 8.55:1 Texas Family Code Section 153.004

Most children's issues cannot be determined by summary judgment practice. However, Texas Family Code section 153.004 provides:

> (a) In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.

> (b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child . . . .

Tex. Fam. Code § 153.004(a), (b).

§ 8.55:2 Mandatory Prohibition

Texas Family Code section 153.004 sets out the criteria to determine whether a mandatory prohibition is warranted against the appointment of parents as joint managing conservators, if credible evidence is introduced that one of them has a "history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child." *See* Tex. Fam. Code § 153.004(b).

COMMENT: Filing a summary judgment motion based on this provision of the Family Code can eliminate the option of joint managing conservators. However, it does not provide a complete solution to the issue of conservatorship, because as it currently stands, an abusive parent may still theoretically be appointed sole managing conservator of a child. However, if the client is a primary parent for the children and a battered spouse, the provisions of section 153.004(d) work in the client's favor.

§ 8.56 Other Causes of Action

Other causes of action that may be included against a spouse or third party in a divorce are (1) assault or intentional infliction of emotional distress, (2) fraud/conversion, (3) transmitting sexual disease, (4) invasion of privacy by unlawful interception of oral or electronic communication, (5) tortious interference with business relations, (6) wrongful interference with an existing contract, (7) interference with custody, (8) parentage action if someone other than a spouse is alleged to be the biological father of a child born during the marriage, (9) cause of action alleging third-party corporation to be alter ego of respondent, (10) request for relief from third-party cotenant, (11) request for relief from third party for fraudulent transfer, (12) request to void fraudulent obligation to third party, (13) request for relief from third-party trustee, and (14) civil conspiracy. See sections 3.61 through 3.75 in this manual. A party is not entitled to final judgment on a summary judgment unless the summary judgment disposes of all claims. *Philips v. McNease*, 467 S.W.3d 688, 694 (Tex. App.—Houston [14th Dist.] 2015, no pet.). A declaratory judgment may also be sought. See section 61.10 in this manual.

To the extent that a party would be entitled to summary judgment on any of these causes of action outside the divorce context, a spouse should also be entitled, at the very least, to summary judgment on the issue of liability. That is, if a party can establish each element of its claim as a matter of law, that party is entitled to summary judgment relief. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986) (per curiam); *Fry v. Commission for Lawyer Discipline*, 979 S.W.2d 331, 334 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

COMMENT: As to causes of action that apply to third parties, there should be no question that summary judgment would be available if a party can prove judgment as a matter of law. This applies to third-party defendants as well. That is, a third-party defendant is entitled to summary judgment on its defenses, as in any other case.

Damages: In *Schlueter v. Schlueter*, the supreme court held that fraud on the community is a factor for division of the community estate, but that it was not an independent tort cause of action between spouses for damages to the community estate. *Schlueter v. Schlueter*, 975 S.W.2d 584, 587–89 (Tex. 1998); *see* Tex. Fam. Code § 7.009. If the damages are unliquidated (not yet determined or calculated), the court may grant an interlocutory summary judgment on liability and hold a hearing on damages. Tex. R. Civ. P. 166a(a). *But see State v. Roberts*, 882 S.W.2d 512, 514 (Tex. App.—Austin 1994, no writ) (summary judgment rarely appropriate in cases regarding unliquidated damages).

COMMENT: If summary judgment is filed on claims where damages cannot be addressed, the motion should be based solely on the issue of liability.

§ 8.57 Postdecree Issues

§ 8.57:1 Texas Family Code Chapter 9

Chapter 9 of the Texas Family Code governs postdecree proceedings. The types of litigation that may be dealt with include a postdecree division of property and dispositions of undivided beneficial interests. With regard to both of these issues, the same summary judgment tools can be used to determine the character of the property as are used in predecree cases. Once character of the property is determined, a just and equal division can be achieved concerning community property. If the property is the separate property of either of the parties, it is not subject to division by the court.

§ 8.57:2 Bill of Review

A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. *Transworld Financial Services Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987). The bill of review is discussed in section 61.1 in this manual.

§ 8.58 Affidavits and Verifications

If a motion or pleading includes facts that are outside the record of the case, it may be necessary for the filing party to verify the facts by sworn proof. Depending on the type of pleading, this proof may be accomplished either by verification of the pleading or by attachment of an affidavit as an exhibit to the pleading.

A verification is a witnessed or notarized statement at the end of a pleading in which either the client or the attorney swears that the statements in the pleading are true and correct.

An affidavit is a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office. Tex. Gov't Code § 312.011(1); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 645–46 (Tex. 1995) (orig. proceeding). An affidavit must show that it is made by a person who is of sound mind, over the age of eighteen years, and competent to testify. *See* Tex. R. Evid. 601.

An affidavit must positively and unequivocally represent that the facts disclosed in the affidavit are true and within the affiant's personal knowledge. *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994) (orig. proceeding) (per curiam); *see also* Tex. R. Evid. 602. Any qualification of the affiant's personal knowledge renders the affidavit legally invalid. *Humphreys*, 888 S.W.2d at 470 (statements based on knowledge affiant learned through inquiry are not based on personal knowledge). The affidavit must also show how the affiant became familiar with these facts. *Jordan v. Geigy Pharmaceuticals*, 848 S.W.2d 176, 181 (Tex. App.—Fort Worth 1992, no writ); *Fair Woman, Inc. v. Transland Management Corp.*, 766 S.W.2d 323, 323 (Tex. App.—Dallas 1989, no writ). Unless authorized by statute, an affidavit is insufficient unless the allegations contained in it are direct and unequivocal and perjury can be assigned upon it. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). Statements as to the affiant's state of mind cannot be readily controverted. *Beaumont Enterprise & Journal v. Smith*, 687 S.W.2d 729, 730 (Tex. 1985). An affidavit must set forth facts, not legal conclusions; in

other words, it may not contain information that is a unilateral and subjective determination of the facts or an opinion about those facts. *Querner Truck Lines v. Alta Verde Industries*, 747 S.W.2d 464, 468 (Tex. App.—San Antonio 1988, no writ). A legal conclusion in an affidavit is insufficient to raise an issue of fact in response to a motion for summary judgment. *Mercer v. Daoran Corp.*, 676 S.W.2d 580, 583 (Tex. 1984); *Hidalgo v. Surety Savings & Loan Ass'n*, 487 S.W.2d 702, 703 (Tex. 1972) (per curiam).

Under certain specific statutes or rules, some affidavits may be based on "knowledge and belief." *See* Tex. Fam. Code § 153.432(c) (grandparent's affidavit alleging that denial of possession or access would significantly impair child's physical health or emotional well-being); Tex. Fam. Code § 156.006(b–1) (affidavit alleging that temporary order is necessary because child's present circumstances would significantly impair child's physical health or emotional well-being (personal knowledge or belief based on representations of person with personal knowledge)); Tex. R. Civ. P. 18a(a) (motion to recuse); Tex. R. Civ. P. 93(8), (13), (15) (certain verified denials). An affidavit may not be based on "knowledge and belief" except in these limited circumstances. *See Burke v. Satterfield*, 525 S.W.2d 950, 954–55 (Tex. 1975); *Wimmer v. Hanna Prime, Inc.*, No. 05-08-01323, 2009 WL 3838867 (Tex. App.—Dallas Nov. 18, 2009, no pet.) (mem. op.).

Unsworn Declarations: In many circumstances, an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law. This provision does not apply to an oath of office or an oath required to be taken before a specified official other than a notary public. Such an unsworn declaration must be in writing and subscribed by the person making the declaration as true under penalty of perjury, and it must include a prescribed jurat. Tex. Civ. Prac. & Rem. Code § 132.001.

This provision does not apply to a waiver of the issuance or service of citation in a suit for dissolution of marriage, a suit for change of name of a child, or a suit affecting the parent-child relationship. These waivers must be sworn before a notary public who is not an attorney in the suit unless the party executing the waiver is incarcerated. Tex. Fam. Code §§ 6.4035(c), 45.0031, 102.0091. This provision also does not apply in certain other circumstances specified in Tex. Civ. Prac. & Rem. Code § 132.001(b) or to acknowledgments.

[Sections 8.59 and 8.60 are reserved for expansion.]

VII. Maintaining Suit

§ 8.61 Dismissal

Rule 165a of the Texas Rules of Civil Procedure provides a procedure for dismissal for want of prosecution that is cumulative of the rules and laws governing any other procedures available to the parties in such cases. Tex. R. Civ. P. 165a(4).

A case may be dismissed for want of prosecution under rule 165a on failure of any party seeking affirmative relief to appear for any hearing or trial of which he had notice. Notice of intention to dismiss must be sent by the clerk to each attorney of record and to each party not represented by an attorney. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall render a pretrial order assigning a trial date for the case and setting deadlines for the joining of new parties, all discovery, the filing of all pleadings, the making of a response or supplemental responses to discovery, and other pretrial matters. The case may be continued thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal must be given as provided in rule 306a of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 306a. Failure to mail notices as required by rule 165a does not affect any of the periods mentioned in rule 306a except as provided in that rule. Tex. R. Civ. P. 165a(1).

Any case not disposed of within the time standards promulgated by the supreme court under its administrative rules may be placed on a dismissal docket. Tex. R. Civ. P. 165a(2).

If one party dies before the divorce is granted, the case should be dismissed, including claims by third parties. *Whatley v. Bacon*, 649 S.W.2d 297, 299 (Tex. 1983) (orig. proceeding); *Janner v. Richardson*, 414 S.W.3d 857, 858 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see Garrison v. Texas Commerce Bank*, 560 S.W.2d 451, 453 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). However, if judgment has been rendered the court may proceed to enter the decree. *Dunn v. Dunn*, 439 S.W.2d 830, 833 (Tex. 1969).

§ 8.62 Reinstatement

One whose suit has been dismissed for want of prosecution may appeal to the equitable powers of the court to have the judgment set aside and the case reinstated for cause. The

court must balance the equities in each case in making its determination. *Moody & Tips Lumber Co. v. South Dallas Bank & Trust Co.*, 246 S.W.2d 263, 265 (Tex. App.—Dallas 1952, writ dism'd). Granting or refusing the motion for reinstatement rests in the sound discretion of the trial court, subject to review for abuse of discretion. *Moss v. State*, 361 S.W.2d 408, 409 (Tex. App.—Eastland 1962, no writ).

Under rule 165a(3), to reinstate a case, a verified motion setting forth the grounds shall be filed within thirty days after the signing of the order of dismissal for want of prosecution or within the period prescribed by rule 306a. *See* Tex. R. Civ. P. 306a.

The clerk shall deliver a copy of the motion to the judge, who shall set a hearing as soon as possible. Tex. R. Civ. P. 165a(3). The failure of the court to hold a hearing on a timely filed and properly verified motion is an abuse of discretion. *Bonifazi v. Birch*, No. 09-14-00136-CV, 2015 WL 8476572, at *2 (Tex. App.—Beaumont Dec. 10, 2015, no pet.) (mem. op.).

If the motion for reinstatement is not decided by written order within seventy-five days after the judgment is signed or within such other time as allowed by rule 306(a), the motion is deemed overruled by operation of law. If the motion to reinstate is timely filed, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until thirty days after all timely filed motions are overruled either by written and signed order or by operation of law, whichever occurs first. Tex. R. Civ. P. 165a(3).

The court shall reinstate the case on finding after hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to accident or mistake or that the failure has been otherwise reasonably explained. Tex. R. Civ. P. 165a(3).

The reinstatement procedure is cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedure and timetable apply to all dismissals for want of prosecution, including cases dismissed under the court's inherent power, whether or not a motion to dismiss has been filed. Tex. R. Civ. P. 165a(4). *See Martin v. Sanders*, No. 01-18-00726-CV, 2019 WL 2750598, at *4 (Tex. App.—Houston [1st Dist.] July 2, 2019, no pet. h.) (mem. op.) (court abused discretion in not reinstating case when attorney forgot to attend hearing because he had been witness giving deposition in federal case on day before and had gone back to deposition instead of going to hearing).

§ 8.63 Exclusion of Expert Witness

Under Tex. R. Evid. 702, the trial court determines the qualifications of an expert witness and whether the expert's opinion is admissible into evidence. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). To object to an expert, the party should make a written pretrial objection to the admissibility of the expert's opinion pursuant to Tex. R. Evid. 104(a). The motion must identify each expert and the opinion or conclusion that it seeks to exclude and should allege that the expert is not qualified to give the opinion, the subject of the testimony is not specialized knowledge, the opinion of the expert is not reliable, or the opinion of the expert is not relevant. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998).

COMMENT: It is good practice (and many courts require) that the objection be filed well in advance of the trial and not at the time the expert is called to testify.

§ 8.64 Bankruptcy

The filing of a bankruptcy petition automatically stays any judicial, administrative, or other action or proceeding against a debtor and his property. *See* 11 U.S.C. § 362(a). The stay applies automatically, regardless of whether a party to the stayed action or the court in which the action is filed learns of the bankruptcy before taking action against the debtor. The stay specifically applies to divorce proceedings, at least to the extent they seek to divide the marital estate. The stay abates any judicial proceeding against the debtor and, until lifted or modified, deprives state courts of jurisdiction over the debtor and his property. Any action taken in violation of the stay is void, not merely voidable. *Adeleye v. Driscal*, 544 S.W.3d 467, 473–74 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Federal law contains exceptions to the automatic stay rule that affect family law cases. Those exceptions include the commencement or continuation of a civil action or proceeding (1) for the establishment of paternity; (2) for the establishment or modification of an order for domestic support obligations; (3) concerning child custody or visitation; (4) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or (5) regarding domestic violence. 11 U.S.C. § 362(b)(2)(A).

The filing of the petition also does not operate as a stay (1) of the collection of a domestic support obligation from property that is not property of the estate; (2) with respect to the withholding of income that is property of the estate or property of the debtor for

payment of a domestic support obligation under a judicial or administrative order or a statute; (3) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under state law, as specified in section 466(a)(16) of the Social Security Act; (4) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act; (5) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous state law; or (6) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act. 11 U.S.C. § 362(b)(2)(B)–(G).

[Sections 8.65 through 8.70 are reserved for expansion.]

VIII. Indigence

§ 8.71 Claiming Indigence in Trial Court

Rule 145 of the Texas Rules of Civil Procedure provides rules under which a party may proceed without paying costs, meaning any fee charged by the court or an officer of the court that could be taxed in a bill of costs, including filing fees, fees for issuance and service of process, fees for a court-appointed professional, and fees charged by the clerk or court reporter for preparation of the appellate record. *See* Tex. R. Civ. P. 145(c).

A party who files a statement of inability to afford payment of costs may not be required to pay costs except by court order. After the statement is filed, the clerk must docket the case, issue citation, and provide any other service that is ordinarily provided to a party. The party must file the statement on a form approved by the Texas Supreme Court, which must be made available without charge or request, or the statement must include the information required by the court-approved form. The statement must be sworn to before a notary or made under penalty of perjury, and the clerk may refuse to file a statement that does not meet this requirement, but no other defect is a ground for refusing to file a statement or requiring the party to pay costs. The court may direct the party filing a statement with a material defect or omission to correct or clarify the statement. Tex. R. Civ. P. 145(a), (b), (d).

The statement must say that the party cannot afford to pay costs, and the party must provide evidence of that inability, such as evidence that the party (1) receives means-tested benefits from a government entitlement program, (2) is being represented by an attor-

ney providing free legal services through a provider funded by the Texas Access to Justice Foundation or the Legal Services Corporation or a nonprofit providing civil legal services to those meeting certain poverty standards, (3) has applied for free legal services through a provider described in (2) and was found financially eligible but was declined representation, or (4) does not have funds to afford payment of costs. Tex. R. Civ. P. 145(e).

When a party has filed a statement of inability to afford payment of costs, the court may order the party to pay costs only under certain circumstances. The clerk, any party, or an attorney ad litem appointed to represent a parent under section 107.013 of the Texas Family Code may move to require payment of costs only if the motion contains sworn evidence (not merely on information or belief) that the statement of inability to afford payment of costs was materially false when made or that, because of changed circumstances, it is no longer true in material respects. The court reporter may move to require the party to prove the inability to afford costs if the party requests the preparation of a reporter's record but cannot make arrangements to pay for it. The court on its own motion may require the party to prove the inability to afford costs if evidence comes before the court that the party may be able to afford costs or when an officer or professional must be appointed in the case. Tex. R. Civ. P. 145(f)(1)–(4).

Before the party who filed the statement may be required to pay costs, there must be an oral evidentiary hearing, with ten days' notice to the party, either written and served in accordance with rule 21a or given in open court. At the hearing, the burden is on the party who filed the statement to prove the inability to afford costs. An order requiring payment of costs must be supported by detailed findings that the party can afford to pay costs. The court may order that the party pay part of the costs or pay in installments, but the court may not delay the case if payment is made in installments. Tex. R. Civ. P. 145(f)(5)–(7).

Only the party filing the statement may challenge a trial court order under rule 145. On this challenge, accomplished by motion filed in the court of appeals, filing fees may not be charged. The motion must be filed within ten days after the trial court's order is signed, although the court of appeals may extend the deadline by fifteen days for good cause demonstrated in writing. Tex. R. Civ. P. 145(g)(1)–(2).

After the motion challenging the trial court's order is filed, the court of appeals must promptly send notice to the trial court clerk and the court reporter requesting preparation of the record of all trial court proceedings on the indigence claim. The court may

set a deadline for filing the record, which must be provided without charge. The court of appeals must rule on the motion as early as practicable. Tex. R. Civ. P. 145(g)(3)–(4).

The trial court judgment may not require the party filing to pay costs—and a provision in the judgment purporting to do so is void—unless the court has issued an order under rule 145(f) or the party has obtained a monetary recovery and the court orders the recovery to be applied toward payment of costs. Tex. R. Civ. P. 145(h).

Provisions in the Family Code for the appointment of counsel for indigent parents in a suit for termination or appointment of a conservator brought by a governmental entity are discussed in sections 13.3 and 50.31 of this manual.

§ 8.72 Indigence on Appeal

Rule 20.1 of the Texas Rules of Appellate Procedure provides rules under which indigent parties may proceed without payment of filing fees in the appellate court. *See* Tex. R. App. P. 20.1. A determination of indigence in the trial court carries forward to appeal in all cases, and there are also some other circumstances in which a party may be allowed to proceed in the appellate court without paying filing fees. The provisions of rule 20.1 regarding appellate filing fees, as well as further requirements regarding provision of the appellate record, are discussed in section 26.18 of this manual.

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Chapter 9

Child Support

I. Basic Principles

§ 9.1 Support of Child

The court may order either or both parents to support a child in the manner specified by the order until the child is eighteen years of age or until graduation from high school, whichever occurs later; until the child is emancipated through marriage, through removal of the disabilities of minority by court order, or by other operation of law; until the death of the child; or, if the child is disabled, for an indefinite period. Tex. Fam. Code § 154.001(a). The court may also order the payment of support by a financially able person whose parental rights have been terminated with respect to a child who is in substitute care for whom the Texas Department of Family and Protective Services has been appointed managing conservator, a child for a reason described by Code section 161.001(b)(1)(T)(iv) or (b)(1)(U) (concerning sexual assault of the other parent), or a child who was conceived as a direct result of conduct that constitutes an offense under section 21.02, 22.011, 22.021, or 25.02 of the Texas Penal Code. *See* Tex. Fam. Code § 154.001(a–1). Family Code section 154.001 does not mandate that a parent have possession of the child in order to be entitled to receive child support. *Duran v. Garcia*, 224 S.W.3d 309 (Tex. App.—El Paso 2005, no pet.).

If the child is enrolled in an accredited secondary school in a program leading toward a high school diploma under chapter 25 of the Texas Education Code, enrolled in courses for joint high school and junior college credit under section 130.008 of the Texas Education Code, or enrolled on a full-time basis in a private secondary school in a program leading toward a high school diploma, and is complying with the relevant minimum attendance requirements, the court may render an original support order or modify an existing order providing child support past the eighteenth birthday of the child. Tex. Fam. Code § 154.002(a). The request for a support order through high school graduation may be filed before or after the child's eighteenth birthday. Tex. Fam. Code

§ 154.002(b). The request may be made in an original suit seeking child support or a motion to modify a previous decree ordering support. *Crocker v. Attorney General*, 3 S.W.3d 650, 652–53 (Tex. App.—Austin 1999, no pet.).

The order for periodic support may provide that payments continue through the end of the month in which the child graduates. Tex. Fam. Code § 154.002(c).

With respect to "minimum attendance requirements," report cards showing multiple absences, without indicating which were unexcused, and reflecting that the child received credit and grades for the period in issue were not evidence that the child failed to meet the minimum attendance requirements. *Roberts v. Swain*, No. 01-13-00801-CV, 2014 WL 1912678, at *2 (Tex. App.—Houston [1st Dist.] May 13, 2014, no pet.) (mem. op.).

With respect to "accredited secondary school," the child may be enrolled in an alternative educational program outside the secondary school system but one adapted to the child's needs as long as any course credit earned under such alternative program may be applied to the gaining of a diploma from an accredited secondary school. *In re Frost,* 815 S.W.2d 890, 892–93 (Tex. App.—Amarillo 1991, no writ); *see also Ewing v. Holt*, 835 S.W.2d 274, 275 (Tex. App.—Fort Worth 1992, no writ) (intent of legislature in allowing for child support after child's eighteenth birthday was "to require a father to aid in the support of his child, even if that child is over the age of eighteen, so long as that child was actively participating in studies which would lead to a high school diploma").

A court may not render an order that conditions the right of a conservator to possession of or access to a child on the payment of child support. Tex. Fam. Code § 153.001(b). In addition, the court may not condition the duty to pay child support on whether a possessory conservator is given possession of or access to a child. Tex. Fam. Code § 154.011. Likewise, an order that relieves the obligor of his or her duty to pay child support until such time as the child resumes visitation with that parent is void as against public policy. *In re A.N.H.*, 70 S.W.3d 918, 920 (Tex. App.—Amarillo 2002, no pet.).

§ 9.2 Who May Be Ordered to Pay

Only parents (or certain persons whose parental rights have been terminated) may be required to pay child support. *See* Tex. Fam. Code § 154.001. Grandparents may not be required to pay child support, even if they have intervened in the case and have been appointed possessory conservators. *Blalock v. Blalock*, 559 S.W.2d 442, 443 (Tex.

App.—Houston [14th Dist.] 1977, no writ). Further, the doctrine of equitable adoption is inapplicable in the child support context. One who has acted as a parent, even if for many years, does not fit within the strict definition of a parent under the Family Code and cannot be held liable for the support of a child. *In re M.L.P.J.*, 16 S.W.3d 45, 47–48 (Tex. App.—Eastland 2000, pet. denied). However, although Texas does not recognize equitable adoption, a party may be liable for child support under an implied contract. *See In re Marriage of Eilers*, 205 S.W.3d 637 (Tex. App.—Waco 2006, pet. denied). In *Eilers*, because the parties took custody of a child and, along with the mother, executed a "Power of Attorney Delegating Parental Authority," the court found the existence of a contract and ordered the husband to pay the amount of support required by the child support guidelines to fulfill his contractual obligation.

While the Family Code does authorize a court to order either parent or both to support a child, the court may not order a sole managing conservator to pay child support to the possessory conservator. *See Peterson v. Office of the Attorney General*, 990 S.W.2d 830, 833 (Tex. App.—Fort Worth 1999, no pet.); *Lueg v. Lueg*, 976 S.W.2d 308, 313 (Tex. App.—Corpus Christi–Edinburg 1998, pet. denied). However, when joint managing conservators are named, the parent who has the exclusive right to determine the primary residence of the child may be ordered to pay support to the parent with an expanded possession order to ensure that the child has "adequate resources" at both residences. *In re A.R.W.*, No. 05-18-00201-CV, 2019 WL 6317870, at *9–10 (Tex. App.—Dallas Nov. 26, 2019, no pet. h.) (mem. op.).

If parties are made joint managing conservators, there is no requirement in the Family Code for a reciprocal support order. *Carson v. Hathaway*, 997 S.W.2d 760, 761 (Tex. App.—El Paso 1999, no pet.).

§ 9.3 Manner of Payment

The court may order that child support be paid by periodic payments; a lump-sum payment; an annuity purchase; the setting aside of property to be administered for the support of the child as specified in the order; or any combination of periodic payments, lump-sum payments, annuity purchases, or setting aside of property. Tex. Fam. Code § 154.003.

If the court orders the obligor to make a one-time lump-sum payment, calculated simply by multiplying the monthly support award by the number of months until the child reaches majority, a discount rate must be applied to arrive at the present value of the future payments. *In re Gonzalez*, 993 S.W.2d 147, 160 (Tex. App.—San Antonio 1999,

no pet.). The court may require the obligor to pay a lump-sum child support amount into a trust for the benefit of the child. *In re Gonzalez,* 993 S.W.2d at 161. It is also permissible for the court to order that a portion of the monthly support amount be paid into a joint account, to be used for purposes specific to the care and welfare of the child, with any amounts remaining on the termination of the support order to be paid to the child. *Bailey v. Bailey*, 987 S.W.2d 206, 209 (Tex. App.—Amarillo 1999, no pet.).

The court did not abuse its discretion in awarding an incarcerated obligor's share of the equity in the couple's home as a lump-sum child support payment to satisfy his child support obligation, where the father would not be up for parole before his child support obligation expired. *Tran v. Nguyen*, 480 S.W.3d 119, 129 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

§ 9.4 Place of Payment

The court shall order the payment of child support to the state disbursement unit. A trial court cannot order the state disbursement unit to remit payments to an individual or entity other than the obligee. *In re B.N.A.*, 278 S.W.3d 530 (Tex. App.—Dallas 2009, no pet.); *In re C.J.M.S.*, 269 S.W.3d 206 (Tex. App.—Dallas 2008, pet. denied); *In re A.B.*, 267 S.W.3d 564 (Tex. App.—Dallas 2008, no pet.). In a title IV-D case, the court or the title IV-D agency shall order that income withheld for child support be paid to the state disbursement unit of Texas or, if appropriate, to the state disbursement unit of another state. Tex. Fam. Code § 154.004(a), (b).

COMMENT: A child support obligor who has been ordered to pay through the state disbursement unit or other registry should be strongly advised to make payments to the proper place and not directly to the obligee. Payments should be properly identified, including the names of the obligor and obligee, the cause number, the Office of Attorney General case number, if applicable, and the name of the county if payment is through the state disbursement unit. The obligor should further be advised to keep an accurate record and proof of any offsets or credits to which he may be entitled.

The petitioner must file with the court clerk a record of support (see form 9-18 in this manual) at the time a child support order is filed of record. Tex. Fam. Code § 105.008(a). The record of support is a form promulgated by the Texas Office of the Attorney General, and its use guarantees that the local registry and the state disbursement unit receive the information necessary to accurately process support payments.

§ 9.5 Payments by Trust

The court may order the trustees of a spendthrift or other trust to make disbursements for the support of a child to the extent the trustees are required to make payments to a beneficiary who is required to make child support payments. If disbursement of the assets of the trust is discretionary, the court may order child support payments from the income of the trust but not from the principal. Tex. Fam. Code § 154.005. The court may *not* order trustees to pay child support directly to a child support obligee without imposing that obligation on the beneficiary-parent. It is only when the parent is first obligated to pay an amount of child support that the court may order a third party to make disbursements directly to the child support obligee. *Kolpack v. Torres*, 829 S.W.2d 913, 915–16 (Tex. App.—Corpus Christi–Edinburg 1992, writ denied).

§ 9.6 Termination of Duty of Support

Unless otherwise agreed in writing or expressly provided in the order, the child support order terminates on the marriage of the child, the removal of the child's disabilities for general purposes, the death of the child, a finding by the court that the child is eighteen years of age or older and has failed to comply with the enrollment or attendance requirements described by Family Code section 154.002(a), the issuance under Family Code section 161.005(h) of an order terminating the parent-child relationship between the obligor and the child based on the results of genetic testing that exclude the obligor as the child's genetic father, or the date on which a child who has enlisted in the armed forces of the United States begins active service as defined by section 101 of title 10 of the United States Code. Tex. Fam. Code § 154.006(a).

Unless a nonparent or agency has been appointed conservator of the child under Family Code chapter 153, the order for current child support terminates on the marriage or remarriage of the obligor and obligee to each other. Tex. Fam. Code § 154.006(b).

If the child support order has not terminated, the support obligation continues beyond the death of the obligee on an order of the court directing that any current support, including amounts collected but not disbursed and any subsequent payments for current support, be paid proportionately for the benefit of each surviving child named in the support order, instead of passing to the estate of the obligee. The order shall direct payment be made to (1) a person, other than a parent, who is appointed managing conservator of the child; (2) a person, including the obligor, who has assumed actual care, control, and possession of the child, in the absence of an appointed managing conservator or guardian; (3) the county clerk acting as custodian of an account for the child,

under chapter 1355 of the Estates Code; (4) a guardian of the child appointed under title 3 of the Estates Code; or (5) the surviving child, if the child is an adult or has otherwise had the disabilities of minority removed. Tex. Fam. Code § 154.013.

If the obligor is not in arrears and the support obligation has terminated, an obligee shall return to the obligor a child support payment made by the obligor that exceeds the amount of ordered support, regardless of whether the payment was made before, on, or after the date the child support obligation terminated. An obligor may file a suit to recover such a payment. If the court finds that the obligee failed to return such a payment, the court must order the obligee to pay the obligor's attorney's fees and costs in addition to the amount of support paid after the order terminated. The court may waive the payment of the attorney's fees and costs for good cause shown, if the court states the reasons supporting that finding. Tex. Fam. Code § 154.012.

§ 9.7 Retroactive Child Support

The court may order a parent to pay retroactive child support if the parent has not previously been ordered to pay support for the child and was not a party to a suit in which support was ordered, except that the court may order a parent subject to a previous support order to pay retroactive support if (1) the previous order terminated as a result of the marriage or remarriage of the child's parents, (2) the parents separated after the marriage or remarriage, and (3) a new support order is sought after the date of separation. Tex. Fam. Code § 154.009(a), (d).

In ordering retroactive child support, the court shall apply the child support guidelines. Tex. Fam. Code §§ 154.009(b), 154.131(a). The court must consider the net resources of the obligor during the relevant period and whether (1) the mother of the child had attempted to notify the obligor of his paternity or probable paternity, (2) the obligor knew of his paternity or probable paternity, (3) the order for retroactive support will impose an undue financial hardship on the obligor or the obligor's family, and (4) the obligor has provided actual support and other necessaries before the action was filed. Tex. Fam. Code § 154.131(b).

An agreement between the parties concerning support or purporting to settle support obligations does not reduce or terminate the amount of retroactive support the title IV-D agency can request unless the title IV-D agency is a party to an agreement. Tex. Fam. Code § 154.009(c). In addition, a parent's voluntary but sporadic payment of support before the entry of a court order does not preclude the trial court from exercising its discretion to award retroactive child support, and the court is not required to credit the full

amount of past financial support the parent claims to have provided. *Bunts v. Williams*, No. 01-17-00643-CV, 2019 WL 2220109, at *10 (Tex. App.—Houston [1st Dist.] May 23, 2019, no pet. h.) (mem. op.).

It is presumed that a court order limiting the amount of retroactive support to an amount not exceeding the total amount that would have been due for the four years preceding the filing date of the petition for support is reasonable and in the best interest of the child. The presumption may be rebutted by evidence that the obligor (1) knew or should have known that he was the child's father and (2) sought to avoid the establishment of a support obligation to the child. Tex. Fam. Code § 154.131(c)–(d); *see In re S.C.B.*, 581 S.W.3d 434 (Tex. App.—El Paso 2019, no pet. h.) (fact that father knew about twelve-year-old child since child's birth insufficient to rebut presumption without proof that he also sought to avoid child support obligation). An order so limiting the amount of retroactive support does not constitute a variance from the mandatory guidelines requiring specific findings of the court. Tex. Fam. Code § 154.131(e). *But see In re B.R.*, 327 S.W.3d 208 (Tex. App.—San Antonio 2010, no pet.) (holding that section 154.131(c)'s presumption applies only when trial court limits amount of retroactive child support to amount not exceeding support that would have been due for preceding four years and does not prohibit court from awarding amount greater than four years of retroactive child support; if court does not limit retroactive support to amount equal to four years of child support, section 154.131(c) presumption is not triggered and does not apply).

A court retains jurisdiction to render an order for retroactive child support in a suit if a petition requesting retroactive child support is filed not later than the fourth anniversary of the date of the child's eighteenth birthday. Tex. Fam. Code § 154.131(f).

§ 9.8 Child Support for Disabled Child

An "adult child" is a child eighteen years of age or older. Tex. Fam. Code § 154.301(1). The court may order either or both parents to provide for the support of a child for an indefinite period and may determine the rights and duties of the parents if the court finds that the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support and that the disability exists, or the cause of the disability is known to exist, on or before the eighteenth birthday of the child. Tex. Fam. Code § 154.302(a); *see, e.g., In re T.A.N.*, No. 07-08-0483-CV, 2010 WL 58334 (Tex. App.—Amarillo Jan. 8, 2010, no pet.) (mem. op.) (finding sufficient evidence that adult child needs substantial care and personal supervision and noting that substantial care is not same as continuous care); *In re M.W.T.*, 12 S.W.3d 598, 605 (Tex. App.—San Antonio 2000, pet. denied)

(finding that uncontrollable anger rendered adult child disabled and incapable of self-maintenance). *But see In re J.M.C.*, 395 S.W.3d 839, 846 (Tex. App.—Tyler 2013, no pet.) (denying petition for adult child support for legally blind adult who did not need substantial care or personal supervision in daily activities).

The court shall designate a parent of the child or another person who has physical custody or guardianship of the child under a court order to receive support for the child. The court may designate a child who is eighteen years of age or older to receive the support directly. Tex. Fam. Code § 154.302(b).

Except in a title IV-D case, a court ordering support for an adult child with a disability may designate a special needs trust and order support be paid directly to the trust for the benefit of the adult child. The court may not order the support be paid to the state disbursement unit. Tex. Fam. Code § 154.302(c).

A suit for the support of a disabled child may be filed only by a parent of the child; another person who has physical custody or guardianship of the child under a court order; or the child, if the child is eighteen years of age or older, does not have a mental disability, and is determined by the court to be capable of managing the child's financial affairs. Tex. Fam. Code § 154.303(a); *In re C.J.N.-S.*, 540 S.W.3d 589 (Tex. 2018) (mother had standing to seek adult disabled child support from father even though mother did not live with child).

The suit may be filed regardless of the age of the child. Tex. Fam. Code § 154.305(a)(1). The cause of action may be assigned to the IV-D agency, pursuant to an application for financial assistance or child support services under Code section 231.104 or in the provision of child support enforcement services under Code section 159.307; however, it may not be assigned to any other entity or person. *See* Tex. Fam. Code § 154.303(b).

In determining the amount of support to be paid after a child's eighteenth birthday, the specific terms and conditions of that support, and the rights and duties of both parents with respect to the support of the child, the court shall determine and give special consideration to any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability; whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child; the financial resources available to both parents for the support, care, and supervision of the adult child; and any other financial

resources or other resources or programs available for the support, care, and supervision of the adult child. Tex. Fam. Code § 154.306.

§ 9.9 Acceleration of Unpaid Child Support Obligation on Death of Obligor

Any remaining unpaid balance of a child support obligation becomes payable when the obligor dies. Tex. Fam. Code § 154.015(b).

The court of continuing jurisdiction shall determine the amount of the unpaid child support obligation. All relevant factors must be considered in determining the amount of the unpaid obligation, including the present value of the total amount of monthly periodic child support payments, health insurance premiums, and dental insurance premiums payable for the child's benefit between the month in which the obligor dies and the month the child becomes eighteen years of age, based on the amounts of support and cost of insurance ordered at the time the obligor dies; in the case of a disabled child, an amount to be determined under Family Code section 154.306; the nature and amount of any benefit to which the child would be entitled as a result of the obligor's death, including life insurance proceeds, annuity payments, trust distributions, Social Security death benefits, and retirement survivor benefits; and any other financial resource available for the child's support. Tex. Fam. Code § 154.015(c).

If, after considering all the relevant factors, the court finds that the child support obligation has been satisfied, the court shall render an order terminating the obligation. If the court finds the obligation is not satisfied, the court shall render a judgment in the obligee's favor, for the child's benefit, for the amount of the unpaid obligation. The order must designate the obligee constructive trustee for the child's benefit of any money received in satisfaction of the judgment. Tex. Fam. Code § 154.015(d).

The obligee has a claim for the unpaid child support obligation against the obligor's estate on the child's behalf and may present that claim as provided in the Texas Estates Code. Tex. Fam. Code § 154.015(e). If money paid to the obligee for the child's benefit exceeds the amount of the unpaid child support obligation remaining when the obligor dies, the obligee must hold the excess amount as constructive trustee for the benefit of the obligor's estate until the obligee delivers the excess amount to the legal representative of the estate. Tex. Fam. Code § 154.015(f).

COMMENT: For a discussion of several unanswered questions regarding the implementation of this statute, see Marilyn Shell & Georganna L. Simpson, *Dealing with the*

Death of a Parent: Family Code §§ 154.015 and 154.016, Winter 2007 Family Law Section Report.

§ 9.10 Provision of Support If Obligor Dies

The court may order a child support obligor to obtain and maintain a life insurance policy, including a decreasing term life insurance policy, that will establish an insurance-funded trust or an annuity payable to the obligee for the child's benefit that will satisfy the support obligation under the child support order if the obligor dies. Tex. Fam. Code § 154.016(a).

In determining the nature and extent of the support obligation in the event of the obligor's death, the court shall consider all relevant factors, including the present value of the total amount of child support payments, health insurance premiums, and dental insurance premiums payable for the child's benefit from the time the order is rendered until the month in which the child becomes eighteen years of age, based on the amount of the support and the cost of insurance ordered to be paid. In the case of a disabled child, the court shall consider an amount to be determined by the court under Family Code section 154.306. Tex. Fam. Code § 154.016(b).

On its own or the obligee's motion, the court may require the obligor to provide satisfactory proof verifying compliance with the order for life insurance. Tex. Fam. Code § 154.016(c).

§ 9.11 Payments in Excess of Court-Ordered Amount

If a child support agency or registry receives from an obligor who is not in arrears a child support payment in an amount that exceeds the court-ordered amount, the agency or registry shall give effect to any expressed intent of the obligor for the application of the amount that exceeds the court-ordered amount. If the obligor does not express an intent for the application of the amount paid in excess of the court-ordered amount, the agency or registry shall credit the excess to the obligor's future child support obligation and disburse the excess to the obligee, unless the obligee is a recipient of public assistance under chapter 31 of the Human Resources Code. Tex. Fam. Code § 154.014. Likewise, when an obligee receives excess child support payments from an obligor, the trial court shall give effect to any expressed intent of the obligor to determine proper application of the excess amount. *In re B.S.H.*, 308 S.W.3d 76 (Tex. App.—Fort Worth 2009, no pet.) (per curiam) (trial court properly refused to apply excess payments to

future obligations, finding that they were voluntary payments intended to avoid costs of modifying decree and to meet current needs of child).

[Sections 9.12 through 9.20 are reserved for expansion.]

II. Child Support Guidelines

§ 9.21 Net Resources Defined

The court shall calculate net resources for the purpose of determining child support liability as follows. Resources include 100 percent of all wage and salary income and other compensation for personal services (including commissions, overtime pay, tips, and bonuses); interest, dividends, and royalty income; self-employment income; net rental income (defined as rent after deducting operating expenses and mortgage payments but not including noncash items such as depreciation); and all other income actually being received, including severance pay, retirement benefits, pensions, trust income, annuities, capital gains, Social Security benefits other than supplemental security income, United States Department of Veterans Affairs disability benefits other than non–service-connected disability benefits (as defined by 38 U.S.C. § 101(17)), unemployment benefits, disability and workers' compensation benefits, interest income from notes regardless of the source, gifts and prizes, spousal maintenance, and alimony. Tex. Fam. Code § 154.062(a), (b).

All receipts of money that are not specifically excluded by section 154.062(c), whether nonrecurring or periodic, whether derived from the obligor's capital or labor or from that of others, must be included in the definition of "resources." *In re P.C.S.*, 320 S.W.3d 525, 537 (Tex. App.—Dallas 2010, pet. denied) (holding that cash inheritance from third party paid to obligor in two payments is "resource" for purpose of calculating monthly child support obligation). *See also In re A.M.P.*, 368 S.W.3d 842, 848–49 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (when calculating net resources, court should have included advance on inheritance, as it was gift and not loan); *Koenig v. DeBerry*, No. 03-09-00252-CV, 2010 WL 1009170 (Tex. App.—Austin Mar. 17, 2010, no pet.) (mem. op.) (trial court properly considered early withdrawal from father's retirement account in its determination of net resources); *In re A.A.G.*, 303 S.W.3d 739 (Tex. App.—Waco 2009, no pet.) (holding that portion of structured settlement annuity attributable to interest should be considered in calculating net resources); *In re J.D.D.*, 242 S.W.3d 916, 922 (Tex. App.—Dallas 2008, pet. denied); *In re S.B.C.*, 952 S.W.2d

15, 18 (Tex. App.—San Antonio 1997, no writ) (latter two holding that duty to pay support is not limited to obligor's ability to pay from current earnings but also extends to his or her financial ability to pay from any and all sources that might be available); *Swaab v. Swaab*, 282 S.W.3d 519 (Tex. App.—Houston [14th Dist.] 2008, review dism'd w.o.j.) (given obligor's undisputed fluctuation in earnings, trial court did not abuse its discretion in averaging net resources over ten-year period to determine his approximate net monthly resources); *Stucki v. Stucki*, 222 S.W.3d 116 (Tex. App.—Tyler 2006, no pet.) (court abused its discretion by not considering one-time $20,000 bonus as part of obligor's net resources for purposes of determining child support); *Knight v. Knight*, 131 S.W.3d 535, 540 (Tex. App.—El Paso 2004, no pet.) (trial court did not abuse its discretion in basing child support on obligor's income from prior year when no evidence of current income was offered); *Norris v. Norris*, 56 S.W.3d 333, 341–42 (Tex. App.—El Paso 2001, no pet.) (if obligor's income fluctuates, it is proper to base order on average amount of monthly net resources over a two-year period). *But see In re P.C.S.*, 320 S.W.3d at 540 (benefits of employment—personal use of company truck and monthly health insurance premium paid for family—not includable in net resources but rather subject to consideration in deviating from guidelines under section 154.123).

In *Powell v. Swanson*, 893 S.W.2d 161, 163–64 (Tex. App.—Houston [1st Dist.] 1995, no writ), the court's calculation of an obligor's net resources by dividing in half the adjusted gross income as stated on his jointly filed federal tax return was found arbitrary and an abuse of discretion.

Resources do not include return of principal or capital, accounts receivable, benefits paid in accordance with the Temporary Assistance for Needy Families program or another federal public assistance program, or payments for foster care of a child. Tex. Fam. Code § 154.062(c).

The court shall deduct the following items from resources to determine the net resources available for child support: Social Security taxes, federal income tax based on the tax rate for a single person claiming one personal exemption and the standard deduction, state income tax, union dues, and expenses for the cost of health insurance, dental insurance, or cash medical support for the obligor's child ordered by the court under Code sections 154.182 and 154.1825; if the obligor does not pay Social Security taxes, the court shall also deduct contributions to a nondiscretionary retirement plan (a plan to which the obligor is required to contribute as a condition of employment). Tex. Fam. Code § 154.062(d), (f). In calculating the amount of the deduction for health-care or dental coverage for a child, if the obligor has other minor dependents covered under

the same health or dental insurance plan, the court must divide the total cost to the obligor for the insurance by the total number of minor dependents, including the child, covered under the plan. Tex. Fam. Code § 154.062(e).

There is no legal presumption that an inmate has no assets. *See Koenig v. DeBerry*, 2010 WL 1009170, at *5 (support set on earnings from year prior to incarceration, which could be satisfied from withdrawals from retirement account).

§ 9.22 Self-Employment Income

Income, whether positive or negative, from self-employment includes benefits allocated to an individual from a business or undertaking in the form of a proprietorship, partnership, joint venture, close corporation, agency, or independent contractor, less ordinary and necessary expenses required to produce that income. In its discretion, the court may exclude from self-employment income amounts allowable under federal income tax law as depreciation, tax credits, or any other business expenses shown by the evidence to be inappropriate in making the determination of income available for the purpose of calculating child support. Tex. Fam. Code § 154.065.

§ 9.23 Intentional Unemployment or Underemployment

If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor. Tex. Fam. Code § 154.066(a); s*ee In re Davis*, 30 S.W.3d 609, 616 (Tex. App.—Texarkana 2000, no pet.). In determining whether an obligor is intentionally unemployed or underemployed, the court may consider evidence that the obligor is a veteran (as defined by 38 U.S.C. § 101(2)) who is seeking or has been awarded VA disability benefits (as defined by 38 U.S.C. § 101(16)) or non–service-connected disability pension benefits (as defined by 38 U.S.C. § 101(17)). Tex. Fam. Code § 154.066(b).

In addition, in setting an appropriate support award, the court is not limited to the obligor's ability to pay from current earnings; rather it extends to the obligor's financial ability to pay from any and all available sources. *Garner v. Garner*, 200 S.W.3d 303 (Tex. App.—Dallas 2006, no pet.). In *Garner*, the court considered prior employment, along with the fact that the obligor received payment for expenses as a member of a singing group. *See also In re A.B.A.T.W.*, 266 S.W.3d 580 (Tex. App.—Dallas 2008, no pet.).

A parent who is qualified to obtain gainful employment cannot evade his support obligation by voluntarily remaining unemployed. *Giangrosso v. Crosley*, 840 S.W.2d 765, 770 (Tex. App.—Houston [1st Dist.] 1992, no writ). In one case the court found the obligor's testimony that he thought self-employment would be "more lucrative" and that he did not foresee a decrease in his earnings was sufficient to base the award on actual earnings rather than earning potential. *McGuire v. McGuire*, 4 S.W.3d 382, 388 (Tex. App.—Houston [1st Dist.] 1999, no pet.). *But see Terry v. Terry*, 920 S.W.2d 423, 426–27 (Tex. App.—Houston [1st Dist.] 1996, no writ) (finding that obligor intentionally unemployed based on educational background); *In re Striegler*, 915 S.W.2d 629, 639–40 (Tex. App.—Amarillo 1996, writ denied) (finding that to avoid paying child support obligor intentionally engaged in activities that did not produce income when he could have been gainfully employed elsewhere).

The trial court is not required to find that voluntary unemployment is for the primary purpose of avoiding a child support obligation before setting support based on the obligor's earning potential. *Iliff v. Iliff*, 339 S.W.3d 74, 80 (Tex. 2011). However, it is not enough to simply show that the obligor is failing to maximize his potential. The obligee must show that the actual earnings of the obligor are "significantly less" than his earnings potential. *Trumbull v. Trumbull*, 397 S.W.3d 317, 321 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *In re J.D.A.*, No. 05-17-00053-CV, 2017 WL 6503094, at *3 (Tex. App.—Dallas Dec. 1, 2017, no pet.) (mem. op.) (once obligor offers proof of current wages, obligee must demonstrate obligor is intentionally unemployed or underemployed in order to receive child support computed on earning potential). There is no presumption that simply because a parent is no longer as lucratively employed as he was during the marriage, he is intentionally underemployed or unemployed. The requisite intent or lack thereof, however, may be inferred from such circumstances as the parent's education, economic adversities and business reversals, business background, and earning potential. *Reddick v. Reddick*, 450 S.W.3d 182 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Hardin v. Hardin*, 161 S.W.3d 14 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App.—El Paso 2003, pet. denied); *In re Davis*, 30 S.W.3d at 616–17; *see also Warren v. Warren*, No. 04-18-00195-CV, 2019 WL 1923236, at *2 (Tex. App.—San Antonio May 1, 2019, no pet. h.) (mem. op.) (mother found intentionally underemployed when she failed to renew her teaching license because it was not her "path goal"); *Udobong v. Udobong*, No. 14-16-00856-CV, 2018 WL 6424677, at *6 (Tex. App.—Houston [14th Dist.] Dec. 6, 2018, pet. denied) (father's argument that inability to gain more lucrative employment resulted from family violence protective order insufficient to rebut claim of intentional underemployment); *In re I.Z.K.*, No. 04-16-00830-CV, 2018 WL

1176646, at *4 (Tex. App.—San Antonio Mar. 7, 2018, no pet.) (mem. op.) (absent actual evidence, mere speculation father could work as percussionist insufficient to show intentional underemployment).

At the same time, the court must keep in mind a parent's right to pursue his or her own happiness. *In re E.A.S.*, 123 S.W.3d at 570; *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App.—Tyler 1997, no pet.).

§ 9.24 Deemed Income

To determine the net resources available for child support, the court may assign a reasonable amount of deemed income attributable to assets that do not currently produce income. The court shall also consider whether certain property that is not producing income can be liquidated without an unreasonable financial sacrifice because of cyclical or other market conditions. If there is no effective market for the property, the carrying costs of such an investment, including property taxes and note payments, shall be offset against the income attributed to the property. Tex. Fam. Code § 154.067(a). *See Matthews v. Northrup*, No. 01-09-00063-CV, 2010 WL 2133910 (Tex. App.—Houston [1st Dist.] May 27, 2010, pet. denied) (mem. op.) (father's income from family partnership allocated to him for federal income tax reporting purposes but not actually distributed to him properly considered "deemed income" to be considered in determining child support obligation); *In re Driver*, 895 S.W.2d 875, 877 (Tex. App.—Texarkana 1995, no writ).

The court may assign a reasonable amount of deemed income to income-producing assets that a party has voluntarily transferred or on which earnings have intentionally been reduced. Tex. Fam. Code § 154.067(b).

§ 9.25 Minimum Wage Presumed

In the absence of evidence of a party's resources, as defined by Family Code section 154.062(b), the court shall presume that the party has income equal to the federal minimum wage for a forty-hour week to which the support guidelines may be applied. The presumption does not apply if the court finds that the party is subject to an order of confinement that exceeds ninety days and is incarcerated in a local, state, or federal jail or prison when the court makes the income determination. Tex. Fam. Code § 154.068. The court is permitted to presume, in the absence of proof otherwise, that an obligor has

earned minimum wage from the time of his child's birth. *In re M.M.*, 980 S.W.2d 699, 700 (Tex. App.—San Antonio 1998, no pet.).

§ 9.26 Net Resources of New Spouse

The court may not add any portion of the net resources of a spouse to the net resources of an obligor or obligee to calculate the amount of child support to be ordered. The court may not subtract the needs of a spouse, or of a dependent of a spouse, from the net resources of the obligor or obligee. Tex. Fam. Code § 154.069; *see Starck v. Nelson*, 878 S.W.2d 302, 305–06 (Tex. App.—Corpus Christi–Edinburg 1994, no writ) (trial court erred in considering income of obligor's wife for purpose of deviating from guidelines). *See In re Knott*, 118 S.W.3d 899 (Tex. App.—Texarkana 2003, no pet.) (trial court erred by adding new spouse's income to obligor's to determine obligor's net resources, particularly when new spouse's investment income was her separate property under terms of premarital agreement). *See also Koenig v. DeBerry*, No. 03-09-00252-CV, 2010 WL 1009170 (Tex. App.—Austin Mar. 17, 2010, no pet.) (mem. op.) (retirement funds subject to father's sole management, control, and disposition were properly considered in determining his child support obligation); *In re J.C.K.*, 143 S.W.3d 131 (Tex. App.—Waco 2004, no pet.) (trial court erred in including income generated by community property subject to sole management and control of obligor's spouse in calculating obligor's net resources).

§ 9.27 Child Support Received by Obligor Included

In a situation involving multiple households due child support, child support received by an obligor shall be added to the obligor's net resources to compute the net resources before determining the child support credit or applying the percentages in the multiple household table. Tex. Fam. Code § 154.070.

§ 9.28 Application of Guidelines

The child support guidelines in the Family Code are intended to guide the court in determining an equitable amount of child support. Tex. Fam. Code § 154.121. The amount of a periodic child support payment established by the child support guidelines in effect at the time of the hearing is presumed to be reasonable. An order of support conforming to the guidelines is presumed to be in the best interest of the child. Tex. Fam. Code § 154.122(a). An automatic increase for future child support payments is an abuse of discretion. *Starck v. Nelson*, 878 S.W.2d 302, 307 (Tex. App.—Corpus

Christi–Edinburg 1994, no writ). A court, however, may determine that the application of the guidelines would be unjust or inappropriate under the circumstances. Tex. Fam. Code § 154.122(b).

§ 9.29 Additional Factors

The trial court is accorded broad discretion in setting child support payments, and, absent a clear abuse of discretion, the trial court's order will not be disturbed on appeal. *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.); *In re Davis*, 30 S.W.3d 609, 616 (Tex. App.—Texarkana 2000, no pet.). The court may order periodic child support payments in an amount other than that established by the guidelines if the evidence rebuts the presumption that application of the guidelines is in the best interests of the child and justifies a variance from the guidelines. The court may also refuse to award child support to the custodial parent based on the other parent's demonstrated inability to earn a living wage. *O'Carolan v. Hopper*, 71 S.W.3d 529, 533 (Tex. App.—Austin 2002, no pet.).

It is an abuse of discretion for the court to enter a child support order when there is no evidence to support its findings concerning the obligor's net resources. *In re C.H.C.*, 396 S.W.3d 33, 56 (Tex. App.—Dallas 2013, no pet.) (court relied on testimony regarding earnings from pretrial hearing, but transcript of testimony was not authenticated or entered into evidence during trial). In *In re T.M.*, No. 02-19-00114-CV, 2019 WL 4010226 (Tex. App.—Fort Worth Aug. 20, 2019, pet. denied) (mem. op.), the parent's income was deemed to be $8,550 based on available information and because the parent failed to comply with discovery requests.

In determining whether application of the guidelines would be unjust or inappropriate under the circumstances, the court shall consider evidence of all relevant factors, including the age and needs of the child; the ability of the parents to contribute to the support of the child; any financial resources available for the support of the child; the amount of time of possession of and access to a child; the amount of the obligee's net resources, including the earning potential of the obligee if the actual income of the obligee is significantly less than what the obligee could earn because the obligee is intentionally unemployed or underemployed and including an increase or decrease in the income of the obligee or income that may be attributed to the property and assets of the obligee; child care expenses incurred by either party to maintain gainful employment; whether either party has the managing conservatorship or actual physical custody of another child; the amount of alimony or spousal maintenance actually and currently being paid or received by a party; the expenses for a son or daughter for education

beyond secondary school; whether the obligor or obligee has an automobile, housing, or other benefits furnished by his or her employer, another person, or a business entity; the amount of other deductions from the wage or salary income and from other compensation for personal services of the parties; provision for health-care insurance and payment of uninsured medical expenses; special or extraordinary educational, health-care, or other expenses of the parties or of the child; the cost of travel in order to exercise possession of and access to a child; positive or negative cash flow from any real and personal property and assets, including a business and investments; debts or debt service assumed by either party; and any other reason consistent with the best interests of the child, taking into consideration the circumstances of the parents. Tex. Fam. Code § 154.123. The list of evidentiary factors provided in the Family Code is not exhaustive. A court may reasonably consider any factor it deems relevant. *Sanchez v. Sanchez*, 915 S.W.2d 99, 102–03 (Tex. App.—San Antonio 1996, no writ).

§ 9.30 Guidelines for Net Resources of $9,200 or Less

The Family Code guidelines for the support of a child are specifically designed to apply to situations in which the obligor's monthly net resources are $9,200 or less. Tex. Fam. Code § 154.125(a). If the obligor's monthly net resources are $9,200 or less, the court shall presumptively apply the following schedule in rendering the child support order:

CHILD SUPPORT GUIDELINES BASED ON THE MONTHLY NET RESOURCES OF THE OBLIGOR:

1 child	20% of obligor's net resources
2 children	25% of obligor's net resources
3 children	30% of obligor's net resources
4 children	35% of obligor's net resources
5 children	40% of obligor's net resources
6+ children	Not less than the amount for 5 children

Tex. Fam. Code § 154.125(b).

The dollar amount is to be adjusted for inflation every six years. Tex. Fam. Code § 154.125(a–1). The adjustment to $9,200 took effect September 1, 2019.

§ 9.31 Guidelines for Net Resources of More Than $9,200

If the obligor's net resources exceed $9,200 per month, the court shall presumptively apply the percentage guidelines to the first $9,200 of the obligor's net resources. Without further reference to the percentage recommended by the guidelines, the court may

order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child. Tex. Fam. Code § 154.126(a). If the court orders additional child support beyond the presumptive amount, the court must make written findings regarding the specific reasons for deviating from the guidelines. *See* Tex. Fam. Code § 154.130. While the findings are required when the amount of child support is set or modified by the court, the court need not make specific findings on the "needs of the child" when a motion to modify is denied. *In re J.A.H.*, 311 S.W.3d 536, 543 (Tex. App.—El Paso 2009, no pet.). The following reasons have been found sufficient: best interests of the child, age and needs of the child, financial resources available for the support of the child, the child's special and extraordinary expenses (for example, a bodyguard), and positive cash flow from the obligor's assets. *See In re Gonzalez*, 993 S.W.2d 147 (Tex. App.—San Antonio 1999, no pet.).

"Needs of the child" is not defined by statute, nor has the supreme court provided a comprehensive definition. The term *needs* includes more than bare necessities but is not to be determined based on the lifestyle of the family. *See Rodriguez v. Rodriguez*, 860 S.W.2d 414, 418. n.3 (Tex. 1993); *In re K.F.*, No. 02-18-00187-CV, 2018 WL 6816119, at *5 (Tex. App.—Fort Worth Dec. 27, 2018, pet. denied) (mem. op.) (children's monthly expenses and proven needs are not same thing). Further, the managing conservator is in the best position to explain the child's needs, and expert testimony is generally not required. *See In re Gonzalez*, 993 S.W.2d at 159–60; *see also McCain v. McCain*, 980 S.W.2d 800, 802 (Tex. App.—Fort Worth 1998, no pet.); *Scott v. Younts*, 926 S.W.2d 415, 420–21 (Tex. App.—Corpus Christi–Edinburg 1996, writ denied). The court is not limited to considering only the needs of the child at the time of the order; estimates and projections of future expenses and needs of the children are as relevant and probative as past and current expenses and needs. *Zajac v. Penkava*, 924 S.W.2d 405, 408–09 (Tex. App.—San Antonio 1996, no writ).

The proper calculation of a child support order that exceeds the presumptive amount established for the first $9,200 of the obligor's net resources requires that the entire amount of the presumptive award be subtracted from the proven total needs of the child. After the presumptive award is subtracted, the court shall allocate between the parties the responsibility to meet the additional needs of the child according to the circumstances of the parties. However, in no event may the obligor be required to pay more child support than the greater of the presumptive amount or the amount equal to 100 percent of the proven needs of the child. Tex. Fam. Code § 154.126(b).

The dollar amount is to be adjusted for inflation every six years. Tex. Fam. Code § 154.125(a–1). The adjustment to $9,200 took effect September 1, 2019.

§ 9.32 Reduction as Number of Eligible Children Decreases

A child support order for more than one child shall provide that, on the termination of support for a child, the level of support for the remaining child or children is in accordance with the child support guidelines. A child support order is in compliance with this requirement if the order contains a provision that specifies the events, including a child's reaching the age of eighteen years or otherwise having the disabilities of minority removed, that have the effect of terminating the obligor's support obligation for that child and the reduced total amount that the obligor is required to pay each month after the occurrence of such an event. Tex. Fam. Code § 154.127.

§ 9.33 Guidelines for Children in More Than One Household

Different rules apply if the obligor has children in more than one household. In such a situation, the court may determine the child support amount for the children before the court by applying the percentages in the table below to the obligor's net resources.

MULTIPLE FAMILY ADJUSTED GUIDELINES
(% OF NET RESOURCES)

		Number of children before the court						
		1	2	3	4	5	6	7
Number of other children for whom the obligor has a duty of support	0	20.00	25.00	30.00	35.00	40.00	40.00	40.00
	1	17.50	22.50	27.38	32.20	37.33	37.71	38.00
	2	16.00	20.63	25.20	30.33	35.43	36.00	36.44
	3	14.75	19.00	24.00	29.00	34.00	34.67	35.20
	4	13.60	18.33	23.14	28.00	32.89	33.60	34.18
	5	13.33	17.86	22.50	27.22	32.00	32.73	33.33
	6	13.14	17.50	22.00	26.60	31.27	32.00	32.62
	7	13.00	17.22	21.60	26.09	30.67	31.38	32.00

Tex. Fam. Code § 154.129.

§ 9.34 Findings of Fact in Child Support Order

In rendering an order of child support, the court must make certain findings if a party files a written request with the court before the final order is signed, but not later than twenty days after the date of rendition of the order, a party makes an oral request in open court during the hearing, or the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines under Code section 154.125 or 154.129, as applicable. Tex. Fam. Code § 154.130(a); *see In re Marriage of Butts*, 444 S.W.3d 147, 154 (Tex. App.—Houston [14th Dist.] 2014, no

pet.). If findings are required, the court shall state whether the application of the guidelines will be unjust or inappropriate and shall state the following in the child support order:

1. The net resources of the obligor per month are $_____.
2. The net resources of the obligee per month are $_____.
3. The percentage applied to the obligor's net resources for child support is _____ percent.
4. If applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount computed by applying the percentage guidelines under Code section 154.125 or 154.129, as applicable.

Tex. Fam. Code § 154.130(b).

Findings as to the obligee's net resources are required only if evidence of the obligee's monthly net resources has been offered. Tex. Fam. Code § 154.130(c).

The court must respond to a timely request for an explanation of any variance from the guidelines, and the failure of the court to justify such variance constitutes reversible error. *See Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam) (obligor has right to demand specific findings of court for deviation from guidelines); *Hanna v. Hanna*, 813 S.W.2d 626, 627–28 (Tex. App.—Houston [1st Dist.] 1991, no writ) (failure of court to make specific findings requested by obligee constituted reversible error); *Haney v. Haney*, 834 S.W.2d 490, 491 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (though not in order, findings of court recorded on docket sheet satisfy requirements of law); *see also Morris v. Morris*, 757 S.W.2d 466, 467 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

COMMENT: Unless it is very clear that the child support ordered by the court does not vary from the amount computed by applying the percentage guidelines, the complaining party should make a request at the hearing or within twenty days of the rendition of the order. The statute appears to provide that the twenty-day time limit does not apply if there is a variation from the child support guidelines. *See* Tex. Fam. Code § 154.130(a); *see also Tenery*, 932 S.W.2d at 29 (findings of fact requested pursuant to rule 296 held to be timely when record revealed clear variation from guidelines). However, since a prematurely filed request for findings of fact and conclusions of law does not render them ineffective, out of an abundance of caution, the best practice would be to make all requests for findings of fact in child support cases within twenty days of the

rendition of the order. *See* Tex. R. Civ. P. 306c (prematurely filed requests for findings of fact and conclusions of law shall not be held ineffective and shall be deemed to have been filed on date of, but subsequent to, time of signing of judgment).

§ 9.35 Agreement Concerning Support

The parties may enter into a written agreement containing provisions for support of the child and for modification of the agreement, including variations from the child support guidelines. If the court finds that the agreement is in the child's best interests, the court shall render an order in accordance with the agreement. Terms of the agreement pertaining to child support in the order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as a contract. If the court finds the agreement is not in the child's best interests, the court may request the parties to submit a revised agreement or the court may render an order for the support of the child. Tex. Fam. Code § 154.124.

§ 9.36 Application of Guidelines to Children of Certain Obligors

In applying the child support guidelines for an obligor who has a disability and is required to pay support for a child who receives benefits as a result of the obligor's disability, the court shall subtract the amount or value of those benefits from the amount of child support that would be ordered under the guidelines. Tex. Fam. Code § 154.132; *In re D.T.S.*, No. 05-12-00110-CV, 2013 WL 4082302 (Tex. App.—Dallas Aug. 13, 2013, no pet.) (mem. op.); *In re G.L.S.*, 185 S.W.3d 56 (Tex. App.—San Antonio 2005, no pet.). This provision, however, does not require the trial court to order an obligee to reimburse the obligor for child support payments previously made once the children receive a lump-sum disability award covering the same period. *In re H.J.W.*, 302 S.W.3d 511, 512 (Tex. App.—Dallas 2009, no pet.). In *Reyes v. Gonzales*, 22 S.W.3d 516, 519–20 (Tex. App.—El Paso 2000, pet. denied), the court held that the obligor's Supplemental Security Income (SSI) disability benefits could not be considered in the calculation of his net resources for purposes of determining his child support obligation. However, in an enforcement proceeding in which child support arrearages had been assigned to the state when the children received public assistance, the obligor's Social Security disability benefits, which had been paid to the children, could not be credited against his child support arrearages. *In re K.E.T.*, 974 S.W.2d 760, 762 (Tex. App.—San Antonio 1998, no pet.).

Although the trial court is specifically required by section 154.132 to deduct the amount of disability payments the children receive from the amount of child support due under the guidelines, there is no similar provision relating to an amount ordered for medical support. *In re H.J.W.*, 302 S.W.3d at 514 (holding that trial court was not required to abate obligation to pay medical support in light of disability payments paid to children).

In applying the child support guidelines for an obligor who is receiving Social Security old age benefits and who is required to pay support for a child who receives benefits as a result of the obligor's receipt of old age benefits, the court shall subtract the amount or value of the benefits paid the child from the amount of child support that would be ordered under the guidelines. Tex. Fam. Code § 154.133.

[Sections 9.37 through 9.40 are reserved for expansion.]

III. Medical Support and Dental Support

§ 9.41 Medical Support Order

The court shall render an order for the medical support of the child in a proceeding in which periodic payments are ordered under chapter 154 or modified under chapter 156; any other suit affecting the parent-child relationship in which the court determines that medical support of the child must be established, modified, or clarified; or, a proceeding under chapter 159. Tex. Fam. Code § 154.181(a); *see* Tex. Fam. Code § 154.008. This medical support, including the costs of health insurance coverage or cash medical support, is in addition to the amount that the obligor is required to pay for child support under the guidelines; is a child support obligation; and may be enforced by any means available for the enforcement of a child support obligation, including withholding from earnings. Tex. Fam. Code § 154.183(a). As additional support, the court shall allocate between the parties, according to their circumstances, the reasonable and necessary health-care expenses, including vision and dental expenses, of the child that are not reimbursed by insurance or are not otherwise covered by ordered cash medical support, as well as insurance deductibles or copayments paid by either party for the child. Tex. Fam. Code § 154.183(c).

Before a hearing on temporary orders or a final order, if no hearing on temporary orders is held, the court shall require the parties to disclose the following information in a pleading or other statement: (1) if private health insurance is in effect for the child, the

identity of the insurance company, the policy number, which parent is responsible for payment of the premium, whether insurance is provided through a parent's employment, and the cost of the premium or (2) if private health insurance is not in effect, whether (a) the child is receiving medical assistance under chapter 32, Human Resources Code (Medicaid program); (b) the child is receiving health benefits under chapter 62, Health and Safety Code (Children's Health Insurance Program (CHIP)), and the cost of any premium; and (c) either parent has access to private health insurance "at reasonable cost" to the obligor. Tex. Fam. Code § 154.181(b).

"Reasonable cost" means the cost of health insurance coverage for a child that does not exceed 9 percent of the obligor's annual resources, as described by section 154.062(b), if the obligor is responsible under a medical support order for the cost of health insurance coverage for only one child. If the obligor is responsible under a medical support order for the cost of health insurance coverage for more than one child, "reasonable cost" means the total cost of health insurance coverage for all children for whom the obligor is responsible under a medical support order that does not exceed 9 percent of the obligor's annual resources, as described by section 154.062(b). Tex. Fam. Code § 154.181(e).

In rendering temporary orders, except for good cause shown, the court shall order that any health insurance in effect for the child continue in effect until the rendition of a final order, except that the court may not require continuation of any health insurance that is not available at a reasonable cost to the obligor. If no health insurance is in effect for the child or the insurance in effect is not available at reasonable cost to the obligor, the court shall, except for good cause shown, order coverage for the child, as provided under section 154.182. Tex. Fam. Code § 154.181(c).

On rendering a final order, the court shall make specific findings with respect to the manner in which health-care coverage is to be provided for the child, in accordance with the priorities identified in section 154.182, and, except for good cause shown or on agreement of the parties, require the parent ordered to provide health-care coverage to produce evidence to the court's satisfaction that the parent has applied for or secured health insurance or has otherwise taken necessary action to provide insurance, as ordered. Tex. Fam. Code § 154.181(d).

In ordering a parent to provide health-care coverage for the child, the court shall consider the cost, accessibility, and quality of health insurance coverage available to the parties and shall give priority to health insurance coverage available through the employment of one of the parties if the coverage is available at a reasonable cost to the

obligor. Tex. Fam. Code § 154.182(a). "Accessibility" means the extent to which health insurance coverage for a child provides for the availability of medical care within a reasonable traveling distance and time from the child's primary residence, as determined by the court. Tex. Fam. Code § 154.182(c)(1).

Unless a party shows good cause why a particular order would not be in the best interests of the child, the court shall render its order in accordance with the following priorities:

1. If health insurance is available for the child at reasonable cost through a parent's employment or membership in a union, trade association, or other organization, the court shall order that parent to include the child in the parent's health insurance. Tex. Fam. Code § 154.182(b)(1).

2. If health insurance is not available for the child through a parent's employment or membership at reasonable cost but is available to a parent at a reasonable cost from another source, including the program under section 154.1826 to provide health insurance in title IV-D cases, the court may order that parent to provide health insurance for the child. Tex. Fam. Code § 154.182(b)(2).

3. If health insurance coverage is not available through either of the above means, the court shall order the obligor to pay the obligee, in addition to child support, an amount, not to exceed 9 percent of the obligor's annual resources, as described by section 154.062(b), as cash medical support for the child. Tex. Fam. Code § 154.182(b)(3).

If the parent ordered to provide health insurance is the obligee, the court shall order the obligor to pay the obligee, as additional child support, an amount equal to the actual cost of health insurance for the child, but not to exceed a reasonable cost to the obligor. In calculating that actual cost, if the obligee has other minor dependents covered under the same health insurance plan, the court shall divide the total cost to the obligee for the insurance by the total number of minor dependents, including the child covered under the plan. Tex. Fam. Code § 154.182(b–1).

Once the court orders the obligee to provide health insurance, the court is not required to modify that order simply because the obligor later obtains health-care coverage through his employer. *In re M.M.S.*, 256 S.W.3d 470, 474 (Tex. App.—Dallas 2008, no pet.).

If the court finds that neither parent has access to private health insurance at a reasonable cost to the obligor, the court shall order the parent awarded the exclusive right to

designate the child's primary residence (or, to the extent permitted by law, the other parent) to apply immediately on the child's behalf for participation in a government medical assistance program or health plan. If the child participates in such a program or plan, the court shall order cash medical support as described in item 3 above. Tex. Fam. Code § 154.182(b–2).

An order requiring the payment of cash medical support as described in item 3 above must allow the obligor to discontinue paying the cash medical support if health insurance for the child becomes available to the obligor at a reasonable cost and the obligor enrolls the child in the insurance plan and provides the obligee and, if applicable, the title IV-D agency the information required under Code section 154.185. Tex. Fam. Code § 154.182(b–3).

The court shall order a parent providing health insurance to furnish to either the obligee, obligor, or child support agency specified information necessary to ensure health insurance coverage not later than the thirtieth day after the date the notice of rendition of the order is received. *See* Tex. Fam. Code § 154.185(a). The court shall also order a parent providing health insurance to furnish the obligor, obligee, or child support agency with additional information regarding the health insurance coverage not later than the fifteenth day after the date the information is received by the parent. Tex. Fam. Code § 154.185(b).

§ 9.42 Dental Support Order

The court shall render an order for the dental support of the child in a suit affecting the parent-child relationship or a proceeding under Family Code chapter 159 (UIFSA). Tex. Fam. Code § 154.1815(b); *see* Tex. Fam. Code § 154.008. This dental support, including the costs of dental insurance coverage, is in addition to the amount that the obligor is required to pay for child support under the guidelines; is a child support obligation; and may be enforced by any means available for the enforcement of a child support obligation, including withholding from earnings. Tex. Fam. Code § 154.183(a). As additional support, the court shall allocate between the parties, according to their circumstances, the reasonable and necessary health-care expenses, including vision and dental expenses, of the child that are not reimbursed by insurance or are not otherwise covered by ordered cash medical support, as well as insurance deductibles or copayments paid by either party for the child. Tex. Fam. Code § 154.183(c).

Before a hearing on temporary orders, or a final order if no hearing on temporary orders is held, the court shall require the parties to disclose in a pleading or other statement

whether the child is covered by dental insurance and, if so, the identity of the insurer, the policy number, which parent is responsible for payment of the premium, whether the coverage is provided through a parent's employment, and the cost of the premium. If dental insurance is not in effect, the parties must disclose whether either parent has access to dental insurance "at reasonable cost" to the obligor. Tex. Fam. Code § 154.1815(c).

"Reasonable cost" means the cost of a dental insurance premium that does not exceed 1.5 percent of the obligor's annual resources, as described by section 154.062(b), if the obligor is responsible under a dental support order for the cost of dental insurance coverage for only one child. If the obligor is responsible under a dental support order for the cost of dental insurance coverage for more than one child, "reasonable cost" means the total cost of dental insurance coverage for all children for whom the obligor is responsible under a dental support order that does not exceed 1.5 percent of the obligor's annual resources, as described by section 154.062(b). Tex. Fam. Code § 154.1815(a).

In rendering temporary orders, the court shall, except for good cause shown, order that any dental insurance coverage in effect for the child continue in effect until the rendition of a final order, except that the court may not require continuation of any dental insurance that is not available to the parent at a reasonable cost to the obligor. If no dental insurance is in effect for the child or the insurance in effect is not available at reasonable cost to the obligor, the court shall, except for good cause shown, order coverage for the child as provided under section 154.1825. Tex. Fam. Code § 154.1815(d).

On rendering a final order, the court shall make specific findings with respect to the manner in which dental insurance coverage is to be provided for the child, in accordance with the priorities identified in section 154.1825, and, except for good cause shown or on agreement of the parties, require the parent ordered to provide dental insurance coverage to produce evidence to the court's satisfaction that the parent has applied for or secured dental insurance or has otherwise taken necessary action to provide insurance, as ordered. Tex. Fam. Code § 154.1815(e).

In ordering a parent to provide dental coverage for the child, the court shall consider the cost, accessibility, and quality of dental insurance coverage available to the parties and shall give priority to dental insurance coverage available through the employment of one of the parties if the coverage is available at a reasonable cost to the obligor. Tex. Fam. Code § 154.1825(b). "Accessibility" means the extent to which dental insurance coverage for a child provides for the availability of dental care within a reasonable trav-

eling distance and time from the child's primary residence, as determined by the court. Tex. Fam. Code § 154.1825(a)(1).

Unless a party shows good cause why a particular order would not be in the best interests of the child, the court shall render its order in accordance with the following priorities:

1. If dental insurance is available for the child at reasonable cost through a parent's employment or membership in a union, trade association, or other organization, the court shall order that parent to include the child in the parent's dental insurance. Tex. Fam. Code § 154.1825(c)(1).

2. If dental insurance is not available for the child through a parent's employment or membership at reasonable cost but is available to a parent at a reasonable cost from another source, the court may order that parent to provide dental insurance for the child. Tex. Fam. Code § 154.1825(c)(2).

If the parent ordered to provide dental insurance is the obligee, the court shall order the obligor to pay the obligee, as additional child support, an amount equal to the actual cost of dental insurance for the child, but not to exceed a reasonable cost to the obligor. In calculating that actual cost, if the obligee has other minor dependents covered under the same dental insurance plan, the court shall divide the total cost to the obligee for the insurance by the total number of minor dependents, including the child covered under the plan. Tex. Fam. Code § 154.1825(d).

The court shall order a parent providing dental insurance to furnish to either the obligee, obligor, or child support agency specified information necessary to ensure dental insurance coverage not later than the thirtieth day after the date the notice of rendition of the order is received. *See* Tex. Fam. Code § 154.185(a). The court shall also order a parent providing dental insurance to furnish the obligor, obligee, or child support agency with additional information regarding the dental insurance coverage not later than the fifteenth day after the date the information is received by the parent. Tex. Fam. Code § 154.185(b).

§ 9.43 Qualified Medical Child Support Order

The federal Employee Retirement Income Security Act (ERISA) makes provision for a qualified medical child support order. 29 U.S.C. § 1169. A group health plan that is provided by a private employer or employee organization is governed by the terms of

ERISA. 29 U.S.C. § 1001. These provisions supersede any state laws that relate to such a plan. 29 U.S.C. § 1144.

A medical child support order meets the requirements of a qualified medical child support order only if that order clearly specifies the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate recipient covered by the order (except that the order may permit substitution of the name and mailing address of an official for the mailing address of any alternate recipient); a reasonable description of the type of coverage to be provided to each alternate recipient or the manner in which the type of coverage is to be determined; and the period to which the order applies. Additionally, to be found qualified, a medical support order may not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan. 29 U.S.C. § 1169(a)(2)(A), (a)(3), (a)(4).

In 1998, Congress amended ERISA to provide that if an employer of a noncustodial parent receives a completed national medical support notice, the notice shall be deemed a qualified medical child support order. *See* Child Support Performance and Incentive Act of 1998, Pub. L. No. 105–200, 112 Stat. 645 (CSPIA). See form 9-1 in this manual for a copy of the national medical support notice, jointly promulgated by the U.S. Department of Health and Human Services and the Department of Labor and effective on March 27, 2001. Pursuant to the CSPIA, each state must enact laws to mandate the use of the national medical support notice in all title IV-D cases. In Texas, use of the form became mandatory in title IV-D cases in July 2003. The notice may also be used by a party in a case not being enforced by the title IV-D agency. Tex. Fam. Code § 154.186(b).

Any payment for benefits made by a group health plan under a medical child support order in reimbursement for expenses paid by an alternate recipient or the custodial parent or legal guardian of the alternate recipient shall be made to the alternate recipient or the alternate recipient's custodial parent or legal guardian. 29 U.S.C. § 1169(a)(8). In other words, the order may provide that the insurance company pay the benefits to the managing conservator.

Any group health plan that complies with ERISA must contain a provision for benefits in accordance with the applicable requirements of any qualified medical child support order. A qualified medical child support order is deemed to apply to each group health plan that has received the order, from which the participant or beneficiary is eligible to receive benefits, and with respect to which the order does not require the provision of

any type or form of benefit or option that the plan does not otherwise provide. 29 U.S.C. § 1169(a)(1).

The following definitions apply under ERISA:

Child: The term *child* includes any child adopted by, or placed for adoption with, a participant of a group health plan. 29 U.S.C. § 1169(a)(2)(D).

Participant: The term *participant* means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan that covers employees of that employer or members of that organization or whose beneficiaries may be eligible to receive any such benefit. 29 U.S.C. § 1002(7).

Alternate recipient: The term *alternate recipient* means any child of a participant who is recognized under a medical child support order as having a right to enrollment under a group health plan with respect to the participant. 29 U.S.C. § 1169(a)(2)(C). Note that the child, not the other parent, is the "alternate recipient."

Medical child support order: The term *medical child support order* means any judgment, decree, or order issued by a court of competent jurisdiction *or* issued through a state administrative process and having the force and effect of state law that (1) provides for child support with respect to a child of a participant under a group health plan or provides for health benefit coverage to such a child, is made in accordance with state law, and relates to benefits under the group health plan or (2) enforces a law relating to medical child support described in 42 U.S.C. section 1396g–1 with respect to a group health plan. An appropriate administrative order shall be treated as a qualifying order. 29 U.S.C. § 1169(a)(2)(B).

Qualified medical child support order: The term *qualified medical child support order* means a medical child support order that creates or recognizes the existence of an alternate recipient's right to, or assigns to an alternate recipient the right to, receive benefits for which a participant or beneficiary is eligible under a group health plan and which provides the information and meets the restrictions provided in the statute. 29 U.S.C. § 1169(a)(2)(A).

COMMENT: The federal and Texas statutes conflict very little, if at all. The careful attorney should comply with both statutes whenever possible. If the two statutes are in conflict, the attorney should comply with the federal statute.

Instructions for Completion of National Medical Support Notice: The National Medical Support Notice (NMSN) consists of Part A, which includes the Qualified Medical Child Support Order and instructions to the employer, and an Employer's Response, to be completed by the employer if enrollment is not possible. Part B includes the Medical Support Notice to Plan Administrator, with instructions, and the Plan Administrator Response, which must be returned to the sender of the NMSN within forty business days after receipt of the NMSN.

The sender of the notice must complete three blanks in the sections regarding limitations on withholding and priority of withholding. These are to be determined by the state law of the state of the obligor's principal place of employment. The first blank to be populated is to inform the employer of the state limit on withholding if it is more restrictive than the federal Consumer Credit Protection Act. Since Texas law places no limit on the amount that an employer can withhold for court-ordered dependent insurance premiums, the federal law applies if the obligor is employed in Texas, and the blank should be completed: "the applicable Consumer Credit Protection Act %."

The second blank should be completed with the amount specified for the health insurance premium in the child support order. If the order does not specify the amount of the premium, the blank should be completed: "Not applicable."

The third blank requires the sender of the NMSN to describe the priority of withholding between court-ordered child support and dependent health insurance. For obligors employed in Texas, the blank should be completed: "Texas law requires that the employee contributions for health insurance are withheld first before withholding for cash support. If an employer is faced with two or more National Medical Support Notices and cannot comply with all of the notices, he should comply with the notices in the order in which they were first received."

COMMENT: The NMSN recognizes dental coverage as one of the coverage options that may be specified.

§ 9.44 Claims Made by Custodial Parent

Any payment for benefits made by a group health plan in accordance with a medical child support order in reimbursement for expenses paid by the child or the child's custodial parent or legal guardian shall be made to the child or the child's custodial parent or legal guardian. 29 U.S.C. § 1169(a)(8). The Texas Insurance Code also provides that group health insurance benefits for a child may be paid to the managing conservator of

that child. Tex. Ins. Code § 1204.251. The Insurance Code does not require a medical child support order; it requires only a certified copy of an order appointing the managing conservator.

§ 9.45 Notice to Employer

The obligee, the obligor, or a child support agency of Texas or another state may send the employer a copy of the order requiring an employee to provide health insurance coverage or dental insurance coverage for a child or may include notice of the medical support order or dental support order in an order or writ of withholding sent to the employer in accordance with Family Code chapter 158. Tex. Fam. Code § 154.186(a). In an appropriate title IV-D case, the title IV-D agency of Texas or another state shall send to the employer the national medical support notice required under part D, title IV, of the Federal Social Security Act (42 U.S.C. § 651 *et seq.*), as amended. The notice may be used in any other suit in which the obligor is ordered to provide health insurance coverage for a child. Tex. Fam. Code § 154.186(b).

§ 9.46 Duties of Employer

Receipt of a medical support order requiring that health insurance be provided for a child or a dental support order requiring that dental insurance be provided for a child shall be considered a change in the family circumstances of the employee or member, for health insurance purposes and dental insurance purposes, equivalent to the birth or adoption of a child. If the employee or member is eligible for dependent health coverage or dependent dental coverage, the employer shall automatically enroll the child for the first thirty-one days after the receipt of the order or notice of the medical support order or dental support order on the same terms and conditions as apply to any other dependent child. The employer shall notify the insurer of the automatic enrollment. During the thirty-one-day period, the employer and insurer shall complete all necessary forms and procedures to make the enrollment permanent or shall report the reasons the coverage cannot be made permanent. Tex. Fam. Code § 154.184.

An order or notice to an employer directing that health or dental insurance coverage be provided to a child of an employee or member is binding on a current or subsequent employer on receipt without regard to the date the order was rendered. If the employee or member is eligible for dependent health or dental coverage for the child, the employer shall immediately enroll the child in a health or dental insurance plan regardless of whether the employee is enrolled in the plan. If dependent coverage is not avail-

able to the employee or member through the employer's health or dental insurance plan or enrollment cannot be made permanent or if the employer is not responsible or otherwise liable for providing coverage, the employer shall provide notice to the sender (the person who sent the copy of the order or notice to the employer). Tex. Fam. Code § 154.187(a), (f).

If additional premiums are incurred as a result of adding the child to the health or dental insurance plan, the employer shall deduct the health or dental insurance premium from the earnings of the employee and apply the amount withheld to payment of the insurance premium. Tex. Fam. Code § 154.187(b).

An employer who has received a medical or dental child support order or notice shall provide to the sender, not later than the fortieth day after the date the employer receives the order or notice, a statement that the child has been enrolled in the employer's health or dental insurance plan or is already enrolled in another health or dental insurance plan in accordance with a previous child support or medical or dental support order to which the employee is subject or a statement that the child cannot be enrolled or cannot be permanently enrolled in the employer's health or dental insurance plan providing the reason why coverage or permanent coverage cannot be provided. Tex. Fam. Code § 154.187(c). The notice must be provided to the sender by first-class mail unless the sender is the title IV-D agency, to which the notice may be provided electronically or by first-class mail. Tex. Fam. Code § 154.187(i).

If the employee ceases employment or if the health or dental insurance coverage lapses, the employer shall provide to the sender, not later than the fifteenth day after the date of the termination of employment or the lapse of the coverage, notice of the termination or lapse and of the availability of any conversion privileges. *See* Tex. Fam. Code § 154.187(d). The notice must be provided to the sender by first-class mail unless the sender is the title IV-D agency, to which the notice may be provided electronically or by first-class mail. Tex. Fam. Code § 154.187(i).

The employer must provide the sender, on request, certain information about the available coverage. *See* Tex. Fam. Code § 154.187(e). Penalties and fines apply to an employer who fails to enroll a child, fails to withhold or remit premiums or cash medical or dental support, or discriminates in hiring or employment on the basis of a medical support order or notice. Tex. Fam. Code § 154.187(g).

An employer who receives a national medical support order under Family Code section 154.186 shall comply with the requirements of the notice. Tex. Fam. Code § 154.187(h).

§ 9.47 Failure to Provide Health Insurance or Dental Insurance

A parent ordered to provide health insurance or dental insurance or to pay the other parent additional child support for the cost of health or dental insurance who fails to do so is liable for (1) necessary medical or dental expenses of the child, without regard to whether the expenses would have been paid if health or dental insurance had been provided, and (2) the cost of health or dental insurance premiums or contributions, if any, paid on behalf of the child. Tex. Fam. Code § 154.188.

§ 9.48 Cancellation or Elimination of Coverage

Unless the employee or member ceases to be eligible for dependent coverage or the employer has eliminated dependent health coverage or dental coverage for all the employer's employees or members, the employer may not cancel or eliminate coverage of a child enrolled under Family Code title 5, chapter 154, subchapter D, until the employer is provided satisfactory written evidence that the court order or administrative order requiring the coverage is no longer in effect or that the child is enrolled in comparable health insurance coverage or will be enrolled in comparable coverage that will take effect not later than the effective date of the cancellation or elimination of the employer's coverage. Tex. Fam. Code § 154.192.

§ 9.49 Continuation Coverage

The plan sponsor of each group health plan shall provide that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled to elect, within the election period, continuation coverage under the plan. 29 U.S.C. § 1161. Relevant qualifying events include the death of the covered employee and a dependent child's ceasing to be a dependent child under the generally applicable requirements of the plan. *See* 29 U.S.C. § 1163(1), (5).

§ 9.50 Support Order Not Qualified

If a plan administrator (or equivalent) determines that a medical support order or a dental support order issued under Family Code chapter 154, subchapter D, is not qualified

for enforcement under federal law, the tribunal may, on its own motion or that of a party, render an order that qualifies. The procedure for filing a motion to enforce a final order applies to a motion for a qualifying order. There is no right to a jury, and the employer or plan administrator is not a necessary party. Tex. Fam. Code § 154.193.

IV. Child Support Registry

§ 9.51 Local Child Support Registry

COMMENT: With the establishment of the state disbursement unit required by federal law (42 U.S.C. § 654b(1)), certain child support payments must be directed to that unit as provided by Family Code section 234.007(a). This includes all cases in which child support orders were initially rendered after January 1, 1994, in which the obligor is subject to income withholding. *See also* Tex. Fam. Code § 154.004 (place of payment). In 1999 the title IV-D agency was mandated to notify employers and obligors to redirect payments from local child support registries to the state disbursement unit. *See* Tex. Fam. Code § 234.007. However, the legislature did not repeal Family Code section 154.241, which authorizes local child support registries. Today only a handful of counties continue to operate local registries pursuant to the adoption of local rules.

The local registry is a county agency or public entity operated under the authority of a district clerk, county government, juvenile board, juvenile probation office, domestic relations office, or other county agency or public entity that serves a county or a court that has jurisdiction under Family Code title 5 and that receives and distributes child support payments, maintains records of child support payments, and maintains custody of official child support payments. Tex. Fam. Code § 101.018. A private entity may perform the duties and functions of a local registry in receiving and distributing child support payments either under contract with a county commissioners court or a domestic relations office or under an appointment by a court. Tex. Fam. Code § 154.241(g).

If a county chooses to maintain a local registry, it must meet the operational requirements set out in Family Code section 154.241.

[Sections 9.52 through 9.54 are reserved for expansion.]

V. Child Support Review Process

§ 9.55 Child Support Review Process

The title IV-D agency is authorized to take expedited administrative actions to establish, modify, and enforce obligations for child support, medical support, and dental support. A child support review order confirmed by a court constitutes an order of the court and is enforceable by any means available for enforcement of child support obligations. Tex. Fam. Code § 233.001. The procedures for confirmation vary according to whether the child support review order is agreed or not agreed. *See generally* Tex. Fam. Code §§ 233.001–.029.

If the child support review order is not agreed, the title IV-D agency files a petition to confirm the order. *See* Tex. Fam. Code § 233.020. A party may file a request for hearing within twenty days after the petition is delivered to that party. Tex. Fam. Code § 233.023. If a request for hearing has not been timely filed, the court shall confirm and sign a nonagreed child support review order not later than the thirtieth day after the date the petition for confirmation was delivered to the last party entitled to service. Tex. Fam. Code § 233.0271. A failure of the trial court to sign the confirmation order within thirty days of service does not render the order automatically void. An affected party may seek mandamus relief if the required judicial action is not performed within the statutorily mandated period, but the trial court does not lose subject-matter jurisdiction to act. *In re J.A.C.*, 362 S.W.3d 756, 761 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

[Sections 9.56 through 9.60 are reserved for expansion.]

VI. Withholding from Earnings

§ 9.61 Withholding Order Required

In a proceeding in which periodic payments of child support are ordered, modified, or enforced, the court or title IV-D agency shall order that income be withheld from the disposable earnings of the obligor. If the court does not order income withholding, an order for support must contain a provision for income withholding to ensure that withholding may be effected if a delinquency occurs. A child support order must be con-

strued to contain a withholding provision even if the provision has been omitted from the written order.

While an income withholding order must be rendered in every case, the order does not necessarily have to be delivered to the obligor's employer. Except in a title IV-D case, the court may provide, for good cause or on agreement of the parties, that delivery of the order to an employer be suspended. Tex. Fam. Code § 158.002.

§ 9.62 Withholding for Arrearages

In addition to income withheld for the current support of a child, income shall be withheld from the disposable earnings of the obligor to be applied toward the liquidation of any child support arrearages, including accrued interest. The additional amount to be withheld for arrearages shall be an amount sufficient to discharge those arrearages in not more than two years or an additional 20 percent added to the amount of the current monthly support order, whichever amount will result in the arrearages being discharged in the least amount of time. Tex. Fam. Code § 158.003.

If current support is no longer owed, the court or the title IV-D agency shall order that income be withheld for arrearages, including accrued interest as provided in Family Code chapter 157, in an amount sufficient to discharge those arrearages in not more than two years. Tex. Fam. Code § 158.004.

In rendering a cumulative judgment for arrearages, the court shall order that a reasonable amount of income be withheld from the disposable earnings of the obligor to be applied toward the satisfaction of the judgment. Tex. Fam. Code § 158.005.

If the court or the title IV-D agency finds that the schedule for discharging arrearages would cause the obligor, the obligor's family, or children for whom support is due from the obligor to suffer unreasonable hardship, the court or agency may extend the payment period for a reasonable length of time. Tex. Fam. Code § 158.007. The trial court has discretion with respect to determining what constitutes "a reasonable length of time" as related to the issue of "unreasonable hardship" and must decide the issue on the basis of any particular case. *In re Chambers*, 5 S.W.3d 341, 343 (Tex. App.—Texarkana 1999, no pet.).

§ 9.63 Maximum Amount to Be Withheld

An order or writ of withholding shall direct that any employer of the obligor withhold from the obligor's disposable earnings the amount specified up to a maximum amount of 50 percent of the obligor's disposable earnings. Tex. Fam. Code § 158.009. There is not a minimum amount that the court must order paid each month on the arrearage, and a minimum payment sufficient to cover the interest accruing on the arrearage is not necessarily required. *In re Chambers*, 5 S.W.3d 341, 343 (Tex. App.—Texarkana 1999, no pet.); *see also Ruffin v. Ruffin*, 753 S.W.2d 824, 827 (Tex. App.—Houston [14th Dist.] 1988, no writ) (trial court may order up to 50 percent of obligor's disposable earnings, including disability benefits, be withheld for liquidation of child support arrearages).

§ 9.64 Limitations

An order or writ for income withholding under Family Code chapter 158 may be issued until all current support and child support arrearages, including interest, and any applicable fees and costs, including ordered attorney's fees and court costs, have been paid. Tex. Fam. Code § 158.102; *see In re Digges*, 981 S.W.2d 445, 446–47 (Tex. App.—San Antonio 1998, no pet.) (upholding constitutionality of judicial writ of withholding process set out in chapter 158). The income withholding remedy is not subject to statute-of-limitations or due-process defenses. *See In re A.D.*, 73 S.W.3d 244, 248–49 (Tex. 2002).

§ 9.65 Contents of Withholding Order or Writ

An order of withholding or writ of withholding must contain the information required by the forms prescribed by the title IV–D agency for income withholding. Tex. Fam. Code § 158.103.

§ 9.66 Forms for Income Withholding

The title IV-D agency prescribes forms as authorized by federal law in a standard format entitled "Income Withholding for Support." *See* Tex. Fam. Code § 158.106(a).

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), PL 104–193, section 324, mandated that each state title IV-D agency use a federal form promulgated by the secretary of the federal Department of Health and Human Services for interstate income withholding. *See* 42 U.S.C. § 654(9). This statutory requirement has been interpreted by the secretary of the federal Department of

Health and Human Services to apply to both title IV-D and non–title IV-D cases, in not only interstate but also intrastate withholding. The form, which may be used as a judicial withholding document, an administrative writ, or an original or amended withholding document or to terminate withholding, is published in the Texas Administrative Code, title 1, section 55.118. A copy of the form is available online at **http://www.acf.hhs.gov/programs/css/resource/income-withholding-for-support-form**.

COMMENT: While federal law mandates that states enact legislation requiring the use of the standard form, state law controls with respect to many of the issues surrounding the use of the form. These include the maximum amount permitted to be withheld, the priorities for withholding and allocating among multiple obligees, and state law requirements or terms that might not be specified in the federal withholding form. *See* 42 U.S.C. § 666(b)(6)(A).

§ 9.67 Request for Order or Writ of Withholding

A request for issuance of an order or judicial writ of withholding may be filed with the clerk of the court by the prosecuting attorney, the title IV-D agency, the friend of the court, a domestic relations office, the obligor, the obligee, or an attorney representing the obligor or the obligee. Tex. Fam. Code § 158.104.

On filing a request for issuance of an order or writ of withholding, the clerk of the court shall cause a certified copy of the order or writ to be delivered to the obligor's current employer or to any subsequent employer of the obligor. The clerk shall issue and deliver the certified copy of the order or writ not later than the fourth working day after the date the order is signed or the request is filed, whichever is later. An order or writ of withholding shall be delivered to the employer by first-class mail or, if requested, by certified or registered mail, return receipt requested, by electronic transmission, including electronic mail or facsimile transmission, or by service of citation to the person authorized to receive service of process for the employer in civil cases generally or to a person designated by the employer, by written notice to the clerk, to receive orders or writs of withholding. The clerk may deliver the order or writ by electronic mail if the employer has an electronic mail address; the clerk must request acknowledgment of receipt from the employer or use a system with a read receipt capability. The clerk may deliver the order or writ by facsimile transmission if the employer is able to receive documents transmitted in that manner; the clerk's facsimile machine must create a delivery confirmation report. Tex. Fam. Code § 158.105.

§ 9.68 Employer's Request for Hearing

The employer may file a motion with the court or file a request with the title IV-D agency for a hearing on the applicability of the order or writ to the employer. The motion must be filed not later than the twentieth day after the date the order or writ is delivered, and the hearing must be held not later than fifteen days after the motion or request is made. Pending further order of the court or action of the title IV-D agency, the order or writ remains binding. Tex. Fam. Code § 158.205.

§ 9.69 Notice of Application for Judicial Writ of Withholding

A notice of application for judicial writ of withholding may be filed if a delinquency occurs in child support payments in an amount equal to or greater than the total support due for one month or if income withholding was not ordered at the time child support was ordered. Tex. Fam. Code § 158.301(a).

The notice of application for judicial writ of withholding may be filed in the court of continuing jurisdiction by the title IV-D agency, the attorney representing the local domestic relations office, the attorney appointed a friend of the court as provided in Family Code chapter 202, the obligor or obligee, or a private attorney representing the obligor or obligee. Tex. Fam. Code § 158.301(b).

§ 9.70 Requirements of Notice of Application for Judicial Writ of Withholding

The notice of application for judicial writ of withholding is filed by the person, attorney, or agency seeking withholding. The notice shall be verified and (1) state the amount of monthly support due, including medical support and dental support, the amount of arrearages or anticipated arrearages, including accrued interest, and the amount of wages that will be withheld in accordance with a judicial writ of withholding; (2) state that the withholding applies to each current or subsequent employer or period of employment; (3) state that if the obligor does not contest the withholding within ten days after the date of receipt of the notice, the obligor's employer will be notified to begin the withholding; (4) describe the procedures for contesting the issuance and delivery of a writ of withholding; (5) state that if the obligor contests the withholding, the obligor will be afforded an opportunity for a hearing by the court not later than the thirtieth day after the date of receipt of the notice of contest; (6) state that the sole ground for successfully contesting the issuance of a writ of withholding is a dispute

concerning the identity of the obligor or the existence or amount of the arrearages, including accrued interest; (7) describe the actions that may be taken if the obligor contests the notice of application for a judicial writ of withholding, including the procedures for suspending issuance of a writ of withholding; and (8) include with the notice a suggested form for the motion to stay issuance and delivery of the judicial writ of withholding that the obligor may file with the clerk of the appropriate court. Tex. Fam. Code § 158.302.

§ 9.71 Delivery of Notice

A notice of application for judicial writ of withholding may be delivered to the obligor by hand delivery by a person designated by the title IV-D agency or local domestic relations office; by first-class or certified mail, return receipt requested, addressed to the obligor's last known address or place of employment; or by service of citation as in civil cases generally. Tex. Fam. Code § 158.306(a).

If the notice is delivered by mailing or hand delivery, the party who filed the notice shall file with the court a certificate stating the name, address, and date on which the mailing or hand delivery was made. Tex. Fam. Code § 158.306(b).

§ 9.72 Motion to Stay Issuance of Writ

The obligor may stay issuance of a judicial writ of withholding by filing a verified motion to stay. The motion to stay must be filed with the clerk of the court not later than the tenth day after the date the notice of application for judicial writ of withholding was received by the obligor. The grounds for filing a motion to stay issuance are limited to a dispute concerning the identity of the obligor or the existence or the amount of the arrearages. Tex. Fam. Code § 158.307.

The proper filing of a motion to stay by an obligor prohibits the clerk of the court from delivering the judicial writ of withholding to any employer of the obligor before a hearing is held. Tex. Fam. Code § 158.308.

If a motion to stay is properly filed, the court shall set a hearing on the motion and the clerk of the court shall notify the obligor, obligee, or his authorized representatives and the party who filed the application for judicial writ of withholding of the date, time, and place of the hearing. The court must hold a hearing on the motion not later than the thirtieth day after the date the motion was filed unless both the obligor and the obligee agree and waive the right to have the hearing within thirty days. On hearing, the court

shall render an order for income withholding that includes a finding of the child support arrearages, including medical support, dental support, and interest, or grant the motion to stay. Tex. Fam. Code § 158.309.

§ 9.73 Request for Issuance and Delivery of Writ

If a notice of application for judicial writ of withholding is delivered and a motion to stay is not filed within the time limits, the party who filed the notice shall file with the clerk of the court a request for issuance of the writ of withholding. Tex. Fam. Code § 158.312(a); *see In re R.G.*, 362 S.W.3d 118, 123 (Tex. App.—San Antonio 2011, pet. denied) (burden is on court to set hearing). The request must state the amount of current support, including medical support and dental support, the amount of arrearages, and the amount to be withheld from the obligor's income. The request for issuance may not be filed before the eleventh day after the date of receipt of the notice of application for judicial writ of withholding by the obligor. Tex. Fam. Code § 158.312.

§ 9.74 Issuance and Delivery of Writ

On the filing of a request for issuance of a writ of withholding, the clerk of the court shall issue the writ. The clerk shall issue and mail the writ not later than the second working day after the date the request is filed. Tex. Fam. Code § 158.313(a), (c).

§ 9.75 Contents of Writ

The judicial writ of income withholding issued by the clerk must direct that the employer or a subsequent employer withhold from the obligor's disposable income for current child support, including medical support and dental support, and child support arrearages an amount that is consistent with the provisions of Family Code chapter 158 regarding orders of withholding. Tex. Fam. Code § 158.314.

If the party who filed the notice of application for judicial writ of withholding finds that the schedule for repaying arrearages would cause the obligor, the obligor's family, or the children for whom the support is due from the obligor to suffer unreasonable hardship, the party may extend the payment period in the writ. Tex. Fam. Code § 158.315.

§ 9.76 Issuance of Judicial Writ to Later Employer

After issuance of a judicial writ of withholding by the clerk, a party authorized to file a notice of application for judicial writ of withholding may issue the judicial writ of with-

holding to a subsequent employer of the obligor by delivering a copy of the writ to the employer by certified mail. The judicial writ of withholding must include the name, address, and signature of the party and clearly indicate that the writ is being issued to a subsequent employer. The party shall file a copy of the judicial writ of withholding with the clerk not later than the third working day following delivery of the writ to the subsequent employer and pay a $15 fee. The party shall file the postal return receipt from the delivery to the subsequent employer not later than the third working day after the party receives the receipt. Tex. Fam. Code § 158.319.

COMMENT: Although the "Income Withholding for Support" form (form 9-3) indicates that the employer's name and address must be provided, it is entirely permissible to complete the form using the language "Any employer of [**name of obligor**]." Texas law provides that a withholding order is binding on an employer regardless of whether the employer is specifically named in the order or writ. Tex. Fam. Code § 158.201(b).

§ 9.77 Parties' Agreement about Amount or Duration of Withholding

An obligor and an obligee may agree on a reduction in or termination of income withholding for child support if one of the following contingencies, stated in the order, occurs: the child's eighteenth birthday or high school graduation, whichever is later; the removal of the child's disabilities of minority by marriage, court order, or other operation of law; or the child's death. The obligor and the obligee may file a notarized or acknowledged request under Family Code section 158.011 for a revised judicial writ of withholding, including the termination of withholding. The clerk shall issue and deliver to the obligor's employer a judicial writ of withholding that reflects the agreed revision or termination. Such an agreement by the parties does not modify the terms of a support order. Tex. Fam. Code § 158.402.

§ 9.78 Delivery of Order Reducing or Terminating Withholding

If a court has rendered an order that reduces the amount of child support to be withheld or that terminates withholding for child support, any person or governmental agency may deliver to the employer a certified copy of the order. There is no requirement that the court clerk deliver it. Tex. Fam. Code § 158.404. The provisions of Family Code chapter 158 regarding the liability of employers for withholding apply to an order reducing or terminating withholding. Tex. Fam. Code § 158.405.

§ 9.79 Order for Withholding for Costs and Fees

In addition to an order for income to be withheld for child support, the court may render an order that income be withheld from an obligor's disposable income toward satisfaction of any ordered attorney's fees and costs resulting from an action to enforce a child support obligation. An order of withholding for costs and fees is subordinate to an order of withholding for child support and is subject to the maximum of 50 percent allowed to be withheld from the obligor's disposable earnings. Tex. Fam. Code § 158.0051(a), (b).

COMMENT: An order for withholding of attorney's fees should not be combined with the order for child support. It should be on a separate form and should direct that payment be sent to the attorney rather than to the state disbursement unit.

§ 9.80 Qualified Domestic Relations Order for Collection of Support

A qualified domestic relations order (QDRO) may be used for the collection of ordered child support when a child support obligor is eligible for retirement benefits. See chapter 25 of this manual for a complete discussion of the use of the QDRO.

VII. Useful Websites

§ 9.81 Useful Websites

The following websites contain information relating to the topic of this chapter:

Office of Child Support Enforcement forms (§ 9.66)
www.acf.hhs.gov/programs/css/resource/income-withholding-for-support-form

Office of the Attorney General of Texas
https://www.texasattorneygeneral.gov

[Chapters 10 through 12 are reserved for expansion.]

Chapter 13
Court-Ordered Representatives

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Chapter 13

Court-Ordered Representatives

Caveat: This chapter does not address in detail suits involving governmental agencies, although the relevant statutes are interwoven with provisions regarding such suits. An attorney in a suit brought by a governmental agency will need to refer to the statutes for additional guidelines for ad litems.

§ 13.1 Generally

Appointment of a representative is considered a fundamental due-process requirement in certain family law–related proceedings. Generally, appointment of ad litems for a child and an indigent parent is mandatory in termination cases brought by the state of Texas and for respondents in certain circumstances in which citation has not been personally served. In other cases, a representative is appointed to safeguard the best interests of children involved in suits involving conservatorship, termination, or adoption. The court may appoint a representative on its own motion or on the motion of any party. *See Gonzalez v. Gonzalez*, 26 S.W.3d 657, 658 (Tex. App.—San Antonio 2000, no pet.).

§ 13.2 Definitions

Family Code section 107.001 provides the following definitions pertaining to court-ordered representation. *See* Tex. Fam. Code § 107.001.

Amicus attorney: an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child.

Attorney ad litem: an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.

Developmentally appropriate: structured to account for a child's age, level of education, cultural background, and degree of language acquisition.

Dual role: the role of an attorney who is appointed under Family Code section 107.0125 to act as both guardian ad litem and attorney ad litem for a child in a suit filed by a governmental entity.

Guardian ad litem: a person appointed to represent the best interests of a child. The term includes a volunteer advocate from a charitable organization described by subchapter C of Family Code chapter 107 who is appointed by the court as the child's guardian ad litem; a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests; an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or an attorney ad litem appointed to serve in the dual role.

Although Texas law is clear in defining the roles and responsibilities of court-ordered representatives in Texas family law cases, the definitions contained in the American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases and listed below are also helpful.

Child's attorney: A lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

Lawyer appointed as guardian ad litem: A lawyer appointed as guardian ad litem for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preference.

Sections A–1, A–2, American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases, are available at **www.americanbar.org/groups/family_law/resources/standards_of_practice_reports_recommendations.html**.

The National Association of Counsel for Children has established the NACC Recommendations for Representation of Children in Abuse and Neglect Cases, available at **www.naccchildlaw.org**.

The American Academy of Matrimonial Lawyers (AAML) has also developed guidelines based on whether a child is impaired or unimpaired. There is a rebuttable presumption that children over twelve years of age are unimpaired and children under twelve years of age are impaired. It is the child's attorney who makes this determination, not the court. Under the AAML standards, guardians ad litem do not make recom-

mendations or closing arguments. If they offer evidence or a report, they are sworn as witnesses and subject to cross-examination. *See Standards Relating to the Appointment of Counsel and Guardians Ad Litem for Children in Custody or Visitation Proceedings*, 9 J. Am. Acad. Matrim. Law. 1 (1992).

§ 13.3 Mandatory Appointment of Representatives

In a suit filed by a governmental entity for the termination of the parent-child relationship or for the appointment of a conservator, a guardian ad litem must be appointed by the court immediately after the filing of the petition but before a full adversary hearing. Tex. Fam. Code § 107.011(a). The guardian ad litem appointed for a child may be a volunteer advocate; an adult having sufficient competence, training, and expertise to represent the best interests of the child; or an attorney appointed in the dual role. Tex. Fam. Code § 107.011(b). Further requirements for guardian ad litem appointments are contained in Family Code section 107.011(c), (d).

Immediately after the filing of the suit but before the full adversary hearing, the court must appoint an attorney ad litem to represent the child's interests in a suit filed by a governmental entity requesting termination or to be named a conservator of a child. Tex. Fam. Code § 107.012.

To comply with the mandatory appointment of a guardian ad litem under Family Code section 107.011 and the mandatory appointment of an attorney ad litem under Family Code section 107.012, the court may appoint an attorney to serve in the dual role. Tex. Fam. Code § 107.0125(a). Section 107.0125 contains further provisions regarding appointments in such cases.

In a suit filed by a governmental entity in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of (1) an indigent parent of a child who responds in opposition to the termination or appointment, (2) a parent served by citation by publication, (3) an alleged father who failed to register with the paternity registry and whose identity or location is unknown, and (4) an alleged father who registered with the paternity registry but on whom the petitioner's attempt to personally serve citation has been unsuccessful. Tex. Fam. Code § 107.013(a). These appointments are mandatory and must be made early in the proceeding. Otherwise, reversible error is likely to be found. *Chapman v. Chapman*, 852 S.W.2d 101, 102 (Tex. App.—Waco 1993, no writ); *Nichols v. Nichols*, 803 S.W.2d 484, 485-86 (Tex. App.—El Paso 1991, no writ). If a parent in such a suit is not represented by an attorney at the parent's

first court appearance, the court must inform the parent of the right to be represented by an attorney and, if the parent is indigent and appears in opposition to the suit, the right to an attorney ad litem appointed by the court. Tex. Fam. Code § 107.013(a–1).

If an alleged father for whom an attorney ad litem has been appointed is adjudicated to be a parent of the child and is determined by the court to be indigent, the court may appoint the attorney ad litem to continue to represent the father's interests as a parent. Tex Fam. Code § 107.0132(c).

The court must require a parent claiming indigence that would require appointment of an attorney under Family Code section 107.013(a) to file an affidavit of indigence before the court may conduct a hearing to determine the parent's indigence. The court may consider additional evidence at the hearing and, if it determines the parent is indigent, must appoint an attorney ad litem to represent the parent. Tex. Fam. Code § 107.013(d). Once the court has determined that a parent is indigent, the parent is presumed to remain indigent for the duration of the suit and any appeal unless the court, after reconsideration on the motion of the parent, the parent's attorney ad litem, or the attorney representing the governmental entity, determines that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances. Tex. Fam. Code § 107.013(e).

In certain circumstances in a suit for termination that is not filed by a governmental agency, the court must appoint an amicus attorney or an attorney ad litem under Tex. Fam. Code § 107.021(a–1). See section 13.4 below.

An attorney ad litem must be appointed to defend a suit on behalf of the defendant when service of citation has been made by publication under rule 109 of the Texas Rules of Civil Procedure and no answer or appearance has been made within the prescribed time. Tex. R. Civ. P. 244. Appointment of an attorney ad litem under rule 244 is also required when other substituted service in lieu of publication has been authorized. Tex. R. Civ. P. 109a. However, in a suit for dissolution of marriage, the court may dispense with the appointment of an attorney ad litem if the petitioner or the petitioner's attorney makes an oath that there are no children of the marriage under eighteen years of age and that the spouses accumulated no appreciable amount of property during the marriage. Tex. Fam. Code § 6.409(e).

If in a parentage suit the court denies a motion for genetic testing, a child who is a minor or is incapacitated must be represented by an amicus attorney or attorney ad litem. Tex. Fam. Code § 160.608(c).

In a parentage proceeding, the court shall appoint an amicus attorney or attorney ad litem to represent a child who is a minor or is incapacitated if the child is a party or the court finds that the interests of the child are not adequately represented. Tex. Fam. Code § 160.612(b).

The court shall appoint an amicus attorney or an attorney ad litem to represent the interest of a petitioner for removal of disabilities of minority at the hearing. Tex. Fam. Code § 31.004.

§ 13.4 Discretionary Appointment of Representatives

In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint one of the following: an amicus attorney, an attorney ad litem, or a guardian ad litem. Tex. Fam. Code § 107.021(a). Because the trial court has discretion whether to appoint an amicus attorney, such discretion also applies regarding whether to remove an amicus, absent the demonstration of some situation that would create a ministerial duty to remove that amicus attorney. *In re Burrows*, No. 06-17-00014-CV, 2017 WL 1031454 at *2 (Tex. App.—Texarkana Mar. 17, 2017, orig. proceeding) (mem. op.) (insufficient evidence of conflict that would require removal of amicus).

In a suit requesting termination of the parent-child relationship that is not filed by a governmental entity, the court shall, unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child's interests, appoint an amicus attorney or an attorney ad litem. Tex. Fam. Code § 107.021(a–1). In a termination proceeding filed by one parent against the other parent, the court must appoint either an amicus attorney or an attorney ad litem for the child absent a finding that the party seeking termination can adequately represent the minor child's interests. Failure to appoint an amicus attorney or an attorney ad litem in such a situation may be raised for the first time on appeal. *In re K.M.M.*, 326 S.W.3d 714 (Tex. App.—Amarillo 2010, no pet.).

In determining whether to make an appointment under Family Code section 107.021, the court shall give due consideration to the ability of the parties to pay reasonable fees to the appointee and balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment. Tex. Fam. Code § 107.021(b)(1); *see Hutchins v. Donley*, No. 11-12-00204-CV, 2014 WL 2767122, at

*4 (Tex. App.—Eastland June 12, 2014, no pet.) (mem. op.). The court may make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child, unless the appointment is otherwise required by the Family Code, and may not require that a person appointed serve without reasonable compensation for the services rendered by the person. Tex. Fam. Code § 107.021(b)(2), (b)(3).

The court may appoint an attorney to serve as an attorney ad litem for a person entitled to service of citation in a suit if the court finds that the person is incapacitated. The attorney ad litem shall follow the person's expressed objectives of representation and, if appropriate, refer the proceeding to the proper court for guardianship proceedings. Tex. Fam. Code § 107.010.

In a suit filed by a governmental agency under Code chapter 262, the court may appoint an attorney ad litem to represent the interests of a parent from the time the court issues a temporary restraining order or attachment of the child until the court determines whether the parent is indigent before commencement of the full adversary hearing. Tex. Fam. Code § 107.0141(a). An attorney ad litem who identifies and locates the parent shall inform the parent of the right to representation and the appointment of an attorney ad litem if the parent is indigent; help the parent make an indigence claim, if applicable; and assist the parent in preparing for the full adversary hearing. Tex. Fam. Code § 107.0141(c).

Continuing Representation after Judgment: In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an order appointing the Texas Department of Family and Protective Services as the child's managing conservator may provide for the continuation of the appointment of the guardian ad litem or attorney ad litem for the child for any period set by the court. Tex. Fam. Code § 107.016(1), (2).

If such an order does not continue the appointment and the child is committed to the Texas Juvenile Justice Department or released under the department's supervision, the court may appoint a guardian ad litem or attorney ad litem for the child. Tex. Fam. Code § 107.0161.

In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an attorney appointed to serve as an attorney ad litem for a parent or an alleged father continues to serve in that capacity until the earliest of the date (1) the suit affecting the parent-

child relationship is dismissed, (2) all appeals in relation to any final order terminating parental rights are exhausted or waived, or (3) the attorney is relieved of the attorney's duties or replaced by another attorney after a finding of good cause is rendered by the court on the record. Tex. Fam. Code § 107.016(3).

§ 13.5 Prohibited Appointment of Representatives

The court may not appoint a person to serve as an amicus attorney in a suit filed by a governmental entity. Tex. Fam. Code § 107.017. In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may not appoint an attorney to serve in the dual role or a volunteer advocate to serve as guardian ad litem for a child unless the training of the volunteer advocate is designed for participation in suits other than suits filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child. Tex. Fam. Code § 107.022.

§ 13.6 Rights, Powers, and Duties of Guardian Ad Litem

The law is clear that a guardian ad litem appointed for a child is not a party to the suit but may conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child and may obtain and review copies of the child's relevant medical, psychological, and school records. *See* Tex. Fam. Code § 107.002(a). The guardian ad litem is entitled to access to the child and to information about the child, as described in section 13.16 below.

Within a reasonable time after his appointment, the guardian ad litem must interview (1) the child in a developmentally appropriate manner, if the child is four years old or older; (2) the parties to the suit; and (3) each person who has significant knowledge of the child's history and condition, including educators, child welfare service providers, and any foster parent of the child. The guardian ad litem must also seek to elicit the child's expressed objectives in a developmentally appropriate manner, consider the child's expressed objectives without being bound by them, encourage settlement and alternative dispute resolution, and perform any specific task the court directs. Tex. Fam. Code § 107.002(b).

The guardian ad litem is entitled to (1) receive a copy of each pleading or other paper filed in the case; (2) receive notice of each hearing in the case; (3) participate in case staffings by the Department of Family and Protective Services concerning the child; (4)

attend all legal proceedings in the case but not to call or question a witness or otherwise provide legal services unless the guardian ad litem is a licensed attorney who has been appointed in the dual role; (5) review and sign, or decline to sign, an agreed order affecting the child; (6) explain the basis for opposition to the agreed order if the guardian ad litem does not agree to the terms of the proposed order; (7) have access to the child in the child's placement; (8) be consulted and provide comments on decisions regarding placement, including kinship, foster care, and adoptive placements; (9) evaluate whether the child welfare services providers are protecting the child's best interests regarding appropriate care, treatment, services, and all other foster children's rights listed in Code section 263.008; (10) receive notification regarding and an invitation to attend meetings related to the child's service plan and a copy of the plan; and (11) attend court-ordered mediation regarding the child's case. Tex. Fam. Code § 107.002(c).

COMMENT: Although not specified in section 107.002, the guardian ad litem should also receive copies of any expert's reports and child custody evaluation or adoption evaluation reports.

In a contested case, the guardian ad litem must provide copies of his report, if any, to the attorneys for the parties as the court directs, but not later than the earlier of the date required by the scheduling order or the tenth day before the commencement of the trial. Tex. Fam. Code § 107.002(g).

Further requirements apply to a guardian ad litem appointed for a child in a proceeding brought by a governmental agency under Family Code chapter 262 or 263. *See* Tex. Fam. Code § 107.002(b–1).

Notice of Abortion: The role of guardians ad litem in this area is covered in chapter 14 of this manual.

§ 13.7 Guardian Ad Litem at Trial

A guardian ad litem is entitled to attend all legal proceedings. The guardian ad litem has considerable latitude in determining what hearings, conferences, depositions, or other proceedings to attend in order to protect the ward. *Diamond v. San Soucie*, 239 S.W.3d 428 (Tex. App.—Dallas 2007, no pet.).

The court may compel the guardian ad litem to attend a trial or hearing and to testify as necessary for the proper disposition of the suit. Tex. Fam. Code § 107.002(d). Unless

the guardian ad litem is an attorney who has been appointed in the dual role and subject to the Texas Rules of Evidence, the court shall ensure in a hearing or in a trial on the merits that the guardian ad litem has an opportunity to testify regarding, and is permitted to submit a report regarding, the guardian ad litem's recommendations relating to the child's best interests and the basis for the guardian ad litem's recommendations. Tex. Fam. Code § 107.002(e).

In a nonjury trial, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian ad litem's report, even if the guardian ad litem is not listed as a witness by a party. If the guardian ad litem is not called as a witness, the court shall permit the guardian ad litem to testify in the narrative. Tex. Fam. Code § 107.002(f). However, in a jury trial, disclosure to the jury of the contents of the report to the court remains subject to the Texas Rules of Evidence. Tex. Fam. Code § 107.002(h).

Further requirements apply to a guardian ad litem appointed to represent a child in the managing conservatorship of the Department of Family and Protective Services. *See* Tex. Fam. Code § 107.002(i).

§ 13.8 Powers and Duties of Attorney Ad Litem

Family Code section 107.003 sets out the powers and duties of an attorney ad litem appointed to represent a child. *See* Tex. Fam. Code § 107.003. All of the attorney ad litem's duties are mandatory.

The attorney ad litem must be trained in child advocacy or have experience determined by the court to be equivalent to that training. Tex. Fam. Code § 107.003(a)(2).

The attorney ad litem must, subject to rules 4.02, 4.03, and 4.04 of the Texas Disciplinary Rules of Professional Conduct and within a reasonable time after the appointment, interview (1) the child in a developmentally appropriate manner, if the child is four years of age or older; (2) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and (3) the parties to the suit. He must seek to elicit in a developmentally appropriate manner the child's expressed objectives of representation, consider the impact on the child in formulating the attorney's presentation of the child's expressed objectives of representation to the court, and investigate the facts of the case to the extent the attorney considers appropriate. He must also obtain and review copies of relevant records relating to the child as provided by Family Code section 107.006; participate in the conduct of the litigation to

the same extent as an attorney for a party; take any action consistent with the child's interests that the attorney considers necessary to expedite the proceedings; encourage settlement and the use of alternative forms of dispute resolution; and review and sign, or decline to sign, a proposed or agreed order affecting the child. Tex. Fam. Code § 107.003(a)(1).

In addition, the attorney ad litem appointed for a child shall, in a developmentally appropriate manner, advise the child and, if the attorney ad litem determines that the child is competent to understand the nature of an attorney-client relationship and has formed that relationship with the attorney ad litem, represent the child's expressed objectives of representation and follow the child's expressed objectives of representation during the course of litigation. As appropriate, considering the nature of the appointment, the attorney ad litem shall become familiar with the American Bar Association's standards of practice for attorneys who represent children in abuse and neglect cases, the suggested amendments to those standards adopted by the National Association of Counsel for Children, and the American Bar Association's standards of practice for attorneys who represent children in custody cases. Tex. Fam. Code § 107.004(a).

Further requirements apply to an attorney ad litem appointed for a child in a proceeding brought by a governmental agency under Family Code chapter 262 or 263. *See* Tex. Fam. Code §§ 107.003(b), 107.004(b)–(e).

Family Code section 107.0131 sets out the powers and duties of an attorney ad litem appointed to represent the interests of a parent in a suit filed by a governmental agency, Family Code section 107.0132 sets out the powers and duties of an attorney ad litem appointed to represent the interests of an alleged father in such a suit, and Family Code section 107.014 sets out the powers and duties of an attorney ad litem appointed to represent the interests of a parent whose identity or location is unknown or who was served by publication in such a suit. *See* Tex. Fam. Code §§ 107.0131, 107.0132, 107.014. All of the attorney ad litem's duties are mandatory.

An attorney ad litem who fails to perform the required duties is subject to disciplinary action under subchapter E, chapter 81, of the Texas Government Code. Tex. Fam. Code §§ 107.0045, 107.0133.

The term ad litem means "for the suit." Therefore, the attorney serving as ad litem in a suit affecting the parent-child relationship does not have the authority to represent the party in other matters. *See Brownsville-Valley Regional Medical Center v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995).

In *In re D.W.G.K.*, 558 S.W.3d 671, 679 (Tex. App.—Texarkana 2018, pet. denied), a parent whose rights had been terminated complained on appeal that the attorney ad litem had provided ineffective assistance of counsel to the child by not representing the child's "expressed objectives." The court held that the parent did not have standing to raise an ineffective assistance of counsel claim on behalf of the child.

§ 13.9 Entitlements of Attorney Ad Litem

The attorney ad litem is entitled to (1) request clarification from the court if the role of the attorney is ambiguous, (2) request a hearing or trial on the merits, (3) consent or refuse to consent to an interview of the child by another attorney, (4) receive a copy of each pleading or other paper filed with the court, (5) receive notice of each hearing in the suit, (6) participate in certain case staffings concerning the child, and (7) attend all legal proceedings in the suit. Tex. Fam. Code §§ 107.003(a)(3), 107.0131(a)(2). The attorney is also entitled to access to the child and to information about the child, as described in section 13.16 below.

§ 13.10 Substituted Judgment of Attorney for Child

Before the 2003 statutory changes, an attorney ad litem was obliged to advocate the child's wishes even if the attorney ad litem believed that the child's desires were detrimental. However, Family Code section 107.008 now allows the attorney ad litem to use his own judgment to determine if the child cannot meaningfully formulate the child's objectives of representation in a case because the child (1) lacks sufficient maturity to understand and form an attorney-client relationship with the attorney; (2) despite appropriate legal counseling, continues to express objectives of representation that would be seriously injurious to the child; or (3) for any other reason is incapable of making reasonable judgments and engaging in meaningful communication. Tex. Fam. Code § 107.008(a).

If an attorney ad litem determines that the child cannot meaningfully formulate the child's expressed objectives of representation, the attorney ad litem may present to the court a position that the attorney determines will serve the best interests of the child. Tex. Fam. Code § 107.008(b). Family Code section 107.008(c) prescribes the steps for the attorney ad litem to take under these circumstances if a guardian ad litem has been appointed for the child in a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child. *See* Tex. Fam. Code § 107.008(c).

§ 13.11 Answer and Other Pleadings

The attorney ad litem must file an answer for the child or the person he is appointed to represent.

The attorney should also consider whether requests for affirmative relief, on a temporary or final basis, should be made, including requests for psychological examinations or evaluations of the child or parties, child custody evaluations, restraining orders and injunctions, family services, counseling, drug or alcohol testing, parenting classes, establishment of child support, implementation of periods of possession, restrictions or limitations on parental possession or access, and contempt for failure to comply with court orders. The attorney ad litem may need to conduct discovery. If applicable, the attorney ad litem may also wish to file pleadings requesting termination of parental rights or the appointment of a nonparent as the child's managing conservator.

COMMENT: It is important to remember that the Texas Disciplinary Rules of Professional Conduct prohibit contact with a person represented by an attorney. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.02. Accordingly, it is imperative that the attorney ad litem obtain the written consent of a person's attorney before conducting an interview with that person or his expert witnesses. If written consent cannot be obtained, formal discovery will be necessary.

§ 13.12 Powers and Duties of Amicus Attorney

The amicus attorney's primary duty is to the trial court to make recommendations regarding the best interest of the child. Because the amicus attorney is appointed to assist the court, he owes a duty of competent representation only to the trial court. The amicus attorney has no duty of care to either parent. *Zeifman v. Nowlin*, 322 S.W.3d 804 (Tex. App.—Austin 2010, no pet.). An amicus attorney is not considered a neutral person and cannot act as a mediator in a case in which he is appointed. *In re E.B.*, No. 12-17-00214-CV, 2017 WL 4675109, at *4 (Tex. App.—Tyler Oct. 18, 2017, orig. proceeding [mand. denied]) (mem. op.).

Family Code section 107.003 sets out the specific powers and duties of an amicus attorney appointed to assist the court. *See* Tex. Fam. Code § 107.003. All of the amicus attorney's duties are mandatory.

The amicus attorney must be trained in child advocacy or have experience determined by the court to be equivalent to that training. Tex. Fam. Code § 107.003(a)(2).

The amicus attorney must, subject to rules 4.02, 4.03, and 4.04 of the Texas Disciplinary Rules of Professional Conduct and within a reasonable time after the appointment, interview (1) the child in a developmentally appropriate manner, if the child is four years of age or older; (2) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and (3) the parties to the suit. He must seek to elicit in a developmentally appropriate manner the child's expressed objectives of representation, consider the impact on the child in formulating the attorney's presentation of the child's expressed objectives of representation to the court, and investigate the facts of the case to the extent the attorney considers appropriate. He must also obtain and review copies of relevant records relating to the child as provided by Family Code section 107.006; participate in the conduct of the litigation to the same extent as an attorney for a party; take any action consistent with the child's interests that the attorney considers necessary to expedite the proceedings; encourage settlement and the use of alternative forms of dispute resolution; and review and sign, or decline to sign, a proposed or agreed order affecting the child. Tex. Fam. Code § 107.003(a)(1).

Unless the court specifically limits the amicus attorney in the order of appointment, an amicus attorney shall advocate the best interests of the child after reviewing the facts and circumstances of the case; however, in determining the best interests of the child, an amicus attorney is not bound by the child's expressed objectives of representation. Tex. Fam. Code § 107.005(a). The amicus attorney shall, in a developmentally appropriate manner, (1) with the consent of the child, ensure that the child's expressed objectives of representation are made known to the court; (2) explain the role of the amicus attorney to the child; (3) inform the child that the amicus attorney may use information that the child provides in providing assistance to the court; and (4) become familiar with the American Bar Association's standards of practice for attorneys who represent children in custody cases. Tex. Fam. Code § 107.005(b).

An amicus attorney may not disclose confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the best interests of the child. Tex. Fam. Code § 107.005(c).

§ 13.13 Entitlements of Amicus Attorney

The amicus attorney is entitled to (1) request clarification from the court if the role of the attorney is ambiguous, (2) request a hearing or trial on the merits, (3) consent or refuse to consent to an interview of the child by another attorney, (4) receive a copy of

each pleading or other paper filed with the court, (5) receive notice of each hearing in the suit, (6) participate in any case staffing concerning the child conducted by the Department of Family and Protective Services, and (7) attend all legal proceedings in the suit. Tex. Fam. Code § 107.003(a)(3). The attorney is also entitled to access to the child and to information about the child, as described in section 13.16 below. The trial court is not the client of the amicus attorney, however, and therefore the amicus shall not engage in ex parte communications with the court. *In re S.A.G.*, 403 S.W.3d 907, 915–16 (Tex. App.—Texarkana 2013, pet. denied).

§ 13.14 Attorney Work Product and Testimony

An attorney ad litem, an attorney serving in the dual role, or an amicus attorney may not (1) be compelled to produce attorney work product developed during the appointment as an attorney, (2) be required to disclose the source of any information, (3) submit a report into evidence, or (4) testify in court except as authorized by rule 3.08 of the Texas Disciplinary Rules of Professional Conduct. Tex. Fam. Code § 107.007(a). However, Family Code section 107.007(a) does not set aside the duty of an attorney to report child abuse or neglect under section 261.101. Tex. Fam. Code § 107.007(b).

§ 13.15 Fees for Representatives

Nongovernmental Cases: In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, in addition to the attorney's fees that may be awarded under Family Code chapter 106, an attorney appointed as an attorney ad litem for the child or as an amicus attorney and a professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate, is entitled to "reasonable fees and expenses" in an amount set by the court and ordered to be paid by one or more parties to the suit. Tex. Fam. Code § 107.023(a). The court shall (1) determine the fees and expenses of the representative by reference to the reasonable and customary fees for similar services in the county of jurisdiction; (2) order a reasonable cost deposit to be made at the time the court makes the appointment; and (3) before the final hearing, order an additional amount to be paid to the credit of a trust account for the use and benefit of the representative. Tex. Fam. Code § 107.023(b). The court may determine that fees thus awarded are necessaries for the benefit of the child. Tex. Fam. Code § 107.023(d). A court may not award costs, fees, or expenses to a representative against the state, a state agency, or a political subdivision of the state under this provision. Tex. Fam. Code § 107.023(c).

A trial court cannot characterize the award of fees to an amicus attorney or attorney ad litem as "additional child support" or order that the award be enforced by income withholding. Attorney's fees may be awarded as child support solely under Family Code chapter 157 in child support enforcement proceedings. *In re R.H.W.*, 542 S.W.3d 724, 744 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Although the court in *R.H.W.* mentioned only child support enforcement proceedings under chapter 157, attorney's fees may also be awarded as child support under chapter 157 in proceedings for enforcement of possession.

A trial court cannot compel the Office of Attorney General to disburse funds collected for child support to pay toward a parent's obligation for amicus attorney's fees. *In re H.G.-J.*, 503 S.W.3d 679, 682 (Tex. App.—Houston [14th Dist.], no pet.). Additionally, a trial court has no authority to strike a jury demand as a sanction for failure to pay amicus attorney's fees in a case where the Family Code expressly authorizes a trial by jury. *Wheeler v. Wheeler*, No. 01-16-00642-CV, 2017 WL 3140027 (Tex. App.—Houston [1st Dist.] July 25, 2017, no pet.) (mem. op.) (citing *Saxton v. Daggett*, 864 S.W.2d 729, 734 (Tex. App.—Houston [1st Dist.] 1993, no writ)).

Governmental Cases: Family Code section 107.015 governs fees for attorneys ad litem and guardians ad litem appointed in suits filed by governmental entities requesting termination of the parent-child relationship or appointment of a conservator of a child. *See* Tex. Fam. Code § 107.015. However, the trial court lacked discretion to award the guardian ad litem compensation for fees once it became clear that there was no conflict of interest between the child and the mother, as next friend of the child, because a guardian ad litem may be compensated only for necessary services performed. *Ford Motor Co. v. Stewart, Cox & Hatcher, P.C.*, 390 S.W.3d 294, 297–98 (Tex. 2013) (per curiam).

§ 13.16 Access to Child and Information about Child

In conjunction with the appointment of an attorney ad litem for the child (not for an adult or a parent), a guardian ad litem for the child, or an amicus attorney, the court shall issue an order authorizing the representative to have immediate access to the child and any information relating to the child. Without requiring an additional order or release, the custodian of any relevant records relating to the child, including records regarding social services, law enforcement records, school records, records of a probate or court proceeding, and records of a trust or account for which the child is a beneficiary, shall provide access to the representative. Without requiring a further order or release, the custodian of a medical, mental health, or substance-abuse treatment record

of a child that is privileged or confidential under other law shall release the record to the authorized representative, except that a child's substance-abuse treatment record that is confidential under 42 U.S.C. § 290dd–2 may be released only as provided under federal regulations. The disclosure of a confidential record to a representative does not affect the confidentiality of the record, and the representative may not disclose the record further except as provided by court order or other law. A physician may charge a reasonable fee for providing copies of the records (Texas Occupations Code section 159.008). Tex. Fam. Code § 107.006.

§ 13.17 Immunity of Ad Litems and Amicus

Family Code section 107.009(a) provides that an appointed guardian ad litem, attorney ad litem, or amicus attorney is not liable for civil damages arising from an action taken, a recommendation made, or an opinion given in the appointed capacity. This immunity does not apply to an action taken, a recommendation made, or an opinion given with conscious indifference or reckless disregard to the safety of another, in bad faith or with malice, or that is grossly negligent or willfully wrongful. Tex. Fam. Code § 107.009. The immunity statute recognizes no exception to immunity based on allegations of fraud. *Zeifman v. Nowlin*, 322 S.W.3d 804 (Tex. App.—Austin 2010, no pet.).

In a case of first impression in Texas, the court considered the issue of absolute immunity for the actions taken by a guardian ad litem pursuant to her court appointment. The court of appeals held that the ad litem functions as "an arm of the court" and is thus entitled to the same immunity extended to judges in the performance of their judicial duties. *Delcourt v. Silverman*, 919 S.W.2d 777, 784–86 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

§ 13.18 Process of Appointment by Court

Certain rules concerning the appointment of attorneys ad litem and guardians ad litem apply to courts in counties with a population of 25,000 or more. *See* Tex. Gov't Code § 37.001.

The court must establish and maintain a list of all attorneys who are qualified to serve as an attorney ad litem and are registered with the court and a list of all attorneys and other persons who are qualified to serve as a guardian ad litem and are registered with the court. Multiple lists categorized by the type of case and the person's qualifications are permitted. Tex. Gov't Code § 37.003(a), (b).

Generally, the court must use a rotation system and appoint the person whose name appears first on the list. Tex. Gov't Code § 37.004(a). A person on the list whose name does not appear first, or a person who meets the requirements to serve but is not on the list, may be appointed if the parties agree and the court approves or if an initial declaration of a state of disaster for the area is made within thirty days before the appointment. Tex. Gov't Code § 37.004(c), (d–1), (g). Such a person may also be appointed on a finding of good cause if the person's appointment is required on a complex matter because he has relevant specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter of the case; has relevant prior involvement with the parties or the case; or is in a relevant geographic location. Tex. Gov't Code § 37.004(d). A person who is not appointed in the order in which his name appears on the applicable list stays next in line, and a person who has been appointed goes to the end of the list. Tex. Gov't Code § 37.004(e), (f).

These provisions do not apply to the appointment of a volunteer under a program authorized by Family Code section 107.031 or of an attorney ad litem, guardian ad litem, or amicus attorney appointed under a domestic relations office established under Family Code chapter 203, providing services without expecting or receiving compensation, or providing services as a volunteer of a nonprofit organization that provides pro bono legal services to the indigent. Tex. Gov't Code § 37.002.

The lists must be posted annually at the courthouse and on the court's website. Tex. Gov't Code § 37.005.

§ 13.19 Special Appointments; Immunity

In addition to appointing amicus attorneys and ad litems, trial courts may delegate their authority or appoint others to perform services for the court. When a trial court makes such a delegation or appointment, judicial immunity that attaches to the judge may follow the delegation or appointment. Whether a delegate or appointee is protected by judicial immunity is determined by whether the delegate or appointee exercises discretionary judgment or merely performs ministerial or administrative tasks. For example, judicial immunity has been extended to court-appointed trustees, receivers, and psychologists, but it has not been extended to court reporters. Derived judicial immunity is lost when the court officer acts in the clear absence of all jurisdiction and outside the scope of his authority. *B.W.D. v. Turnage*, No. 05-13-01733-CV, 2015 WL 869289 (Tex. App.—Dallas 2015, pet. denied) (mem. op.).

§ 13.20 Practical Pointers

The case of *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), although involving the termination of parental rights, is generally recognized for its nonexclusive list of factors that a court should consider in ascertaining the best interests of the child in any suit affecting the parent-child relationship. Accordingly, in conducting an investigation, reviewing records concerning the child, interviewing the child, and interviewing other persons who have information concerning the child, the representative can find guidance in these factors listed in *Holley*. The courts should consider in ascertaining the best interests of a child—

1. the desires of the child,
2. the emotional and physical needs of the child now and in the future,
3. the emotional and physical danger to the child now and in the future,
4. the parenting abilities of the individuals seeking custody,
5. the programs available to assist these individuals to promote the best interest of the child,
6. the plans for the child by these individuals or by the agency seeking custody,
7. the stability of the home or proposed placement,
8. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and
9. any excuse for the acts or omissions of the parents.

Holley, 544 S.W.2d at 371–72.

In addition to complying with any duties established by statute, the representative should consider conducting a home visit of each person seeking conservatorship; attending all hearings and administrative meetings; reviewing psychological evaluations with his own experts; interviewing teachers, doctors, and other professionals who have worked with the child; observing the child and parent interact; reviewing other documentation regarding the child and/or family (such as the TDFPS file or district attorney's file); conducting a criminal background check on the parties and other family members with whom the child will be in regular contact if placed with the party seeking custody; determining the resources available to each party to meet the child's needs;

and carefully interviewing each party and the professionals involved in the case as to their perception of the child's needs.

COMMENT: The attorney should consider being discharged as guardian or attorney ad litem or amicus attorney in a court order at the conclusion of the case. Alternatively, the judge should be asked to include the date the attorney's services end in the court's order of appointment or an affirmative statement that the appointment does not include any responsibility to appeal. However, the attorney should advise the client of the right to appeal and the necessary steps to perfect the appeal. The client will have to obtain other counsel or agree to ask the court to affirmatively continue the appointment in a new court order. As a practical matter, the attorney should have the appointment extended, with an order for payment. If this has not been clarified at the trial level, the attorney should seek an order from the appellate court on this issue.

§ 13.21 Useful Websites

The following websites contain information relating to the topic of this chapter:

American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases (§ 13.2)
www.abanet.org/child/rep-define.html

National Association of Counsel for Children Recommendations for Representation of Children in Abuse and Neglect Cases (§ 13.2)
www.naccchildlaw.org

Chapter 14

Judicial Bypass

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Chapter 14

Judicial Bypass

§ 14.1 Generally

Family Code chapter 33 governs parental notification or judicial approval to bypass parental notification and consent required before an abortion can be performed on a pregnant, unemancipated minor. *See* Tex. Fam. Code § 33.001 *et seq.* Specifically, a physician may not perform an abortion on such a minor unless—

1. the physician gives at least forty-eight hours' actual notice, in person or by telephone, to a parent of the minor (if the minor has no managing conservator or guardian) or to a court-appointed managing conservator or guardian;
2. the physician receives an order issued by a court authorizing the minor to consent to the procedure; or
3. the physician concludes that a medical emergency exists, certifies in writing to the Texas Department of Health and in the patient's medical record the medical indications supporting the judgment that a medical emergency exists, and provides the notice required by section 33.0022 of the Family Code.

Tex. Fam. Code § 33.002(a).

A physician may not perform an abortion in violation of section 164.052(a)(19) of the Occupations Code. Tex. Fam. Code § 33.0021; *see* Tex. Occ. Code § 164.052(a)(19). More extensive discussion is provided at section 14.13 below.

A pregnant minor may apply for a court order authorizing the minor to consent to an abortion without notification to and consent of a parent, managing conservator, or guardian. Tex. Fam. Code § 33.003(a).

This chapter of the manual discusses the procedures for seeking judicial authorization.

To ensure confidentiality and expedite the process, the Texas Supreme Court has promulgated a set of rules entitled "Rules for a Judicial Bypass of Parental Notice and Consent under Chapter 33 of the Family Code" (hereinafter TRJB). These rules, in

addition to a set of prescribed forms, are for use in proceedings under chapter 33 of the Family Code. To the extent of any conflict, these rules control over any other statute or rule of law. TRJB 1.1.

The rules and forms must be posted on the Texas Judiciary website at **www.txcourts.gov**. Forms 1A, 2A, and 2B must be translated into Spanish. The clerk of a court in which an application or appeal may be filed must make the rules and forms (including specified Spanish versions) available without charge to a minor. TRJB 1.7.

§ 14.2 Application

The application must be filed in a county court at law, court having probate jurisdiction, or district court, including a family district court, in the minor's county of residence in most circumstances. Other provisions apply if the minor's parent, managing conservator, or guardian is a presiding judge of such a court; if the minor's county of residence has a population of less than 10,000; or if the minor is not a Texas resident. *See* Tex. Fam. Code § 33.003(b); TRJB 2.1.

The application may be filed in paper form, by fax, or by e-mail but may not be filed electronically through the statewide portal. The court clerk must designate an e-mail address or fax number for filings in these proceedings and take all reasonable steps to maintain confidentiality of the filings. An attorney must notify the clerk by telephone before filing a document by fax or e-mail. *See* TRJB 1.5. The time limits for the court to rule on the application do not begin to run until the application is filed, which is "when it is actually received by the district or county clerk." Therefore, the provisions of rule 21a of the Texas Rules of Civil Procedure do not apply. TRJB 2.1(d); TRJB 2 cmt. 2.

An application consists of two pages—a cover page and a separate verification page—if the minor is not represented by an attorney when the application is filed. If the minor is represented by an attorney, the application must also include a third page—the attorney's sworn statement or declaration made under penalty of perjury. TRJB 2.1(c). The minor must be referred to as "Jane Doe" in the numbered cause except on the verification page and required court communications. TRJB 1.3(b), 2.1(c)(1).

A minor who has filed an application may not withdraw it or nonsuit the application without the court's permission. Tex. Fam. Code § 33.003(o); TRJB 2.1(e). In general, a determination by the court is res judicata of the issue whether the minor may or may not be authorized to consent to an abortion without notice to and consent of a parent, managing conservator, or guardian, and the minor may not initiate a new application pro-

ceeding with regard to the same pregnancy. Tex. Fam. Code § 33.003(p); TRJB 2.1(f)(1). However, a minor whose application is denied may submit a new application to the same court if the minor shows that there has been a material change in circumstances since the prior denial. Tex. Fam. Code § 33.003(q); TRJB 2.1(f)(2).

§ 14.3 Cover Page

The cover page must be styled "In re Jane Doe" and state—

1. that the minor is pregnant;
2. that the minor is unmarried, is under eighteen years of age, and has not had her disabilities of minority removed under chapter 31 of the Family Code;
3. that the minor wishes to have an abortion without notifying or obtaining consent from a parent, managing conservator, or guardian and the statutory ground or grounds on which she relies;
4. that venue is proper in the county in which the application has been filed;
5. whether the minor has retained an attorney and, if so, the attorney's name, e-mail address, mailing address, and telephone number;
6. whether the minor requests the court to appoint a particular person as her guardian ad litem; and
7. that, concerning her current pregnancy, the minor has not previously filed an application that was denied; or
8. if the minor has filed a previous application with respect to the current pregnancy that was denied, that this application is being filed in the same court that denied the previous application and that there has been a material change in circumstances since the time the previous application was denied.

Tex. Fam. Code § 33.003(c); TRJB 2.1(c)(1)(A)–(H).

§ 14.4 Verification Page

The verification page must be separate from the cover page, must be signed by the minor under oath or penalty of perjury, and must state—

1. the minor's full name, date of birth, physical address, mailing address, and telephone number;

2. the name, address, telephone number, and relationship to the minor of any person the minor requests the court to appoint as her guardian ad litem;

3. if the minor has not retained an attorney, a telephone number—whether that of the minor or someone else (such as a physician, friend, or relative)—at which the minor may be contacted immediately and confidentially until an attorney is appointed to represent her; and

4. that all information contained in the application, including both the cover page and the verification page, is true.

TRJB 2.1(c)(2).

§ 14.5 Attorney's Statement

If the minor has retained an attorney to assist her in filing an application, the attorney shall fully inform himself of the minor's prior application history, including the representations of the minor in her application regarding her address, proper venue, and whether a prior application has been filed and initiated. If an attorney assists the minor in any way in the application process, with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement accompanying the application. Tex. Fam. Code § 33.003(c)(3), (r); TRJB 2.1(c)(3).

§ 14.6 Filing Fees and Court Costs

No filing fee or court costs may be assessed against the minor for any proceeding in a trial or appellate court. Tex. Fam. Code § 33.003(n); TRJB 1.9(a). The state may be ordered to pay the reasonable and necessary fees and expenses of the attorney ad litem and the guardian ad litem, the court reporter's fee, and the trial court's filing fees and costs, which include the expenses of an interpreter and an evaluation by a licensed mental health counselor. Witness fees and expenses are not included. The court's order is directed to the Comptroller of Public Accounts and sent to the Director, Fiscal Division, Texas Department of Health. The order must be a separate document addressing only the assessment of fees, expenses, and costs. Forms 2F and 2G may be used to draft the order, and they are reproduced as part of form 14-1 in this manual. The order must be signed and sent to the Department of Health not later than the ninetieth day after the date of a final ruling. TRJB 1.9(b).

§ 14.7 Assignment of Cases; Objection to, Recusal of, and Disqualification of Judge

The rules give broad discretion in the assignment of cases. The Texas Supreme Court has made it a practice to approve local rules governing chapter 33 proceedings. Most large counties have adopted local rules or have designated a particular deputy clerk to assign cases. The rules govern assignment of cases only in jurisdictions that have not adopted local rules. Rule 2.1(b)(4) details the clerk's duties in assigning cases. *See* TRJB 2.1(b)(4).

After filing and assignment of the case to a judge, a hearing is set. Procedures for disqualification, recusal, or objection to a judge are set forth in rule 1.6. A minor who objects under section 74.053 or section 75.551 of the Government Code to a judge assigned to the proceeding may not thereafter move to recuse the judge assigned to replace that judge. A minor who moves to recuse or disqualify a judge may not thereafter object under section 74.053 or section 75.551 of the Government Code to another judge assigned to the proceeding. TRJB 1.6(d). A motion to recuse or disqualify a trial judge or an objection to the judge under section 74.053 of the Government Code must be filed before 10:00 A.M. on the first business day after the application is filed or promptly after the minor's attorney is notified of the assignment of a judge, whichever is later. A motion to recuse or disqualify an appellate judge or an objection to the judge under section 75.551 of the Government Code must be filed before 10:00 A.M. on the first business day after a notice of appeal is filed or promptly after the minor's attorney is notified of the assignment of a judge, whichever is later. A judge who chooses to withdraw voluntarily must do so immediately. A motion to disqualify or recuse or an objection to an assigned judge does not extend the deadline for ruling on the application. TRJB 1.6(a).

§ 14.8 Appointment of Ad Litems and Attorney

For a discussion of ad litems, see chapter 13 of this manual. (Note, however, that proceedings under chapter 33 of the Family Code are title 2 proceedings and thus are not specifically governed by Code chapter 107 relating to appointments in suits affecting the parent-child relationship under title 5 of the Code.)

The court shall appoint a guardian ad litem for the minor who shall represent the best interest of the minor. If the minor has not retained an attorney, the court shall appoint an attorney to represent the minor. The guardian ad litem may not also serve as the minor's

attorney ad litem. Tex. Fam. Code § 33.003(e); TRJB 2.3(a), (b). The court may appoint to serve as guardian ad litem—

1. a person who may consent to treatment for the minor under Family Code section 32.001(a)(1)–(3) (that is, a grandparent, an adult brother or sister, an adult aunt or uncle);
2. a psychiatrist or a licensed or certified psychologist;
3. an appropriate employee of the Texas Department of Family and Protective Services;
4. a member of the clergy; or
5. another appropriate person selected by the court.

Tex. Fam. Code § 33.003(f).

An attorney ad litem must represent the minor in the trial court and in any appeal to the court of appeals or the Texas Supreme Court. The attorney ad litem is not required to represent the minor in any other court or any other proceeding. TRJB 1.8. The ad litem is not obligated to represent the minor in any appeal to the United States Supreme Court or in "any other proceeding" (for example, if the minor attempts to refile in another court).

A guardian ad litem appointed under chapter 33 acting in the scope and course of the appointment is not liable for damages arising from an act or omission if acting in good faith. Immunity does not extend to conduct committed in a manner described by section 107.003(b)(1)–(4) (now section 107.009(b)). Tex. Fam. Code § 33.006. Section 107.009 provides exceptions to the immunity of guardians ad litem appointed in suits affecting the parent-child relationship in certain circumstances. The immunity does not apply to an ad litem's action taken, recommendation made, or opinion given with conscious indifference or reckless disregard to the safety of another, in bad faith or with malice, or that was grossly negligent or willfully wrongful. *See* Tex. Fam. Code § 107.009.

The court may order the state to pay the costs of any ad litem appointed for the minor. Tex. Fam. Code § 33.007(a)(1); TRJB 1.9(b). The order is directed to the Comptroller of Public Accounts and sent to the Department of Health. It must be a separate order addressing only the subject of assessment of fees, expenses, and costs. TRJB 1.9(b). Rule 1.9 also establishes other provisions to ensure the continued confidentiality of the order.

Although there are no direct guidelines for the ad litem in chapter 33, the notes and comments to the rules indicate that the guardian ad litem should interview the minor and investigate as deemed appropriate, while protecting confidentiality, to assist the court in determining whether to grant the minor authority to consent to an abortion without notice to and consent of a parent, managing conservator, or guardian. (Nonexclusive factors the court may consider are listed in subsections (i–1) and (i–2) of section 33.003 the Family Code.) The guardian ad litem should also consider the applicability of the duties and responsibilities set forth in Family Code chapter 107 as well as whether—

1. the minor has been examined by a doctor of medicine, doctor of osteopathy, or registered nurse (who is licensed to practice in Texas) and has given the health-care provider an accurate and complete statement of her medical history;
2. the minor has been provided with information or counseling bearing on her decision to have an abortion;
3. the minor desires further counseling;
4. based on the information or counseling provided to the minor, she is able to give informed consent;
5. the minor is attending school or is or has been employed;
6. the minor has previously filed an application that was denied;
7. the minor lives with her parents;
8. the minor desires an abortion or has been threatened, intimidated, or coerced into having an abortion;
9. the pregnancy resulted from sexual assault, sexual abuse, or incest;
10. there is a history or pattern of family violence; and
11. the minor fears for her safety.

These considerations may not be relevant in every case, are not exclusive, and may not be sufficient to discharge the guardian ad litem's responsibilities in every case. Use of these factors as a basis for civil liability or as a statement of the standard of care is contrary to their intended purpose. These considerations do not alter existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct. TRJB 2 cmt. 4.

§ 14.9 Hearing—Logistics

The hearing should be held in a location that will ensure confidentiality, such as the judge's chambers or away from the courthouse. TRJB 2.4(b). The hearing must be closed to the public. Only the judge, the court reporter, other essential court personnel, the minor, her attorney, her guardian ad litem, and witnesses on the minor's behalf may be present. TRJB 2.4(c). The pregnant minor must appear before the court in person and may not appear using videoconferencing, telephone conferencing, or other remote electronic means. Tex. Fam. Code § 33.003(g–1); TRJB 1.5(d). A witness, however, may participate by such remote electronic means. TRJB 1.5(d).

The trial court should attempt to rule on the application without regard to technical defects in the application or evidence. The court may assist the minor in curing defects and presenting evidence. Affidavits of persons other than the minor are admissible. TRJB 2.4(e).

Proceedings shall be given precedence. The court is required to rule on the application and issue written findings of fact and conclusions of law not later than 5:00 P.M. on the fifth business day after the application is filed. The minor may request an extension of time, and, if requested, the court must rule and file findings not later than 5:00 P.M. on the fifth business day after the minor states she is ready to proceed to hearing. Tex. Fam. Code § 33.003(h); TRJB 2.4(a), 2.5(f). If the court fails to timely rule on an application, the application is deemed to be denied. TRJB 2.5(g). On the minor's request if the court failed to timely rule, the clerk must immediately issue a certificate to that effect, stating that the application is deemed to be denied. TRJB 2.2(g).

§ 14.10 Hearing—Evidentiary Considerations by Trial Court

The court shall determine by clear and convincing evidence whether—

1. the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to or consent of a parent, managing conservator, or guardian; or
2. the notification and attempt to obtain consent would not be in the best interests of the minor.

If the court finds *either* of these criteria, it shall enter an order authorizing the minor to consent to abortion without notification and consent. Tex. Fam. Code § 33.003(i–3); TRJB 2.5(b).

If the court finds neither of these grounds exist, the court must deny the application. Tex. Fam. Code § 33.003(j); TRJB 2.5(e)(1). If the minor does not attend the hearing and either the minor had actual knowledge of the setting or diligent attempts were made to notify the minor of the setting, the court must deny the application. TRJB 2.5(e)(2). If the court denies the application, it must inform the minor of her right to appeal and furnish her with the form for the notice of appeal. TRJB 2.5(h).

In determining whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification or consent, the court shall consider the experience, perspective, and judgment of the minor. The court may consider all relevant factors, including the minor's age; the minor's life experiences, such as working, traveling independently, or managing her own financial affairs; and steps taken by the minor to explore her options and the consequences of those options. The court may also inquire about the minor's reasons for seeking an abortion, consider the degree to which the minor is informed about specified state-published informational materials, and require the minor to be evaluated by a licensed mental health counselor. Tex. Fam. Code § 33.003(i–1).

In determining whether the notification and the attempt to obtain consent would not be in the minor's best interest, the court may inquire about the minor's reasons for not wanting to notify and obtain consent from a parent, managing conservator, or guardian; whether notification or the attempt to obtain consent may lead to physical or sexual abuse; whether the pregnancy was the result of sexual abuse by a parent, managing conservator, or guardian; and any history of physical or sexual abuse from a parent, managing conservator, or guardian. Tex. Fam. Code § 33.003(i–2).

§ 14.11 Confidentiality

The application and all other court documents, including the order and information pertaining to the proceedings, are confidential and privileged and not subject to disclosure under chapter 552 of the Texas Government Code or to discovery, subpoena, or other legal process. The court may not notify a parent, managing conservator, or guardian that the minor is pregnant or wants to have an abortion. Confidential records pertaining to the minor may be disclosed to her. Tex. Fam. Code § 33.003(k), (*l*); TRJB 1.4(a), (b).

No reference may be made in any order, decision, finding, or notice or on the record to the name of the minor, her address, or other information by which she might be identified by persons not participating in the proceeding. TRJB 1.3(b). The sole exceptions to this rule are communications from the court to ad litems notifying them of their

appointments and the verification page of the application. TRJB 1.3(b), 2.1(c)(2). The order may not be released to any person except the pregnant minor, her guardian ad litem, her attorney, the physician who is to perform the abortion, another person designated in writing by the minor to receive the order, or a governmental agency or attorney in a criminal or administrative action seeking to assert or protect the interest of the minor, or to another court, judge, or clerk in the same or related proceedings. Tex. Fam. Code § 33.003(*l*); TRJB 1.4(b).

The court clerk is to periodically submit a confidential and privileged report to the Office of Court Administration containing certain information about cases filed under chapter 33. The Office of Court Administration is to publish an annual report aggregating data about (1) the court of appeals districts in which cases have been filed and (2) the disposition of the cases. That report must protect the confidentiality of all minors and judges who are the subject of the report and the case number and style of the cases. Tex. Fam. Code § 33.003(*l*–1), (*l*–2).

A record of all testimony and other oral proceedings shall be kept. Tex. Fam. Code § 33.003(g). The court reporter's notes must be filed with other court documents in the proceeding to ensure confidentiality. TRJB 1.4(c).

Exceptions to Confidentiality: If the court, guardian ad litem, or attorney ad litem reasonably believes, based on the information obtained in the proceeding, that a violation of Texas Penal Code section 21.02, 22.011, 22.021, or 25.02 (possible sexual abuse) has occurred, a report must be made to the appropriate officials or agencies. Tex. Fam. Code § 33.009; *see* TRJB 1.4(d).

A judge or justice who has reason to believe, because of trial or appeal proceedings under chapter 33, that a minor has been or may be physically or sexually abused shall immediately report the suspected abuse and the name of the abuser to the Department of Family and Protective Services and to a local law enforcement agency and refer the minor to the department for services or intervention. The law enforcement agency and the department shall investigate the suspected abuse and, if warranted, refer the case for prosecution. Tex. Fam. Code § 33.0085; *see* TRJB 1.4(d)(1).

If a minor claims to have been physically or sexually abused or a physician or physician's agent has reason to believe that a minor has been physically or sexually abused, the physician or agent shall immediately report the suspected abuse and the name of the abuser to the Texas Department of Family and Protective Services and to a local law enforcement agency and refer the minor to the department for services or intervention.

The law enforcement agency must respond and write a report within twenty-four hours of being notified of the alleged abuse, regardless of whether the agency knows or suspects that a report about the abuse may have been previously made. When the law enforcement agency responds to the report, a law enforcement officer or appropriate agent from the department may take emergency possession of the minor without a court order. The law enforcement agency and the department shall investigate the suspected abuse and, if warranted, refer the case for prosecution. Tex. Fam. Code § 33.008.

The department or a local law enforcement agency may disclose any information obtained under Family Code sections 33.008, 33.0085, and 33.009 to the court, the guardian ad litem, and the minor's attorney without a court order (and must do so on court order). TRJB 1.4(e). Information obtained by the Department or another entity under Family Code section 33.008, 33.0085, or 33.009 is confidential except to the extent necessary to prove a violation of Penal Code section 21.02, 22.011, 22.021, or 25.02. Tex. Fam. Code § 33.010.

§ 14.12 Appeal

If a trial court denies the minor's application, the minor may appeal. The time deadlines, deemed granting of the minor's request, waiver of fees, and confidentiality provisions in the appellate court mirror those in the trial court. *See* Tex. Fam. Code § 33.004(a)–(e); TRJB 3.

There is no provision for an appeal from an order granting an application. TRJB 3 cmt. 1. Neither the Family Code nor the rules prescribe the appellate standard of review. TRJB 3 cmt. 3.

The minor may request permission to file a brief and present oral argument, but the court may decide to rule without either. TRJB 3.3(a).

The court of appeals, sitting in a three-judge panel, must issue a judgment affirming or reversing the trial court's order denying the application. The court may use parental notification form 3C but is not required to do so. TRJB 3.3(b). If the court of appeals fails to timely rule on the appeal, the trial court's judgment is deemed to be affirmed. TRJB 3.3(f).

The court of appeals may publish an opinion relating to the proceeding if it is written in a way to preserve the confidentiality of the minor's identity. Tex. Fam. Code § 33.004(c)(1); TRJB 3.3(e)(1).

An expedited confidential appeal shall be made available if the court of appeals denies an application to authorize the minor to consent to the performance of an abortion without notification to or consent of a parent, managing conservator, or guardian. Tex. Fam. Code § 33.004(f). To appeal from the court of appeals to the supreme court, the minor must simultaneously file a notice of appeal with the clerk of the supreme court, file a copy of the notice of the appeal with the clerk of the court of appeals, and notify the clerk of each court by telephone that an appeal is being taken under Family Code chapter 33. The notice of appeal must (1) be styled "In re Jane Doe," (2) state the number of the cause in the court of appeals, (3) state an intention to appeal, and (4) be signed by the minor's attorney. TRJB 4.1.

The minor may request permission to file a brief and present oral argument, but the supreme court may decide to rule without either. The court must rule as soon as possible. TRJB 4.3.

Amicus briefs may be submitted and received by a court as either a confidential, case-specific brief or a public or general brief. *See* TRJB 1.10.

§ 14.13 Written Consent Required for Physician; Emergency

The Texas Occupations Code defines prohibited practices by a physician or applicant for a license to practice medicine, including (1) performing an abortion on an unemancipated minor without the written consent of the child's parent, managing conservator, or legal guardian or without a court order, as provided in Family Code section 33.003 or 33.004, unless the abortion is necessary due to a medical emergency, as defined by section 171.002 of the Health and Safety Code and (2) otherwise performing an abortion on an unemancipated minor in violation of chapter 33 of the Family Code. *See* Tex. Occ. Code § 164.052(a)(19), (a)(20). A medical emergency is a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed. Tex. Health & Safety Code § 171.002(3).

The statute further requires the physician's licensing board to adopt forms necessary for physicians to obtain the consent required for an abortion to be performed on an unemancipated minor and requires the physician to retain the consent or any other required documentation until the later of the fifth anniversary of the date of the minor's majority or the seventh anniversary of the date the physician received or created the documentation for the record. Tex. Occ. Code § 164.052(c). The forms are published at

22 Tex. Admin. Code § 165.6(f) and are available on the Texas Medical Board's website, **www.tmb.state.tx.us**.

A physician must use due diligence to determine that any woman on whom the physician performs an abortion is of age or emancipated and report to the Department of State Health Services instances in which proof of identify and age was not obtained. *See* Tex. Fam. Code § 33.002(j)–(*l*).

§ 14.14 Civil Penalties

Civil penalties are provided for violations of the provisions of chapter 33 of the Family Code. It is not a defense to an action under those provisions that a minor gave informed and voluntary consent. *See* Tex. Fam. Code § 33.012. An unemancipated minor does not have the capacity to consent to any action that violates chapter 33. Tex. Fam. Code § 33.013.

§ 14.15 Practical Tips

Remember that Family Code chapter 33 focuses on whether a minor's parent should be notified and consent obtained, not whether the minor should be permitted to obtain an abortion. Also, check to see if your county has specific local rules.

Before Hearing: Prepare the minor to give narrative factual answers, rather than conclusions, with reference to each ground on which the application is based. For example, prepare the minor to explain all the options she has considered, persons to whom she has talked, what she has read, and other sources used to reach her decision.

At Hearing: Avoid leading and conclusory questions that require "yes" or "no" answers. The minor should express no doubt about her decision. The minor's testimony needs to be consistent and unequivocal. Have information about the minor's school performance and/or extracurricular or community activities that support the level of maturity you are asserting.

Resources: Jane's Due Process is a nonprofit organization that provides information for minors, lawyers, and health-care providers on the judicial bypass procedures. The organization may be contacted at 1-866-www-jane or on the Internet at **www.janesdueprocess.org**.

§ 14.16 Useful Websites

The following websites contain information relating to the topic of this chapter:

Jane's Due Process (§ 14.15)
www.janesdueprocess.org

Texas Medical Board (§ 14.13)
www.tmb.state.tx.us

Texas Rules for a Judicial Bypass of Parental Notice and Consent under Chapter 33 of the Family Code (§ 14.1)
http://www.txcourts.gov under the "Rules & Forms" link

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Chapter 15

Collaborative Law

§ 15.1 Introduction

In 2001, when sections 6.603 and 153.0072 were added to titles 1 and 5 of the Family Code, Texas became the first state in the United States to pass statutes specifically authorizing collaborative law. In May 2011, the 82nd Texas Legislature passed the Collaborative Family Law Act (CFLA), which repealed sections 6.603 and 153.0072 and which was assigned to the new title 1–A of the Texas Family Code. It became effective September 1, 2011. The CFLA includes most of the provisions of former Code sections 6.603 and 153.0072 and adds greater detail to the process and procedures of this unique process of alternative dispute resolution, originally created in 1999 by Minnesota family lawyer Stuart G. Webb.

§ 15.2 Definitions

Pauline Tesler, one of the most respected leaders of the collaborative law movement, provided a definition of collaborative law in *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 Am. J. Fam. L. 215, 219 (1999):

> Collaborative law consists of two clients and two attorneys working together toward the sole goal of reaching an efficient, fair, comprehensive settlement of all issues. Each party selects independent collaborative counsel. Each lawyer's retainer agreement specifies that the lawyer is retained solely to assist the client in reaching a fair agreement and that under no circumstances will the lawyer represent the client if the matter goes to court. If the process fails to reach agreement and either party then wishes to have matters resolved in court, both collaborative attorneys are disqualified from further representation. They assist in the orderly transfer of the case to adversarial counsel. Experts are brought into the collaborative process as needed, but only as neutrals, jointly retained by both parties. . . . The process involves binding commitments to disclose voluntarily all relevant information, to

> proceed respectfully and in good faith, and to refrain from any threat of litigation during the collaborative process.

Family Code section 15.052 provides a series of definitions that clarify the provisions of the Act. A "collaborative family law communication" is a statement made by a party or nonparty participant, whether oral or in a record, or verbal or nonverbal, that is made to conduct, participate in, continue, or reconvene a collaborative family law process and occurs after the parties sign a collaborative family law participation agreement and before the collaborative family law process is concluded. Tex. Fam. Code § 15.052(1).

The "collaborative family law process" is a procedure intended to resolve a collaborative family law matter without court intervention in which parties sign a family law participation agreement and are represented by collaborative family law lawyers. Tex. Fam. Code § 15.052(4).

The Act makes it clear that collaborative law is a purely voluntary procedure. *See* Tex. Fam. Code §§ 15.102(f), 15.111(3)(b). A court may not order a party to participate in the process over that party's objection. Tex. Fam. Code § 15.102(b).

A new "team" model of collaborative law has developed in Texas, involving mental health professionals who serve as communications coaches for the clients, assisting them in effectively communicating with each other during the collaborative process, and financial professionals who assist in gathering and analyzing financial information, provide financial education, and assist the parties in developing options for dividing their assets. The team approach can also include child specialists (also mental health professionals) who can act as ombudsman for the children of the marriage. Unlike the lawyers, the additional team members are all neutrals, retained to assist the process, not the individual clients.

COMMENT: Although the Act does not require a lawyer to obtain any special training in order to represent a client in a collaborative law matter, a family attorney should not handle a case collaboratively without attending at least one collaborative law training conducted by an experienced trainer. Both the Collaborative Law Institute of Texas, Inc. (CLI-TX), a nonprofit group, and the State Bar of Texas schedule periodic trainings and seminars throughout the state. Information about available training in Texas and throughout the United States, Canada, and worldwide can be found at the website of the International Academy of Collaborative Professionals, **www.collaborativepractice.com**, and at the CLI-TX website, **www.collablawtexas.com**. The sites also provide links to other information relevant to collaborative lawyers.

§ 15.3 Participation Agreement

At the beginning of a collaborative law case, the attorneys and parties enter into an agreement to participate in collaborative law. Family Code section 15.101 sets out the requirements for the participation agreement, which must be in writing and signed by the parties. The agreement must state the parties' intent to resolve a collaborative family law matter through a collaborative family law process, describe the nature and scope of the collaborative family law matter, identify the collaborative lawyer who represents each party in the collaborative family law process, and contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative family law process. Tex. Fam. Code § 15.101(a).

A collaborative family law participation agreement must further include provisions for suspending tribunal (court) intervention in the collaborative family law matter while the parties are using the collaborative family law process and, unless otherwise agreed in writing, jointly engaging any professionals, experts, or advisors serving in a neutral capacity. Tex. Fam. Code § 15.101(b).

To obtain the benefit of the collaborative law statute, the parties must expressly provide for "withdrawal of all counsel in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute." *In re Mabray*, 355 S.W.3d 16, 26 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding).

COMMENT: Collaborative law agreements may include provisions to exchange sworn inventories, enjoin certain behaviors during the collaborative process, determine whether jointly hired experts may or may not testify if the collaborative process breaks down, and allocate the cost of the collaborative process. The agreement may be modified by mutual agreement as the collaborative process progresses, but anticipating potential problems and clarifying the ground rules at the inception of the process will help collaborative lawyers avoid potential roadblocks to a smooth collaboration.

§ 15.4 Beginning and Concluding Process

A collaborative family law process begins when the parties sign a collaborative family law participation agreement. Tex. Fam. Code § 15.102(a). It is concluded by resolution of the collaborative family law matter, as evidenced by a signed record; by resolution of part of the matter, as evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or by termination of the process in a prescribed manner. Tex. Fam. Code § 15.102(c).

The process can terminate under several different conditions: when a party gives notice to the other parties that the process has ended; when a party begins a proceeding (for example, prehearing or posthearing conferences, motions, or discovery) before the court without the agreement of all of the parties; or when, in a pending proceeding related to the matter, a party initiates a pleading, motion, or request for a conference without such agreement, initiates an order to show cause, requests that the case be put on the court's active calendar, or takes a similar action requiring that notice be sent to the parties. Tex. Fam. Code § 15.102(d)(1), (d)(2).

The process also terminates if a collaborative lawyer is discharged or withdraws from further representation of a party and is not replaced within thirty days by a successor collaborative lawyer. Tex. Fam. Code § 15.102(d)(3), (g)(1), (g)(2). A collaborative lawyer must given prompt written notice to all other parties of his discharge or withdrawal. Tex. Fam. Code § 15.102(e).

A party may terminate the collaborative process with or without cause. Tex. Fam. Code § 15.102(f).

On the engagement of a successor collaborative lawyer, the parties must reaffirm the participation agreement and amend the agreement to identify the successor collaborative lawyer, who must confirm his representation of the party in the collaborative process. Tex. Fam. Code § 15.102(g)(2). The new agreement may provide additional methods of concluding the process agreed on by the parties.

§ 15.5 Collaborative Law Cases on Different Track in Court

Parties have until thirty days before trial to notify the court that the parties are using collaborative law procedures to attempt to settle a dispute. For a period of two years after the date that the suit was filed, the court may not, until notified by a party that the collaborative law procedures did not result in a settlement, set a hearing or trial in the case, impose discovery deadlines, require compliance with scheduling orders, or dismiss the case. Tex. Fam. Code § 15.103(b).

§ 15.6 Status Reports Required

Until settlement is reached or the collaborative process is terminated, the parties are required to file periodic status reports with the presiding court. The first such report is required not later than the 180th day after the date the written agreement to use the procedures was signed or, if the proceeding was filed by agreement after the collaborative

law agreement was signed, after the date of filing. A second status report is required on or before the first anniversary of the date the written agreement to use the procedures was signed or, if the proceeding was filed by agreement after the collaborative law agreement was signed, of the date of filing, accompanied with a motion for continuance. Tex. Fam. Code § 15.103(c).

The court is required to grant the continuance if the status report indicates the desire of the parties to continue to use collaborative law procedures. Tex. Fam. Code § 15.103(d). The court shall provide parties notice and an opportunity to be heard before dismissing a proceeding based on delay or failure to prosecute in which a notice of collaborative family law process is filed. Tex. Fam. Code § 15.103(i).

COMMENT: There is no provision in the Code for sanctions if the parties fail to file the required reports. Although anecdotal evidence indicates that most collaborative law cases settle long before the second status report and request for continuance are due, the responsible practitioner would be wise to add the status report dates to his tickler system.

§ 15.7 Two-Year Time Limit

If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court has the options of setting the suit for trial on the regular docket or dismissing the suit without prejudice. Tex. Fam. Code § 15.103(e).

§ 15.8 Disqualification

One of the provisions that makes a case a collaborative one is the provision that a collaborative lawyer is disqualified, except as provided in Family Code section 15.106(d), from appearing before a tribunal to represent a party in an adversarial proceeding related to a collaborative family law matter, whether or not the collaborative lawyer is representing the party for a fee. Any lawyer in a law firm with which the collaborative lawyer is associated is also disqualified from appearing before a tribunal to represent a party in a proceeding related to that collaborative family law matter, except as provided in Code sections 15.106(d), 15.107, and 15.108. Tex. Fam. Code § 15.106(b), (c).

§ 15.9 Exceptions to Disqualification

There are exceptions to the disqualification provision in the CFLA. A collaborative lawyer may represent a collaborative client in exigent circumstances in order to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party or a family if a successor lawyer is not immediately available to represent that party. The lawyer may also represent a party to request a tribunal to approve an agreement resulting from the collaborative family law process. Tex. Fam. Code § 15.106(d). This exception does not apply after the party is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that party or family. Tex. Fam. Code § 15.106(e).

Although the collaborative lawyer may be disqualified, Code sections 15.107 and 15.108 provide exceptions for other attorneys associated with the collaborative lawyer's firm. Associated attorneys at legal aid organizations and law firms that represent clients on a pro bono basis are excepted if the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation, the collaborative family law participation agreement authorizes that representation, and the collaborative lawyer is isolated from any participation in the collaborative family law matter or a matter related to the collaborative family law matter through procedures within the law firm that are reasonably calculated to isolate the collaborative lawyer from such participation. Tex. Fam. Code § 15.107. The same exception exists when the collaborative lawyer represents the state, a political division of the state, or an agency of the state. Tex. Fam. Code § 15.108(c).

§ 15.10 Full Disclosure of Information

During the collaborative family law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party shall update promptly any previously disclosed information that has materially changed. A collaborative law agreement requiring the husband to disclose "all developments affecting . . . [his] income" reestablished a fiduciary duty on the part of the husband to update information, and he committed fraud for failing to do so. *Rawls v. Rawls*, No. 01-13-00568-CV, 2015 WL 5076283 (Tex. App.—Houston [1st Dist.] Aug. 27, 2015, no pet.) (mem. op.). The parties may, by agreement, define the scope of disclosure during the collaborative family law process. Tex. Fam. Code § 15.109.

§ 15.11 Professional Responsibility Unchanged

The CFLA does not affect the professional responsibility obligations and standards applicable to a lawyer or any other licensed professional working in the process or the obligation of a person under other law to report abuse or neglect, abandonment, or exploitation of a child or adult. Tex. Fam. Code § 15.110.

§ 15.12 Informed Consent

Before a prospective party signs a collaborative family law participation agreement, a prospective collaborative lawyer must assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative family law process is appropriate for the prospective party's matter and provide the prospective party with information that the lawyer reasonably believes is sufficient for the prospective party to make an informed decision about the material benefits and risks of a collaborative family law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, including litigation, mediation, arbitration, or expert evaluation. Tex. Fam. Code § 15.111(1), (2).

Additionally, the lawyer must inform the prospective party that, after signing an agreement, if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative family law matter, the collaborative family law process terminates; that participation in a collaborative family law process is voluntary and any party has the right to terminate unilaterally a collaborative family law process with or without cause; and that the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in an adversarial proceeding related to the collaborative family law matter, except as authorized by Code sections 15.106(d), 15.107, and 15.108. Tex. Fam. Code § 15.111(3); see discussion of the authorized exceptions at sections 15.8 and 15.9 above.

COMMENT: Ideally, all family attorneys, whether they practice collaborative law or not, should provide their clients with sufficient information about all the alternative approaches to reaching resolution of their case so they can be sufficiently informed to decide which approach makes the most sense to them. To lead clients blindly into the litigation alternative without informing them of the options available in reaching resolution seems irresponsible and dismissive of the client's right to give informed consent to the form his representation should take. *See* ABA Model Rules of Prof'l Conduct 1.4(a)(1), (a)(2) (2009).

§ 15.13 Family Violence

Before a prospective party signs a collaborative family law participation agreement in a collaborative family law matter in which another prospective party is a member of the prospective party's family or household or with whom the prospective party has or has had a dating relationship, a prospective collaborative lawyer must make reasonable inquiry regarding whether the prospective party has a history of family violence with the other prospective party. Tex. Fam. Code § 15.112(b).

If the collaborative lawyer reasonably believes that the party the lawyer represents, or the prospective party with whom the collaborative lawyer consults, as applicable, has a history of family violence with another party or prospective party, the lawyer may not begin or continue a collaborative family law process unless the party or prospective party requests beginning or continuing a process and the collaborative lawyer or prospective collaborative lawyer determines with the party or prospective party what, if any, reasonable steps could be taken to address the concerns regarding family violence. Tex. Fam. Code § 15.112(c).

§ 15.14 Confidentiality of Communications

A collaborative family law communication is confidential to the extent agreed to by the parties in a signed record or as otherwise provided by law. If the parties agree in the participation agreement or other signed record, the conduct and demeanor of the parties and nonparty participants, including their collaborative lawyers, are confidential. Additionally, if the parties agree in a signed record, communications related to the collaborative family law matter occurring before the signing of the collaborative family law participation agreement are confidential. Tex. Fam. Code § 15.113.

§ 15.15 Privilege against Disclosure

Except as provided by Family Code section 15.115, a collaborative family law communication, whether made before or after the institution of a proceeding, is privileged and not subject to disclosure and may not be used as evidence against a party or nonparty participant in a proceeding. Tex. Fam. Code § 15.114(a). Any record of a collaborative family law communication is privileged, and neither the parties nor the nonparty participants may be required to testify in a proceeding related to or arising out of the collaborative family law matter or be subject to a process requiring disclosure of privileged information or data related to the collaborative matter. Tex. Fam. Code § 15.114(b). An oral communication or written material used in or made a part of a collaborative family

law process is admissible or discoverable if it is admissible or discoverable independent of the collaborative family law process. Tex. Fam. Code § 15.114(c).

If these provisions regarding privilege conflict with other legal requirements for disclosure of communications, records, or materials, the issue of privilege may be presented to the court to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure. The presentation of the issue of privilege to the court does not constitute a termination of the collaborative family law process under Code section 15.102(d)(2)(B). Tex. Fam. Code § 15.114(d).

A party or nonparty participant may disclose privileged collaborative family law communications to a party's successor counsel, subject to the terms of confidentiality in the collaborative family law participation agreement, and those disclosures remain privileged. Tex. Fam. Code § 15.114(e).

A person who makes a disclosure or representation about a collaborative family law communication that prejudices the rights of a party or nonparty participant in a proceeding may not assert a privilege under Code section 15.114. This restriction applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation. Tex. Fam. Code § 15.114(f).

§ 15.16 Limits of Privilege

The privilege prescribed by Code section 15.114 (described in section 15.15 above) does not apply to a collaborative family law communication that is (1) in an agreement resulting from the collaborative family law process, evidenced in a record signed by all parties to the agreement; (2) subject to an express waiver of the privilege in a record or orally during a proceeding if the waiver is made by all parties and nonparty participants; (3) available to the public under chapter 552 of the Texas Government Code or made during a session of a collaborative family law process that is open, or is required by law to be open, to the public; (4) a threat or statement of a plan to inflict bodily injury or commit a crime of violence; or (5) a disclosure of a plan to commit or attempt to commit a crime or conceal an ongoing crime or ongoing criminal activity. Tex. Fam. Code § 15.115(a)(1)–(5).

The privilege also does not apply to disclosures in a report of suspected abuse or neglect of a child to an appropriate agency or in a proceeding regarding abuse or neglect of a child (Code section 15.115(a)(6)(A) allows for attorney-client privilege in

child abuse cases subject to subchapter C of Code chapter 261) or in a report of abuse, neglect, or exploitation of an elderly or disabled person to an appropriate agency. Tex. Fam. Code § 15.115(a)(6).

The privilege also does not apply when the communication is sought or offered to prove or disprove (1) a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative family law process; (2) an allegation that the settlement agreement was procured by fraud, duress, coercion, or other dishonest means or that terms of the settlement agreement are illegal; (3) the necessity and reasonableness of attorney's fees and related expenses incurred during a collaborative family law process or to challenge or defend the enforceability of the collaborative family law settlement agreement; or (4) a claim against a third person who did not participate in the collaborative family law process. Tex. Fam. Code § 15.115(a)(7).

Only the part of the communication necessary for the application of the exception may be disclosed or admitted. Tex. Fam. Code § 15.115(b). The disclosure or admission of evidence excepted from the privilege does not make the evidence or any other collaborative family law communication discoverable or admissible for any other purpose. Tex. Fam. Code § 15.115(c).

§ 15.17 Parties Entitled to Judgment

A collaborative family law settlement agreement is enforceable in the same manner as a written settlement agreement under section 154.071 of the Texas Civil Practice and Remedies Code. A party is entitled to judgment on a collaborative family law settlement agreement if the agreement provides in a prominently displayed statement that is bold-faced, capitalized, or underlined that the agreement is not subject to revocation and is signed by each party to the agreement and the collaborative lawyer of each party. Tex. Fam. Code § 15.105.

COMMENT: It would be unusual for an interim collaborative law agreement with such warnings to be filed with the court. The better practice is for an agreed decree to be prepared, signed, and proved up in an uncontested hearing. If such an agreement were filed and one of the parties had a change of heart, the collaborative attorneys could not represent either party if the other party wanted to enter a decree based on the collaborative law settlement agreement but would instead have to terminate the collaborative process, withdraw, and send their clients on to litigation counsel.

§ 15.18 Joint Petitions

Some jurisdictions will permit the parties to file a joint petition for divorce. If this is the case, before filing, the parties should establish which name appears first in the caption because, in the event the collaborative process breaks down, many court clerks will designate the first named person as the petitioner and the second named person as the respondent.

§ 15.19 Paradigm Shift

The collaborative process requires the practitioner to make a radical paradigm shift in the way representation is viewed and conducted.

> The process moves forward via carefully managed four-way settlement meetings, preceded by considerable groundwork between lawyer and client, and between lawyer and lawyer. The lawyer's job is challenging: In addition to the usual identification, investigation, and development of issues and proposals for settlement, the lawyer must work with the client and the other lawyer to anticipate and manage conflict and to guide the negotiation process. The lawyer also must encourage the client to take a considered and broad view in setting goals and priorities and must teach the client how to use interest-based, rather than positional bargaining.

Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 Am. J. Fam. L. 215, 219–20 (1999).

COMMENT: Because the process entails cooperation between lawyers rather than an arm's-length, adversarial approach, some lawyers fear that collaborative law poses ethical problems. For others, it is just another form of alternative dispute resolution, offering an opportunity to avoid the sometimes emotionally taxing and often outrageously expensive traditional adversarial approach. Despite the fact that there has not been one recorded malpractice case or grievance filed against an attorney in a collaborative case in the United States, many attorneys agonize over what they perceive to be the ethical challenges of collaborative law. Some found relief when the American Bar Association found it to be ethical (ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 447 (2007)), and Texas gave the practice its tacit blessing when it passed the earlier collaborative law statutes. Passage of the CFLA should give additional comfort to those lawyers who have lingering doubts.

§ 15.20 Practice Groups

The practice of collaborative law is unique in that practice groups of unaffiliated lawyers have been formed. These groups pool their resources for mutual support, continuing education, peer evaluation, and marketing collaborative law and other individual services to the public. A number of Texas practice groups are listed at section 15.21 below. A listing of groups throughout the United States and Canada can also be found at the IACP website, **www.collaborativepractice.com**.

§ 15.21 Useful Websites

The following websites contain information relating to the topic of this chapter:

General:

Collaborative Law Institute of Texas, Inc. (§ 15.2)
www.collablawtexas.com

Cutting Edge Law
www.cuttingedgelaw.com

International Academy of Collaborative Professionals (§ 15.2)
www.collaborativepractice.com

Renaissance Lawyer Society
www.renaissancelawyer.com

Texas Bar CLE
www.texasbarcle.com

Texas Practice Groups:

Collaborative Divorce Collin County
https://collaborativedivorce-collincounty.com

Collaborative Divorce Denton County
https://collaborativedivorcedentoncounty.org

Collaborative Divorce Dallas
https://collaborativedivorcedallas.net

Collaborative Divorce Austin
https://www.collaborativedivorceaustin.com

Collaborative Divorce Houston
https://collaborativedivorcehouston.com

Collaborative Divorce San Antonio
https://collaborativedivorcesanantonio.com

Collaborative Divorce Texas
https://collaborativedivorcetexas.com

Chapter 16

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Chapter 16

Parenting Plans, Parenting Coordinators, and Parenting Facilitators

I. Parenting Plans

§ 16.1 Parenting Plans Generally

A parenting plan is the provisions of a final court order that set out rights and duties of a parent or a person acting as a parent in relation to a child, provide for periods of possession of and access to the child, provide for child support, and optimize the development of a close and continuing relationship between each parent and the child. Tex. Fam. Code § 153.601(4).

Requirements in the Family Code related to parenting plans do not apply to a proceeding in a title IV-D case relating to the determination of parentage or establishment, modification, or enforcement of a child support, medical support, or dental support obligation. Tex. Fam. Code § 153.611.

§ 16.2 No Temporary Parenting Plan Requirement

A temporary order in a suit affecting the parent-child relationship rendered in accordance with Family Code section 105.001 is not required to include a temporary plan, and the court may not require the submission of a temporary parenting plan in any case or by local rule or practice. Tex. Fam. Code § 153.602.

§ 16.3 Final Parenting Plan Requirement

With few exceptions, a final order in a suit affecting the parent-child relationship must include a parenting plan. Tex. Fam. Code § 153.603(a). These orders are not required to include a parenting plan: an order that only modifies child support, an order that only

terminates parental rights, and a final order described by Family Code section 155.001(b). Tex. Fam. Code § 153.603(b).

If the parties have not reached agreement on a final parenting plan on or before the thirtieth day before the date set for trial on the merits, a party may file with the court and serve a proposed parenting plan. Tex. Fam. Code § 153.603(c).

These provisions do not preclude the parties from requesting the appointment of a parenting coordinator to resolve parental conflicts. Tex. Fam. Code § 153.603(d).

§ 16.4 Exception to Dispute Resolution Process Requirement

A requirement in a parenting plan that a party initiate or participate in a dispute resolution process before filing a court action does not apply to an action to modify the parenting plan in an emergency, an action to modify child support, an action alleging that the child's present circumstances will significantly impair the child's physical health or significantly impair the child's emotional development, an action to enforce, or an action in which the party shows that enforcement of the requirement is precluded or limited by Family Code section 153.0071. Tex. Fam. Code § 153.6031.

A dispute resolution process is a process of alternative dispute resolution conducted in accordance with Family Code section 153.0071 (mediation and arbitration) and chapter 154 of the Texas Civil Practice and Remedies Code or any other method of voluntary dispute resolution. Tex. Fam. Code § 153.601(1); *see* Tex. Fam. Code § 153.0071; Tex. Civ. Prac. & Rem. Code ch. 154.

§ 16.5 Agreed Parenting Plan

To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreed parenting plan containing provisions for conservatorship and possession of the child and for modification of the parenting plan, including variations from the standard possession order. If the court finds that the agreed parenting plan is in the child's best interest, the court shall render an order in accordance with the parenting plan. Terms of the agreed parenting plan contained in the order or incorporated by reference regarding conservatorship or support of or access to a child in an order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as a contract. If the court finds the agreed parenting plan is not in the child's best interest, the court may request the parties to submit a revised parenting plan. If the parties do not submit a revised parenting plan satisfactory

to the court, the court may, after notice and hearing, order a parenting plan that the court finds to be in the child's best interest. Tex. Fam. Code § 153.007.

§ 16.6 Parenting Plan for Joint Managing Conservatorship

If a written agreed parenting plan is filed with the court, the court shall render an order appointing the parents as joint managing conservators only if the parenting plan designates the conservator who has the exclusive right to designate the primary residence of the child and establishes, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence or specifies that the conservator may designate the child's primary residence without regard to geographic location. The parenting plan must also specify the rights and duties of each parent regarding the child's physical care, support, and education; include provisions to minimize disruption of the child's education, daily routine, and association with friends; allocate between the parents—independently, jointly, or exclusively—all of the remaining rights and duties of a parent provided by Family Code chapter 151; be voluntarily and knowingly made by each parent and not have been repudiated by either parent at the time the order is rendered; and be in the best interest of the child. Tex. Fam. Code § 153.133(a).

The agreed parenting plan may contain an alternative dispute resolution procedure that the parties agree to use before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency. Tex. Fam. Code § 153.133(b).

Notwithstanding the requirement that the parenting plan designate the conservator who has the exclusive right to designate the child's primary residence, the court shall render an order adopting the provisions of a written agreed parenting plan appointing the parents joint managing conservators if the parenting plan meets all the other requirements above and provides that the child's primary residence shall be within a specified geographic area. Tex. Fam. Code § 153.133(c).

If a written agreed parenting plan is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors: (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators; (2) the parents' ability to give first priority to the welfare of the child and reach shared decisions in the child's best interest; (3) whether each parent can encourage and accept a positive relationship between the

child and the other parent; (4) whether both parents participated in child rearing before the filing of the suit; (5) the geographical proximity of the parents' residences; (6) if the child is twelve years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and (7) any other relevant factor. Tex. Fam. Code § 153.134(a).

[Sections 16.7 through 16.20 are reserved for expansion.]

II. Parenting Coordinators

§ 16.21 Parenting Coordinators Generally

A parenting coordinator is an impartial third party who performs any function described by Family Code section 153.606 and who is appointed under subchapter K of chapter 153 of the Code ("subchapter K") by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through confidential procedures and is not appointed under another statute or a rule of civil procedure. Tex. Fam. Code § 153.601(3).

Provisions in the Family Code related to parenting coordinators do not apply to a proceeding in a title IV-D case relating to the determination of parentage or establishment, modification, or enforcement of a child support, medical support, or dental support obligation. Tex. Fam. Code § 153.611.

The provisions for confidentiality of alternative dispute resolution procedures under chapter 154 of the Texas Civil Practice and Remedies Code apply equally to the work of a parenting coordinator and to the parties and any other person who participates in the parenting coordination. This confidentiality provision does not affect a person's duty to report abuse or neglect under Family Code section 261.101. Tex. Fam. Code § 153.0071(g).

§ 16.22 Appointment of Parenting Coordinator

In a suit affecting the parent-child relationship, the court may, on its own motion or on a motion or agreement of the parties, appoint a parenting coordinator or assign a domestic relations office to appoint an employee or other person to serve as a parenting coordinator. Tex. Fam. Code § 153.605(a).

The court may not appoint a parenting coordinator unless, after notice and hearing, the court makes a specific finding that (1) the case is a high-conflict case or there is good cause shown for the appointment of a parenting coordinator and the appointment is in the best interest of any minor child in the suit and (2) the person appointed has the minimum qualifications required by Family Code section 153.610, as documented by the person, unless the court has waived those requirements with the agreement of the parties in accordance with Family Code section 153.610(c). Tex. Fam. Code § 153.605(b). A "high-conflict case" is a suit affecting the parent-child relationship in which the court finds that the parties have demonstrated an unusual degree of repetitiously resorting to the adjucative process, of anger and distrust, and of difficulty in communicating about and cooperating in the care of their children. Tex. Fam. Code § 153.601(2).

However, a party may at any time file a written objection to the appointment of a parenting coordinator on the basis that family violence has been committed by another party against the objecting party or against a child who is the subject of the suit. After an objection is filed, a parenting coordinator may not be appointed unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If a parenting coordinator is appointed, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order may provide that the parties not be required to have face-to-face contact and that they be placed in separate rooms during the parenting coordination. Tex. Fam. Code § 153.605(c).

An individual appointed as a parenting coordinator may not serve in any nonconfidential capacity in the same case, including serving as an amicus attorney; guardian ad litem; child custody or adoption evaluator; friend of the court; or parenting facilitator. Tex. Fam. Code § 153.605(d).

§ 16.23 Duties of Parenting Coordinator

The court must specify the duties of a parenting coordinator in the order appointing the parenting coordinator. Those duties are limited to matters that will aid the parties in identifying disputed issues; reducing misunderstandings; clarifying priorities; exploring possibilities for problem solving; developing methods of collaboration in parenting; understanding parenting plans and reaching agreements about parenting issues to be included in a parenting plan; complying with the court's order regarding conservatorship or possession of and access to the child; implementing parenting plans; obtaining training regarding problem solving, conflict management, and parenting skills; and set-

tling disputes regarding parenting issues and reaching a proposed joint resolution or statement of intent regarding those disputes. Tex. Fam. Code § 153.606(a).

The appointment of a parenting coordinator does not divest the court of its exclusive jurisdiction to determine issues of conservatorship, support, and possession of and access to the child or of its authority to exercise management and control of the suit. Tex. Fam. Code § 153.606(b).

The parenting coordinator may not modify any order, judgment, or decree. Tex. Fam. Code § 153.606(c).

Meetings between the parenting coordinator and the parties may be informal and are not required to follow any specific procedures unless otherwise provided by subchapter K. Tex. Fam. Code § 153.606(d).

A parenting coordinator must comply with the Ethical Guidelines for Mediators as adopted by the Supreme Court of Texas (Misc. Docket No. 05–9107, June 13, 2005). On request by the court, the parties, or the parties' attorneys, the parenting coordinator must sign a statement of agreement to comply with those guidelines and submit the statement to the court on acceptance of the appointment. A failure to comply with the guidelines is grounds for removal of the parenting coordinator. Tex. Fam. Code § 153.606(f).

§ 16.24 Removal of Parenting Coordinator

If a parenting coordinator's services have been conducted as provided by subchapter K and the Ethical Guidelines for Mediators, there is a rebuttable presumption that the parenting coordinator is acting in good faith. The court may remove the parenting coordinator in the court's discretion. The court must remove the parenting coordinator on the request and agreement of all parties; on the request of the parenting coordinator; if good cause is shown, on the motion of a party; or if the parenting coordinator ceases to satisfy the minimum qualifications required by Family Code section 153.610. Tex. Fam. Code § 153.607.

§ 16.25 Report of Parenting Coordinator

A parenting coordinator must submit a written report to the court and to the parties as often as ordered by the court. The report must be limited to a statement of whether the parenting coordination should continue. Tex. Fam. Code § 153.608.

§ 16.26 Compensation of Parenting Coordinator

A court may not appoint a parenting coordinator other than a domestic relations office or a comparable county agency or a volunteer unless, after notice and hearing, the court finds that the parties have the means to pay the fees of the parenting coordinator. Any fees of a parenting coordinator appointed under this provision shall be allocated between the parties as determined by the court. Public funds may not be used to pay the fees of a parenting coordinator, although the court may appoint the domestic relations office or a comparable county agency if personnel are available to serve that function. If due to hardship the parties are unable to pay the fees of a parenting coordinator and a domestic relations office or a comparable county agency is not available, the court, if feasible, may appoint a person, including a court employee, who meets the minimum qualifications prescribed by Family Code section 153.610 to act as a parenting coordinator on a volunteer basis and without compensation. Tex. Fam. Code § 153.609.

§ 16.27 Qualifications of Parenting Coordinator

The court shall determine the required qualifications of a parenting coordinator, provided that a parenting coordinator must have experience working in a field relating to families, have practical experience with high-conflict cases or litigation between parents, and (1) hold at least a bachelor's degree in counseling, education, family studies, psychology, or social work or a graduate degree in a mental health profession, with an emphasis in family and children's issues or (2) be licensed in good standing as an attorney in Texas. Tex. Fam. Code § 153.610(a).

In addition, a parenting coordinator must complete at least eight hours of family violence dynamics training provided by a family violence service provider; forty classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court; and twenty-four classroom hours of training in the fields of family dynamics, child development, family law and the law governing parenting coordination, and parenting coordination styles and procedures. Tex. Fam. Code § 153.610(b).

In appropriate circumstances, a court may, with the agreement of the parties, appoint a person as parenting coordinator who does not satisfy the stated requirements other than the family violence dynamics training requirement if the court finds that the person has sufficient legal or other professional training or experience in dispute resolution processes to serve as a parenting coordinator. Tex. Fam. Code § 153.610(c).

The actions of a parenting coordinator who is not an attorney do not constitute the practice of law. Tex. Fam. Code § 153.610(d).

§ 16.28 Report of Joint Proposal or Statement of Intent; Agreements and Recommendations

If the court has ordered the parties to attempt to settle parenting issues with the assistance of a parenting coordinator and to attempt to reach a proposed joint resolution or statement of intent regarding the dispute, the parenting coordinator must submit a written report describing the parties' joint proposal or statement to the parties, any attorneys for the parties, and any attorney for the child who is the subject of the suit. Tex. Fam. Code § 153.6082(a).

The proposed joint resolution or statement of intent is not an agreement unless the resolution or statement is (1) prepared by the parties' attorneys, if any, in a form that meets the applicable requirements of rule 11 of the Texas Rules of Civil Procedure, a mediated settlement agreement described by Family Code section 153.0071, a collaborative law agreement described by Family Code section 153.0072, a settlement agreement described by section 154.071 of the Civil Practice and Remedies Code, or a proposed court order and (2) incorporated into an order signed by the court. A parenting coordinator may not draft the resolution or statement. Tex. Fam. Code § 153.6082(b), (c).

The actions of a parenting coordinator in this process do not constitute the practice of law. Tex. Fam. Code § 153.6082(d).

[Sections 16.29 through 16.40 are reserved for expansion.]

III. Parenting Facilitators

§ 16.41 Parenting Facilitators Generally

A parenting facilitator is an impartial third party who performs any function described by Family Code section 153.6061 and who is appointed under subchapter K of chapter 153 of the Family Code ("subchapter K") by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through procedures that are not confidential and is not appointed under another statute or a rule of civil procedure. Tex. Fam. Code § 153.601(3–a).

Provisions in the Family Code related to parenting facilitators do not apply to a proceeding in a title IV-D case relating to the determination of parentage or establishment, modification, or enforcement of a child support, medical support, or dental support obligation. Tex. Fam. Code § 153.611.

§ 16.42 Appointment of Parenting Facilitator

In a suit affecting the parent-child relationship, the court may, on its own motion or on a motion or agreement of the parties, appoint a parenting facilitator or assign a domestic relations office to appoint an employee or other person to serve as a parenting facilitator. Tex. Fam. Code § 153.6051(a).

The court may not appoint a parenting facilitator unless, after notice and hearing, the court makes a specific finding that (1) the case is a high-conflict case or there is good cause shown for the appointment of a parenting facilitator and the appointment is in the best interest of any minor child in the suit and (2) the person appointed has the minimum qualifications required by Family Code section 153.6101, as documented by the person. Tex. Fam. Code § 153.6051(b). A "highconflict case" is a suit affecting the parent-child relationship in which the court finds that the parties have demonstrated an unusual degree of repetitiously resorting to the adjucative process, of anger and distrust, and of difficulty in communicating about and cooperating in the care of their children. Tex. Fam. Code § 153.601(2).

However, a party may at any time file a written objection to the appointment of a parenting facilitator on the basis that family violence has been committed by another party against the objecting party or against a child who is the subject of the suit. After an objection is filed, a parenting facilitator may not be appointed unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If a parenting facilitator is appointed, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order may provide that the parties not be required to have face-to-face contact and that they be placed in separate rooms during the parenting facilitation. Tex. Fam. Code § 153.6051(c).

§ 16.43 Duties of Parenting Facilitator

The court must specify the duties of a parenting facilitator in the order appointing the parenting facilitator. Those duties are limited to matters that will aid the parties in identifying disputed issues; reducing misunderstandings; clarifying priorities; exploring

possibilities for problem solving; developing methods of collaboration in parenting; understanding parenting plans and reaching agreements about parenting issues to be included in a parenting plan; complying with the court's order regarding conservatorship or possession of and access to the child; implementing parenting plans; obtaining training regarding problem solving, conflict management, and parenting skills; settling disputes regarding parenting issues and reaching a proposed joint resolution or statement of intent regarding those disputes; and monitoring compliance with court orders. In performing the duties, the parenting facilitator must comply with the standard of care that applies to the professional license the parenting facilitator holds. Tex. Fam. Code § 153.6061(a), (b); *see* Tex. Fam. Code § 153.606(a).

The appointment of a parenting facilitator does not divest the court of its exclusive jurisdiction to determine issues of conservatorship, support, and possession of and access to the child or of its authority to exercise management and control of the suit. Tex. Fam. Code § 153.6061(c).

The parenting facilitator may not modify any order, judgment, or decree. Tex. Fam. Code § 153.6061(d).

Meetings between the parenting facilitator and the parties may be informal and are not required to follow any specific procedures unless otherwise provided by subchapter K or the standards or practice of the parenting facilitator's professional license. Tex. Fam. Code § 153.6061(e).

§ 16.44 Removal of Parenting Facilitator

If a parenting facilitator's services have been conducted as provided by subchapter K and the standard of care that applies to the parenting facilitator's professional license, there is a rebuttable presumption that the parenting facilitator is acting in good faith. The court may remove the parenting facilitator in the court's discretion. The court must remove the parenting facilitator on the request and agreement of all parties; on the request of the parenting facilitator; if good cause is shown, on the motion of a party; or if the parenting facilitator ceases to satisfy the minimum qualifications required by Family Code section 153.6101. Tex. Fam. Code § 153.6071.

§ 16.45 Report of Parenting Facilitator

A parenting facilitator must submit a written report to the court and to the parties as often as the court orders. The report may include a recommendation described by Fam-

ily Code section 153.6082(e) (to implement or clarify an existing court order) and any other information the court requires, but it may not include recommendations regarding conservatorship of, possession of, or access to the child. Tex. Fam. Code § 153.6081.

§ 16.46 Compensation of Parenting Facilitator

A court may not appoint a parenting facilitator other than a domestic relations office or a comparable county agency or a volunteer unless, after notice and hearing, the court finds that the parties have the means to pay the fees of the parenting facilitator. Any fees of a parenting facilitator appointed under this provision shall be allocated between the parties as determined by the court. Public funds may not be used to pay the fees of a parenting facilitator, although the court may appoint the domestic relations office or a comparable county agency if personnel are available to serve that function. If due to hardship the parties are unable to pay the fees of a parenting facilitator and a domestic relations office or a comparable county agency is not available, the court, if feasible, may appoint a person, including a court employee, who meets the minimum qualifications prescribed by Family Code section 153.6101 to act as a parenting facilitator on a volunteer basis and without compensation. Tex. Fam. Code §§ 153.609, 153.6091.

§ 16.47 Qualifications of Parenting Facilitator

A parenting facilitator must hold a license to practice in Texas as a social worker, licensed professional counselor, licensed marriage and family therapist, psychologist, or attorney. A parenting facilitator must also have completed at least eight hours of family violence dynamics training provided by a family violence service provider; forty classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court; twenty-four classroom hours of training in the fields of family dynamics, child development, and family law; and sixteen hours of training in the laws governing parenting coordination and parenting facilitation and the multiple styles and procedures used in different models of service. Tex. Fam. Code § 153.6101(b).

The court must determine whether the qualifications of a proposed parenting facilitator satisfy these requirements. On request by a party, an attorney for a party, or any attorney for a child who is the subject of the suit, a person under consideration for appointment as a parenting facilitator must provide proof that the person satisfies the required minimum qualifications. Tex. Fam. Code § 153.6101(a).

The actions of a parenting facilitator who is not an attorney do not constitute the practice of law. Tex. Fam. Code § 153.6101(c).

§ 16.48 Conflicts of Interest and Bias of Parenting Facilitator

Before being appointed as parenting facilitator in a suit, a person who has a conflict of interest with, or previous knowledge of, a party or a child who is the subject of a suit must disclose the conflict or previous knowledge to the court, each attorney for a party, any attorney for a child, and any party who does not have an attorney. Unless, after the disclosure, the parties and the child's attorney, if any, agree in writing to the person's appointment as parenting facilitator, the person must decline appointment. Tex. Fam. Code § 153.6102(a).

A parenting facilitator who, after being appointed in a suit, discovers that the parenting facilitator has a conflict of interest with, or previous knowledge of, a party or a child who is the subject of the suit must immediately disclose the conflict or previous knowledge to the court, each attorney for a party, any attorney for a child, and any party who does not have an attorney. Unless, after the disclosure, the parties and the child's attorney, if any, agree in writing to the person's continuation as parenting facilitator, the person must withdraw. Tex. Fam. Code § 153.6102(b).

Before accepting appointment in a suit, a parenting facilitator must disclose to the court, each attorney for a party, any attorney for a child who is the subject of the suit, and any party who does not have an attorney a pecuniary relationship with an attorney, party, or child in the suit; a relationship of confidence or trust with an attorney, party, or child in the suit; and other information regarding any relationship with an attorney, party, or child in the suit that might reasonably affect the ability of the person to act impartially during the person's service as parenting facilitator. Unless, after the disclosure, the parties and the child's attorney, if any, agree in writing to the person's service as parenting facilitator in the suit, the person must decline appointment. Tex. Fam. Code § 153.6102(c), (d).

A parenting facilitator may not serve in any other professional capacity at any other time with any person who is a party to, or the subject of, the suit in which the person serves as parenting facilitator, or with any member of the family of a party or subject. A person who, before appointment as a parenting facilitator in a suit, served in any other professional capacity with a person who is a party to, or subject of, the suit, or with any member of the family of a party or subject, may not serve as parenting facilitator in a suit involving any family member who is a party to or subject of the suit. These provi-

sions do not apply to a person whose only other service in a professional capacity with a family or any member of a family that is a party to or the subject of a suit to which this provision applies is as a teacher of coparenting skills in a class conducted in a group setting. The definition of the term *family* in Family Code section 71.003 applies in these provisions. Tex. Fam. Code § 153.6102(e); *see* Tex. Fam. Code § 71.003.

A parenting facilitator must promptly and simultaneously disclose to each party's attorney, any attorney for a child who is a subject of the suit, and any party who does not have an attorney the existence and substance of any communication between the parenting facilitator and another person, including a party, a party's attorney, a child who is the subject of the suit, and any attorney for a child who is the subject of the suit, if the communication occurred outside a parenting facilitator session and involved the substance of parenting facilitation. Tex. Fam. Code § 153.6102(f).

§ 16.49 Communications and Recordkeeping of Parenting Facilitator

A communication made by a participant in parenting facilitation is subject to disclosure and may be offered in any judicial or administrative proceeding, if otherwise admissible under the rules of evidence, regardless of any rule, standard of care, or privilege applicable to the parenting facilitator's professional license. The parenting facilitator may be required to testify in any proceeding relating to or arising from the duties of the parenting facilitator, including as to the basis for any recommendation made to the parties that arises from the duties of the parenting facilitator. Tex. Fam. Code § 153.6083(a). However, it is not error for a court to exclude testimony at trial regarding the facilitator's recommendation regarding conservatorship and possession, as such a recommendation is statutorily prohibited. *Gadekar v. Zankar*, No. 12-16-00209-CV, 2018 WL 2440393 at *3–4 (Tex. App.—Tyler May 31, 2018, no pet.) (mem. op.).

A parenting facilitator must keep a detailed record about meetings and contacts with the parties, attorneys, or other persons involved in the suit. A person who participates in parenting facilitation is not a patient as d efined by section 611.001 of the Health and Safety Code, and no record created as part of the parenting facilitation that arises from the parenting facilitator's duties is confidential. On request, the parenting facilitator must make records of parenting facilitation available to an attorney for a party, an attorney for a child who is the subject of the suit, and a party who does not have an attorney. Tex. Fam. Code § 153.6083(b)–(d).

A parenting facilitator must keep parenting facilitation records from the suit until the seventh anniversary of the date the facilitator's services are terminated, unless the

licensing authority that issues the parenting facilitator's professional license establishes a different period. Tex. Fam. Code § 153.6083(e).

§ 16.50 Report of Joint Proposal or Statement of Intent; Agreements and Recommendations

If the court has ordered the parties to attempt to settle parenting issues with the assistance of a parenting facilitator and to attempt to reach a proposed joint resolution or statement of intent regarding the dispute, the parenting facilitator must submit a written report describing the parties' joint proposal or statement to the parties, any attorneys for the parties, and any attorney for the child who is the subject of the suit. Tex. Fam. Code § 153.6082(a).

The proposed joint resolution or statement of intent is not an agreement unless the resolution or statement (1) is prepared by the parties' attorneys, if any, in a form that meets the applicable requirements of rule 11 of the Texas Rules of Civil Procedure, a mediated settlement agreement described by Family Code section 153.0071, a collaborative law agreement described by Family Code section 153.0072, a settlement agreement described by section 154.071 of the Civil Practice and Remedies Code, or a proposed court order and (2) is incorporated into an order signed by the court. A parenting facilitator may not draft the resolution or statement. Tex. Fam. Code § 153.6082(b), (c).

The actions of a parenting facilitator in this process do not constitute the practice of law. Tex. Fam. Code § 153.6082(d).

If the court has ordered the parties to attempt to settle parenting issues with the assistance of a parenting facilitator and the parties are unable to settle those issues, the parenting facilitator may make recommendations, other than recommendations regarding the conservatorship or possession of or access to the child, to the parties and attorneys to implement or clarify provisions of an existing court order that are consistent with the substantive intent of the court order and in the best interest of the child who is the subject of the suit. Such a recommendation does not affect the terms of an existing court order. Tex. Fam. Code § 153.6082(e).

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Chapter 17

Protective Orders

§ 17.1 Introduction

The provisions for a protective order in title 4 of the Texas Family Code provide broad relief for a variety of people in a wide variety of circumstances. Title 4 provides emergency assistance to abused spouses and other family members, as well as victims of "dating violence." Although much of the relief provided by title 4 is available under title 5, title 4 provides some specialized relief that is not included in title 5, such as the twenty-day duration for an immediate ex parte order and extended protection and relief to members of a household, including a person who previously lived in a household and family members other than an abused or battered spouse, as well as the potential for stronger penalties because the violation can be a criminal offense.

Because a protective order under title 4 is generally effective only for a two-year period, many potential applicants for protective orders opt to file for a dissolution of the marriage instead. *See* Tex. Fam. Code § 85.025(a)(1). If an applicant who is a party to a pending suit for the dissolution of a marriage wishes to apply for a protective order, the application must be filed in accordance with section 85.062 of the Family Code. *See* Tex. Fam. Code § 85.062; *see also* Tex. Fam. Code § 6.504.

Title 4 offers broad possibilities in the area of postdivorce relief, and many practitioners are using protective orders in postdivorce situations in which "family violence" or threats of violence have occurred. If a party to a suit for dissolution of marriage or suit affecting the parent-child relationship seeks a protective order against another party to the suit after a final order has been rendered, the application must be filed in accordance with section 85.063 of the Family Code. *See* Tex. Fam. Code § 85.063.

Title 4 also seems to be useful in dealing with nonmarital situations, such as parent abuse, grandparent abuse, and other violent or threatening situations involving members or former members of the same household or extended family relationships. Protective orders are also available for people who have never been members of the same household but who have a "dating relationship." *See* Tex. Fam. Code § 71.0021(b).

The term *family*, as defined by the Family Code, includes individuals related by consanguinity or affinity, individuals who are former spouses of each other, individuals who are the parents of the same child (without regard to marriage), and a foster child and foster parent, whether or not those individuals reside together. Tex. Fam. Code § 71.003.

The Family Code defines the term *family violence* as (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault but does not include defensive measures to protect oneself; (2) abuse as that term is defined by Family Code section 261.001(1)(C), (E), (G), (H), (I), (J), (K), and (M) by a member of a family or household toward a child of the family or household; or (3) dating violence as that term is defined by section 71.0021. Tex. Fam. Code § 71.004.

The Family Code defines the term *dating violence* as an act, other than a defensive measure to protect oneself, by an actor that is committed against a victim or applicant for a protective order with whom the actor has or has had a dating relationship or because of the victim's or applicant's marriage to or dating relationship with an individual with whom the actor is or has been in a dating relationship or marriage and is (1) intended to result in physical harm, bodily injury, assault, or sexual assault or (2) a threat that reasonably places the victim or applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault. Tex. Fam. Code § 71.0021(a).

The term *dating relationship*, as defined by the Family Code, means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of the length of the relationship, the nature of the relationship, and the frequency and type of interaction between the persons involved in the relationship. Tex. Fam. Code § 71.0021(b). A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a "dating relationship." Tex. Fam. Code § 71.0021(c). A suit for protection from dating violence may be filed by a minor. *See* Tex. Fam. Code § 82.002(b)(1).

§ 17.2 Caption

A proceeding for a protective order is initiated by filing "An Application for a Protective Order." Tex. Fam. Code § 82.001.

If a protective order is applied for in conjunction with a divorce, the application may be contained in the original pleading or in a subsequent pleading.

COMMENT: The attorney should advise the client to consult the county or district attorney in the client's jurisdiction to file an application for protective order before filing the divorce action because of the cost savings to the client.

§ 17.3 Relationship between Protective Order and Other Suits

Application Filed before Other Suit: If an application for a protective order is pending, a court may not dismiss the application or delay a hearing on the application on the grounds that a suit for dissolution of marriage or a suit affecting the parent-child relationship is filed after the application was filed. Tex. Fam. Code § 85.061.

If a protective order is rendered before the suit for dissolution or suit affecting the parent-child relationship was filed or while the suit is pending, the court that rendered the order may, on its own motion or that of a party, transfer the protective order to the court having jurisdiction of the suit if the court finds that the transfer is in the interest of justice or is for the safety or convenience of a party or a witness. Tex. Fam. Code § 85.064(a), (c).

Application Filed during Pending Suit: On the motion of any party to a suit for divorce or annulment or to declare a marriage void, the court may issue a protective order. Tex. Fam. Code § 6.504.

A person who wishes to apply for a protective order with respect to the person's spouse and who is a party to a pending dissolution suit or suit affecting the parent-child relationship must file the application for the order as required by Family Code chapter 85, subchapter D. Tex. Fam. Code § 82.005.

The person may apply for a protective order against another party to the suit by filing an application in the court in which the suit is pending or in a court in the county in which the applicant resides if the applicant resides outside the jurisdiction of the court in which the suit is pending. If the application is filed in a court other than where the dissolution is pending, then the applicant must inform the clerk of the court that renders the protective order that a dissolution suit or suit affecting the parent-child relationship is pending in another county. The clerk of the court rendering the protective order shall inform the clerk of the other court that a final protective order has been rendered and

forward a copy of the protective order to the other court. *See* Tex. Fam. Code § 85.062(a)–(c).

The requirements for service of notice under chapter 82 do not apply if the application is filed as a motion in a suit for dissolution of a marriage. Notice is given in the same manner as in any other motion in that cause. Tex. Fam. Code § 82.043(e).

A protective order in a suit for dissolution of a marriage must be in a separate document entitled "PROTECTIVE ORDER." Tex. Fam. Code § 85.004.

When a suit is pending, the court must inform a party of the right to apply for a protective order if the court believes that the party or a member of the party's family or household may be a victim of family violence. Tex. Fam. Code §§ 6.404, 105.0011.

Application Filed after Final Order Is Rendered in Other Suit: Once a final decree has been rendered for dissolution or a suit affecting the parent-child relationship, an application for a protective order between the same parties, filed in the same county, must be filed in the court that rendered the final order. If the application is filed in another county, it may be filed in any court having jurisdiction to render the protective order. Tex. Fam. Code § 85.063(a).

If a protective order is rendered by a court in a county other than the county that rendered the final order, then it is subject to transfer. Tex. Fam. Code § 85.063(b). If a protective order that affects a party's right to possession of or access to a child is rendered after the date a final order was rendered in a suit affecting the parent-child relationship, on the motion of a party or on the court's own motion, the court may transfer the protective order to the court of continuing, exclusive jurisdiction if the court finds that the transfer is in the interest of justice or is for the safety or convenience of a party or a witness. Tex. Fam. Code § 85.064(b), (c).

Waiting Period for Divorce: The usual sixty-day waiting period can be waived in a divorce if the petitioner has an active protective order or an active magistrate's order for emergency protection, based on a finding of family violence, against the respondent because of family violence committed during the marriage. The waiting period can be waived if the respondent has been finally convicted of, or received deferred adjudication for, an offense involving family violence against the petitioner or a member of the petitioner's household. Tex. Fam. Code § 6.702(c).

Transfer: Transfer of a protective order shall be conducted according to the procedures provided by Family Code section 155.207. Except as provided by Family Code

section 81.002, the fees and costs associated with the transfer are to be paid by the movant. Tex. Fam. Code § 85.064(d), (e).

The transferred order is subject to modification by the transferee court to the same extent modification is permitted under Family Code chapter 87 by the court that rendered the order. Tex. Fam. Code § 85.065(c).

A Texas court with jurisdiction of proceedings arising under title 4 may enforce a protective order rendered by another court in the same manner as the court that rendered the order could enforce the order, regardless of whether the order is transferred under chapter 85. A court may enforce the protective order by contempt. Tex. Fam. Code § 81.010(a), (b).

Validity: A protective order rendered under chapter 85 is valid and enforceable pending further action by the court that rendered the order until it is properly superseded by another court with jurisdiction over the order. Tex. Fam. Code § 85.009. If a magistrate's order for emergency protection is issued under Texas Code of Criminal Procedure article 17.292 before an order issued under Family Code chapter 85 or an order under Family Code title 1 or title 5, the order issued under the Family Code prevails to the extent of any conflict. Tex. Code Crim. Proc. art. 17.292(f–1). If such an emergency protection order is issued before an order issued under Family Code chapter 83, the emergency protection order prevails to the extent of any conflict unless the court that issued the chapter 83 order is informed of the existence of the emergency protection order and makes a finding in the chapter 83 order that the court is superseding the emergency protection order. Tex. Code Crim. Proc. art. 17.292(f–2).

§ 17.4 Venue

The application may be filed in the county in which the applicant resides *or* in the county in which the respondent resides or in any county in which the family violence is alleged to have occurred. Tex. Fam. Code § 82.003.

A motion for enforcement of a protective order may be filed in any court with jurisdiction of proceedings under title 4 in the county in which the order was rendered, a county in which the movant or respondent resides, or a county in which an alleged violation occurs. Tex. Fam. Code § 81.010(c).

See section 17.3 above concerning situations in which a party in a suit for dissolution of marriage or a suit affecting the parent-child relationship that is pending or in which a final order has been rendered seeks a protective order against another party to the suit.

§ 17.5 Contents of Application

The application must state the name and county of residence of each applicant; the name and county of residence of each individual alleged to have committed family violence; the relationships between the applicants and the individual alleged to have committed family violence; a request for one or more protective orders; and whether an applicant is receiving services from the title IV-D agency in connection with a child support case and, if known, the agency case number for each open case. Tex. Fam. Code § 82.004. If a prior court order is required to be attached to the application but is unavailable to the applicant, the application must contain a statement that the order is unavailable to the applicant and that a copy of the order will be filed with the court before the hearing on the application.

If an applicant is a former spouse of the individual alleged to have committed family violence, the application must include a copy of the decree dissolving the marriage. Tex. Fam. Code § 82.006.

An application that requests a protective order for a child who is subject to the continuing, exclusive jurisdiction of a court under title 5 of the Family Code or alleges that such a child has committed family violence must include a copy of each court order affecting the conservatorship, support, and possession of or access to the child. Tex. Fam. Code § 82.007.

An application that requests the issuance of a temporary ex parte order under Family Code chapter 83 must contain a detailed description of the facts and circumstances concerning the alleged family violence and the need for immediate protective orders, and it must be signed by each applicant under oath stating that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant. A statement signed under oath by a child is valid if the statement otherwise complies with Code chapter 82. Tex. Fam. Code § 82.009.

An application for a protective order that is filed after a previously rendered protective order has expired must include—

1. a copy of the expired protective order attached to the application;
2. a description of *either* the violation of the expired protective order, if the application alleges that the respondent violated the expired protective order by committing an act prohibited by that order before it expired, or the threatened harm

that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault; and

3. if a violation of the expired order is alleged, a statement that the violation of the expired order has not been grounds for any other order protecting the applicant that has been issued or requested under subtitle B of title 4.

Tex. Fam. Code § 82.008(a).

If an application for a protective order alleges that an unexpired protective order applicable to the respondent is due to expire not later than the thirtieth day after the date the application was filed, the application for the subsequent protective order must include—

1. a copy of the previously rendered protective order attached to the application; and

2. a description of the threatened harm that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault.

Tex. Fam. Code § 82.0085(a).

§ 17.6 Temporary Orders and Extraordinary Relief

Orders Issued under Family Code Title 4: An application for temporary ex parte orders must contain a detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective orders, *and* it must be signed by each applicant under oath stating that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant. Tex. Fam. Code § 82.009(a). Such a statement, signed under oath by a child, is valid if the statement otherwise complies with Code chapter 82. Tex. Fam. Code § 82.009(b).

A temporary ex parte order is valid for the period specified in the order, not to exceed twenty days, and these orders may be extended for additional twenty-day periods. Tex. Fam. Code § 83.002.

A temporary ex parte order prevails over any other court order made under title 5 of the Family Code to the extent of any conflict between the orders. Tex. Fam. Code § 83.005. A temporary order issued pursuant to Family Code chapter 83 will not prevail over a magistrate's order for emergency protection issued pursuant to Texas Code of Criminal Procedure article 17.292 unless the court that issued the chapter 83 order was informed

of the magistrate's order and makes a finding that the court is superseding the magistrate's order. *See* Tex. Code Crim. Proc. art. 17.292(f–2).

Chapter 83 of the Family Code regulates when a person may be excluded from the occupancy of the person's residence by an ex parte order. The applicant must file a sworn affidavit detailing the facts and circumstances requiring exclusion from the residence, and the applicant must appear in person to testify at the ex parte hearing. For an ex parte order to exclude a person from the person's residence, the court must find from the required affidavit and testimony that (1) the applicant requesting the exclusion order either resides on the premises or has resided there within thirty days before the date the application was filed, (2) the person to be excluded has within the thirty days before the date the application was filed committed family violence against a member of the household, and (3) there is a clear and present danger that the person to be excluded is likely to commit family violence against a member of the household. Tex. Fam. Code § 83.006(a), (b).

The court may recess the hearing on a temporary ex parte order for exclusion of a party from the residence to contact the respondent by telephone and provide the respondent the opportunity to be present when the court resumes the hearing. Without regard to whether the respondent is able to be present at the hearing, the court shall resume the hearing before the end of the working day. Tex. Fam. Code § 83.006(c).

On request by the applicant, the court granting a temporary ex parte order that excludes the respondent from the respondent's residence shall render a written order to the sheriff, constable, or chief of police to provide a law enforcement officer to (1) accompany the applicant to the residence covered by the order; (2) inform the respondent that the court has ordered that the respondent be excluded from the residence; (3) protect the applicant while the applicant takes possession of the residence; and (4) protect the applicant, if the respondent refuses to vacate the residence, while the applicant takes possession of necessary personal property. Tex. Fam. Code § 86.003.

Orders Issued under Code of Criminal Procedure: A defendant who has been charged with family violence may be held by the magistrate for up to four hours after bond has been made and for an additional period of up to forty-eight hours if the magistrate determines that violence would continue if the defendant is released; probable cause for certain aggravating circumstances is required if the additional period exceeds twenty-four hours. Tex. Code Crim. Proc. art. 17.291(b).

A magistrate also has the authority to issue an order for emergency protection after the defendant has been arrested for a criminal offense involving family violence or an offense under Texas Penal Code section 22.011, 22.021, or 42.072. An order for emergency protection shall be issued if the arrest was for an offense involving family violence that also involved serious bodily injury to the victim or the use or exhibition of a deadly weapon during the commission of an assault. The order is issued when the defendant makes an appearance before the magistrate. The victim need not be present when the order is issued. Tex. Code Crim. Proc. art. 17.292(a), (b), (d).

The order for emergency protection may be requested by the victim of the offense, the guardian of the victim, a peace officer, or the attorney representing the state. The magistrate may also issue the order on its own motion. Tex. Code Crim. Proc. art. 17.292(a).

The order for emergency protection may prohibit the arrested person from—

1. committing family violence or an assault of the person protected under the order or an act in furtherance of an offense under Penal Code section 42.072;
2. communicating directly with a member of the family or household or with the person protected under the order in a threatening or harassing manner;
3. communicating a threat through any person to a member of the family or household or to the person protected under the order;
4. going to or near the residence, place of employment, or business of a member of the family or household or of the person protected under the order;
5. going to or near the residence, child care facility, or school where a child protected under the order resides or attends; and
6. possessing a firearm, unless the person is a peace officer, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.

Tex. Code Crim. Proc. art. 17.292(c).

In addition, the magistrate may impose a condition described in article 17.49 of the Code of Criminal Procedure, including ordering the defendant to participate in a global positioning monitoring system or allowing the alleged victim or other person protected by the order to participate in the system. Tex. Code Crim. Proc. art. 17.292(c–1); *see* Tex. Code Crim. Proc. art. 17.49.

The order must suspend the defendant's license to carry a handgun issued under subchapter H of chapter 411 of the Texas Government Code. Tex. Code Crim. Proc. art. 17.292(*l*).

The order must contain prescribed statements in bold-faced type or capital letters. Tex. Code Crim. Proc. art. 17.292(g).

To the extent that an order for emergency protection conflicts with an existing court order granting possession of or access to a child, the emergency protection order prevails for its duration. Tex. Code Crim. Proc. art. 17.292(f). To the extent that an order for emergency protection conflicts with an order subsequently issued under Family Code chapter 85 or under Family Code title 1 or 5, the order issued under the Family Code prevails. Tex. Code Crim. Proc. art. 17.292(f–1). To the extent that an order for emergency protection conflicts with an order subsequently issued under Family Code chapter 83, the order for emergency protection prevails unless the court issuing the Family Code order is informed of the existence of the emergency protection order and makes a finding in the Family Code order that the court is superseding the emergency protection order. Tex. Code Crim. Proc. art. 17.292(f–2).

An order issued under article 17.292(a) or (b)(1) of the Code of Criminal Procedure is effective for not less than thirty-one days after the date of issuance and not more than sixty-one days after the date of issuance. An order issued under article 17.292(b)(2) of the Code of Criminal Procedure is effective for not less than sixty-one days after the date of issuance and not more than ninety-one days after the date of issuance. A copy of the order shall be served on the defendant by the magistrate or the magistrate's designee in person or electronically. The magistrate must make a separate record of the service in written or electronic format. After notice to each affected party and a hearing, the issuing court may modify all or part of the order if the court finds that the order as originally issued is unworkable, the modification will not place the victim of the offense at greater risk than did the original order, and the modification will not in any way endanger a person protected under the order. Tex. Code Crim. Proc. art. 17.292(j).

A copy of the order shall be sent by the magistrate to the chief of police of the municipality or the sheriff of the county where the member of the family or household or individual protected by the order resides. If the victim was not in the court, a peace officer shall make a good-faith effort to notify the victim, within twenty-four hours, that the order was issued by calling the victim's residence and place of employment. The clerk of the court shall send a copy of the order to the victim. Tex. Code Crim. Proc. art. 17.292(h). A copy of the order shall be sent to any school or child care facility affected

by the order. Tex. Code Crim. Proc. art. 17.292(i). If the order suspends the defendant's license to carry a handgun, the clerk shall immediately send a copy of the order to the Department of Public Safety, and the department shall demand surrender of the license from the holder, record the suspension, and report the suspension to the appropriate local law enforcement agencies. Tex. Code Crim. Proc. art. 17.293.

§ 17.7 Court

An application for a protective order may be filed in the district court, court of domestic relations, juvenile court having the jurisdiction of a district court, statutory county court, constitutional county court, or other court expressly given jurisdiction under title 4. *See* Tex. Fam. Code § 71.002. The parties to a protective order are not entitled to a trial before a jury. *See Williams v. Williams*, 19 S.W.3d 544 (Tex. App.—Fort Worth 2000, pet. denied).

§ 17.8 Applicant

An application for a protective order to protect the applicant or any other member of the applicant's family or household from family violence (but not dating violence) may be filed by an adult member of the family or household or by any adult for the protection of a child. Tex. Fam. Code § 82.002(a), (c). An application for a protective order for dating violence may be filed by (1) a member of the dating relationship, regardless of whether the member is an adult or a child; (2) an adult member of the marriage, if the victim is or was married as described by Code section 71.0021(a)(1)(B); or (3) any adult on behalf of a child. Tex. Fam. Code § 82.002(b), (c). An application for a protective order arising out of dating violence may not be filed by another member of the family or household. An application may be filed for the protection of any person alleged to be a victim of family or dating violence by a prosecuting attorney or by the Texas Department of Family and Protective Services. Tex. Fam. Code § 82.002(d). "Prosecuting attorney" means the attorney who represents the state in a district or statutory county court in the county of proper venue and who has responsibility for filing applications under title 4. *See* Tex. Fam. Code §§ 71.007, 81.007. If an application is filed by a prosecuting attorney or the department, or by an adult for the protection of a child, the alleged victim is considered to be the applicant. Tex. Fam. Code § 82.002(e).

COMMENT: The practitioner should inform the client that the prosecuting attorney or the Texas Department of Family and Protective Services can file an application on the client's behalf.

§ 17.9 Fees and Costs

An applicant or an attorney representing an applicant may not be assessed a fee, cost, charge, or expense by a district or county clerk of the court or by a sheriff, constable, or other public official or employee in connection with the filing, serving, or entering of a protective order or for any other services described in Family Code section 81.002, including a fee to dismiss, modify, transfer, or withdraw a protective order. Tex. Fam. Code § 81.002(a).

Except on a showing of good cause or indigence of a party found to have committed family violence, the party against whom the order is rendered shall be ordered to pay the $16 protective order fee, the standard fees charged by the clerk of the court in a general civil proceeding for serving the order, the costs of court, and all other fees, charges, or expenses incurred in connection with the protective order. The court may order such fees paid by a party against whom an agreed protective order is rendered. Tex. Fam. Code § 81.003.

A party who is ordered to pay fees and costs may be punished for contempt of court as provided by section 21.002 of the Texas Government Code for failure to pay before the date specified by the order. If the order does not specify a date, payment of costs is required before the sixtieth day after the date the order was rendered. Tex. Fam. Code § 81.004.

The court may assess reasonable attorney's fees against the party who is found to have committed family violence or a party against whom an agreed protective order is rendered. A protective order can be modified to provide for the recovery of attorney's fees after an unsuccessful appeal of the order. *In re S.S.*, 217 S.W.3d 685, 686 (Tex. App.—Eastland 2007, no pet.). In setting the amount of attorney's fees, the court shall consider the income and ability to pay of the person against whom the fee is assessed. Tex. Fam. Code § 81.005. Attorney's fees that are awarded in protective orders are enforceable by contempt. *In re Skero*, 253 S.W.3d 884, 887 (Tex. App.—Beaumont 2008, no pet.) (per curiam).

§ 17.10 Notice, Hearing, and Evidence

Notice of the application must be served on each respondent. Tex. Fam. Code § 82.043(a). Notice is to be served in the same manner as citation under the Texas Rules of Civil Procedure, except that service by publication is not authorized. Tex. Fam. Code § 82.043(c). A temporary ex parte protective order under Family Code chapter 83 may

be issued without notice to the individual alleged to have committed family violence. Tex. Fam. Code §§ 82.043(d), 83.001(a). The applicant must provide the clerk with sufficient copies of the application for service on each respondent. Tex. Fam. Code § 82.043(b). The statute prescribes the contents of the notice. *See* Tex. Fam. Code § 82.041. If the application is filed as a motion in a suit for dissolution of marriage, these requirements of service of notice do not apply; instead, notice is given in the same manner as any other motion in such a suit. Tex. Fam. Code § 82.043(e).

Generally, a hearing must be set for a date no later than the fourteenth day after the date the application is filed. Tex. Fam. Code § 84.001(a). If the respondent requests additional time because the respondent received service of the application within forty-eight hours before the hearing, the hearing must be rescheduled for no later than fourteen days after the date set for the hearing, with no requirement of additional service. Tex. Fam. Code § 84.004. If a hearing is not held because the respondent failed to receive service, the hearing must be rescheduled for no later than fourteen days after a request from the applicant. Tex. Fam. Code § 84.003. A legislative continuance sought in a proceeding that includes an application for protective order is discretionary with the court. Tex. Fam. Code § 84.005.

On request of a prosecutor in a county with a population of more than two million or in a county in a judicial district composed of more than one county, the district court shall set the hearing for no later than twenty days after the date the application was filed or, if rescheduled, no later than twenty days after the date a request to reschedule was made. Tex. Fam. Code § 84.002(a).

Any individual affected by a temporary ex parte order may file a motion to vacate at any time, and the court must set a date for hearing the motion as soon as possible. Tex. Fam. Code § 83.004. Before vacating the order, the court must hold a hearing. *In re Goddard*, No. 12-18-00355-CV, 2019 WL 456866, at *3 (Tex. App.—Tyler Feb. 6, 2019, orig. proceeding) (mem. op.).

The court may permit the parties to conduct accelerated discovery before the hearing on a protective order, but the hearing date cannot be delayed to accommodate discovery. *See Martinez v. Martinez*, 52 S.W.3d 429, 432–33 (Tex. App.—Fort Worth 2001, pet. denied).

A statement made by a child twelve years of age or younger that describes alleged family violence against the child is admissible if the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliabil-

ity and (1) the child testifies or is available to testify or (2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the child's welfare. Tex. Fam. Code §§ 84.006, 104.006.

The court may render a protective order that is binding on a respondent who does not attend a hearing if the respondent received service of the application and notice of the hearing. If the court reschedules the hearing under chapter 84, a protective order may be rendered if the respondent does not attend the rescheduled hearing. Tex. Fam. Code § 85.006.

The parties are not entitled to a jury trial on the issue of whether the protective order should be granted. *Roper v. Jolliffe*, 493 S.W.3d 624, 634–35 (Tex. App.—Dallas 2015, pet. denied); *Aguilar v. Aguilar*, No. 02-11-00370-CV, 2012 WL 6632526, at *4 (Tex. App.—Fort Worth Dec. 21, 2012, no pet.) (per curiam) (mem. op.).

§ 17.11 Answer

A written answer to an application for a protective order is permitted but is not required and may be filed at any time before the hearing. Tex. Fam. Code § 82.021. A written answer should be filed in response to a motion for enforcement of a protective order to raise affirmative defenses or to request a jury if the movant requests incarceration for more than six months.

§ 17.12 Findings and Orders

If, after the hearing, the court finds that family violence has occurred and is likely to occur in the future, the court *shall* render a protective order applying only to a person found to have committed family violence. Tex. Fam. Code § 85.001(b). There can be a finding of "family violence" even if there is no actual physical harm. *Bedinghaus v. Adams*, No. 2-08-096-CV, 2009 WL 279388 (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (mem. op.). A threat without an actual act of violence or physical harm is sufficient. *Wilkerson v. Wilkerson*, 321 S.W.3d 110, 117 (Tex. App.—Houston [1st Dist.] 2010, pet. dism'd); *Clements v. Haskovec*, 251 S.W.3d 79, 85 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.). Even if no express threats are conveyed, the fact finder may conclude that a person was reasonably placed in fear. *Burt v. Francis*, 528 S.W.3d 549, 553–54 (Tex. App.—Eastland 2016, no pet.). While a trial court is required to find, at the close of the hearing on the application for a protective order, whether family violence has occurred and is likely to occur in the future, those findings are not required to be express. *In re M.I.W.*, No. 04-17-00207-CV, 2018 WL 1831678, at *2

(Tex. App.—San Antonio Apr. 18, 2018, no pet.) (mem. op.). Evidence of family violence in the past can be competent evidence that family violence is likely to occur in the future. *Clements*, 251 S.W.3d at 87; *Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 819, 824–25 (Tex. App.—Fort Worth 2007, no pet.); *In re Epperson*, 213 S.W.3d 541, 544 (Tex. App.—Texarkana 2007, no pet.). A court may but is not required to find that violent behavior will continue in the future just because it happened in the past. *Hassan v. Hassan*, No. 14-17-00179-CV, 2018 WL 3061320, at *2 (Tex. App.—Houston [14th Dist.] June 21, 2018, no pet.) (mem. op.).

There is a presumption that family violence has occurred and is likely to occur in the future if (1) the respondent has been convicted of or placed on deferred adjudication community supervision for certain offenses under Penal Code title 5 or 6 against the child for whom the petition is filed, (2) the respondent's parental rights with respect to the child have been terminated, and (3) the respondent is trying to have contact with the child. Tex. Fam. Code § 81.0015.

A protective order may also include orders affecting property and children that apply to both parties as set forth in Family Code section 85.021, if such orders are in the best interests of the person protected by the order or a member of the family or household of the person protected by the order. *See* Tex. Fam. Code §§ 81.001, 85.001(b), 85.021. Unless the evidence shows that family violence occurred against the children of the applicant, a child may not be included as a protected person, but the court may make orders regarding a member of the family or household of a person protected by an order when contact with another member of the family might escalate and involve the protected person. Tex. Fam. Code § 85.022; *see Martin v. Martin*, 545 S.W.3d 162, 168 (Tex. App.—El Paso 2017, no pet.).

If the court finds that (1) the respondent violated a protective order by committing an act prohibited by the order under Family Code section 85.022, (2) the order was in effect at the time of the violation, and (3) the order has expired after the date the violation occurred, the court shall, without the necessity of finding whether family violence has occurred or is likely to occur again in the future, render a protective order applying only to the respondent and may render a protective order under Family Code section 85.021. Tex. Fam. Code § 85.002; *see* Tex. Fam. Code §§ 85.021, 85.022; *see Maldonado v. Bearden*, No. 01-17-00371-CV, 2018 WL 4087411, at *4 (Tex. App.—Houston [1st Dist.] Aug. 28, 2018, no pet.) (mem. op.).

If the court approves an agreement between the parties as authorized under section 85.005 (agreed orders), the court shall render a protective order that is in the best inter-

ests of the applicant, the family or household, or a member thereof. The court may not approve an agreement that requires the applicant to refrain from doing an act listed in section 85.022. An agreed protective order as provided by section 85.022 is enforceable civilly or criminally. An agreed protective order is not enforceable as a contract. Tex. Fam. Code § 85.005(b)–(d).

On a finding that family violence has occurred and is likely to occur in the future, the court may issue an order prohibiting a party from (1) removing a child from the possession of a named person or the jurisdiction of the court, (2) transferring or encumbering property, or (3) removing a pet, companion animal, or assistance animal from the possession or actual or constructive care of a person named in the order. Tex. Fam. Code § 85.021(1).

The court may also (1) grant exclusive use of residence to one party in certain circumstances, (2) provide for possession of and access to a child, (3) require the payment of support for a party or a child, or (4) award use and possession of certain property. Tex. Fam. Code § 85.021(2)–(5).

The court may order the person found to have committed family violence to perform acts specified by the court that are deemed necessary or appropriate to prevent or reduce the likelihood of family violence and may order the person to complete an accredited battering intervention and prevention program. If an accredited program is not available, the court may order that the person counsel with a professional who has completed specified family violence intervention training. Tex. Fam. Code § 85.022(a)(1)–(3).

The court may also order that the person who has committed family violence is prohibited from (1) committing family violence in the future; (2) communicating with a person protected by an order or a member of the family or household of a person protected by an order in a threatening or harassing manner, communicating a threat through any person to a person protected by an order or a member of the family or household of a person protected by an order, or, on good cause, communicating in any manner with a person protected by an order or a member of the family or household of a person protected by an order except through the party's attorney or a person appointed by the court; (3) going near the residence, school, child care facility, or place of employment or business of a person protected by an order or a member of the family or household of a person protected by an order; (4) engaging in conduct directed specifically toward a person protected by an order or a member of the family or household of a person protected by an order that is reasonably likely to harass, annoy, alarm, abuse, torment, or

embarrass that person, including following that person; (5) possessing a firearm, unless the person is a peace officer actively engaged in full-time employment as an officer; and (6) harming, threatening, or interfering with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by or is in the actual or constructive care of a person protected by an order or by a member of the family or household of a person protected by an order. Tex. Fam. Code § 85.022(b).

Further, the court shall suspend a license to carry a handgun issued under subchapter H of chapter 411 of the Texas Government Code that is held by a person found to have committed family violence. Tex. Fam. Code § 85.022(d). In *Webb v. Schlagal*, 530 S.W.3d 793 (Tex. App.—Eastland 2017, pet. denied), the court found that a protective order prohibiting appellant's possession of a firearm did not infringe on his Second Amendment rights and that the statutory provisions under which it was issued, as applied to the appellant, were not unconstitutional under section 23, article 1, of the Texas Constitution. The order was issued under Tex. Code Crim. Proc. art. 7A.05(a)(2)(D), which has identical language to Tex. Fam. Code § 85.022(b)(6).

The court may render a protective order that is effective for more than two years if the court finds that the subject of the order (1) committed an act constituting a felony offense involving family violence against the applicant or a member of the applicant's family or household, regardless of whether the person has been charged with or convicted of the offense; (2) caused serious bodily injury to the applicant or a member of the applicant's family or household; or (3) was the subject of two or more previous protective orders rendered to protect the person on whose behalf the current order is sought and after a finding by the court that the subject of the order has committed family violence and is likely to commit family violence in the future. Tex. Fam. Code § 85.025(a–1). If the court renders such a protective order, it must include one of these findings in the order. Tex. Fam. Code § 85.001.

§ 17.13 Confidentiality of Certain Information

On request by an applicant for a protective order, the court may protect the applicant's mailing address by (1) ordering the applicant to disclose the information to the court, designate a person to receive notices and filed documents on the applicant's behalf, and disclose that designee's mailing address to the court; (2) requiring the court clerk to strike the applicant's mailing address from the public records of the court, if applicable, and maintain a confidential record of the applicant's mailing address for use only by the court; and (3) prohibiting the release of the information to the respondent. Tex. Fam. Code § 82.011.

On request by a person protected by an order or a member of the family or household of a person protected by an order, the court may exclude from a protective order the address and telephone number of a person protected by the order (specifying only the county of residence), the place of employment or business of a person protected by the order, or the child care facility or school a child protected by the order attends or in which the child resides. In that case the court shall order the clerk to strike the information from the public records and maintain a confidential record of the information solely for the court's use or that of a law enforcement agency for entry of required information into the statewide law enforcement information system. Tex. Fam. Code § 85.007.

In a protective order under Family Code section 85.022(b)(3) or (4), the court shall specifically describe each prohibited location and the minimum distances from the residence, school, child care facility, or place of employment or business that the party must maintain, unless the location information is excluded because of the need for confidentiality. Tex. Fam. Code § 85.022(c).

§ 17.14 Agreed Orders

The parties may agree in writing to the terms of a protective order under Family Code section 85.021, subject to the court's approval. Tex. Fam. Code § 85.005(a).

A respondent may agree in writing, subject to court approval, to the terms of a protective order under Family Code section 85.022, but the court may not approve an agreement that requires the applicant to do or refrain from doing an act under that section. The agreed order is enforceable civilly or criminally. Tex. Fam. Code § 85.005(b).

An agreed protective order must contain the finding that family violence has occurred and is likely to occur again in the future. *In re I.E.W.*, No. 13-09-00216-CV, 2010 WL 3418276 (Tex. App.—Corpus Christi–Edinburg 2010, no pet.) (mem. op.).

If the court approves an agreement, the court shall render an agreed protective order that is in the best interest of the applicant, the family or household, or a member of the family or household. Tex. Fam. Code § 85.005(c).

An agreed protective order is not enforceable as a contract, and it expires on the date the court order expires. Tex. Fam. Code § 85.005(d), (e).

§ 17.15 Modification of Orders

On the motion of any party, the court, after notice and hearing, may modify an existing order to exclude any item included in the order or include any item that could have been included. Tex. Fam. Code § 87.001. A change of circumstances is not required to modify a protective order. *In re S.S.*, 217 S.W.3d 685 (Tex. App.—Eastland 2007, no pet.). A protective order may not be modified to extend the period of the order's validity beyond the second anniversary of the date the original order was rendered or the date the order expires under Family Code section 85.025(a–1) or (c), whichever date occurs later. Tex. Fam. Code § 87.002. Section 85.025(c) provides that, if the subject of the protective order is confined or imprisoned on the date the protective order would expire under Family Code section 85.025(a) or (a–1) or if the protective order would expire not later than the first anniversary of the date the person is released from confinement or imprisonment, the period for which the order is effective is extended. In this situation, the order expires on the first anniversary of the date the person is released from confinement or imprisonment if the person was sentenced for more than five years or on the second anniversary of the date the person is released if the person was sentenced for five years or less. Tex. Fam. Code § 85.025(c). Notice of a motion to modify is sufficient if delivery of the motion is attempted on the respondent at the respondent's last known address by registered or certified mail as provided by rule 21a of the Texas Rules of Civil Procedure. Tex. Fam. Code § 87.003.

If a protective order includes an address or telephone number of a person protected by the order, of that person's place of employment or business, or of the school or child care facility of a child protected by the order and the information is not confidential under Family Code section 85.007, the person protected by the order may file a notification of change of address or telephone number with the court that rendered the order to modify the information contained in the order. The clerk shall attach the notification to the order and shall deliver a copy of the notification to the respondent by registered or certified mail under rule 21a of the Texas Rules of Civil Procedure. The filing of the notification and its attachment to the order do not affect the validity of the order. Tex. Fam. Code § 87.004.

§ 17.16 Appeal of Protective Orders

Generally, protective orders issued under subtitle B of title 4 of the Family Code may be appealed. However, a protective order rendered against a party in a suit for dissolution of marriage may not be appealed until the decree of dissolution becomes a final, appeal-

able order. Likewise, a protective order rendered against a party in a suit affecting the parent-child relationship may not be appealed until the underlying order becomes a final, appealable order. Tex. Fam. Code § 81.009. Unless one of these two exceptions exists, the protective order is immediately appealable. *Watts v. Adviento*, No. 02-17-00424-CV, 2019 WL 1388534, at *2 (Tex. App.—Fort Worth Mar. 28, 2019, no pet. h.) (mem. op.). A protective order based on a finding of family violence may be appealed even if the order has expired before the hearing, because of the long-term collateral consequences. *Clements v. Haskovec*, 251 S.W.3d 79 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.); *State for Protection of Cockerham v. Cockerham*, 218 S.W.3d 298 (Tex. App.—Texarkana 2007, no pet.); *Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 815 (Tex. App.—Fort Worth 2007, no pet.).

§ 17.17 Remedies for Violations of Protective Orders or Conditions of Bond

There are a variety of remedies available for violations of protective orders. A violation of a protective order can be punishable as contempt of court by a fine, incarceration, or both. Each protective order must contain warnings about the possible punishments for violation of the order. The warnings must be prominently displayed in bold-faced type or capital letters or underlined, and the wording is prescribed by statute. *See* Tex. Fam. Code § 85.026. The respondent must be served with a temporary ex parte order before he may be arrested for violating it. *See* Tex. Const. art. I, § 11c.

If the protective order is violated by the commission of a prohibited act, the punishment could be up to a $4,000 fine, confinement in jail for as long as one year, or both. *See* Tex. Penal Code §§ 12.21, 25.07. Commission of prohibited acts can also be prosecuted criminally as misdemeanor or felony offenses.

If the provisions of the protective order concerning the payment of fees and costs under Family Code sections 81.003–.006 are not complied with, then pursuant to the Texas Government Code the violations of the provisions could be punished by a fine up to $500, confinement in jail for as long as six months, or both. *See* Tex. Fam. Code § 81.004; Tex. Gov't Code § 21.002. The same remedies are also available for enforcement of the counseling provisions pursuant to Family Code section 85.024. *See* Tex. Fam. Code § 85.024; Tex. Gov't Code § 21.002.

Generally, an award of attorney's fees is not enforceable by contempt. However, one court has found that the obligation to pay fees awarded in a family violence protective order is a legal duty like the duty to pay fees awarded in the enforcement of a child

support obligation. *See In re Skero*, 253 S.W.3d 884, 887 (Tex. App.—Beaumont 2008, no pet.) (per curiam). The *Skero* court held that a family violence protective order, including the assessment of attorney's fees, enforces a legal duty, not a private agreement or contract between the parties, and that the attorney's fee in such a proceeding is a part of the procedural remedy for enforcing substantial rights and the fee allowed, like other costs in the protective order proceeding, is "incidental to and a part of" the order necessary to protect the spouse and the minors from family violence.

A person who violates the provisions of a condition of bond set in a family violence case that are related to the safety of the victim or the community may be subject to felony sanctions. An offense under Texas Penal Code section 25.07 for violation of an order or condition of bond is a class A misdemeanor, unless it is shown at trial that the defendant has been convicted previously under that section two or more times or has violated the protective order or condition of bond by committing assault or stalking; in that case the offense is increased to a third-degree felony. Tex. Penal Code § 25.07(g). A person who commits an offense under Penal Code section 25.07 may be taken into custody and denied release on bail if, at a hearing, a judge or magistrate makes certain findings concerning the commission of the offense based on a preponderance of the evidence. *See* Tex. Code Crim. Proc. art. 17.152. In determining whether to deny release on bail, the judge or magistrate may consider facts or circumstances relevant to a determination of whether the accused poses an imminent threat of future family violence. Tex. Code Crim. Proc. art. 17.152(e).

Prescribed warnings concerning penalties for the violation of an emergency protection order issued by a magistrate must appear in each such order in bold-faced type or capital letters. *See* Tex. Code Crim. Proc. art. 17.292(g). A person arrested or held without a warrant in the prevention of family violence may be detained if there is probable cause to believe the violence will continue if the person is immediately released. The person may be held after bond has been posted for a period of not more than four hours; in some cases the period may be extended, but the extension cannot exceed forty-eight hours. Tex. Code Crim. Proc. art. 17.291.

If the relief requested includes six months or more in jail, the respondent is entitled to a jury trial, which should be specifically requested in the respondent's answer. The respondent may also be able to object to discovery if it violates a right against self-incrimination. When appropriate, the answer should specifically assert that the protective order has expired, if the enforcement is seeking to punish the respondent for violating one of the prohibitions contained in the order.

§ 17.18 Counseling

A protective order may contain a requirement that the person found to have committed family violence complete a battering intervention and prevention program accredited under article 42.141 of the Texas Code of Criminal Procedure. If such a program is not available, the person may be ordered to counsel with a social worker, family service agency, physician, psychologist, licensed therapist, or licensed professional counselor who has completed specified family violence intervention training. Tex. Fam. Code § 85.022(a), (a–1).

A person found to have engaged in family violence and ordered to complete an accredited battering intervention and prevention program or counseling under section 85.022 of the Family Code shall file an affidavit with the court before the sixtieth day after the order was rendered stating that the person has begun the program or counseling or that a program or counseling is not available within a reasonable distance from the person's residence. Once the program or counseling is completed, the person must file an affidavit verifying completion by the earlier of the thirtieth day before the order expires or the thirtieth day before the first anniversary of the date the order was issued. The affidavit must be accompanied with a letter, notice, or certificate from the program or counselor verifying the person's completion of the program or counseling. A person who does not comply with these requirements may be fined up to $500 and held in contempt of court under section 21.002 of the Texas Government Code. The protective order must specifically advise the person of this reporting requirement and the possible punishments if the person fails to comply. Tex. Fam. Code § 85.024.

§ 17.19 Request by Respondent for Protective Order

A protective order that requires the first applicant to do or refrain from doing an act under Family Code section 85.022 shall include a finding that the first applicant has committed family violence and is likely to commit family violence in the future. Tex. Fam. Code § 85.001(c).

To apply for a protective order, a respondent to an application for a protective order must file a separate application. Tex. Fam. Code § 82.022; *State for Protection of Cockerham v. Cockerham*, 218 S.W.3d 298 (Tex. App.—Texarkana 2007, no pet.).

A court may not delay a hearing on an application for a protective order in an attempt to consolidate it with a hearing on a subsequently filed application for protective order. Tex. Fam. Code § 84.001(b).

A court may not render one protective order under section 85.022 that applies to both parties. If the respondent files an application for a protective order and there is a separate finding of family violence and that it is likely to occur again in the future, then two separate orders shall be issued that reflect the appropriate conditions for each party. *See* Tex. Fam. Code § 85.003.

§ 17.20 Copies of Orders

A protective order made under subtitle B of title 4 of the Family Code shall be delivered to the respondent as provided by rule 21a of the Texas Rules of Civil Procedure, served in the same manner as a writ of injunction, or served in open court at the close of the hearing. The court shall serve an order in open court to a respondent who is present at the hearing by giving the respondent a copy of the order. A certified copy of the signed order shall be given to the applicant at the same time. If the applicant is not in court at the conclusion of the hearing, the clerk of the court shall mail a certified copy of the order to the applicant no later than the third business day after the date the hearing is concluded. Tex. Fam. Code § 85.041(a), (b).

If the order has not been reduced to writing, the court shall give notice orally to a respondent who is present at the hearing of the part of the order that contains prohibitions under Family Code section 85.022 or any other part of the order that contains provisions necessary to prevent further family violence. The clerk of the court shall mail a copy of the order to the respondent and a certified copy to the applicant no later than the third business day after the date the hearing is concluded. Tex. Fam. Code § 85.041(c).

If the respondent is not present at the hearing and the order has been reduced to writing at the conclusion of the hearing, the clerk of the court shall immediately provide a certified copy of the order to the applicant and mail a copy to the respondent no later than the third business day after the date the hearing is concluded. Tex. Fam. Code § 85.041(d).

The court clerk shall send a copy of the protective order, whether the order is original or modified, along with the information provided by the applicant or the applicant's attorney that is required under section 411.042(b)(6) of the Texas Government Code, to the following not later than the next business day after the court issues the order: the chief of police of the municipality where the protected person resides, if the person resides in a municipality; the appropriate constable and the sheriff of the county where the person resides, if the person does not reside in a municipality; and the title IV-D agency, if the application for the protective order indicates that the applicant is receiving services

from the agency. Tex. Fam. Code § 85.042(a). The clerk may delay sending the order only if the clerk lacks information necessary to ensure service and enforcement. Tex. Fam. Code § 85.042(g).

If the respondent is a member of the state military forces or is on active-duty status in the U.S. Armed Forces and the applicant or the applicant's attorney provides to the court clerk the mailing address of the staff judge advocate or provost marshal, the clerk must also provide a copy of the order and information to the staff judge advocate at Joint Force Headquarters or the provost marshal of the military installation to which the respondent is assigned with the intent that the commanding officer will be notified, as applicable. Tex. Fam. Code § 85.042(a–1). If an original or modified protective order is vacated, the clerk shall so notify each individual or entity who received a copy of the original or modified order from the clerk. Tex. Fam. Code § 85.042(c).

The clerk may transmit the order and any related information electronically or in another manner that can be accessed by the recipient. Tex. Fam. Code § 85.042(f).

If the order prohibits a respondent from going to or near a child care facility or school, the clerk of the court shall send a copy of it to the facility or school. Tex. Fam. Code § 85.042(b).

Since the order must suspend a license to carry a handgun, the clerk of the court shall send a copy of the order to the appropriate division of the Department of Public Safety. On receipt of the order, the department shall record the license suspension in the department records, report the suspension to the local law enforcement agencies, and demand surrender of the suspended license from the license holder. Tex. Fam. Code § 85.042(e).

The applicant or the applicant's attorney shall provide the clerk of the court with the name and address of each law enforcement agency, child care facility, school, and other individual or entity to which the clerk is required to send a copy of the order, along with any other information required under section 411.042(b)(6) of the Texas Government Code. Tex. Fam. Code § 85.042(d).

§ 17.21 Duration of Protective Orders

In general, a protective order is effective for the period stated in the order, not to exceed two years, or, if no period is stated, until the second anniversary of the date the order was issued. Tex. Fam. Code § 85.025(a). However, the court may render a protective order that is effective for more than two years if the court finds that the subject of the order (1) committed an act constituting a felony offense involving family violence

against the applicant or a member of the applicant's family or household, regardless of whether the person has been charged with or convicted of the offense; (2) caused serious bodily injury to the applicant or a member of the applicant's family or household; or (3) was the subject of two or more previous protective orders rendered to protect the person on whose behalf the current order is sought and after a finding by the court that the subject of the order has committed family violence and is likely to commit family violence in the future. Tex. Fam. Code § 85.025(a–1).

If the subject of a protective order is confined or imprisoned on the date the order would expire or if the order would expire not later than the first anniversary of the date the person is released, the effective period is extended, and the order expires on the first anniversary of the date the person is released from confinement or imprisonment if the person was sentenced for more than five years or on the second anniversary of the date the person is released if the person was sentenced for five years or less. Tex. Fam. Code § 85.025(c).

A person who is the subject of a protective order may file a motion not earlier than the first anniversary of the date on which the order was rendered requesting the court to review the protective order and determine whether there is a continuing need for it. Tex. Fam. Code § 85.025(b). (This provision does not apply to a protective order issued under chapter 7A (recodified as subchapter A, chapter 7B, effective September 1, 2021) of the Texas Code of Criminal Procedure. Tex. Fam. Code § 85.025(b–3).) Following the filing of such a motion, a person who is the subject of an order issued under section 85.025(a–1) that is effective for longer than two years may file not more than one subsequent motion for review; that motion may be filed no earlier than the first anniversary of the date on which the court rendered an order on the previous motion. Tex. Fam. Code § 85.025(b–1). After a hearing on a motion under section 85.025(b) or (b–1), if the court does not make a finding that there is no continuing need for the order, the order stays in effect until it expires under section 85.025. Evidence of the movant's compliance with the order does not by itself support a finding that there is no continuing need for the order. If the court finds that there is no continuing need for the order, the court shall order that it expires on a date set by the court. Tex. Fam. Code § 85.025(b).

A person subject to a protective order does not have standing to file a motion to rescind a protective order issued on family violence grounds under chapter 85 of the Family Code and sexual assault grounds under article 7A of the Code of Criminal Procedure. *Molinar v. S.M.*, No. 08-15-00083-CV, 2017 WL 511888 (Tex. App.—El Paso Feb. 8, 2017, pet. denied).

§ 17.22 Duties of Law Enforcement Officers

Exclusions from Residence: On request by an applicant obtaining a final order that excludes the respondent from the respondent's residence, the court granting the final order shall render a written order to the sheriff, constable, or chief of police to provide a law enforcement officer from the department of the sheriff, constable, or chief of police to (1) accompany the applicant to the residence covered by the order; (2) inform the respondent that the court has ordered that the respondent be excluded from the residence; (3) protect the applicant while the applicant takes possession of the residence and the respondent takes possession of the respondent's necessary personal property; and (4) if the respondent refuses to vacate the residence, to remove the respondent from the residence and arrest the respondent for violating the court order. Tex. Fam. Code § 86.004. See section 17.6 above for temporary orders.

Awareness of Protective Orders: A law enforcement agency may enter a protective order in the agency's computer records of outstanding warrants as notice that the order has been issued and is currently in effect. On receipt of notification by a clerk of court that the court has vacated or dismissed an order, the law enforcement agency shall remove the order from those records. Tex. Fam. Code § 86.001(b).

To ensure that law enforcement officers responding to calls are aware of the existence and terms of protective orders from their jurisdiction as well as others, each law enforcement agency shall establish procedures to provide adequate information or access to information for officers about the name of each person protected by an order rendered in any Texas jurisdiction and of each person against whom the order is directed. Tex. Fam. Code §§ 86.001(a), 86.005.

Statewide Law Enforcement Information System: On receipt of a protective order from the clerk of the issuing court, a law enforcement agency shall immediately, but not later than the third business day after the date the order is received, enter the information required by Government Code section 411.042(b)(6) into the statewide law enforcement information system maintained by the Texas Department of Public Safety. Tex. Fam. Code § 86.0011.

Firearms Transfer Information: On receipt of a request for a law enforcement information system record check of a prospective transferee by a licensed firearms dealer under the Brady Handgun Violence Prevention Act, title 18, section 922, of the United States Code, the chief law enforcement officer shall determine whether the Department of Public Safety has in its law enforcement information system a record

indicating the existence of an active protective order directed to the prospective transferee. If so, the chief law enforcement officer shall immediately advise the dealer that the transfer is prohibited. Tex. Fam. Code § 86.002.

§ 17.23 Protective Order Registry

Subchapter F of chapter 72 of the Texas Government Code provides for the establishment by the Office of Court Administration ("the office") of a centralized Internet-based registry for protective order applications filed under chapter 82, and protective orders issued under chapters 83 and 85, of the Texas Family Code on or after September 1, 2020. The provisions also apply to such applications and orders under article 17.292 of the Texas Code of Criminal Procedure with respect to a person arrested for an offense involving family violence. Tex. Gov't Code §§ 72.152, 72.153.

The registry is to allow the public, free of charge, to electronically search and to receive publicly accessible information about each protective order issued in Texas (other than orders issued under chapter 83 of the Family Code (temporary ex parte orders) or article 17.292 of the Code of Criminal Procedure (magistrate's order for emergency protection)). The registry is to be searchable by the county of issuance, by the name of the subject of the order, and by the subject's birth year. The publicly accessible information is (1) the issuing court; (2) the case number; (3) the full name, county of residence, birth year, and race or ethnicity of the subject of the order; (4) the dates the order was issued and served; (5) the date the order was vacated, if applicable; and (6) the date the order expired or will expire. Tex. Gov't Code § 72.154.

Public access to the information, however, is to be available only if a protected person requests the office to grant the public the ability to access the information for the order protecting the person and the office approves the request. The protected person may thereafter request the office to remove the public's ability to access the information, and the office is to do so no later than the third business day after the request is received. Tex. Gov't Code § 72.158.

While the registry must contain a copy of each application filed and each protective order issued in Texas, only certain authorized users may have access to the non–publicly available information. *See* Tex. Gov't Code § 72.155.

Clerks are generally required to enter copies of applications within twenty-four hours after the time they are filed and to ensure that the information isn't accessible to the public. Tex. Gov't Code § 72.156. Within twenty-four hours after a court issues an orig-

inal or modified order or extends the duration of an order, the clerk is to enter a copy of the order (and, if applicable, a notation regarding any modification or extension) and the publicly accessible information. If an order is vacated or expired, the clerk is to modify the record of the order in the registry accordingly. Tex. Gov't Code § 72.157.

§ 17.24 Right to Terminate Lease Early

A tenant with an order protecting the tenant or an occupant from family violence may terminate a lease, vacate the premises, and avoid liability for future rents and other sums due for terminating before the end of the lease period. Tex. Prop. Code § 92.016(b).

The tenant must provide the landlord or agent a copy of one or more of the following: a temporary injunction issued under subchapter F, chapter 6, of the Family Code; a temporary ex parte order issued under chapter 83; a protective order issued under chapter 85; or an order of emergency protection issued under article 17.292 of the Code of Criminal Procedure. Alternatively, the tenant may provide a copy of documentation of the family violence from a licensed health-care services provider who examined the victim, a licensed mental health services provider who examined or evaluated the victim, or an advocate who assisted the victim. Tex. Prop. Code § 92.016(b–1).

The tenant must also furnish the landlord with written notice of termination of the lease on or before the thirtieth day before the lease terminates. Liability then ends on the date after (1) thirty days have passed since the notice of termination was provided to the landlord and (2) the tenant has vacated the property. Tex. Prop. Code § 92.016(c).

If the person who committed the family violence is a cotenant or an occupant of the leased property, unless the protective order is based on a temporary ex parte order issued under chapter 83 of the Texas Family Code, the tenant is not required to provide written notice to the landlord before terminating the lease. *See* Tex. Prop. Code § 92.016(c–1). An occupant is a person who has the landlord's consent to occupy a dwelling but has no obligation to pay the rent. Tex. Prop. Code § 92.016(a).

In general, the tenant's liability for delinquent, unpaid rent or other sums owed before termination is not affected, but the tenant is released from liability for delinquent, unpaid rent if the lease does not contain prescribed language notifying tenants of the right to terminate early in certain circumstances. The tenant may not waive this right. Tex. Prop. Code § 92.016(d), (f), (g).

A landlord who violates these provisions is liable to the tenant for actual damages, a civil penalty equal to a month's rent plus $500, and attorney's fees. Tex. Prop. Code § 92.016(e).

§ 17.25 Related Laws

Several other provisions of Texas law, described below, relate to the prevention of family violence.

The penalty for assault under Penal Code section 22.01(a) (intentionally, knowingly, or recklessly causing bodily injury to another) may be enhanced if the victim is a person whose relationship or association with the defendant is described by Family Code section 71.0021(b) (dating), 71.003 (family), or 71.005 (household). *See* Tex. Penal Code § 22.01(b)(2), (b–3), (f).

A person commits a third-degree felony (continuous violence against the family) if, during a period of twelve months or less, the person two or more times intentionally, knowingly, or recklessly causes bodily injury to a person or persons whose relationship to or association with the defendant is described by Family Code section 71.0021(b), 71.003, or 71.005. Tex. Penal Code § 25.11; *see* Tex. Penal Code § 22.01(a).

A person commits an offense if he sells, rents, leases, loans, or gives a handgun to any person, knowing that an active protective order is directed to the person to whom the handgun is to be delivered. Further, a person against whom an active protective order is directed commits an offense if he knowingly purchases, rents, leases, or receives as a loan or gift a handgun. Tex. Penal Code § 46.06(a)(5), (a)(6).

The Department of Public Safety shall collect information about the number and nature of protective orders and all other pertinent information about all persons on active protective orders. Tex. Gov't Code § 411.042(b)(6).

The spousal privilege not to be called as a witness for the state does not apply if the offense charged is a crime committed against the accused person's spouse, a minor child, or a member of the household of either spouse. Tex. Code Crim. Proc. art. 38.10.

The agency releasing a person arrested or held without warrant for prevention of family violence shall make a reasonable attempt to notify the victim of the imminent release. Tex. Code Crim. Proc. art. 17.29(b).

Texas Government Code section 411.180 (concerning notification of denial, revocation, or suspension of a license to carry a handgun and review of the same) does not apply to the suspension of a license under Family Code section 85.022 or Texas Code of Criminal Procedure article 17.292. Tex. Gov't Code § 411.180(i).

The Department of Public Safety shall suspend a license to carry a handgun if the license holder commits an act of family violence and is the subject of an active protective order rendered under Family Code title 4 or is arrested for an offense involving family violence and is the subject of an order for emergency protection issued under Texas Code of Criminal Procedure article 17.292; such a suspension is for the duration of, or the period specified by, the protective order or the order for emergency protection. *See* Tex. Gov't Code § 411.187(a), (c).

The Department of Public Safety shall issue a new driver's license number or personal identification certificate number to a person who shows a court order stating that the person has been the victim of domestic violence. With few exceptions, the department may not disclose the changed license or certificate number or the person's name or any former name. Tex. Transp. Code § 521.275.

A person who is determined to have committed family violence in the physical presence of, or in the same habitation or vehicle occupied by, a person younger than fifteen years of age, knowing that the young person was present or in the same habitation or vehicle, must be ordered to pay restitution for the cost of necessary rehabilitation of the young person, including medical, psychiatric, and psychological care and treatment. Tex. Code Crim. Proc. art. 42.0373.

The federal Violence Against Women Act provides federal criminal penalties for a person who travels in interstate or foreign commerce with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner and in the course of the travel commits or attempts to commit a crime of violence against that person. The federal law also covers people who commit the act of stalking or placing a person under surveillance with the intent to kill, injure, harass, or intimidate the person and, as a result, places the person in reasonable fear of death or injury or causes substantial emotional distress. If a person commits the crime of stalking in violation of a protective order, the punishment is imprisonment for not less than one year. *See* 18 U.S.C. §§ 2261, 2261A.

§ 17.26 Protective Orders from Other Jurisdictions

Judicial Enforcement: Texas has enacted the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act. *See* Tex. Fam. Code ch. 88. Under the Act, a Texas court shall enforce a protective order issued in another state, even if it includes terms that a Texas court could not have included in the order. The presentation of a protective order that is valid on its face establishes a prima facie case for the validity of the order. Texas enforcement remedies will apply to the enforcement of foreign protective orders. Tex. Fam. Code § 88.003(a), (e).

A foreign protective order is valid if it (1) names the protected individual and the respondent, (2) is currently in effect, (3) was rendered by a tribunal that had jurisdiction over the parties and the subject matter under the law of the issuing state, and (4) was rendered after the respondent was given reasonable notice and an opportunity to be heard consistent with the right to due process either before the order was issued or, in the case of an ex parte order, within a reasonable time after the order was rendered. It is an affirmative defense to an enforcement action that the order does not meet these requirements. Tex. Fam. Code § 88.003(d), (f).

Provisions of a mutual protective order will be enforced against the applicant only if the respondent filed a written pleading seeking a protective order in the issuing state and the tribunal made specific findings in favor of the respondent. Tex. Fam. Code § 88.003(g).

Nonjudicial Enforcement: A Texas law enforcement officer shall enforce a foreign protective order if he has probable cause to believe that a valid foreign order exists and that it has been violated. The officer has probable cause to believe the existence of a protective order if the protected individual presents a foreign protective order that identifies the protected individual and the respondent and, on its face, is currently in effect. A certified copy is not required. The order may be inscribed in a tangible medium or be stored in an electronic form that can be retrieved in a perceivable form. If a protected individual does not present the foreign protective order, the law enforcement officer may determine that a valid foreign protective order exists by relying on any relevant information. Tex. Fam. Code § 88.004(a)–(c).

If the law enforcement officer determines that the order cannot be enforced because the respondent was never served or notified of the order, the officer shall inform the respondent of the order, make a reasonable effort to serve the order on the respondent, and

then allow the respondent a reasonable opportunity to comply with the order. Tex. Fam. Code § 88.004(d).

Registration of Foreign Orders: An individual may register a foreign protective order by presenting a certified copy of the order to the Texas Department of Public Safety (DPS), requesting that the order be registered in the statewide law enforcement system maintained by the DPS, or to the sheriff, constable, or chief of police responsible for the registration of orders in the local computer records and in the statewide law enforcement system maintained by the DPS. The individual registering the foreign protective order shall file an affidavit made by the protected individual that to the best of the protected individual's knowledge the order is in effect. A fee may not be charged for registration of the order. Tex. Fam. Code § 88.005(a), (d), (f). Registration is not required for the enforcement of a valid foreign protective order. Tex. Fam. Code § 88.004(e).

Immunity: Civil and criminal immunity is granted to state and local governmental agencies, law enforcement officers, prosecuting attorneys, court clerks, and any state or local governmental officials acting in an official capacity for acts or omissions arising from the registration or enforcement of a foreign protective order or for the detention or arrest of a person alleged to have violated a foreign protective order if the act or omission was done in good faith. Tex. Fam. Code § 88.006.

§ 17.27 Self-Help Protective Order Kit

A self-help protective order kit for victims of domestic violence is available at **www.TexasLawHelp.org**. The kit was developed by a task force of experienced family law practitioners, judges, and prosecutors from across Texas appointed by the Supreme Court of Texas. The kit includes detailed instructions for filling out the necessary forms, having a temporary order signed by a judge, and requesting a hearing date for grant of the protective order. The kit contains the court forms, which are approved for use by the supreme court in a special order, and helpful information for victims on how to prepare for the hearing. The kit is available in English, Spanish, and Vietnamese.

Although the kit was designed to facilitate pro se action by victims of domestic violence, attorneys also find the forms and instructions useful.

§ 17.28 Useful Websites

The following websites contain information relating to the topic of this chapter:

Office of the Attorney General—general information about protective orders
https://www.texasattorneygeneral.gov/cvs/protective-orders

Office of the Attorney General—form for victim compensation
https://www.texasattorneygeneral.gov/cvs/crime-victim-forms-applications

Self-help protective order kit (§ 17.27)
www.TexasLawHelp.org

Chapter 18

Alternative Dispute Resolution and Informal Settlement

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Chapter 18

Alternative Dispute Resolution and Informal Settlement

I. Alternative Dispute Resolution

§ 18.1 Alternative Dispute Resolution Generally

Five different alternative dispute resolution (ADR) methods are described in subchapter B of chapter 154 of the Texas Civil Practice and Remedies Code: mediation, arbitration, summary jury trial, mini-trial, and moderated settlement conference.

Mediation: Mediation is a process in which a neutral third party acts as a facilitator to assist in resolving a dispute between two or more parties. It is an approach to conflict resolution in which the parties generally communicate directly. The role of the mediator is to facilitate communication between the parties, help them focus on the real issues of the dispute, and generate options for settlement. A mediator may not impose the mediator's judgment on the issues for that of the parties. The goal of mediation is for the parties themselves to arrive at a mutually acceptable resolution of the dispute. As with all ADR procedures, the mediation process is flexible; variables affecting the process include the style of the mediator and the communication mode of the parties. See Tex. Civ. Prac. & Rem. Code § 154.023 for a definition of mediation.

Arbitration: In the arbitration process, the arbitrator listens to a typically adversarial presentation of all sides of the case and then renders a decision (usually called an "award"). Arbitration awards may be binding on the parties if they have so agreed in advance. Arbitrations are usually conducted by either a sole arbitrator or a panel of three arbitrators. See Tex. Civ. Prac. & Rem. Code § 154.027 for a definition of arbitration.

Summary Jury Trial: During the summary jury trial, the attorneys present an abbreviated version of their evidence to an advisory jury selected from the regular jury pool.

The jury, after deliberation, returns a nonbinding, advisory verdict. The parties and their attorneys then poll and question the jurors. The information gained from this process is to be used as a basis for further settlement negotiations. The summary jury trial is used if the parties believe that a preview of what a jury may do will help them evaluate the case. See Tex. Civ. Prac. & Rem. Code § 154.026 for a definition of a summary jury trial.

Mini-Trial: The mini-trial is an ADR process in which the attorneys and parties meet with a neutral third party and each side presents its best case. Negotiation by the parties, usually without the attorneys present, follows; if this negotiation is unsuccessful, the neutral party provides an advisory opinion about the merits of the case. This opinion is nonbinding unless the parties agree that it is binding and enter into a written settlement agreement. A primary basis for settlement is often the parties' desire to resolve the dispute without protracted litigation. See Tex. Civ. Prac. & Rem. Code § 154.024 for a definition of a mini-trial.

Moderated Settlement Conference: The moderated settlement conference uses a panel of neutral, experienced attorneys who listen to a presentation of factual and legal arguments by attorneys for each party. The panel then questions the attorneys and the clients, who are present throughout the entire process. After deliberation, the panel renders a confidential advisory evaluation of the strengths and weaknesses of the case and often provides a dollar range or percentage for settlement. The evaluation is not binding on the parties and is used as a basis for further settlement negotiations. See Tex. Civ. Prac. & Rem. Code § 154.025 for a definition of a moderated settlement conference.

All five ADR methods are available for use in all civil cases, including family law cases under the Civil Practice and Remedies Code. However, only mediation and arbitration are mentioned in the Family Code. Accordingly, this manual includes forms only for mediation and arbitration.

Collaborative law is another method of ADR; it is discussed in chapter 15 of this manual.

§ 18.2 Notification and Objection

The court may, on its own motion or that of a party, refer a pending dispute for resolution by one of various alternative dispute resolution procedures. The court shall confer with the parties in determining the most appropriate ADR procedure. Tex. Civ. Prac. & Rem. Code § 154.021.

If the court determines that a pending dispute is appropriate for referral, the court shall notify the parties of its determination. Any party may file a written objection to the referral within ten days of receiving the notice. If the court finds that there is a reasonable basis for the objection, the court may not refer the dispute. Tex. Civ. Prac. & Rem. Code § 154.022.

At any time before the final mediation order a party may file a written objection to the referral of a suit to mediation on the basis that family violence has been committed against the objecting party by the other party (in a suit for dissolution of marriage) or by another party against the objecting party or a child who is the subject of the suit (in a suit affecting the parent-child relationship). After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party (dissolution suit) or of a party (suit affecting the parent-child relationship), a hearing is held, and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order that appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. Tex. Fam. Code §§ 6.602(d), 153.0071(f). These provisions do not apply to suits filed under Family Code chapter 262. Tex. Fam. Code § 153.0071(f).

§ 18.3 Arbitration and Mediation Agreements

Family Code sections 6.601, 6.602, and 153.0071 set out certain procedures concerning alternative dispute resolution that apply to all cases under title 1 and title 5.

Arbitration: On written agreement of the parties, the court may refer a case to arbitration. The agreement must state whether the arbitration is binding or nonbinding. Tex. Fam. Code §§ 6.601(a), 153.0071(a).

If the parties to a suit for dissolution of a marriage agree to binding arbitration, the court shall render an order reflecting the arbitrator's award. Tex. Fam. Code § 6.601(b); *Cayan v. Cayan*, 38 S.W.3d 161, 165 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). As in any contractual provision, an agreement to arbitrate can be waived, either expressly or impliedly. *In re Marriage of Brown & Chavez*, No. 07-13-00025-CV, 2013 WL 6044454, at *3–4 (Tex. App.—Amarillo Nov. 7, 2013, no pet.) (mem. op.).

If the parties to a suit affecting the parent-child relationship agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a nonjury hearing that the agreement is not in the child's best interest. The burden of proof is on the party seeking to avoid rendition of the order based on the arbitrator's award. Tex. Fam. Code § 153.0071(b). If the court determines that the arbitrator's award is not in the child's best interest, it must vacate the award and refer the matter back to binding arbitration pursuant to the parties' agreement. *Stieren v. McBroom*, 103 S.W.3d 602, 605–07 (Tex. App.—San Antonio 2003, pet. denied). By failing to file a motion to vacate the arbitrator's award and failing to present evidence concerning the child's best interest before rendition, a party waives the right to a best-interest hearing. *In re T.B.H.-H.*, 188 S.W.3d 312 (Tex. App.—Waco 2006, no pet.). Absent fraud, misconduct, or gross mistake, the express waiver by parties to an arbitration agreement of a right to judicial review is permissible and effective. *In re C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.—San Antonio 2004, pet. denied). Arbitration of a suit affecting the parent-child relationship is governed by both Tex. Fam. Code § 153.0071 and the Texas General Arbitration Act (Tex. Civ. Prac. & Rem. Code ch. 171). When the two statutes conflict, the provisions of the Family Code control. *Kilroy v. Kilroy*, 137 S.W.3d 780, 786 (Tex. App.—Houston [1st Dist.] 2004, no pet.). However, the court cannot compel arbitration over child-related claims since the court has continuing and exclusive jurisdiction over matters provided for under title 5 of the Texas Family Code. *In re Ron*, 582 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding [mand. denied]).

The Texas Arbitration Act does not preclude an agreement for judicial review of an arbitration award for reversible error, and the Federal Arbitration Act does not preempt enforcement of such an agreement. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

The failure to identify an arbitrator, or even specify a method for choosing one, does not render an arbitration agreement unenforceably incomplete. *Goetz v. Goetz*, 130 S.W.3d 359, 362 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). If an agreement to arbitrate does not specify a method of appointment, or if the agreed method fails or cannot be followed, the court, on application of a party stating the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators, shall appoint one or more qualified arbitrators. Tex. Civ. Prac. & Rem. Code § 171.041(b)(1), (b)(2). If the parties agree to arbitration, there is no necessity to petition the trial court and seek a referral before proceeding directly to arbitration. *Kilroy*, 137 S.W.3d at 788–89.

If an arbitrator exceeds its authority, the excessive portion of the award should be severed and canceled and the correct portion should be retained. *In re S.M.H.*, 523 S.W.3d 783 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Under the Texas Arbitration Act, a trial court shall vacate an award if the rights of a party were prejudiced by the evident partiality of an appointed arbitrator. *See, e.g., In re Marriage of Piske*, 578 S.W.3d 624 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

If a party seeks to avoid arbitration and asserts that the contract containing the agreement to arbitrate is not valid or enforceable, the court must try the issue promptly and may order arbitration only if the court determines that the contract is valid and enforceable against the party seeking to avoid arbitration. Even if the contract is found valid and enforceable, the court may stay arbitration or refuse to compel arbitration on any other ground. These provisions do not apply to a court order, a mediated settlement agreement (MSA), a collaborative law settlement agreement, a written settlement agreement reached at an informal settlement conference, an agreed parenting plan, or any other agreement between the parties that is approved by a court. Tex. Fam. Code §§ 6.6015, 153.00715.

Mediation: On written agreement of the parties or on the court's own motion, the court may refer a case to mediation. Tex. Fam. Code §§ 6.602(a), 153.0071(c). However, a court referral to mediation is not required before an MSA is binding on the parties. *Cojocar v. Cojocar*, No. 03-14-00422-CV, 2016 WL 3390893, at *3–4 (Tex. App.—Austin June 16, 2016, no pet.) (mem. op.). Likewise, a suit for divorce need not be pending at the time the parties sign an MSA. *Highsmith v. Highsmith*, 587 S.W.3d 771, 776–77 (Tex. 2019).

An MSA is binding on the parties if the agreement provides, in a prominently displayed statement that is in bold-faced type or in capital letters or underlined, that the agreement is not subject to revocation; if it is signed by each party to the agreement; and if it is signed by the party's attorney, if any, who is present when the agreement is signed. Tex. Fam. Code §§ 6.602(b), 153.0071(d). Including "subject to the court's approval" language in an MSA does not make the agreement any less binding if the MSA satisfies all the requirements of the statute. *In re C.C.E.*, 530 S.W.3d 314 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

If an MSA meets these requirements, a party is entitled to judgment on the agreement notwithstanding rule 11 of the Texas Rules of Civil Procedure or another rule of law. Tex. Fam. Code §§ 6.602(c), 153.0071(e). A trial court may not deny a motion to enter

judgment on a properly executed MSA solely on the grounds that it is not in a child's best interests. Stated another way, the trial court is not authorized to conduct a best-interest inquiry. *In re Lee*, 411 S.W.3d 445 (Tex. 2013) (orig. proceeding). However, a court may decline to enter a judgment on an MSA in a suit affecting the parent-child relationship if the court finds that the agreement is not in the child's best interest and (1) that a party to the agreement was a victim of family violence and that circumstance impaired the party's ability to make decisions or (2) that the agreement would permit a person who is subject to registration under chapter 62 of the Texas Code of Criminal Procedure, on the basis of an offense committed by the person when the person was seventeen years of age or older, or who otherwise has a history or pattern of past or present physical or sexual abuse directed against any person to reside in the same household as the child or otherwise have unsupervised access to the child. Tex. Fam. Code § 153.0071(e–1). The parties may not agree to set aside a statutorily compliant MSA. *In re Minix*, 543 S.W.3d 446, 452 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding [mand. denied]). Note, however, that nothing in section 153.0071 of the Texas Family Code requires the court to render judgment; merely, it provides that the parties are entitled to one. *Williams v. Finn*, No. 01-17-00476-CV, 2018 WL 5071196, at *4 (Tex. App.—Houston [1st Dist.] Oct. 18, 2018, pet. denied) (mem. op.).

See section 18.6 below for a discussion of issues regarding enforcement of MSAs.

Family Code section 153.0071(e) does not apply to suits for termination of the parent-child relationship under chapter 161 of the Code. The court can decline to render judgment on an MSA unless there is a clear and convincing showing that termination is in the child's best interests. *In re Morris*, 498 S.W.3d 624, 634 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding [mand. denied]).

If the MSA does not satisfy Family Code criteria for entry of a judgment and is revoked by a party, it may still be enforceable as a contract. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995).

Sometimes parties enter into an MSA containing a provision that any dispute regarding, for example, the drafting of the decree will be decided by binding arbitration. In the absence of a defense to the arbitration agreement, the trial court must compel arbitration of claims falling within the scope of the agreement to arbitrate. *In re Provine*, 312 S.W.3d 824 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *see also In re L.T.H.*, 502 S.W.3d 338, 347 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Note: Tex. Comm. on Prof'l Ethics, Op. 583 (2008) states, "Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary documents to effect an agreement resulting from the mediation. Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effect the terms of an agreed divorce."

The mediator can decide issues regarding the intent of the parties and the mediation documents if the MSA contains a provision that the mediator can decide these issues. *In re Marriage of Allen*, 343 S.W.3d 513 (Tex. App.—Texarkana 2011, no pet.).

§ 18.4 Confidentiality of Communications in ADR Proceedings

In general, any communication relating to the subject matter of the referred dispute made by a participant in the alternative dispute resolution procedure, whether before or after formal judicial proceedings are instituted, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding. Any record made at the ADR procedure is confidential; neither the participants nor the third-party facilitator may be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute. Tex. Civ. Prac. & Rem. Code § 154.073(a), (b).

Unless expressly authorized by the disclosing party, the third-party facilitator may not disclose to either party information given in confidence by the other and must at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. All matters, including the conduct and demeanor of the parties and their attorneys during the settlement process, are confidential and may never be disclosed to anyone, including the court, unless the parties agree otherwise. Tex. Civ. Prac. & Rem. Code § 154.053(b), (c).

An oral communication or written material used in or made a part of an ADR procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure. Tex. Civ. Prac. & Rem. Code § 154.073(c).

These provisions for confidentiality apply equally to the work of a parenting coordinator and to the parties and any other person who participates in the parenting coordination. Tex. Fam. Code § 153.0071(g).

Exceptions to Confidentiality: Despite the requirements for confidentiality discussed above, in certain instances applicable law may require disclosure of information revealed in the mediation process. For example, a mediator may be required to disclose child abuse or neglect to the proper authorities. A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report. Tex. Fam. Code § 261.101(a). Professionals are subject to more specific requirements for reporting child abuse or neglect. *See* Tex. Fam. Code § 261.101(b). Reporting may also be required regarding an adult who was a victim of abuse or neglect as a child. *See* Tex. Fam. Code § 261.101(b–1). The requirement to report child abuse or neglect applies without exception to an individual, including an attorney, whose personal communications may otherwise be privileged. Tex. Fam. Code § 261.101(c). Knowing failure to make a report as required by section 261.101(a) or (b) constitutes a class A misdemeanor or state jail felony. Tex. Fam. Code § 261.109. The confidentiality provisions for parenting coordination do not affect a person's duty to report abuse or neglect under Code section 261.101. Tex. Fam. Code § 153.0071(g).

Disclosure of mediation communications was permitted when one of the parties alleged that a new and independent tort arose during the course of a mediation, and the tort encompassed a duty to disclose (fiduciary relationship). *Avary v. Bank of America, N.A.*, 72 S.W.3d 779, 800 (Tex. App.—Dallas 2002, pet. denied). A party may bring suit for fraudulent inducement to enter into a mediated settlement agreement, but section 154.073 of the Civil Practice and Remedies Code prohibits the use of any statements made during the mediation. *Vick v. Waits*, No. 05-00-01122-CV, 2002 WL 1163842 (Tex. App.—Dallas June 4, 2002, pet. denied) (not designated for publication). Whether a party attended a mediation and whether he had the mediator's permission to leave do not concern the subject matter of the underlying suit, and the conduct is not confidential. *In re Daley*, 29 S.W.3d 915 (Tex. App.—Beaumont 2000, orig. proceeding). A party can waive mediation confidentiality under sections 154.053 and 154.073 of the Civil Practice and Remedies Code through offensive use of the statutory confidentiality provisions. See *Alford v. Bryant*, 137 S.W.3d 916 (Tex. App.—Dallas 2004, pet. denied), in which a client sued her lawyer for malpractice committed during mediation. The lawyer sought to depose the mediator; the client objected, citing sections 154.053 and 154.073. The court held that the client had waived the protection of the two statutes when she brought suit.

The confidentiality provisions of section 154.073 of the Civil Practice and Remedies Code do not affect the duty to report abuse or neglect under subchapter B of Family

Code chapter 261 or abuse, exploitation, or neglect under subchapter C of Human Resources Code chapter 48. *See* Tex. Civ. Prac. & Rem. Code § 154.073(f). Each participant, including the impartial third party, to an ADR procedure is subject to the requirements of subchapter B of Family Code chapter 261 and to subchapter C of Human Resources Code chapter 48. Tex. Civ. Prac. & Rem. Code § 154.053(d).

COMMENT: If confidential information is disclosed during a mediation that is required to be reported, the mediator should advise the parties that disclosure is required and will be made.

Disclosures regarding the valuation, characterization, or existence of assets made during the mediation process remain confidential and cannot be used to set aside the MSA. *See Triesch v. Triesch*, No. 03-15-00102-CV, 2016 WL 1039035, at *6 (Tex. App.—Austin Mar. 8, 2016, no pet.) (mem. op.).

COMMENT: Because a disclosure regarding the value, character, or existence of an asset made during mediation remains confidential, it is good practice to place those disclosures in the actual MSA.

§ 18.5 Selection and Qualifications of Impartial Third Party

When a dispute is referred, the court may appoint one or more properly qualified impartial third parties to facilitate the procedure. Tex. Civ. Prac. & Rem. Code § 154.051. To be qualified for appointment as an impartial third party, a person must have completed at least forty hours of prescribed training in dispute resolution techniques. Appointment to a parent-child case requires the basic forty hours of training plus an additional twenty-four hours of training in family dynamics, child development, and family law, including a minimum of four hours of family violence dynamics training developed in consultation with a statewide family violence advocacy organization. The court may appoint a person who does not have the prescribed training if the appointment is based on legal or other professional training or experience in particular dispute resolution processes. Tex. Civ. Prac. & Rem. Code § 154.052. An amicus attorney is not a neutral person and cannot act as a mediator. *In re E.B.*, No. 12-17-00214-CV, 2017 WL 4675109, at *4 (Tex. App.—Tyler Oct. 18, 2017, orig. proceeding [mand. denied]) (mem. op.).

The court may set a reasonable fee for the services of an impartial third party. Unless the parties agree to a method of payment, the court shall tax the fee as other costs of suit. Tex. Civ. Prac. & Rem. Code § 154.054.

§ 18.6 Enforcement of Mediated Settlement Agreement

A final judgment founded on a settlement agreement must be in strict compliance with the agreement. *In re Marriage of Ames*, 860 S.W.2d 590, 593 (Tex. App.—Amarillo 1993, no writ).

Because a mediated settlement agreement (MSA) is a contract, courts look to general contract-interpretation principles to determine its meaning. *Loya v. Loya*, 526 S.W.3d 448, 451 (Tex. 2017). Specifically, courts give terms their plain, ordinary, and generally accepted meanings unless the instrument shows that the parties used them in a technical or different sense. *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). In *Loya*, the MSA stated that "[a]ll future income of a party and/or from any property herein awarded to a party is partitioned to the person to whom the property is awarded." The wife contended that part of a $4.5 million bonus the husband received nine months after the MSA was signed was undivided community property. The supreme court held that the character of the funds was not relevant, since it was undisputed that the bonus was paid after the MSA was signed; it therefore belonged to the husband. The plain wording of the MSA trumped all other arguments. *Loya*, 526 S.W.3d at 452.

The court may not provide terms, provisions, or essential details not previously agreed to by the parties. *Matthews v. Looney*, 123 S.W.2d 871, 872 (Tex. 1939). However, terms necessary to effectuate and implement the parties' agreement do not affect the agreed substantive division of property and may be left to future articulation between the parties or to future consideration by the trial court. *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.—Dallas 2006, no pet.); *McLendon v. McLendon*, 847 S.W.2d 601, 606 (Tex. App.—Dallas 1992, writ denied); *see also In re Lee*, 411 S.W.3d 445, 458 n.17 (Tex. 2013) (to extent there is no dispute about parties' intent, trial court has discretion to provide clarification of any other provision of settlement agreement).

COMMENT: The foregoing doctrine has not yet been applied to agreements in suits affecting the parent-child relationship.

Even if an error exists in a mediated settlement agreement, a clarification order is not appropriate if the change would be substantive rather than clerical. *See Weido v. Weido*, No. 01-15-00755-CV, 2016 WL 1355764, at *4 (Tex. App.—Houston [1st Dist.] Apr. 5, 2016, no pet.) (mem. op.).

Ambiguity in an MSA is not cause to set aside the agreement. *See Milner v. Milner*, 361 S.W.3d 615, 623 (Tex. 2011); *In re Lauriette*, No. 05-15-00518, 2015 WL 4967233, at *3–4 (Tex. App.—Dallas Aug. 20, 2015, orig. proceeding [mand. denied]) (mem. op.). If the MSA is clear and unambiguous, the court may not rewrite or add to that agreement. *Jonjak v. Griffith*, No. 03-18-00118-CV, 2019 WL 1576157 (Tex. App.—Austin Apr. 12, 2019, no pet. h.) (mem. op.). If the MSA provides that the parties are to return to the mediator for arbitration of a dispute regarding drafting, interpretation, or intent, only the mediator, not the trial court or the court of appeals, has the authority to resolve the fact dispute. *See Milner*, 361 S.W.3d at 622 (divorce); *see also In re L.T.H.*, 502 S.W.3d 338, 347 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (suit affecting parent-child relationship).

One party cannot unilaterally repudiate the agreement. *In re Marriage of Banks*, 887 S.W.2d 160, 163 (Tex. App.—Texarkana 1994, no writ).

If a mediated settlement agreement contains a provision that is impossible to perform, unless there is a contingency provision, the agreement will be unenforceable. The agreement in a 2016 case contained a provision requiring that certain real property would be refinanced so that the community interest of a spouse would be bought out. The agreement unambiguously provided that the inability to refinance would render the agreement of "no further force and effect." The court was without authority to partially enforce or modify the agreement. *Vasquez v. Vasquez*, No. 13-15-00306-CV, 2016 WL 6804462 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.) (mem. op.).

The Supreme Court of Texas has held that a series of letters constituted an agreement under rule 11 of the Texas Rules of Civil Procedure. Although a rule 11 agreement must be filed, there is no requirement about when the filing must take place. After proper notice and hearing, the court can enforce an order complying with rule 11 even though one side no longer consents to the settlement. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995).

The foregoing cases, however, must be read in conjunction with sections 6.602 and 153.0071 of the Family Code, which are discussed in section 18.3 above. An MSA that meets the statutory requirements of section 6.602(b) or section 153.0071(d) is binding on the parties, and a party is entitled to judgment on the agreement notwithstanding rule 11 of the Texas Rules of Civil Procedure or another rule of law unless, in a title 5 case, the court makes certain findings. Tex. Fam. Code §§ 6.602(c), 153.0071(e), (e–1). If the statutory requirements of section 6.602 of the Family Code are met, an agreement is binding and can be enforced even in the absence of a judgment incorporating it. *Spiegel*

v. KLRU Endowment Fund, 228 S.W.3d 237, 242 (Tex. App.—Austin 2007, pet. denied) (wife died after MSA but before entry of decree). An MSA can be set aside only if the opposing party establishes that the agreement was illegal or was procured by fraud, duress, coercion, or other dishonest means. *Spiegel*, 228 S.W.3d at 242; *see also Mueller v. Mueller*, No. 01-11-00247-CV, 2012 WL 682285, at *3 (Tex. App.—Houston [1st Dist.] Mar. 1, 2012, pet. denied) (mem. op.). When the Texas legislature enacted section 6.602 of the Family Code, it deliberately created a procedural shortcut for enforcement of MSAs in divorce cases. *Cayan v. Cayan*, 38 S.W.3d 161, 166 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). An agreement in which the stipulation of irrevocability did not meet the specific formal requirements of section 153.0071(d) could be revoked before the rendition of judgment. *Spinks v. Spinks*, 939 S.W.2d 229, 230 (Tex. App.—Houston [1st Dist.] 1997, no writ) (stipulation of irrevocability contained in separate paragraph but not underlined).

Not all MSAs can be enforced even though they comply with sections 6.602 or 153.0071 of the Family Code. A court cannot enforce a section 153.0071 agreement if it contains an illegal provision. *See In re Kasschau*, 11 S.W.3d 305, 311–13 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). If the parties to an MSA have represented to one another that they have disclosed the marital property known to them, there is a duty to disclose all information about substantial assets. Without a full disclosure, the agreement will not be enforced. *Boyd v. Boyd*, 67 S.W.3d 398, 404 (Tex. App.—Fort Worth 2002, no pet.). When one voluntarily discloses information, there is a duty to disclose the whole truth rather than make a partial disclosure that conveys a false impression. *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 670 (Tex. App.—Fort Worth 1998, pet. denied). The *Boyd* court held that construing section 6.602 of the Texas Family Code "to mean that a settlement agreement that complies with section 6.602(b) must be enforced no matter what the circumstances could require enforcement of an agreement that was illegal or that was procured by fraud, duress, coercion or other dishonest means. We do not believe that the legislature intended such an absurd result in enacting section 6.602." *See Boyd*, 67 S.W.3d at 403. *In re Calderon*, 96 S.W.3d 711 (Tex. App.—Tyler 2003, orig. proceeding [mand. denied]), involved a situation in which an MSA contained a provision requiring that venue remain in Smith County for three years from the date of the entry of the order. The court held that the provisions of an MSA that restricts the right to mandatory transfer in the event of a future controversy could not be enforced. *In re Calderon*, 96 S.W.3d at 718–19. *See also In re Lovell-Osburn*, 448 S.W.3d 616, 621 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding). The trial court has the authority not to enforce an MSA that is illegal or violates public policy. *See Garcia-Udall v. Udall*, 141 S.W.3d 323 (Tex. App.—Dal-

las 2004, no pet.). Moreover, in a parent-child relationship suit, the trial court may decline to enter a judgment on an MSA if it finds that the agreement is not in the child's best interest and (1) that a party to the agreement was a victim of family violence and that circumstance impaired the party's ability to make decisions or (2) that the agreement would permit a person who is subject to registration under chapter 62 of the Texas Code of Criminal Procedure, on the basis of an offense committed by the person when the person was seventeen years of age or older, or who otherwise has a history or pattern of past or present physical or sexual abuse directed against any person to reside in the same household as the child or otherwise have unsupervised access to the child. Tex. Fam. Code § 153.0071(e–1).

COMMENT: Sanctions may be imposed on a party who repudiates an MSA without grounds or justification. *See Hall v. Hall*, No. 12-03-00417-CV, 2005 WL 1000619 (Tex. App.—Tyler Apr. 29, 2005, no pet.) (mem. op.). In *Clements v. Clements*, the court of appeals upheld the trial court, which awarded attorney's fees as sanctions against a party for delaying the signing of a decree even though the MSA provided that each party pay his or her attorney's fees. The court distinguished the provision regarding attorney's fees in the property division and the later effort to frustrate the signing of the decree. *Clements v. Clements*, No. 13-13-00560-CV, 2015 WL 3523028 (Tex. App.—Corpus Christi–Edinburg June 4, 2015, no pet.) (mem. op.).

The enforcement of an otherwise irrevocable MSA may be defeated by quasi-estoppel. In *Brooks v. Brooks*, 257 S.W.3d 418 (Tex. App.—Fort Worth 2008, pet. denied), the divorcing parties entered into an MSA in accordance with section 6.602 of the Texas Family Code. The MSA was filed with the court. Later the parties agreed to remediate the issues and to proceed to trial if the second mediation failed. The second mediation did, indeed, fail. At trial, no mention was made of the original MSA by either party, and both parties submitted to the trial court proposed property divisions that differed from that of the MSA. The court divided the property but did not follow the original MSA. The husband filed a motion for new trial, insisting that the trial court should have divided the community estate according to the provisions of the original MSA because it was irrevocable under section 6.602 of the Family Code. The court of appeals upheld the trial court, holding that the doctrine of quasi-estoppel can be invoked to preclude "a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." *Brooks*, 257 S.W.3d at 423. Compare *Brooks* with *In re Minix*, 543 S.W.3d 446, 452 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding [mand. denied]) (parties may not agree to set aside statutorily compliant MSA).

§ 18.7 Court Appointment of Mediator

Certain rules concerning the appointment of mediators apply to courts in counties with a population of 25,000 or more. *See* Tex. Gov't Code § 37.001.

The court must establish and maintain a list of all persons who are registered with the court to serve as a mediator. Multiple lists categorized by the type of case and the person's qualifications are permitted. Tex. Gov't Code § 37.003(a), (b).

In each case in which the appointment of a mediator is necessary because the parties are unable to agree on a mediator, the court must use a rotation system and appoint the person whose name appears first on the list. Tex. Gov't Code § 37.004(b). A person on the list whose name does not appear first, or a person who meets the requirements to serve but is not on the list, may be appointed on a finding of good cause if the person's appointment is required on a complex matter because he has relevant specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter of the case; has relevant prior involvement with the parties or the case; or is in a relevant geographic location. Tex. Gov't Code § 37.004(d). If an initial declaration of a state of disaster for the area is made within thirty days before the appointment, the court may appoint a person on the list whose name does not appear first or a person who meets requirements to serve but is not on the list. Tex. Gov't Code § 37.004(d–1), (g). A person who is not appointed in the order in which his name appears on the applicable list stays next in line, and a person who has been appointed goes to the end of the list. Tex. Gov't Code § 37.004(e), (f).

These provisions do not apply to a mediation conducted by an alternative dispute resolution system established under Civil Practice and Remedies Code chapter 152 or to a mediator appointed under a domestic relations office established under Family Code chapter 203, providing services without expecting or receiving compensation, or providing services as a volunteer of a nonprofit organization that provides pro bono legal services to the indigent. Tex. Gov't Code § 37.002.

The lists must be posted annually at the courthouse and on the court's website. Tex. Gov't Code § 37.005.

[Sections 18.8 through 18.10 are reserved for expansion.]

II. Informal Settlement

§ 18.11 Informal Settlement Conference

The parties to a suit for divorce, for annulment, or to declare a marriage void may agree to one or more informal settlement conferences. They may agree that the conferences may be conducted without or without the presence of their attorneys, if any. Tex. Fam. Code § 6.604(a).

§ 18.12 Informal Settlement Agreement

A written settlement agreement reached at an informal settlement conference is binding on the parties if the agreement provides, in a prominently displayed statement that is in bold-faced type, in capital letters, or underlined, that the agreement is not subject to revocation; if it is signed by each party to the agreement; and if it is signed by the party's attorney, if any, who is present when the agreement is signed. Tex. Fam. Code § 6.604(b).

If a written settlement agreement meets these requirements, a party is entitled to judgment on the agreement notwithstanding rule 11 of the Texas Rules of Civil Procedure or another rule of law. Tex. Fam. Code § 6.604(c).

If the court finds that the terms of the agreement are just and right, those terms are binding on the court. If the court approves the agreement, the court may set the agreement forth in full in the final decree or incorporate it by reference. When a trial court renders judgment and signs a decree based on the terms of a written informal settlement agreement and does not issue any findings of fact or conclusions of law, it is implied that the trial court found that the agreement was just and right, which satisfies the statute. *Comerio v. Comerio*, No. 04-13-00493-CV, 2014 WL 2547607, at *2 (Tex. App.—San Antonio June 4, 2014, no pet.) (mem. op.). If the court finds that the terms of the agreement are not just and right, the court may request the parties to submit a revised agreement or set the case for a contested hearing. Tex. Fam. Code § 6.604(d), (e).

§ 18.13 Not for Suits Affecting Parent-Child Relationship

No provision analogous to section 6.604 of the Family Code, discussed above, has been enacted to apply to proceedings under title 5 of the Code.

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Chapter 19

Trial Proceedings

§ 19.1 Applicable Rules

In connection with this chapter on trial proceedings, the family law practitioner should consult not only the Texas Rules of Civil Procedure and the Texas Rules of Evidence but also the local rules of the county of practice. Often the local rules are stricter than the Texas Rules of Civil Procedure or the Texas Rules of Evidence. The material that follows is applicable to a hearing on temporary orders as well as a final trial.

§ 19.2 Pretrial Conference

The court may order the parties and attorneys to attend a conference to consider matters, including motions and pleas, necessity of amending pleadings, setting of discovery schedules, requirement of the written statement of the parties' contentions, stipulations of fact, identification of legal matters to be ruled on, exchange of lists of fact witnesses and expert witnesses, consideration of the jury charge and questions, marking and exchanging of exhibits, stipulations about admissibility or objections, and reference of any issue to a master or auditor. Tex. R. Civ. P. 166. Proper notice of the pretrial conference must be given. *Vega v. Vega*, No. 09-17-00468-CV, 2019 WL 3949463, at *4 (Tex. App.—Beaumont Aug. 22, 2019, no pet. h.) (mem. op.) (court erred in striking pleadings when counsel filed counterpetition listing different address than one trial court used to mail scheduling letter, pleading did not list fax number, and court did not attempt to provide notice to counsel by using e-file system).

§ 19.3 Preferential Setting

A case may be preferentially set if a motion is filed by a party, the amicus attorney, or the child's attorney ad litem. The court may give precedence to that hearing over other civil cases if the delay created by ordinary scheduling practices will unreasonably affect the best interests of the child. Tex. Fam. Code § 105.004.

§ 19.4 Continuance

Any case may be postponed or continued by agreement, with approval of the court. *See* Tex. R. Civ. P. 330(c)–(d). Motions for continuance are controlled by rules 251–254 of the Texas Rules of Civil Procedure and by any local rules that may apply.

Motions for continuance shall not be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law. Tex. R. Civ. P. 251.

Motions for continuance generally must be in writing, state the specific facts supporting the motion, and be verified or supported by an affidavit. *In re C.F.*, 565 S.W.3d 832, 844 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (citing *In re Marriage of Harrison*, 557 S.W.3d 99, 117 (Tex. App.—Houston [14th Dist.] 2018, pet. denied)). When no written motion is filed it is presumed the court did not abuse its discretion in denying a motion for continuance, but the presumption may be overcome. *In re L.N.C.*, 573 S.W.3d 309, 320–21 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.) (father bench-warranted to trial but did not appear on day of trial, and his counsel had not been given explanation for his nonappearance).

Although the rule provides that an affidavit is to be used to support sufficient cause, case law has interpreted the rule to allow either a verification or an affidavit. *See Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *Hawthorne v. Guenther*, 917 S.W.2d 924, 929 (Tex. App.—Beaumont 1996, writ denied). An unsworn declaration may be used in lieu of a verification or affidavit. Tex. Civ. Prac. & Rem. Code § 132.001. Such a verification must be based on personal knowledge, not on knowledge and belief. *Hawthorne*, 917 S.W.2d at 930. A verification that is not notarized is insufficient to support a motion for continuance. *See Hardwick v. Hardwick*, No. 02-15-00325-CV, 2016 WL 5442772 (Tex. App.—Fort Worth Sept. 29, 2016, no pet.) (mem. op.) (husband's motion for continuance, which lacked notary's signature, was not verified or supported by affidavit, and court therefore presumed that trial court did not abuse its discretion in denying it). Failure to comply with rule 251's requirement that a motion for continuance be supported by affidavit will allow an appellate court to presume the trial court did not abuse its discretion by denying the motion. *In re D.P.B.*, No. 05-17-00185-CV, 2018 WL 3014628, at *2 (Tex. App.—Dallas June 15, 2018, no pet.) (mem. op.) (court denied mother's oral motion for continuance).

If the ground of the motion for continuance is that certain necessary testimony is not available at the time of trial, there shall be an affidavit made that the testimony is mate-

rial, showing its materiality, and that due diligence has been used to procure the testimony, stating the diligence and the cause of failure, if known. The affidavit must show that the testimony cannot be procured from any other source. If continuance is sought for the absence of a witness, the name and residence address of the witness and what is expected to be proved by the witness must be stated. The motion for continuance must also state that it is not sought for delay only but that justice may be done. If it is a first motion for continuance, it is not necessary to show that the absent testimony cannot be procured from another source. Tex. R. Civ. P. 252.

Absence of counsel (rule 253) and attendance on legislative business (rule 254) are other grounds for continuance. *See* Tex. R. Civ. P. 253, 254. When the basis for the motion for continuance is the withdrawal of counsel, the movant must show that the failure to be represented at trial was not due to his own fault or negligence. *Harrison v. Harrison*, 367 S.W.3d 822, 827 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *In re J.P.*, 365 S.W.3d 833, 836 (Tex. App.—Dallas 2012, no pet.); *Jordan-Nolan v. Nolan*, No. 07-12-00431-CV, 2014 WL 3764509, at *2 (Tex. App.—Amarillo July 28, 2014, no pet.) (mem. op.) (wife failed to show sufficient cause for continuance where three months after her counsel withdrew she attempted to hire counsel a week before trial and counsel declined to represent her). When counsel withdraws due to the fault of the movant, a trial court generally does not abuse its discretion in denying a motion for continuance. *In re Marriage of Harrison*, 557 S.W.3d at 119 (testimony of counsel that wife had caused conflict between attorney and client). It is an abuse of discretion to allow an attorney to withdraw on the day of trial without ascertaining the substantive basis of the dispute between client and attorney and, therefore, without determining whether the attorney had good cause to withdraw, and without providing adequate time for the client to secure other representation and for new counsel to investigate the case and prepare for trial. *Jackson v. Jackson*, 556 S.W.3d 461, 471 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

Legislative Continuance: A trial court is under the ministerial duty to grant a legislative continuance when the statutory criteria are met. Section 30.003 of the Texas Civil Practice and Remedies Code provides the following:

> Except as provided by subsections (c) and (c–1), at any time within 30 days of a date when the legislature is to be in session, at any time during a legislative session, or when the legislature sits as a constitutional convention, the court on application shall continue a case in which a party applying for the continuance or the attorney for that party is a member or member-elect of the legislature and will be or is attending a legislative session. The court

> shall continue the case until 30 days after the date on which the legislature adjourns.

Tex. Civ. Prac. & Rem. Code § 30.003(b).

Subsection (c) provides that if the attorney for a party to the case is a member or member-elect of the legislature who was employed on or after the thirtieth day before the date on which the suit is set for trial, the continuance is discretionary with the court. Tex. Civ. Prac. & Rem. Code § 30.003(c).

Subsection (c–1) provides that if the attorney for a party to any criminal case is a member or member-elect of the legislature who was employed on or after the fifteenth day on which the suit is set for trial, the continuance is discretionary with the court. Tex. Civ. Prac. & Rem. Code § 30.003(c–1).

The legislature's intent under section 30.003 was to create a window of time that begins thirty days before session and ends thirty days after session in which a legislator may seek a continuance. During that time frame, when an application for legislative continuance is made, the trial court must grant it. *In re Smart*, 103 S.W.3d 515, 520–21 (Tex. App.—San Antonio 2003, orig. proceeding) (trial court abused discretion in granting legislative continuance, but other party had adequate remedy at law). Because a hearing on temporary orders is neither a suit nor a trial, a legislative continuance is mandatory even if filed within thirty days of the hearing. *In re I.E.F.*, 345 S.W.3d 637, 640 (Tex. App.—San Antonio 2011, orig. proceeding).

It is not relevant whether the attorney is necessary to the party or the extent of the legislator's participation in the lawsuit. *Amoco Production Co. v. Salyer*, 814 S.W.2d 211, 213 (Tex. App.—Corpus Christi–Edinburg 1991, orig. proceeding). *But see Broesche v. Jacobson*, 218 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (trial court found wife hired legislator for purposes of delay, and wife's counsel's failure to timely notify husband's counsel of legislator's retention, which caused husband's counsel to work over Christmas holiday, was intended to cause husband unnecessary additional litigation fees). The trial court, however, is allowed the discretion in those cases in which the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay. In cases of this type the trial court has a duty to conduct a hearing on the allegations. If the allegations are shown to be meritorious, the court should deny the continuance. *Waites v. Sondock*, 561 S.W.2d 772, 776 (Tex. 1977) (orig. proceeding) (trial court abused discretion in granting continuance rather than recognizing due-process exception; right to child support could not be enforced by any other means).

Stay for Military Service: The Servicemembers Civil Relief Act provides that, under certain circumstances, a stay may be granted to a party to any civil action or proceeding, including any child custody proceeding, who is in military service or has separated from military service within ninety days and who has received notice of the action or proceeding. *See* 50 U.S.C. § 3932(a).

At any stage before final judgment, the court may, on its own motion, and must, on the servicemember's application, stay the action for at least ninety days if the following conditions are met. The application must include (1) a letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear and (2) a letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave for the servicemember has not been authorized. *See* 50 U.S.C. § 3932(b).

The application does not constitute an appearance for jurisdictional purposes or a waiver of any defense. 50 U.S.C. § 3932(c). An additional stay may be sought under certain circumstances, and the court must appoint counsel for the servicemember if it does not grant the additional stay. *See* 50 U.S.C. § 3932(d).

A servicemember of the Texas military forces who is ordered to state active duty or to state training and other duty is entitled to the same benefits and protections provided to U.S. servicemembers by the foregoing provisions of 50 U.S.C. § 3932. Tex. Gov't Code § 437.213.

§ 19.5 Inventory Summary; Suggested Property Division

When a suit for dissolution of a marriage is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may grant temporary orders requiring one or both parties to prepare a sworn inventory and appraisement of the real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities. Tex. Fam. Code § 6.502(a)(1).

Each party in a divorce proceeding has a responsibility to produce evidence of the value of various properties to provide the trial court with a basis on which to make the division of property. *Reyes v. Reyes*, 458 S.W.3d 613, 620 (Tex. App.—El Paso 2014, no pet.). In order for the court to determine, with some degree of accuracy, the true nature

and extent of the estates of the parties (whether community or separate), an accurate inventory of all assets and liabilities should be required by the court. Requiring an accurate inventory and appraisement will increase the probability of the court's dividing the property in a manner the court deems just and right, with due regard for the rights of each party and any children of the marriage, in accordance with section 7.001. *See* Tex. Fam. Code § 7.001. The court may not ignore stipulations or inventories that characterize property as separate property when the parties do not dispute the separate property claims and submit proposed property divisions confirming the separate property of the other party. *Alcedo v. Alcedo*, No. 02-17-00451-CV, 2019 WL 2292979, at *3 (Tex. App.—Fort Worth May 30, 2019, pet. denied) (mem. op.). Additionally, an inventory and appraisement should be the starting point for the preparation of findings of fact and conclusions of law concerning the characterization and value of all assets, liabilities, claims, and offsets on which disputed evidence has been presented. *See* Tex. Fam. Code § 6.711(a).

Local rules of the county in which the case is filed govern the form of the inventory, the degree of particularity required in its preparation, and the time within which it must be filed.

Having both an inventory summary and a suggested division of community property for the court's reference available during trial will enable the court to understand the client's position more clearly. Both the inventory and the suggested division of property may be offered into evidence as a shorthand rendition of the witness's testimony. If it involves a great number of items of property, reflected by a number of documents, the inventory may be admitted as a summary as allowed by Tex. R. Evid. 1006.

§ 19.6 Limiting Attendance

In a suit under title 5 of the Family Code, on the agreement of all parties to the suit, the court may limit attendance at any hearing to those persons who have a direct interest in the suit or in the work of the court. Tex. Fam. Code § 105.003(b).

To exclude a witness from the courtroom during the trial, a party must invoke "the rule." Tex. R. Civ. P. 267(a) and Tex. R. Evid. 614 require the trial court, at the request of the party, to administer the oath to the witnesses and remove them from the courtroom so they cannot hear the testimony given by other witnesses. A party or a spouse of a party may not be excluded from the courtroom during the trial. Tex. R. Civ. P. 267(b); Tex. R. Evid. 614(a). A person whose presence is shown by a party to be essential to the presentation of the case also may not be excluded from the courtroom during the trial.

Tex. R. Civ. P. 267(b); Tex. R. Evid. 614(c). This provision is commonly applied to an expert witness.

Litigants cannot be denied access to the courts simply because they are inmates. While an inmate does not have an absolute right to appear, inmates may be allowed access through alternative means such as affidavits, deposition, videoconferencing, or telephone. *In re Marriage of Niyonzima & Kazabukeye*, No. 07-18-00287-CV, 2019 WL 923829, at *1 (Tex. App.—Amarillo Feb. 25, 2019, no pet. h.) (mem. op.).

§ 19.7 Child as Witness

In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the child's attorney ad litem, the court *shall* interview a child twelve years of age or older, and *may* interview a child younger than twelve years of age, in chambers to determine the child's wishes about conservatorship or about the person who will have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for such a purpose. Tex. Fam. Code § 153.009(a).

In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the child's attorney ad litem, or on the court's own motion, the court may interview the child in chambers to determine the child's wishes about possession, access, or any other issue in the suit affecting the parent-child relationship. Tex. Fam. Code § 153.009(b).

In a jury trial, the court may not interview a child in chambers about an issue on which a party is entitled to a jury verdict. Tex. Fam. Code § 153.009(d).

In any trial or hearing, the court may permit the attorney for a party, the amicus attorney, the child's guardian ad litem, or the child's attorney ad litem to be present at the interview. Tex. Fam. Code § 153.009(e). On the motion of a party, the amicus attorney, or the child's attorney ad litem, or on the court's own motion, the court shall cause a record of the interview to be made when the child is twelve years of age or older, and the record of the interview shall be a part of the record in the case. Tex. Fam. Code § 153.009(f). Interviewing a child does not diminish the court's discretion in determining the child's best interests. Tex. Fam. Code § 153.009(c).

A child is a competent witness unless, after being examined by the court, he appears not to possess sufficient intellect to relate transactions with respect to which he is interrogated. Tex. R. Evid. 601(a)(2). It is error not to permit a child of competent qualifica-

tions to testify. *Callicott v. Callicott*, 364 S.W.2d 455, 458 (Tex. App.—Houston 1963, writ ref'd n.r.e.).

Family Code sections 104.002 through 104.005 set out various conditions under which prerecorded statements, videotaped testimony, or remote televised broadcast of testimony of a child are permissible. *See* Tex. Fam. Code §§ 104.002–.005. Such evidence would be subject to the rules of evidence. As a general rule, a trial court should view video evidence before ruling on admissibility when the contents of the video are at issue. *Diamond Offshore Services, Ltd. v. Williams*, 542 S.W.3d 539, 546 (Tex. 2018).

§ 19.8 Default Judgment

On call of the docket or at any time after a respondent is required to answer, a judgment may be taken by default if the respondent has not previously filed an answer, provided the return of service has been filed with the clerk for the length of time required by rule 107 of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 239. Notice must be sent immediately to the respondent at the last known mailing address. *See* Tex. R. Civ. P. 239a. See section 26.3:5 in this manual concerning new trials after default judgments.

To support a default judgment in a family law case, the petitioner must present proof to support the material allegations in the petition despite a respondent's failure to answer. *Agraz v. Carnley*, 143 S.W.3d 547, 553 (Tex. App.—Dallas 2004, no pet.); *O'Neal v. O'Neal*, 69 S.W.3d 347, 349 (Tex. App.—Eastland 2002, no pet.).The record must contain evidence as to the value of any property to be divided as well as evidence as to the appellee's income or financial ability to pay child support. *O'Neal*, 69 S.W.3d at 350; *see Rodgers v. Perez*, No. 03-16-00313-CV, 2017 WL 4348170, at *2 (Tex. App.—Austin Sept. 7, 2017, no pet.) (mem. op.) (testimony did not address nature, size, or components of community estate, nor was any such evidence offered through other means); *see also Pena v. Pena*, No. 13-17-00585-CV, 2018 WL 3301920, at *3 (Tex. App.—Corpus Christi–Edinburg July 5, 2018, no pet.) (with no evidence of properties' values, trial court had insufficient evidence to divide property fairly and equitably).

Protection of Servicemembers: Before default judgment is entered, if the respondent has not made an appearance, an affidavit must be on file stating that the respondent is not in military service. A plaintiff unable to make such a showing must file an alternative affidavit stating either that the defendant is in military service or that the plaintiff is unable to determine whether the defendant is in military service. *See* 50 U.S.C.

§ 3931(a), (b)(1). A person who knowingly makes or uses a false affidavit may be fined or imprisoned or both. 50 U.S.C. § 3931(c).

The court may not enter judgment until an attorney has been appointed for a defendant in military service. If the appointed attorney cannot locate the servicemember, actions by the attorney do not waive any defense or otherwise bind the servicemember. 50 U.S.C. § 3931(b)(2). If the court is unable to determine whether the defendant is in military service, the court may require the plaintiff to file a bond to indemnify the defendant, if later found to be in military service, against loss or damage suffered because of the judgment if it is set aside. 50 U.S.C. § 3931(b)(3).

If the defendant is in military service, the court must grant a stay for at least ninety days if the court determines that there may be a defense that cannot be presented without the defendant's presence or that counsel, after due diligence, has been unable to contact the defendant or otherwise determine whether a meritorious defense exists. 50 U.S.C. § 3931(d). A defendant who receives actual notice may request a stay under 50 U.S.C. § 3932. 50 U.S.C. § 3931(f). See the discussion at section 19.4 above.

A default judgment entered against a servicemember during military service or within sixty days thereafter may be vacated or set aside under certain circumstances. *See* 50 U.S.C. § 3931(g). See the discussion at section 26.3:5 in this manual.

A servicemember of the Texas military forces who is ordered to state active duty or to state training and other duty is entitled to the same benefits and protections provided to U.S. servicemembers by the foregoing provisions of 50 U.S.C. § 3931. Tex. Gov't Code § 437.213.

§ 19.9 Relief Pending Final Order

After trial, the trial court may make any of a variety of temporary orders pending the rendition of a final order. Tex. Fam. Code §§ 6.501–.507, 105.001. See chapter 4 of this manual for further information about temporary orders.

§ 19.10 Motion for Judgment in Nonjury Case

It is error for the trial court to grant a motion for judgment at the close of the plaintiff's case if the evidence and reasonable inferences raise a material issue of fact. *R.W.M. v. J.C.M.*, 684 S.W.2d 746, 747 (Tex. App.—Corpus Christi–Edinburg 1984, writ ref'd n.r.e.).

§ 19.11 Request for Jury Trial

A written jury request must be filed with the clerk a reasonable time before the date set for the trial of the case on the nonjury docket, but not less than thirty days in advance, and the jury fee must be paid in the same time period. Tex. R. Civ. P. 216. The time limit applies to both the application and the fee deposit. *Huddle v. Huddle*, 696 S.W.2d 895, 895 (Tex. 1985) (per curiam).

A party may demand a jury trial except in a suit to annul an underage marriage, a suit in which an adoption is sought (including a trial on the issue of denial or revocation of consent to the adoption by the managing conservator), or a suit to adjudicate parentage under Family Code chapter 160. Tex. Fam. Code §§ 6.703, 105.002(a), (b).

In a suit for dissolution of a marriage, a party may demand a jury trial unless the action is a suit to annul a marriage on the grounds that a party was underage. Tex. Fam. Code § 6.703; *see also Skop v. Skop*, 201 S.W.2d 77 (Tex. App.—Galveston 1947, no writ). A party may not demand a jury trial on the issue of the unconscionability of a premarital or marital agreement. *See* Tex. Fam. Code §§ 4.006(b), 4.105(b).

A party may demand a jury trial on issues regarding conservatorship, including which joint managing conservator has the exclusive right to designate the primary residence of a child and any restrictions on the geographic area where the residence may be located, but not regarding the issues of child support, a specific term or condition of possession or access, or the rights and duties of a conservator, other than the determination of which joint managing conservator has the exclusive right to designate the child's primary residence. Tex. Fam. Code § 105.002(c).

A party may demand a jury trial in an enforcement proceeding if the punishment sought is more than 180 days' incarceration. *Muniz v. Hoffman*, 422 U.S. 454 (1975).

A party may demand a jury trial on the fact issues of the division of property. *See generally Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Lawson v. Lawson*, 828 S.W.2d 158 (Tex. App.—Texarkana 1992, writ denied); *Baker v. Baker*, 104 S.W.2d 531 (Tex. App.—San Antonio 1936, no writ). A jury's determination of value is binding on the trial court; the division of the estate, however, is properly determined by the court, and a jury's division is advisory only. *Archambault v. Archambault*, 763 S.W.2d 50, 51 (Tex. App.—Beaumont 1988, no writ).

If a party demands a jury trial and then does not appear at trial, the party waives its request for a jury. Tex. R. Civ. P. 220.

A court may not strike a jury demand as a discovery sanction. *In re I.R.H.*, No. 01-15-00787-CV, 2016 WL 3571398, at *4 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet.) (mem. op.) (striking jury demand is not sanction provided by Tex. R. Civ. P. 215, and jury demand survives even death-penalty sanctions for discovery abuse). A trial court has no authority to strike a jury demand as a sanction for failure to pay amicus attorney's fees when the Family Code expressly authorizes a trial by jury as to the determination of the children's primary residence. *Wheeler v. Wheeler*, No. 01-16-00642-CV, 2017 WL 3140027 (Tex. App.—Houston [1st Dist.] July 25, 2017, no pet.) (mem. op.).

Although a party may withdraw its request for a jury trial, the other party may prevent the withdrawal by either making a timely objection or filing its own request for a jury trial. *See In re Webb-Goetz*, No. 01-19-0139, 2019 WL 3293697, at *4 (Tex. App.—Houston [1st Dist.] July 23, 2019, orig. proceeding) (mem. op.). The trial court may not withdraw a case from the jury docket over the objection of a party, even if the party making the objection did not make a request for a jury or pay a fee. *Zemanek v. Boren*, 810 S.W.2d 10, 12 (Tex. App.—Houston [14th Dist.] 1991, no writ).

§ 19.12 Number of Peremptory Challenges

Each party to a civil suit is entitled to six peremptory challenges in a case tried in district court. Cases tried in statutory county courts with family law jurisdiction may have only six jurors and therefore only three peremptory challenges. Tex. R. Civ. P. 233.

In multiple-party cases, the trial judge must decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue that will be presented to the jury. The term *side* does not mean "party," "litigant," or "person"; rather, it means one or more litigants with common interests on the matters with which the jury is concerned. Tex. R. Civ. P. 233.

In multiple-party cases, on motion of any litigant made before the exercise of peremptory challenges, the trial judge must equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side. In allocating the challenges, the court shall consider any matters brought to the trial judge's attention concerning the ends of justice and the elimination of unfair advantage. Tex. R. Civ. P. 233.

Case law that developed before the 1984 amendment of rule 233 may provide guidance on allocation of peremptory challenges. For example, when paternal grandparents who intervened in a divorce action primarily sought to have custody of the minor children awarded to the husband or, in the alternative, to the intervenors, which would result in the husband's having effective custody, the relationship between the intervenors and the husband, insofar as managing conservatorship was concerned, was not antagonistic and hostile to the extent that the intervenors and the husband were each entitled to six peremptory challenges; and awarding the intervenors and the husband twice the number of challenges as the wife was awarded denied the wife a fair trial. *Lipshy v. Lipshy*, 525 S.W.2d 222, 226 (Tex. App.—Dallas 1975, writ dism'd).

§ 19.13 Motion in Limine

The motion in limine is not addressed by a particular rule of civil procedure. However, it has been defined by the Supreme Court of Texas as follows:

> The purpose in filing a motion in limine to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which a motion in limine is intended to reach.

Bridges v. City of Richardson, 354 S.W.2d 366, 367 (Tex. 1962) (per curiam).

The motion should be presented before voir dire examination of the jury and preferably at pretrial conference. However, it is not reversible error for the court to rule on the motion after the parties announce ready for trial. *City of Houston v. Watson*, 376 S.W.2d 23, 33 (Tex. App.—Houston 1964, writ ref'd n.r.e.).

If a motion in limine is overruled, a judgment will not be reversed unless *in fact* the questions were asked or the evidence was offered. If they were *in fact* asked or offered, an objection made at the time is necessary to preserve the right to complain on appeal that the questions asked or the evidence tendered was so prejudicial that the mere asking or tendering should require reversal. In neither case—(1) questions not asked or evidence not offered nor (2) questions asked or evidence offered—should the error of the trial court in overruling the motion in limine be regarded as harmful or reversible error.

Hartford Accident & Indemnity Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963). When the trial court properly instructs the jury to disregard the statements made in violation of the court's instruction, it is presumed the jury followed these instructions unless there is evidence to the contrary in the record. *See Epps v. Deboise*, 537 S.W.3d 238, 251 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

§ 19.14 Requests for Questions, Definitions, and Instructions

Either party may present to the court and request written questions, definitions, and instructions to be given to the jury. The court may give them or a part of them or may refuse to give them as may be proper. Such a request shall be made separate and apart from the party's objections to the court's charge. Tex. R. Civ. P. 273; *see also* Tex. R. Civ. P. 226a. Suggested questions, definitions, and instructions may be found in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate*.

§ 19.15 Submission to Jury

In all jury cases the court shall, whenever feasible, submit the cause on broad-form questions. The court shall submit such instructions and definitions as are proper to enable the jury to render a verdict. Tex. R. Civ. P. 277. The use of broad-form questions is not permitted in a case involving the termination of parental rights. (*Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990), in which the court had specifically approved broad-form submission, is superseded by amendment of rule 277 effective May 1, 2020. *See* Texas Supreme Court, *Order Amending Texas Rule of Civil Procedure 277*, Misc. Docket No. 20-9008 (Jan. 8, 2020), 83 Tex. B.J. 104 (2020); proposed rule subject to change in response to public comments to be sent by Apr. 1, 2020.)

Inferential rebuttal issues shall not be submitted. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question. Tex. R. Civ. P. 277.

If the judge refuses or modifies a properly requested instruction, question, or definition, the judge shall so endorse the request, which will constitute a bill of exceptions. Tex. R. Civ. P. 276.

For guidance on the content of jury charges, including commentary on the underlying statutory and case law, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate*.

§ 19.16 Objection to Jury Charge

A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint about a question, definition, or instruction, because of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. If the complaining party's objection or requested question, definition, or instruction is in the opinion of the appellate court obscured or concealed by voluminous unfounded objections, minute differentiations, or numerous unnecessary requests, the objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to another part of the charge by reference only. Tex. R. Civ. P. 274.

Objections must be presented to the court in writing or dictated to the court reporter in the presence of the court and opposing counsel. Tex. R. Civ. P. 272. Failure to submit a question, a definition, or an explanatory instruction shall not be deemed a ground for reversal unless it was requested in substantially correct form in writing. Tex. R. Civ. P. 278.

§ 19.17 Judgment Non Obstante Veredicto/Directed Verdict

On motion and reasonable notice, the court may render judgment non obstante veredicto if a directed verdict would have been proper. On like motion and notice, the court may disregard any jury finding on a question that has no support in the evidence. Only one final judgment shall be rendered in any cause except when it is otherwise specifically provided by law. Tex. R. Civ. P. 301.

If judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more questions, an appellee may bring forward by cross-point contained in his brief filed in the court of appeals any ground that would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based on it should be set aside because of improper argument of counsel. Tex. R. Civ. P. 324(c).

In suits affecting the parent-child relationship, the court may not contravene a jury verdict on the issue of the appointment of a sole managing conservator, the appointment of joint managing conservators, the appointment of a possessory conservator, the determi-

nation of which joint managing conservator has the exclusive right to designate the child's primary residence, or any restrictions on the geographic area where the residence may be located. Tex. Fam. Code § 105.002(c)(1).

A motion for directed verdict shall state the specific grounds. Tex. R. Civ. P. 268.

To challenge the legal sufficiency of the evidence supporting a jury's verdict, a party must raise the legal sufficiency challenge with the trial court in either (1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the question to the jury, (4) a motion to disregard the jury's answer to a vital fact question, or (5) a motion for new trial. *In re A.L.*, 486 S.W.3d 129, 130 (Tex. App.—Texarkana 2016, no pet.).

§ 19.18 Subpoenas

All subpoenas must be issued in the name of "The State of Texas" and contain these elements: the style; the cause number; the court; the date of issuance; identification of the subpoenaed person; the time, place, and nature of the action required by the subpoenaed person; the name of the party causing the subpoena to be issued (and the party's attorney, if any); the text contained in rule 176.8(a); and the signature of the issuing person. Tex. R. Civ. P. 176.1.

Properly issued subpoenas are generally valid within a radius of 150 miles from the county in which the subpoenaed person resides or is served. Tex. R. Civ. P. 176.3(a).

A witness is entitled to a fee of $10 for each day the witness is required to attend trial, and the subpoena must include the fee for one day. Tex. Civ. Prac. & Rem. Code § 22.001(a), (b). The court may not impose a fine or issue a writ of attachment for a witness who was subpoenaed to attend and did not appear until the subpoenaing party provides an affidavit stating that all fees due the witness were paid or tendered. Tex. R. Civ. P. 176.8(b).

A subpoena must command the person to attend and give testimony at a deposition, hearing, or trial; produce and permit inspection and copying of designated documents or tangible things in the person's possession, custody, or control; or both. Tex. R. Civ. P. 176.2.

A subpoena may be issued by an attorney authorized to practice in Texas, the clerk's office, or an officer authorized to take depositions in Texas. Tex. R. Civ. P. 176.4. The subpoena may be served by a sheriff or constable or any nonparty person over eighteen

years of age. Tex. R. Civ. P. 176.5(a). Proof of service must be documented either by memorandum signed by the witness acknowledging acceptance of the subpoena or by a statement by the person serving, which must include the date, time, and manner of service and the name of the person served. Tex. R. Civ. P. 176.5(b).

A party causing a subpoena to issue must take reasonable steps to avoid undue burden and expense on the person served. Tex. R. Civ. P. 176.7.

A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the discovery rules. Tex. R. Civ. P. 176.3(b).

Failure by a subpoenaed person to obey the subpoena, without adequate excuse, may be deemed a contempt of court. (Requirements related to the response, objections, and protective orders are detailed in rule 176.6.) On a finding of contempt, the court may punish the violating party by fine, confinement, or both. Tex. R. Civ. P. 176.8(a).

Before a fine may be imposed on a person who has failed to comply with a subpoena or the person be attached, there must be filed an affidavit of the party requesting the subpoena, or the attorney of record, that all fees due the witness by law were paid or tendered. Tex. R. Civ. P. 176.8(b).

§ 19.19 Attorney's Fees

Attorney's fees paid to prosecute or defend a lawsuit cannot be recovered absent a statute or contract that allows for their recovery. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 120 (Tex. 2009); *In re Marriage of Pyrtle*, 433 S.W.3d 152, 160 (Tex. App.—Dallas 2014, pet. denied); *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006). Attorney's fees are specifically authorized by statute in many circumstances encountered by the family law practitioner. See section 20.41 in this manual.

Proving up attorney's fees, including establishing reasonableness and necessity, is discussed in part II of chapter 20 (sections 20.11–20.23).

§ 19.20 Pleadings

Relief granted by the court must be supported by the pleadings. *See* Tex. R. Civ. P. 301. Because the best interests of the child are the principal concern in child custody cases, technical pleading rules in such cases are of reduced significance, but the pleadings must nevertheless notify the opposing party of the claim involved. *Messier v. Messier*,

389 S.W.3d 904, 907 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see King v. Lyons*, 457 S.W.3d 122 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

While issues may be tried by consent, when evidence at trial is relevant to an issue that has been pleaded, it will not be regarded as evidence of trial of an unpleaded issue. *King*, 457 S.W.3d at 133. Unless waived by a failure to object, a trial amendment must be filed as a written pleading; an oral amendment at trial is insufficient to modify the pleadings. *In re J.C.J.*, No. 05-14-01449-CV, 2016 WL 345942, at *8 (Tex. App.—Dallas Jan. 28, 2016, no pet.) (mem. op.).

COMMENT: For additional information on trial proceedings, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate* and *Predicates Manual* (Texas Family Law Foundation 2012).

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Chapter 20

Attorney's Fees

This chapter addresses the issues regarding attorney's fees that are commonly encountered by the family law practitioner. Considerations specific to particular proceedings are discussed in other chapters.

I. Setting the Fee

§ 20.1 Setting the Fee—Generally

Comment 2 to rule 1.04 of the Texas Disciplinary Rules of Professional Conduct provides:

> When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. If, however, the basis or rate of fee being charged to a regularly represented client differs from the understanding that has evolved, the lawyer should so advise the client. In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth. In the case of a contingent fee, a written agreement is mandatory.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 2, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

§ 20.2 Factors to Consider in Setting Fee

Rule 1.04(a) prohibits arranging for, charging, or collecting an illegal or unconscionable fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a). Some factors that may be considered in determining the reasonableness of a fee, set out in rule 1.04(b), are—

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04(b). These factors are not exclusive.

An attorney in good conscience should not charge or collect more than a reasonable fee. However, a standard of "reasonableness" is too vague to be an appropriate standard in a disciplinary action. For disciplinary purposes only, the attorney is subject to discipline for an illegal or unconscionable fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 1.

A fee is unconscionable if a competent attorney could not form a reasonable belief that the fee is reasonable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a).

Several of the factors listed above have been cited by appellate courts to support the reasonableness of a jury award of attorney's fees in matters involving substantial amounts of property. *See Morgan v. Morgan*, 657 S.W.2d 484, 491–92 (Tex. App.—

Houston [1st Dist.] 1983, writ dism'd); *Braswell v. Braswell*, 476 S.W.2d 444, 446 (Tex. App.—Waco 1972, writ dism'd).

§ 20.3 Written Contract for Fees

If the attorney has not regularly represented the client, the basis or rate of the fee must be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c). This practice will not only prevent later misunderstanding but will also promote good attorney-client relations. Many persons who desire legal services have had little or no experience with attorney's fees, and therefore the attorney should explain fully the reasons for the particular fee arrangement.

Because of the confidential nature of the attorney-client relationship, courts carefully scrutinize all contracts for attorney compensation. "There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney." *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) (wife deeded real property to lawyer under contingent fee contract for lawyer's representation of wife in divorce; court set aside deed because value of property was approximately ten times that which was considered reasonable fee for services provided in case); *see also Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508–09 (Tex. 1980).

§ 20.4 Retainers

Lawyers must distinguish between advance payment retainer fees (advance payments for services to be performed) and true retainer fees (payments to compensate a lawyer for his commitment to provide certain services and to forgo other employment opportunities).

§ 20.4:1 Refundable Retainers (Deposits)

A refundable retainer is an advance payment or deposit paid by the client to the lawyer for costs, expenses, and legal fees that will be incurred but are not yet earned. A refundable retainer, until it is earned or expenses incurred, belongs to the client and must be placed in the lawyer's trust account. As fees are earned, whether the lawyer uses an hourly billing method or some other basis for establishing the fee, the client is billed and payment is made out of the lawyer's trust account, under the provisions of the written fee contract between the client and the lawyer. The lawyer enjoys the security of the retainer for the payment of fees and costs.

The retention and handling of client funds, in the form of a refundable retainer, must conform to the requirements imposed by rule 1.14 of the Texas Disciplinary Rules of Professional Conduct. Virtually every issue of the *Texas Bar Journal* reports disciplinary action taken against one or more lawyers for violating some portion of rule 1.14 by either failing to maintain an identifiable bank account for client trust funds, failing to account for client funds, or failing to return client trust funds to the client. Segregation and safekeeping of client funds, as required by rule 1.14, is discussed in section 1.15 in this manual.

§ 20.4:2 Nonrefundable Retainers

Nonrefundable retainers, though not inherently unethical, pose many potential problems and must be used with caution. A fee is not earned simply because it is designated as "nonrefundable." A "true retainer" is a payment to compensate the lawyer for his commitment to provide certain services and forgo other employment opportunities. *See* Tex. Comm. on Prof'l Ethics, Op. 431 (1986).

A true nonrefundable retainer belongs entirely to the lawyer at the time it is received because the fee is earned at the time of receipt. The fee is earned on receipt because payment commits the lawyer to the client's case. In effect, a nonrefundable retainer is an engagement fee that indicates the lawyer's willingness to represent the client and guarantees the lawyer's availability to take on the case for the client. However, a nonrefundable retainer is subject to rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct, which states that a lawyer shall not enter into an agreement for or charge or collect an illegal or unconscionable fee. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a).

A legal fee relating to future services is a true nonrefundable retainer when received only if the fee in its entirety is a reasonable fee to secure the availability of the lawyer's services and compensate the lawyer for the preclusion of other employment. An agreement with a client that a fee is nonrefundable on receipt, whether or not designated nonrefundable, would violate the rules of disciplinary conduct if the fee includes payment for the provision of future legal services rather than being solely for the *availability* of future services. Such an arrangement would not be reasonable under rule 1.04(a) and (b), and placing the entire payment in the lawyer's operating account would violate rule 1.14 of the Texas Disciplinary Rules of Professional Conduct. *See* Tex. Comm. on Prof'l Ethics, Op. 611 (2011); *see also Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.—Austin 2007, no pet.) (lawyer's deposit in operating account

of "nonrefundable retainer" against which hourly fee would be billed constituted professional misconduct).

Only the payment meeting the requirements for a true nonrefundable retainer may be deposited in the lawyer's operating account; any advance payment amount must be deposited in a trust or escrow account from which amounts may be transferred to the operating account only when earned. *See* Tex. Comm. on Prof'l Ethics, Op. 611 (2011); Tex. Disciplinary Rules Prof'l Conduct R. 1.14 cmt. 2. A client paying for both a true nonrefundable retainer and an advance payment should pay the lawyer with two separate checks. It is critically important to note that if a client pays both amounts with one check, the entire check must be deposited into the lawyer's trust account according to the provisions of rule 1.14. Thereafter, the lawyer may transfer the funds representing the nonrefundable retainer into the lawyer's general operating account in accordance with rule 1.14.

§ 20.4:3 Evergreen Retainers

Many lawyers include an "evergreen" refundable retainer provision in their employment contracts. When credits against the evergreen retainer for the lawyer's fees deplete it below a designated dollar amount, the client is required to replenish it. For example, the employment contract could require the client to pay the lawyer an initial refundable retainer of $5,000, which is placed in the lawyer's trust account; as the lawyer bills for legal services and reduces the refundable retainer by monthly billings to an amount below $2,000, the client would be required to replenish the lawyer's trust account—to keep it "green"—by paying an amount into the lawyer's trust account to replenish the retainer to $5,000 or by paying a designated dollar amount. A properly used evergreen retainer allows a lawyer to enjoy the security of having funds on hand with which to pay attorney's fees as they are earned and billed.

§ 20.5 Contingent Fees

In civil cases, a lawyer may contract with a client for a reasonable contingent fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(b)(8), (d), (e). The rules, however, discourage contingent fees in family law cases:

> Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained

> for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 9.

Although contingent fees are discouraged in family law matters, they may be appropriate in tort causes of action arising in domestic relations circumstances and in some other types of family law cases.

One court has found that a contingent fee was enforceable in connection with determining the validity of a common-law marriage, stating:

> While rarely justified in divorce actions, contingent fee contracts may be appropriate in a situation such as this. If the marriage is not established, the plaintiff may recover nothing, a situation differing sharply from a divorce suit involving a ceremonial marriage in which each party will obtain a recovery of some sort.

Ballesteros v. Jones, 985 S.W.2d 485, 497 (Tex. App.—San Antonio 1999, pet. denied).

A lawyer may charge a contingent fee for the collection of a child support arrearage, but the fee must be reasonable and must comply with rule 1.04 of the Texas Disciplinary Rules of Professional Conduct. Before execution of the contingent fee contract, the lawyer must fully disclose all options to the client, including the option for the client to use the Texas Attorney General's Office to handle the child support arrearage case free of charge to the client. Other options should be discussed, as well as the pros and cons of the options. All dealings with the arrearages that are collected should comply with rule 1.14 of the Texas Disciplinary Rules of Professional Conduct involving the safekeeping of property and keeping client funds separate from attorney's fees. *See* Tex. Comm. on Prof'l Ethics, Op. 485 (1994).

Formal Requirements: Any contingent fee contract must be in writing; state the method by which the fee is to be determined, including any percentage differentiation in the event of settlement, trial, or appeal; and provide for all expenses. On conclusion of the matter, the attorney must give the client a written closing statement stating the outcome of the representation and, if there is a recovery, showing the remittance to the client and describing how it was determined. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(d). A contingent fee contract for legal services must be in writing and signed by the attorney and the client. Tex. Gov't Code § 82.065(a). A lawyer's attempt to enforce

an arbitration agreement contained in a contingent fee contract failed because the lawyer failed to sign the contract. *In re Godt*, 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi–Edinburg 2000, orig. proceeding).

Recovery on Contract: A lawyer under a contingent fee contract terminated by the client may recover on the contract in Texas. The usual rules of contract law apply. Any of three remedies may be pursued: (1) treating the contract as rescinded and recovering on a quantum meruit theory to the extent justified by performance; (2) keeping the contract alive for the benefit of both parties, being always ready and able to perform; or (3) treating the repudiation as ending the contract for all purposes of performance and suing for the profits that performance would have justified. *Howell v. Kelly*, 534 S.W.2d 737, 739–40 (Tex. App.—Houston [1st Dist.] 1976, no writ). *But cf. Rocha v. Ahmad*, 676 S.W.2d 149, 156 (Tex. App.—San Antonio 1984, writ dism'd) (lawyer discharged for good cause may recover fees earned before discharge under quantum meruit but may not recover under contingent fee contract). *See also Findlay v. Cave*, 611 S.W.2d 57 (Tex. 1981) (attorney's fees for prosecuting suit on contingent fee contract allowed although contract found not fair and reasonable and recovery based on quantum meruit; circumstances did not show sufficient level of unreasonableness or bad faith to warrant finding excessive demand as matter of law).

§ 20.6 Fee Splitting

Fee splitting is the practice of sharing fees with professional colleagues in return for being sent referrals or being associated with the colleague on a legal matter.

Fee splitting between lawyers who are not in the same firm is permitted only if the following conditions are met:

1. The division is in proportion to the professional services performed by each attorney or made between attorneys who assume joint responsibility for the representation.
2. The client consents in writing to the terms of the arrangement before the time of the association or referral proposed. The consent must include (a) the identity of all lawyers or law firms who will participate in the fee-splitting agreement; (b) whether fees will be divided based on the proportion of services performed or by attorneys agreeing to assume joint responsibility for the representation; and (c) the share of the fee that each attorney or firm will receive or, if the divi-

sion is based on the proportion of services performed, the basis on which the division will be made.

3. The aggregate fee does not violate rule 1.04(a).

Tex. Disciplinary Rules Prof'l Conduct R. 1.04(f).

As always, there is an overarching requirement that the aggregate fee is not illegal or unconscionable. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a).

Any agreement that allows an attorney or firm to associate other counsel in representing a person, or to refer the person to other counsel for representation, that results in such an association with or referral to a different firm or an attorney in a different firm must be confirmed by an arrangement conforming to rule 1.04(f). Consent by a client or prospective client without knowledge of the information described above about the terms of the arrangement does not constitute a confirmation. No attorney may collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way except for the reasonable value of legal services provided to the person and the reasonable and necessary expenses actually incurred on behalf of the person. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(g).

[Sections 20.7 through 20.10 are reserved for expansion.]

II. Proving Up Attorney's Fees

§ 20.11 Pleadings Required

Attorney's fees must be pleaded in order to be awarded. Because a trial court's judgment must conform to the pleadings, a party seeking attorney's fees must plead for them, specifying the legal standard under which they are sought. *See Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 659 (Tex. 2009) (party waived right to recover attorney's fees under contractual provision by pleading for attorney's fees only under statutory provision); *Peterson Group, Inc. v. PLTQ Lotus Group, L.P.*, 417 S.W.3d 46, 61 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (party could not recover attorney's fees under contractual provision when it pleaded for attorney's fees only under statutory provision). If a person requesting attorney's fees pleads for a specific amount, he will be limited to that amount. *Carson v. Carson*, 528 S.W.2d 308, 309 (Tex. App.—Waco 1975, no writ).

§ 20.12 Authorization to Recover Attorney's Fees

Attorney's fees paid to prosecute or defend a lawsuit cannot be recovered absent a statute or contract that allows for their recovery. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 120 (Tex. 2009); *In re Marriage of Pyrtle*, 433 S.W.3d 152, 160 (Tex. App.—Dallas 2014, pet. denied); *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006).

Attorney's fees are specifically authorized by statute in many circumstances encountered by the family law practitioner. In a suit for dissolution of marriage or in a suit affecting the parent-child relationship, the court may award reasonable attorney's fees and expenses. Tex. Fam. Code §§ 6.708(c), 106.002(a). During the pendency of such a suit, the court may render temporary orders for the payment of reasonable attorney's fees and expenses. Tex. Fam. Code §§ 6.502(a)(4), 105.001(a)(5). The court may also require payment of reasonable and necessary attorney's fees and expenses during the pendency of an appeal of such a suit. Tex. Fam. Code §§ 6.709(a)(2), 109.001(a)(5). For a more comprehensive list of statutes allowing or related to the recovery of attorney's fees, see section 20.41 below.

§ 20.13 Reasonable and Necessary

As a general rule, the party seeking to recover attorney's fees carries the burden of proof, and reasonableness of the fee is a fact question. *See, e.g.*, *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892 (Tex. App.—Austin 2010, pet. denied).

When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019).

The idea behind awarding attorney's fees in fee-shifting situations is to compensate the prevailing party generally for its reasonable losses resulting from the litigation process. To secure an award of attorney's fees from an opponent, the prevailing party must prove that (1) recovery of attorney's fees is legally authorized and (2) the requested attorney's fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process. *Rohrmoos Venture*, 578 S.W.3d at 487.

Because such fee awards are compensatory in nature, fee-shifting is not a mechanism to improve a lawyer's economic situation, and only fees that are reasonable and necessary for the legal representation will be shifted to the nonprevailing party. The fee award may not necessarily be the amount contracted for between the prevailing party and its lawyer, because a client's agreement to a certain fee arrangement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 487–88.

A party must be represented by a lawyer to secure an award of attorney's fees. A law firm can be awarded fees for representation by its own lawyer. *Rohrmoos Venture*, 578 S.W.3d at 488.

§ 20.14 Expert Testimony

Reasonableness of attorney's fees must be supported by expert testimony. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 830 (Tex. App.—Dallas 2014, no pet.); *Twin City Fire Insurance Co. v. Vega-Garcia*, 223 S.W.3d 762, 770–71 (Tex. App.—Dallas 2007, pet. denied). This requirement may be satisfied by sworn testimony from an attorney designated as an expert before testifying. *See Woodhaven Partners*, 422 S.W.3d at 830. Testimony from a party's lawyer about that party's attorney's fees that "is not contradicted by any other witness and is clear, positive, direct, and free from contradiction" is taken as true as a matter of law. *In re A.B.P.*, 291 S.W.3d 91, 98 (Tex. App.—Dallas 2009, pet. denied).

An affidavit complying with section 18.001 of the Texas Civil Practice and Remedies Code can support an award of attorney's fees; however, compliance with the statute is cumbersome, and live expert testimony by the attorney is the common practice for proving reasonableness and necessity of attorney's fees in proceedings under the Family Code. *See* Tex. Civ. Prac. & Rem. Code § 18.001. Form 20-2 in this manual contains sample prove-up testimony for attorney's fees.

§ 20.15 Lodestar Method

The lodestar method for proving reasonableness and necessity of attorney's fees applies to fee-shifting claims under the Texas Family Code. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019).

There is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney's fees that can be shifted to a nonprevailing party. *Rohrmoos Venture*, 578 S.W.3d at 499.

The determination of what constitutes a reasonable attorney's fee involves two steps. *Rohrmoos Venture*, 578 S.W.3d at 501.

The fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts. *Rohrmoos Venture*, 578 S.W.3d at 498. Under the lodestar method, sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. The fact finder then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. *Rohrmoos Venture*, 578 S.W.3d at 501.

The fact finder may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. Thus, the fact finder must first determine a base lodestar figure based on reasonable hours worked multiplied by a reasonable hourly rate. In a jury trial, the jury should be instructed that the base lodestar figure is presumed to represent reasonable and necessary attorney's fees, but other considerations may justify an enhancement or reduction to the base lodestar; accordingly, the fact finder must then determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to reach a reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 501.

§ 20.16 Sufficiency of Evidence

Legally sufficient evidence to establish a reasonable and necessary fee must include a description of the particular services performed, the identity of each person who performed the services, approximately when the services were performed, the reasonable amount of time required to perform the services, and the reasonable hourly rate for each person performing the services. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). Although Texas courts do not require contemporaneous billing records to prove that the requested fees are reasonable and necessary, such billing records are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested. In all but the simplest cases, counsel

should introduce detailed billing records into evidence, in addition to counsel's oral testimony, to support fee requests. *See Rohrmoos Venture*, 578 S.W.3d at 502.

Thus, when representing family law clients, counsel should document their time by using contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed to ensure that a potential award of attorney's fees can withstand appellate scrutiny.

§ 20.17 Relevance of Amount Incurred under Fee Contract

Because fee-shifting awards are to be reasonable and necessary for successfully prosecuting or defending against a claim, reasonableness and necessity do not depend solely on the contractual fee arrangement between the prevailing party and its lawyer. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). An amount incurred or contracted for is not conclusive evidence of reasonableness or necessity; the fee claimant still has the burden to establish reasonableness and necessity. *Rohrmoos Venture*, 578 S.W.3d at 488.

§ 20.18 *Arthur Andersen* Factors

The lodestar method developed as a "short hand version" of the *Arthur Andersen* factors and was never intended to be a separate test or method for determining reasonableness and necessity of attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019); *see Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

The base lodestar figure accounts for most of the relevant *Arthur Andersen* considerations, and an enhancement or reduction of the base lodestar figure cannot be based on a consideration that is subsumed in the first step of the lodestar method. The base lodestar calculation usually includes at least the following considerations from *Arthur Andersen*: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal service properly; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved; (6) the experience, reputation, and ability of the lawyer or lawyers performing the services; (7) whether the fee is fixed or contingent on results obtained; (8) the uncertainty of collection before the legal services have been rendered; and (9) results obtained. These *Arthur Andersen* considerations therefore may not be used to enhance or reduce the base lodestar calculation to the extent that they are already reflected in the reasonable hours worked and reasonable hourly rate. If a fee claimant seeks an enhancement, it

must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award. Similarly, if a fee opponent seeks a reduction in the fee, that party bears the burden of providing specific evidence to overcome the presumptive reasonableness of a base lodestar figure. *Rohrmoos Venture*, 578 S.W.3d at 500–501.

In cases under the Family Code, additional factors may be considered when determining reasonableness and necessity of fee awards, including (1) the financial standing of the parties and their disparate earning capacities (*Smith v. Smith*, 620 S.W.2d 619, 625 (Tex. App.—Dallas 1981, no writ)); (2) disparity of ages, size of separate estates, and nature of the property (*Campbell v. Campbell*, 625 S.W.2d 41, 43 (Tex. App.—Fort Worth 1981, writ dism'd)); and (3) disparate earning capabilities, different business opportunities, the relative abilities of the parties, the relative financial standing of the parties, their physical conditions, and their probable future needs of support (*Mills v. Mills*, 559 S.W.2d 687, 689 (Tex. App.—Fort Worth 1977, no writ)).

§ 20.19 Attorney's Fees as Sanctions

Before a court may exercise its discretion to shift attorney's fees as a sanction, there must be some evidence of reasonableness, because without such proof a trial court cannot determine that the sanction is no more severe than necessary to fairly compensate the prevailing party. The standard for fee-shifting awards in *Rohrmoos Venture* applies as well to fee-shifting sanctions. *Nath v. Texas Children's Hospital*, No. 17-0110, 2019 WL 2553538, at *2–3 (Tex. June 21, 2019); *see Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Thus, the lodestar method for proving reasonableness and necessity must be used when requesting attorney's fees as sanctions, including discovery sanctions.

§ 20.20 Paralegal Fees

Paralegal fees are not automatically recoverable as a subset of attorney's fees. For recovery of paralegal fees in connection with the recovery of attorney's fees, the paralegal must have performed work that has traditionally been done by an attorney. *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied). In addition, the evidence must establish—

1. that the paralegal is qualified through education, training, or work experience to perform substantive legal work;

2. that the substantive legal work was performed under the direction and supervision of an attorney;
3. the nature of the legal work performed;
4. that the hourly rate charged for the paralegal was reasonable and necessary; and
5. that the number of hours expended by the paralegal were reasonable and necessary.

"Substantive legal work" includes conducting client interviews and maintaining general contact with the client; locating and interviewing witnesses; conducting investigations and statistical and documentary research; drafting documents, correspondence, and pleadings; summarizing depositions, interrogatories, and testimony; and attending executions of wills, real estate closings, depositions, court or administrative hearings, and trials with an attorney. "Substantive legal work" does not include clerical or administrative work. Texas Paralegal Standards, Paralegal Division of the State Bar of Texas. For more information about the definition of paralegal standards, *see* State Bar of Texas Paralegal Division, **txpd.org** (last visited July 24, 2019).

In *Gill Savings*, although holding that paralegal fees are includable in an attorney's fee award under certain conditions, the court found that the testimony and exhibits did not provide any help in determining the qualifications, if any, of the legal assistants, the nature of the work performed, or the hourly rate being charged and held that the evidence was legally insufficient to support the award. *Gill Savings*, 759 S.W.2d at 705; *see also Clary Corp. v. Smith*, 949 S.W.2d 452, 469–70 (Tex. App.—Fort Worth 1997, pet. denied) (outlining requirements necessary for recovery and finding evidence legally insufficient for recovery); *Moody v. EMC Services*, 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (outlining requirements necessary for recovery and finding evidence legally insufficient for recovery); *Multi-Moto Corp. v. ITT Commercial Finance Corp.*, 806 S.W.2d 560, 570 (Tex. App.—Dallas 1991, writ denied) (outlining requirements necessary for recovery).

When proving a reasonable attorney's fee, the lawyer should testify that the hourly rate charged for the paralegal work was reasonable; testifying simply about the total amount of paralegal fees is not sufficient. *See Clary Corp.*, 949 S.W.2d at 470; *see also Moody*, 828 S.W.2d at 248 (invoices listing total cost for various services performed by paralegal not sufficient to support award of fees).

§ 20.21 Segregation of Fees

Generally, a party is required to segregate fees that are recoverable from fees that are not. If discrete legal services advance both a recoverable and an unrecoverable claim, they need not be segregated. *Tony Gullo Motors I, L.P., v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006). In other words, courts concentrate on intertwined legal services rather than intertwined facts.

As examples of legal services that may be necessary whether a claim is filed alone or with others, the supreme court listed "[r]equests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services." The court stated that "[t]o the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service." *Tony Gullo Motors*, 212 S.W.3d at 313.

This standard does not require more precise proof for attorney's fees than for any other claims or expenses. For example, a lawyer need not keep separate time records when drafting the paragraphs of a petition that includes both recoverable and unrecoverable claims. An opinion that a certain percentage of the drafting time would have been necessary even if there had been no unrecoverable claim would suffice. *Tony Gullo Motors*, 212 S.W.3d at 314.

Evidence of unsegregated fees for the entire case constitutes some evidence of what the segregated amount should be. If segregation was required but the lawyer failed to introduce evidence of segregation, remand is required. *Tony Gullo Motors*, 212 S.W.3d at 314.

Whether fees should be segregated is a question of law, and the issue of proper segregation is a mixed question of law and fact. *Endsley Electric, Inc. v. Altech, Inc.*, 378 S.W.3d 15, 28–29 (Tex. App.—Texarkana 2012, no pet.); *Penhollow Custom Homes, LLC v. Kim*, 320 S.W.3d 366, 374 (Tex. App.—El Paso 2010, no pet.).

Segregation can be done simply by using color-coded highlights. *In re Marriage of Mobley*, 503 S.W.3d 636, 646 (Tex. App.—Texarkana 2016, pet. denied).

If attorney's fees are incurred for both enforcement and modification proceedings, the lawyer must segregate the fees attributable to the enforcement action or all the fees are enforceable only as a debt. Specifically, when a party fails to segregate attorney's fees incurred with an enforcement proceeding (fees that can be enforced through contempt) from attorney's fees incurred for work performed in connection with a modification

proceeding (fees that cannot be enforced through contempt), the award of attorney's fees is enforceable only as a debt. *See In re Braden*, 483 S.W.3d 659, 666 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (per curiam). An obligee necessarily required to defeat the obligor's motion to recover overpayments in order to prevail on a claim for unpaid child support need not segregate requested fees. *Bruce v. Bruce*, No. 03-17-00672-CV, 2018 WL 2653550, at *4 (Tex. App.—Austin June 5, 2018, no pet.) (mem. op.).

Because attorney's fees are not recoverable in tort actions, attorney's fees attributable to those causes of action must be segregated. *See Villasenor v. Villasenor*, 911 S.W.2d 411, 420 (Tex. App.—San Antonio 1995, no pet.).

Appeals: The requirement of segregation also applies to attorney's fees on appeal in some circumstances. Because an award of appellate attorney's fees to the appellee in a suit for dissolution of marriage must be contingent on the appellant's unsuccessful appeal, an appellee may not recover attorney's fees for work performed on any issue of the appeal where the appellant was successful but may still recover attorney's fees for work performed on any issue of the appeal where the appellant was unsuccessful. If a party is entitled to attorney's fees from the adverse party on one claim but not another, the party claiming attorney's fees must segregate the recoverable fees from the unrecoverable fees. *Robertson v. Robertson*, No. 13-16-00309-CV, 2017 WL 6546005, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 21, 2017, no pet.) (mem. op.).

§ 20.22 Proof for Interim Attorney's Fees

Dissolution of Marriage: While a suit for dissolution of marriage is pending, the court may order payment of reasonable attorney's fees and expenses after notice and hearing. *See* Tex. Fam. Code § 6.502(a)(4). The court must hold an evidentiary hearing and allow the opposing spouse an opportunity to participate through cross-examination and presentation of evidence. *Post v. Garza*, 867 S.W.2d 88, 90 (Tex. App.—Corpus Christi–Edinburg 1993, orig. proceeding). In a hearing for interim attorney's fees, it is important to prove not only that the fees are reasonable and necessary but also the source from which the fees will be paid. The award of temporary attorney's fees must be based on the needs of the applicant as weighed against the ability of the other party to pay, but the court may not order a party to pay interim attorney's fees beyond the party's present ability to pay. *See Herschberg v. Herschberg*, 994 S.W.2d 273, 279 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.).

Suit Affecting the Parent-Child Relationship: In a suit affecting the parent-child relationship, the court may make a temporary order for the safety and welfare of the child, including an order for payment of reasonable attorney's fees and expenses. Tex. Fam. Code § 105.001(a). Notice and a hearing are required. Tex. Fam. Code § 105.001(b). The statute does not authorize a trial court to order payment of temporary attorney's fees for a purpose other than the safety and welfare of the child. *Saxton v. Daggett*, 864 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding). The party seeking fees must present evidence concerning the safety and welfare of the child, not just evidence that an award of fees is sought to address the disparity in the parties' relative wealth. *In re T.M.F.*, No. 09-10-00019-CV, 2010 WL 574577 (Tex. App.—Beaumont 2010, orig. proceeding) (per curiam) (mem. op.). The party seeking fees must also present evidence that the funds are necessary at the time of the request, not at trial, to protect the safety and welfare of the child. *In re Rogers*, 370 S.W.3d 443 (Tex. App.—Austin 2012, orig. proceeding). *But see In re H.D.V.*, No. 05-15-00421, 2016 WL 4492702 (Tex. App.—Dallas Oct. 5, 2016, pet. denied) (mem. op.) (evidence that, without fee award, party seeking fees would be taking money away from children to pay legal fees would support fee award as being necessary for welfare of children).

§ 20.23 Attorney's Fees on Appeal

The general rule is that a trial court's award of attorney's fees may include appellate attorney's fees. *Hunsucker v. Fustok*, 238 S.W.3d 421, 431 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Neal v. SMC Corp.*, 99 S.W.3d 813, 818 (Tex. App.—Dallas 2003, no pet.)).

Allowing attorney's fees for an appeal is within the discretion of the trier of fact but is not required. However, if there is uncontroverted testimony by the movant for fees and the opposing party has "the means and opportunity of disproving the testimony and fails to do so, the testimony will be taken as true as a matter of law." *Hunsucker*, 238 S.W.3d at 431.

An award of appellate attorney's fees must be contingent on the appellant's unsuccessful appeal; to do otherwise would penalize a party for pursuing a meritorious appeal. *Robertson v. Robertson*, No. 13-16-00309-CV, 2017 WL 6546005, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 21, 2017, no pet.) (mem. op.). If the fees are not so conditioned, the court may reform the judgment to make them conditional on success, so failure to condition is not the basis for reversible error. *See Solomon v. Steitler*, 312 S.W.3d 46, 59–60 (Tex. App.—Texarkana 2010, no pet.). At least one court has held that, in a suit affecting the parent-child relationship, an award of appellate attorney's

fees is not required to be conditioned on a successful appeal. *In re Jafarzadeh*, No. 05-14-01576-CV, 2015 WL 72693, at *2 (Tex. App.—Dallas Jan. 2, 2015, orig. proceeding) (mem. op.). (See the discussion in section 26.8 in this manual.)

Ideally attorney's fees for the appeal should be requested as part of the final judgment and proved up as part of the general request for attorney's fees. If there is a credible showing of the need for appellate attorney's fees in the amount requested and of the opposing spouse's ability to meet that need, the trial court, pending appeal, has authority by temporary orders to require payment of the fees. *Halleman v. Halleman*, 379 S.W.3d 443, 454 (Tex. App.—Fort Worth 2012, no pet.). Several levels of attorney's fees should be considered when proving up the appellate attorney's fees:

1. *Perfecting the appeal.* This step requires the filing of the notice of appeal. At or about the same time, the clerk's record and the reporter's record should be requested, the docketing statement should be filled out, and the filing fee should be paid.
2. *Appellate mediation.* Some of the courts of appeal require the parties to attend mediation. Usually this is voluntary, but not always. An objection may be filed, but the court of appeals may still order both parties to attend.
3. *Appellant's brief.* The appellant's brief is due thirty days after both the clerk's record and the reporter's record have been filed with the court.
4. *Appellee's brief.* The appellee's brief is due thirty days after the appellant's brief has been filed.
5. *Appellant's reply brief.* A reply brief is optional; it is due twenty days after the appellee's brief has been filed.
6. *Oral argument.* The parties must request oral argument, or none will be granted. Even if requested, oral argument is not always granted.
7. *Motion for rehearing.* A motion for rehearing is optional and is due fifteen days after the court of appeals has issued its opinion. A response is required only if requested by the court.
8. *Petition for review.* A petition for review is the first step in pursuing the appeal to the Supreme Court of Texas. It is due forty-five days after the court of appeals has issued its opinion or after the last ruling on the motion for rehearing.

9. *Response to petition for review.* A response to the petition for review is optional unless specifically requested by the supreme court. Usually a response is not requested. If the response is requested, the supreme court generally allows thirty days to file it.

10. *Reply to response to petition for review.* If a response is filed, a reply to the response to the petition for review is optional but may be necessary. A reply is due fifteen days after the response is filed.

11. *Brief on the merits.* A brief on the merits is filed only if specifically requested by the supreme court. If the brief is requested, the supreme court generally allows thirty days to file it.

12. *Response to brief on the merits.* If a brief on the merits has been requested by the supreme court, a response brief should be filed. Generally, the supreme court allows twenty days to file a response brief on the merits.

13. *Oral argument.* Even if both sides request oral argument, the supreme court does not always grant it.

14. *Motion for rehearing.* A motion for rehearing is optional and is due fifteen days after the supreme court has issued its opinion.

The court may grant one or more extensions of the deadlines described above.

Temporary Orders During Appeal: Both title 1 and title 5 of the Texas Family Code provide for temporary orders for attorney's fees during the pendency of an appeal. *See* Tex. Fam. Code §§ 6.709, 109.001. Both require notice and hearing. In a suit for dissolution of marriage, a temporary order may be rendered as considered equitable and necessary for the preservation of the property and for the protection of the parties during the appeal. Tex. Fam. Code § 6.709(a). In a suit affecting the parent-child relationship, the court may make any order necessary to preserve and protect the safety and welfare of the child during pendency of the appeal as the court may deem necessary and equitable. Tex. Fam. Code § 109.001(a).

Mandamus: Unlike for appeals, there are no specific statutory provisions for the award of attorney's fees for prosecuting or defending a petition for writ of mandamus.

[Sections 20.24 through 20.30 are reserved for expansion.]

III. Collecting Attorney's Fees

§ 20.31 Charging Interest on Attorney's Fees

A lawyer may charge interest on unpaid balances of fees owed to the lawyer by a client, provided that the interest charged is reasonable and complies with custom and law and that the underlying fee is reasonable. Tex. Comm. on Prof'l Ethics, Op. 409 (1984). The original fee must not be excessive or unconscionable, in violation of rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct.

The interest rate must not violate Texas usury laws as set forth in chapters 301–305 of the Texas Finance Code. In some instances, the interest charged and the credit arrangements made must comply with Regulation Z (12 C.F.R. pt. 1026) of the Federal Truth in Lending Act (15 U.S.C. §§ 1601–1667f). Failure to comply with these state and federal provisions can result in both civil and criminal penalties, and lawyers must use utmost caution. For a discussion of these complex provisions, see 1 *Texas Collections Manual*, State Bar of Texas, ch. 2 (5th ed. 2018).

§ 20.32 Filing Suit for Fees

It is improper for a lawyer to secure a judgment for legal fees against his client in the same suit in which the lawyer is representing the client. Tex. Comm. on Prof'l Ethics, Op. 374 (1974). Thus a lawyer may not prepare a divorce decree that includes a judgment for recovery of his fees against the client. Such conduct would violate rule 1.06 of the Texas Disciplinary Rules of Professional Conduct. However, a lawyer can include language in a divorce decree awarding debts to the husband and debts to the wife, including the husband's attorney's fees and the wife's attorney's fees. Allocating a debt for these attorney's fees is far different from including language for a judgment for attorney's fees.

The proper procedure would be to withdraw from representation in accordance with rule 1.15 of the Texas Disciplinary Rules of Professional Conduct and then intervene in the same suit or file a separate suit. See the discussion of withdrawal from representation in section 8.12 in this manual.

A lawyer may seek to recover attorney's fees by intervening in the title 1 or title 5 suit. Careful consideration should be given to the ethical aspects of such an intervention and to the possible detrimental effect on the case of the lawyer's client or former client. A lawyer representing a client whose former lawyer intervenes for fees should advise the

client that an action for legal malpractice is a compulsory counterclaim to the action for fees.

"Nearly every continuing legal education article or speech on the topic . . . advises against suing your client for attorney's fees. . . . Invariably your suit for attorney's fees will be followed by a suit against you for some alleged act of malpractice." Larry H. Schwartz, *Attorney's Fees*, 1 State Bar of Tex. Prof. Dev. Program, Advanced Family Law Course 8 (2003). See also Kathryn J. Murphy, *Attorney's Fees Agreements*, 1 State Bar of Tex. Prof. Dev. Program, Advanced Family Law Course 6 (2011). However, if the practitioner is determined to do so, he must first withdraw and then file suit. He may intervene if he can show that the intervention will not complicate the case and that the intervention is almost essential to effectively protect his interest. *Collins v. Moroch*, 339 S.W.3d 159, 163 (Tex. App.—Dallas 2011, pet. denied).

COMMENT: In an intervention for fees based on a client's breach of an hourly-fee contract, the evidence, including the lawyer's billing statements and witness testimony, must provide sufficient detail for the trial court to determine the nature of the work performed. *See John H. Carney & Associates v. Ahmad*, No. 07-15-00252-CV, 2016 WL 368527 (Tex. App.—Amarillo Jan. 28, 2016, pet. denied) (mem. op.).

§ 20.33 Withholding of Services Until Fee Is Paid

Late payment or nonpayment of a fee does not justify withholding services from a client. If the client substantially fails to fulfill an obligation to the attorney regarding the attorney's services, including an obligation to pay the attorney's fee as agreed, the only recourse is to withdraw from representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5). Withdrawal is permitted only on written motion for good cause shown. Tex. R. Civ. P. 10. The attorney must take steps to the extent reasonably practicable to protect the client's interests. These steps include giving reasonable warning to the client that the attorney will withdraw unless the obligation is fulfilled, allowing time to employ other attorneys, and surrendering papers and property to which the client is entitled. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5), (d). The attorney must continue representing the client, notwithstanding good cause to withdraw, if the court so orders. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(c). Withdrawal from representation is more fully discussed in section 8.12 in this manual.

A Texas lawyer was publicly reprimanded when, after obtaining a divorce for his client, he failed to distribute all the property awarded to the client. He kept certain properties in his own name and failed to return them because of a fee dispute with the client. The

district grievance committee concluded that these actions constituted professional misconduct. 45 Tex. B.J. 203 (1982).

A lawyer may condition acceptance of employment on advance payment but may not condition completion of legal services on payment of unpaid portions of the fee. A client's failure to pay for the lawyer's services does not relieve the lawyer of the duty to perform completely and on time unless the lawyer withdraws from representation in a manner that does not prejudice the client's legal rights. If a client refuses to pay for legal services, the lawyer may withdraw from representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5). Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d).

§ 20.34 Attorney's Liens

Often lawyers mistakenly believe that clients' attempts to dismiss them can be denied on an attorney's lien theory. An attorney who is discharged by a client must withdraw from employment. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(a)(3).

In Texas, a lien for attorney's fees has a common-law rather than statutory basis. To perfect and maintain the lien, the lawyer must have actual possession of the client's property and must make a demand for payment. *Smith v. State*, 490 S.W.2d 902, 910 (Tex. App.—Corpus Christi–Edinburg 1972, writ ref'd n.r.e.).

Assertion of Lien May Be Unethical: An attorney withdrawing from representation must take steps to the extent reasonably practicable to protect the client's interests. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d). Thus, if assertion of an attorney's lien would result in foreseeable prejudice to the client, the lien should not be exercised. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 395 (1979); Tex. Comm. on Prof'l Ethics, Op. 411 (1984).

If clients request payment or delivery of funds or other property to which they are entitled, attorneys have a duty to comply promptly. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d). One lawyer was suspended from practice for three months for refusing to return a client's files after repeated requests. *Hebisen v. State*, 615 S.W.2d 866 (Tex. App.—Houston [1st Dist.] 1981, no writ). In *Smith v. State*, 523 S.W.2d 1, 6 (Tex. App.—Corpus Christi–Edinburg 1975, writ ref'd n.r.e.), a disbarment proceeding, the jury found that a lawyer who refused to turn over a client's file to her selected lawyer

was not trying to exert an attorney's lien but was instead willfully and wrongfully refusing to relinquish a client's documents.

The lawyer is the agent of the client, and the work product generated by the lawyer in representing the client belongs to the client. *In re George*, 28 S.W.3d 511, 516 (Tex. 2000) (orig. proceeding).

COMMENT: To avoid potential embarrassment and ill will by the client, the lawyer should refrain from putting uncomplimentary comments in the client's file.

In another case, the court held the following:

> An attorney should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. . . . [The attorney should give] due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm.

Robinson v. Risinger, 548 S.W.2d 762, 766 (Tex. App.—Tyler 1977, writ ref'd n.r.e.).

Under former DR 9-102(B)(4), a client has a right to the return of papers on request if the lawyer cannot claim an attorney's lien. The court reasoned that, although a client's remedy for a lawyer's violation of this right would be a damage action sounding in tort, the fact that the client cast the violation in terms of breach of contract would not preclude damages if the client could prove the violation. *Nolan v. Foreman*, 665 F.2d 738, 742–43 (5th Cir. 1982). *But see Martin v. Trevino*, 578 S.W.2d 763, 770 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.) (violation of former Code of Professional Responsibility will not give rise to private cause of action). However, the same court later stated that the appellee might seek recovery in a private cause of action against the appellant's lawyer whose violation of the Code of Professional Responsibility rendered a postjudgment settlement agreement void and unenforceable. *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 233 (Tex. App.—Corpus Christi–Edinburg 1985, writ ref'd n.r.e.).

COMMENT: Returning a client's file has become increasingly important because most discovery is not filed with the court and many clients do not retain a complete copy of the papers sent to them during the course of the case. If a client subsequently

changes lawyers, the second lawyer may be unaware of outstanding discovery requests or that discovery supplementation may be needed.

A court may not place an equitable lien on a former spouse's real and personal property to ensure payment of attorney's fees incurred in a postdivorce enforcement action. *Higgins v. Higgins*, 514 S.W.3d 382, 391 (Tex. App.—San Antonio 2017, pet. denied).

[Sections 20.35 through 20.40 are reserved for expansion.]

IV. Statutory Authority

§ 20.41 Appendix: Statutes and Rules—Attorney's Fees

The following statutes and rules allow or relate to the recovery of attorney's fees in family law litigation:

Family Code:

§ 6.502(a)(4)	Temporary Injunction and Other Temporary Orders [Dissolution of Marriage]
§ 6.708(c)	Costs: Attorney's Fees and Expenses [Dissolution of Marriage]
§ 6.709(a)(2)	Temporary Orders Pending Appeal [Dissolution of Marriage]
§ 8.0591(b)	Overpayment [of Spousal Maintenance]
§ 8.206(b)(3)	Liability and Obligation of Employer for Payments [of Spousal Maintenance]
§ 8.208(c)	Employer's Liability for Discriminatory Hiring or Discharge
§ 9.014	Attorney's Fees [for Enforcement of Decree]
§ 9.106	Attorney's Fees [for Obtaining QDRO]
§ 9.205	Attorney's Fees [for Suit to Divide Undivided Property]
§ 41.002	Limit of Damages [for Liability of Parents for Conduct of Child]

§ 41.0025	Liability for Property Damages to an Inn or Hotel [for Liability of Parents for Conduct of Child]
§ 42.006	Damages [Civil Liability for Interference with Possessory Interest in Child]
§ 42.009	Frivolous Suit [Civil Liability for Interference with Possessory Interest in Child]
§ 81.005	Attorney's Fees [for Obtaining Protective Order]
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Chapter 23

Divorce—Decrees and Agreements Incident to Divorce

I. Decrees

§ 23.1 Required Specificity

Courts have inherent and statutory power to enforce decrees, but a decree's enforceability is determined by the nature of the decree itself. *Ex parte Gorena*, 595 S.W.2d 841, 845 (Tex. 1979) (orig. proceeding). The decree must set out the details of compliance in clear, specific, and unambiguous terms so that the parties will readily know exactly what obligations are imposed. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding). A general residuary clause in a divorce decree can divide property if the property was not otherwise divided in a specific award. *See In re W.L.W.*, 370 S.W.3d 799, 804 (Tex. App.—Fort Worth 2012, orig. proceeding). The decree must inform the parties of their obligations without calling on them to make or draw conclusions about which persons might well differ. *Ex parte Slavin*, 412 S.W.2d at 44–45. Except as discussed below, if the requirement of specificity is met, the final decree will be enforceable by contempt as a court order even if the terms of the judgment have been determined by agreement of the parties rather than by decision of the judge. *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979) (per curiam).

§ 23.2 Orders Not Enforceable by Contempt

Certain provisions of a divorce decree may not be made enforceable by contempt, either because enforcement would violate constitutional principles or because the court lacks the requisite subject-matter jurisdiction. For example, a finding of contempt for violation of an order for the payment of debts resulting in imprisonment violates the Texas Constitution. *Ex parte Yates*, 387 S.W.2d 377, 380 (Tex. 1965) (orig. proceeding). Similarly, orders requiring a party to perform an act the party is incapable of performing are likewise not subject to enforcement by contempt. *Ex parte Gonzales*, 414

S.W.2d 656, 657 (Tex. 1967) (orig. proceeding). Orders requiring religious instruction violate article I, section 6, of the Texas Constitution and are not enforceable by contempt. *See Salvaggio v. Barnett*, 248 S.W.2d 244 (Tex. App.—Galveston, writ ref'd n.r.e.). Accordingly, visitation cannot be conditioned on taking a child to Sunday school. *Watts v. Watts*, 563 S.W.2d 314, 316–17 (Tex. App.—Dallas 1978, writ ref'd n.r.e.), *disapproved on other grounds*, *Jones v. Cable*, 626 S.W.2d 734, 736 (Tex. 1981). Nor is a judgment providing that a child attend a particular school enforceable by contempt. *Ex parte Miller*, 400 S.W.2d 295, 296 (Tex. 1966) (orig. proceeding). Unless otherwise allowed by statute, orders for the support of children beyond their eighteenth birthdays are unenforceable by contempt, even if such orders incorporate an agreement to that effect, absent statutory authority for such an order. *In re Cobble*, 592 S.W.2d 46, 48–49 (Tex. App.—Tyler 1979, writ dism'd). An order enjoining future speech, even if defamatory, may be an unconstitutional infringement on free speech and therefore not enforceable by contempt. *Kinney v. Barnes*, 443 S.W.3d 87, 98–99 (Tex. 2014).

COMMENT: Under certain conditions, orders for the support of children over the age of eighteen but still enrolled in an accredited secondary school in a program leading toward a high school diploma under chapter 25 of the Texas Education Code, enrolled in courses for joint high school and junior college credit pursuant to Education Code section 130.008, or enrolled on a full-time basis in a private secondary school in a program leading toward a high school diploma, and meeting relevant attendance requirements, are valid and enforceable court orders. *See* Tex. Fam. Code § 154.002(a). Furthermore, the court retains the authority to issue orders for the support of an adult disabled child over the age of eighteen. *See* Tex. Fam. Code § 154.302 *et seq.*

Other provisions of a decree may be enforceable by contract. A marital property agreement, although incorporated into a final divorce decree, is treated as a contract, and its legal force and meaning are governed by the law of contracts, not by the law of judgments. *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986). A person may contract to support his spouse, and that obligation, to the extent it exceeds his legal duty, is a debt. *Ex parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993) (orig. proceeding). Where the duty to make support payments arises from an agreement between the parties, rather than from a divorce decree based entirely on the power conferred by the Family Code, the rights and obligations of the parties are governed by the rules of contract. *See Hutchings v. Bates*, 406 S.W.2d 419, 420 (Tex. 1966); *Griffin v. Griffin*, 535 S.W.2d 42, 43–44 (Tex. App.—Austin 1976, no writ). As with any other contract, absent the parties' consent, the provisions of an agreed decree cannot be set aside except on the basis of fraud, accident, or mutual mistake of fact. *Schwartz v. Schwartz*, 247 S.W.3d 804 (Tex. App.—

Dallas 2008, no pet.). This holding does not apply to provisions in a suit affecting the parent-child relationship.

§ 23.3 Specificity of Dates and Times

The divorce decree should specify the dates, times, and locations of any required acts, including the conveyance of property or payment of money. The requirement to pay certain medical bills *timely* has been held to be unduly vague. *Ex parte Carpenter*, 566 S.W.2d 123, 124 (Tex. App.—Houston [14th Dist.] 1978, orig. proceeding) (per curiam). However, an order that required certain transfers of personalty or payments of money be made "immediately," while not as desirable as stating a specific time, has been held to have unequivocal meaning and therefore not to be unduly vague. *Ex parte Fernandez*, 645 S.W.2d 636, 638 (Tex. App.—El Paso 1983, orig. proceeding). Payment into the "registry of the court" is also not unduly vague, because it is a common procedure, provided the court and county are identified in the order sought to be enforced. *Ex parte Fernandez*, 645 S.W.2d at 638.

§ 23.4 Execution and Delivery of Instruments

General language providing for the execution of future documents necessary to effect the terms of the decree is often too vague for enforcement by contempt. *See Ex parte Choate*, 582 S.W.2d 625, 627–28 (Tex. App.—Beaumont 1979, orig. proceeding) (order holding husband in contempt for failure to sign "required instruments" was void).

COMMENT: The attorney may wish to include specific language requiring the execution of certain transfer documents attached to the decree as exhibits, as such language should increase the availability of contempt.

§ 23.5 Clarification and Enforcement of Orders

The court retains the inherent power to clarify or enforce a divorce decree as long as the court does not substantively alter the property division made in the original decree. Clarifying a decree that imposes an equitable lien against property to provide that the lien must be satisfied on the sale of the property is not a substantive alteration. *Karigan v. Karigan*, 239 S.W.3d 436 (Tex. App.—Dallas 2007, no pet.). Various procedures for clarification and enforcement of property divisions and orders in parent-child cases are discussed in chapters 31, 33, and 34 of this manual.

§ 23.6 Insurance

Life Insurance: The trial court is authorized to divest title to a life insurance policy as part of the division of the estate of the parties. *Wallace v. Wallace*, 371 S.W.2d 918, 920–22 (Tex. App.—San Antonio 1963, writ dism'd). The court may also order that the policy be transferred to the noninsured spouse to be held in trust for the benefit of the children or that life insurance coverage be continued for the benefit of the children. Forms 24-25 and 24-26 in this manual are designed to assist in securing the change of beneficiary and to obtain confirmation of continued coverage.

A constructive trust may be imposed on the proceeds of a life insurance policy paid to a third party when the divorce decree orders the insured to name the children or the former spouse, who is the trustee for the children, as beneficiary. *Hudspeth v. Stoker*, 644 S.W.2d 92, 95–96 (Tex. App.—San Antonio 1982, writ ref'd); *Roberts v. Roberts*, 560 S.W.2d 438, 439-40 (Tex. App.—Beaumont 1977, writ ref'd).

If a decree of divorce or annulment is rendered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of rendition of the decree, a provision in the policy in favor of the insured's former spouse is not effective unless (1) the decree designates the insured's former spouse as the beneficiary, (2) the insured redesignates the former spouse as the beneficiary after rendition of the decree, or (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse. Tex. Fam. Code § 9.301(a); *see also Gray v. Nash*, 259 S.W.3d 286 (Tex. App.—Fort Worth 2008, pet. denied). *But see Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (ERISA requires payment of benefits to designated beneficiary notwithstanding state law to the contrary). Although ERISA requires payment of benefits to the designated beneficiary, it does not preempt a postdistribution lawsuit against that beneficiary. *Hennig v. Didyk*, 438 S.W.3d 177 (Tex. App.—Dallas 2014, pet. denied) (ex-wife ordered to pay proceeds to estate of ex-husband where agreed divorce decree awarded husband all life insurance policies incident to his employment).

If the predecree designation fails, the proceeds of the policy are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the estate of the insured. Tex. Fam. Code § 9.301(b). An insurer who pays the proceeds of a life insurance policy issued by the insurer to the beneficiary under a predecree designation that is not effective under section 9.301(a) is liable for payment of the proceeds to the proper person or estate *only if* before the improper payment the insurer received written notice at its home office from an interested person that the designation was not effective

and the insurer did not interplead the proceeds into the registry of a court of competent jurisdiction. Tex. Fam. Code § 9.301(c).

Health Insurance for Child: The court must render an order for the medical support of a child in any suit affecting the parent-child relationship in which the court orders periodic payments of child support or determines that medical support of the child must be established, modified, or clarified. Tex. Fam. Code § 154.181(a)(1), (a)(2). On rendering a final order, the court must make specific findings with respect to how health-care coverage is to be provided and must follow the statutory priorities unless good cause is shown for not doing so. Tex. Fam. Code §§ 154.181(d), 154.182(b). Except for good cause shown or on agreement of the parties, the court must require the parent ordered to provide health-care coverage to provide evidence to the court's satisfaction that the parent has applied for or secured health insurance or has otherwise taken necessary action to provide for health-care coverage for the child as ordered. Tex. Fam. Code § 154.181(d).

Detailed coverage of this topic is provided in chapter 9 of this manual.

Form 24-27 in this manual is designed to assist the obligee of a child support order in verifying the continued existence of the coverage.

Dental Insurance for Child: In any suit affecting the parent-child relationship, the court must render an order for the dental support of the child. Tex. Fam. Code § 154.1815(b). On rendering a final order, the court must make specific findings with respect to how dental coverage is to be provided and must follow the statutory priorities unless good cause is shown for not doing so. Tex. Fam. Code §§ 154.1815(e), 154.1825(c). Except for good cause shown or on agreement of the parties, the court must require the parent ordered to provide dental coverage to provide evidence to the court's satisfaction that the parent has applied for or secured dental insurance or has otherwise taken necessary action to provide for dental insurance coverage for the child as ordered. Tex. Fam. Code § 154.1815(e).

Detailed coverage of this topic is provided in chapter 9 of this manual.

Form 24-27 in this manual is designed to assist the obligee of a child support order in verifying the continued existence of the coverage.

Insurance for Child Support after Obligor's Death: The court may order a child support obligor to obtain and maintain life insurance to satisfy the support obligation in

the event of the obligor's death. Tex. Fam. Code § 154.016. For a discussion of this topic, see section 9.10 in this manual.

Disposition of Beneficial Interests: In the decree of divorce, the trial court shall specifically divide or award the rights of each spouse in an insurance policy. Tex. Fam. Code § 7.004.

If the decree does not specifically award all the rights of the spouses in an insurance policy (for example, casualty, homeowner's insurance, auto insurance) other than life insurance in effect at the time the decree is rendered, the policy remains in effect until it expires according to its own terms. If the interest in the insured property is awarded solely to one former spouse by the decree, the proceeds are payable to that former spouse. If each spouse receives an interest in the insured property, the proceeds are payable to those former spouses in proportion to the interests awarded. If the insurance coverage is directly related to the person of one of the former spouses, the proceeds are payable to that former spouse. The failure of either former spouse to change the endorsement on a policy to reflect the proper distribution of proceeds established by section 7.005 does not relieve the insurer of liability to pay the proceeds or any other obligation of the policy. Tex. Fam. Code § 7.005(a)–(c).

An ownership interest in an undivided life insurance policy may be asserted in a suit for a postdecree division of property under Family Code chapter 9.

§ 23.7 Continuation of Insurance Coverage

Health Insurance: After divorce, a spouse can elect to continue health insurance under either federal or state law. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires most group health plans to offer continued coverage for former spouses of members of the group. COBRA provisions for health insurance are codified at 26 U.S.C. § 4980B (Internal Revenue Code), 29 U.S.C. §§ 1161–1168 (ERISA), and 42 U.S.C. §§ 300bb–1 to –8. COBRA does not apply to church plans, small employer plans (fewer than twenty employees), and certain governmental plans.

A former spouse desiring to obtain continued health insurance coverage under a former spouse's group policy must make the election by notifying the plan administrator within sixty days of the severance of the family relationship. The applicant must have been a dependent of the group member on the day preceding the date of the dissolution of the marriage. The coverage is available for a period of thirty-six months following the dis-

solution or until the applicant is covered under another group plan or Medicare, whichever occurs first.

The Texas Insurance Code contains similar extended coverage provisions for all group health insurance policies delivered, issued for delivery, or renewed in Texas and does not exempt small employers or churches. *See* Tex. Ins. Code §§ 1251.301–.310. Either the group member or dependent must notify the plan administrator within fifteen days of the dissolution of the marriage. Tex. Ins. Code § 1251.308(a). (This fifteen-day notice is not required for plans covered by the federal version.) The applicant must request the continued coverage within sixty days of the dissolution. Tex. Ins. Code § 1251.308(d). Unlike under the federal COBRA, which allows for continuation of coverage even if the spouse has only been a member of the plan for one day, the applicant must have been a member of the group for at least one year before the dissolution. Tex. Ins. Code § 1251.302. The Texas version also provides for extended coverage for a period of thirty-six months or until the applicant becomes eligible for coverage under another plan, whichever occurs first. Tex. Ins. Code § 1251.310. Forms 24-28 and 24-29 in this manual are designed for seeking continuation of health insurance coverage.

COMMENT: Failure to strictly comply with the notice requirements of both federal and Texas COBRA provisions may result in the complete loss of the opportunity to continue health insurance coverage.

Homeowner's or Fire Insurance: A homeowner's or fire insurance policy covering residential property remains in effect regardless of divorce or change of ownership between the spouses, unless excluded by endorsement, until regular expiration or cancellation of the policy. Tex. Ins. Code § 2002.003.

Automobile Insurance: Automobile insurance coverage continues during a period of separation in contemplation of divorce but does not continue after the divorce. Tex. Ins. Code § 1952.056.

§ 23.8 Debts and Tax Liabilities

The court's authority to divide the estate of the parties includes the authority to order one of the parties to pay community debts. The court's award cannot prejudice the rights of creditors, but, as between husband and wife, it may award one party property entirely free from the community debts. *Broadway Drug Store of Galveston, Inc. v. Trowbridge*, 435 S.W.2d 268, 270 (Tex. App.—Houston [14th Dist.] 1968, no writ).

However, taxes on community income must be specifically addressed to a party. General language ordering one party to pay the "community debts" is not sufficient to include an obligation to pay taxes on community income. *Brooks v. Brooks*, 515 S.W.2d 730, 733 (Tex. App.—Eastland 1974, writ ref'd n.r.e.).

COMMENT: While decrees often require a party to be responsible for the taxes associated with the property awarded to that party or confirmed as the party's separate property, the parties should also address the tax consequences of any assets that were disposed of during the year of divorce but before the date of divorce. For example, if, in the year of divorce, a wife sold shares of stock in her name to pay her husband's interim attorney's fees and temporary spousal support, should the wife, the husband, or both the wife and the husband be responsible for the tax resulting from that sale?

§ 23.9 Spousal Maintenance and Contractual Alimony

Spousal Maintenance: The purpose of spousal maintenance is to provide temporary and rehabilitative support for a spouse whose ability to support himself has eroded over time while he was engaged in homemaking activities and whose capital assets are insufficient to provide support. *Howe v. Howe*, 551 S.W.3d 236, 256 (Tex. App.—El Paso 2018, no pet.). Texas courts may order spousal maintenance at the time of divorce only if the spouse seeking maintenance will lack sufficient property, including his separate property, on dissolution of the marriage to provide for his minimum reasonable needs and if certain other conditions are met. Such maintenance may be granted if the party from whom maintenance is requested was convicted of or received deferred adjudication for a criminal offense that also constitutes an act of family violence, as defined by Family Code section 71.004, committed during the marriage against the other spouse or the other spouse's child and the offense occurred within two years before the date on which the suit was filed or while the suit is pending. Alternatively, such maintenance may be granted if the spouse seeking maintenance is unable to earn sufficient income to provide for his minimum reasonable needs because of an incapacitating physical or mental disability or has been married to the other spouse for ten years or longer and lacks the ability to earn sufficient income to provide for his minimum reasonable needs or is the custodian of a child of the marriage of any age who requires substantial care and personal supervision because of a physical or mental disability that prevents the spouse from earning sufficient income to provide for his minimum reasonable needs. *See* Tex. Fam. Code § 8.051.

The trial court is not required to determine whether a spouse seeking spousal support will be able to provide for his minimum reasonable needs at some point in the future.

The trial court must only consider the requesting spouse's eligibility for maintenance at the time of the divorce. *Castillo v. Castillo*, No. 13-16-00174-CV, 2018 WL 1960168, at *3 (Tex. App.—Corpus Christi–Edinburg Apr. 26, 2018, no pet.) (mem. op.).

In considering assets awarded in the divorce, the law does not require a spouse to spend down long-term assets, liquidate all available assets, or incur new debt simply to obtain job skills and meet needs in the short term. *Trueheart v. Trueheart*, No. 14-02-01256-CV, 2003 WL 22176626, at *3 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, no pet.) (mem. op.); *see also Alfayoumi v. Alzoubi*, No. 13-15-00094-CV, 2017 WL 929482, at *2 (Tex. App.—Corpus Christi–Edinburg Mar. 9, 2017, no pet.) (mem. op.) (wife not required to spend down $250,000 in gold awarded to her to meet her short-term needs).

The term "minimum reasonable needs" is not defined in the Family Code. A trial court determines whether a party's minimum reasonable needs are met on a fact-specific, individualized, case-by-case basis. *Howe*, 551 S.W.3d at 256. A court abuses its discretion if it awards maintenance when there is insufficient evidence of the requesting spouse's minimum reasonable needs. *See Howe*, 551 S.W.3d at 257. A court also abuses its discretion in awarding maintenance if the requesting spouse will receive more income than his proven minimum reasonable needs. The income can include Social Security benefits and payments for a judgment awarded to the requesting spouse by the court as part of the property division. *See Willis v. Willis*, 533 S.W.3d 547, 556 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

The ten-year marriage requirement is measured as of the time of trial, not the time of filing suit. *See Hipolito v. Hipolito*, 200 S.W.3d 805 (Tex. App.—Dallas 2006, pet. denied).

There is a rebuttable statutory presumption against the award of spousal maintenance based on a marriage of ten years or longer. To rebut this presumption, the requesting spouse must show he has exercised diligence in earning sufficient income to provide for his minimum reasonable needs or in developing the necessary skills to provide for his minimum reasonable needs during separation and during the pendency of the dissolution suit. Tex. Fam. Code § 8.053; *see In re Marriage of Hale*, 975 S.W.2d 694, 698 (Tex. App.—Texarkana 1998, no pet.) (federal minimum wage is not as a matter of law sufficient to meet minimum reasonable needs). Evidence that the requesting spouse exercised diligence in attempting to develop the necessary skills to provide for her minimum reasonable needs, which were also hindered by CPS's requirement for her to be employed, was sufficient to rebut this presumption. *See Arellano v. Arellano*, No. 01-16-00854-CV, 2018 WL 284333, at *4 (Tex. App.—Houston [1st Dist.] Jan. 4, 2018,

no pet.) (mem. op.). A requesting spouse's high-school education, twenty years of marriage as a homemaker, work at a low-paying job, lack of transportation, and child-rearing responsibilities also were sufficient to rebut this presumption. *See In re Marriage of Eilers*, 205 S.W.3d 637, 646 (Tex. App.—Waco 2007, pet. denied).

If the court determines that the requesting spouse is eligible for postdivorce spousal maintenance, the court may consider a multitude of factors in deciding on the nature, amount, duration, and manner of the periodic payments. Among these factors are—

1. each spouse's ability to provide for that spouse's minimum reasonable needs independently, considering that spouse's financial resources on dissolution of the marriage;
2. the education and employment skills of the spouses, the time necessary to acquire sufficient education or training to enable the spouse seeking maintenance to earn sufficient income, and the availability and feasibility of that education or training;
3. the duration of the marriage;
4. the age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance;
5. the effect on each spouse's ability to provide for that spouse's minimum reasonable needs while providing periodic child support payments or maintenance, if applicable;
6. acts by either spouse resulting in excessive or abnormal expenditures or destruction, concealment, or fraudulent disposition of community property, joint tenancy, or other property held in common;
7. the contribution by one spouse to the education, training, or increased earning power of the other spouse;
8. the property brought to the marriage by either spouse;
9. the contribution of a spouse as homemaker;
10. marital misconduct, including adultery and cruel treatment, by either spouse during the marriage; and
11. any history or pattern of family violence, as defined by Family Code section 71.004.

Tex. Fam. Code § 8.052. These factors apply only once the trial court had determined that a spouse is eligible for spousal support. *Howe*, 551 S.W.3d at 257.

The court may not deny a request for maintenance on the basis that the spouse could acquire additional debts to meet monthly expenses. *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 15 (Tex. App.—Waco 2002, no pet.).

Section 8.053 contains the requirements that the spouse exercise diligence in earning sufficient income or developing the necessary skills to provide for his minimum reasonable needs. *See* Tex. Fam. Code § 8.053.

If the spouse seeking maintenance is not suffering from an impediment that diminishes the ability to meet minimum reasonable needs, the court must limit the time the spouse receives court-ordered spousal maintenance to the shortest reasonable period sufficient for that spouse to earn sufficient income to provide for his minimum reasonable needs. The court may not order maintenance that remains in effect for more than five years after the date of the order if the spouses were married for less than ten years and eligibility for maintenance is based on family violence or if the spouses were married for at least ten but not more than twenty years; the limit is seven years if the spouses were married for at least twenty but not more than thirty years; the limit is ten years if the spouses were married for thirty years or more. *See* Tex. Fam. Code § 8.054(a).

However, an order of longer duration may be made for a spouse who is unable to earn sufficient income because of having an incapacitating physical or mental disability (Code section 8.051(2)(A)) or because of being the custodian of a child who requires substantial care and personal supervision because of a physical or mental disability (Code section 8.051(2)(C)). In these circumstances, the court may order maintenance for as long as the spouse continues to satisfy those eligibility criteria. Tex. Fam. Code § 8.054(b). On its own motion or that of a party, the court may order periodic review of such an order. Tex. Fam. Code § 8.054(c). Continuation of maintenance under these circumstances is subject to a motion to modify under Family Code section 8.057. Tex. Fam. Code § 8.054(d).

The amount awarded may be reduced by the filing of a motion in the court that originally rendered the order. A party affected by the order may file the motion to modify. Tex. Fam. Code § 8.057(a). The statute does not provide for an increase of the amount of maintenance, only a reduction. The person seeking the modification must plead and prove that there has been a material and substantial change in circumstances, including circumstances reflected in the factors specified in Code section 8.052, relating to either

party or to a child of the marriage requiring substantial care and personal supervision because of a physical or mental disability. The court shall apply the modification only to payment accruing after the filing of the motion. Tex. Fam. Code § 8.057(c); *see Carlin v. Carlin*, 92 S.W.3d 902, 911 (Tex. App.—Beaumont 2002, no pet.) (in suit to extend maintenance, former wife did not establish by preponderance of evidence that she had incapacitating disability and that disability prevented her from supporting herself through appropriate employment). *But see Crane v. Crane*, 188 S.W.3d 276 (Tex. App.—Fort Worth 2006, pet. denied) (continuation of spousal maintenance based on incapacitating physical or mental disability is not modification of spousal maintenance and places no special burden of proof on movant other than to prove by preponderance of evidence that disability is continuing).

Medical testimony regarding disability or prognosis based on medical probability is not required to support a claim for spousal maintenance. In fact, no expert testimony of any kind is required to make a case for postdivorce spousal maintenance. The trial court may infer disability from the circumstances. *Pickens v. Pickens*, 62 S.W.3d 212, 215–16 (Tex. App.—Dallas 2001, pet. denied); *see also Galindo v. Galindo*, No. 04-13-00325-CV, 2014 WL 1390474, at *2 (Tex. App.—San Antonio Apr. 9, 2014, no pet.) (mem. op.) (trial court could infer incapacity from evidence of long-term medical issues even though wife did not feel she was disabled).

The obligation to pay spousal maintenance terminates on the death of either party, remarriage of the obligee, or a court finding of cohabitation of the obligee with another person with whom the obligee has a dating or romantic relationship in a permanent place of abode on a continuing basis. Termination, whether as a result of death or remarriage or a court order based on cohabitation, does not terminate the obligation to pay any maintenance that accrued before the date of termination. Tex. Fam. Code § 8.056. Agreed contractual maintenance provisions will not be terminated or modified by courts except as provided for in the agreement. *Waldrop v. Waldrop*, 552 S.W.3d 396, 408 (Tex. App.—Fort Worth 2018, no pet.).

"Maintenance" means an award in a suit for dissolution of a marriage of periodic payments from the future income of one spouse for the support of the other spouse. Tex. Fam. Code § 8.001(1). An award of maintenance is limited to the lesser of $5,000 or 20 percent of the paying spouse's average monthly gross income. Tex. Fam. Code § 8.055(a). Gross income is defined in Tex. Fam. Code § 8.055(a–1). For purposes of Code chapter 8, gross income includes "wage and salary income and other compensation for personal services" and other specified types of "income." *See* Tex. Fam. Code § 8.055(a–1)(1). The statute also identifies certain items not included in gross income,

such as return of principal or capital, accounts receivable, and benefits provided by certain government programs. *See* Tex. Fam. Code § 8.055(a–1)(2). Incumbent in a spousal maintenance award is the obligor spouse's ability to earn income to satisfy the maintenance obligation. *Mathis v. Mathis*, No. 12-17-00049-CV, 2018 WL 1324777, at *4 (Tex. App.—Tyler Mar. 15, 2018, no pet.) (mem. op.) (incarcerated spouse lacks "income" from any source identified in Code section 8.055(a–1)).

Spousal maintenance may be subject to an order or writ of income withholding. *See* Tex. Fam. Code §§ 8.101–.108. Only an amount (including any amount being withheld for child support) up to 50 percent of the obligor's disposable earnings is subject to withholding. Tex. Fam. Code § 8.106.

For a discussion of the enforcement of spousal maintenance and the return of any overpayments, see chapter 32 of this manual.

Spousal maintenance is not property. *O'Carolan v. Hopper*, 71 S.W.3d 529, 533 (Tex. App.—Austin 2002, no pet.). A court may not award maintenance in lieu of any interest in the available community property. *O'Carolan*, 71 S.W.3d at 533–34.

The court has the authority to render a spousal maintenance award only in a suit for dissolution of marriage or, after a dissolution of marriage by a court that did not have personal jurisdiction over an absent spouse, in a proceeding for maintenance in a court that has personal jurisdiction over both former spouses. Tex. Fam. Code § 8.051. Loss of job or incapacitating disability occurring after the original order cannot be grounds for the institution of spousal maintenance. Tex. Fam. Code § 8.057(d).

One court of appeals has stated that spousal maintenance is taxable to the payee and deductible by the payor just like alimony. *See O'Carolan*, 71 S.W.3d at 534. (See the discussion of federal tax treatment at "Tax Considerations of Alimony and Maintenance" below.)

COMMENT: Note that the appellate court in *O'Carolan* is not a tax court.

Contractual Alimony: The husband and wife can agree to an alimony contract that is enforceable under Texas law as a contract. *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967). An affidavit of sponsorship for an alien spouse creates a contractual support obligation that the court cannot modify. *In re Marriage of Kamali & Alizadeh*, 356 S.W.3d 544, 547 (Tex. App.—Texarkana 2011, no pet.). Chapter 8 of the Family Code also provides that an order for maintenance or an agreement for periodic payments of maintenance voluntarily entered into between the parties and approved by the court

may be enforced by contempt. Tex. Fam. Code § 8.059(a). This provision applies only to agreements that would qualify for maintenance in both amount and duration under Family Code chapter 8 (with a $5,000 monthly cap and, generally, a limit of five to ten years). *See In re Green*, 221 S.W.3d 645 (Tex. 2007) (orig. proceeding) (per curiam); *Kee v. Kee*, 307 S.W.3d 812 (Tex. App.—Dallas 2010, pet. denied). A court cannot order wage withholding to enforce payment of contractual alimony. *Heller v. Heller*, 359 S.W.3d 902 (Tex. App.—Beaumont 2012, no pet.). However, section 8.101 allows withholding for agreed periodic payments to the extent that they do not exceed in amount or duration maintenance that the court could have ordered. *See* Tex. Fam. Code § 8.101. See chapter 32 of this manual concerning enforcement of spousal maintenance provisions.

Tax Considerations of Alimony and Maintenance: Federal tax treatment of alimony and separate maintenance payments differs depending on when the underlying decree or agreement was executed or, in some instances, modified. Under recent amendments to the Internal Revenue Code, longstanding provisions regarding the deductibility and taxation of such payments will no longer be in effect for instruments executed after December 31, 2018, or for instruments executed on or before that date but modified thereafter if the modification expressly provides that the amended law applies to the modification. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051(c), 131 Stat. 2054 (2017). ***The provisions set out below apply only to payments under decrees and agreements executed before January 1, 2019, and not thereafter modified to apply the new law.***

Note: Internal Revenue Code sections 62(a)(10), 71, and 215, cited below, were stricken in the 2017 Act and are effective only as noted above.

Sections 62(a)(10), 71, and 215 of the Internal Revenue Code provide for tax treatment of "alimony" and "separate maintenance" payments. Qualified payments under these sections are deductible in arriving at adjusted gross income by the payor (26 U.S.C. §§ 62(a)(10), 215) and are taxable to the payee as ordinary income (26 U.S.C. § 71). For the payments to qualify, the requirements are that—

1. the payment must be made in cash,
2. the payment must be received by (or on behalf of) a spouse pursuant to a divorce or separation instrument,
3. the liability to pay must be terminable on the death of the recipient,
4. the spouses involved must not file a joint return,

5. the spouses involved must not be in the same household when the payments are made,
6. the payment is not for child support or tied to any contingency relating to a child, and
7. the instrument involved does not designate the payment as a payment not includable in gross income under section 71 and not allowable as a deduction under section 215.

26 U.S.C. § 71(b), (c), (e); Temp. Treas. Reg. § 1.71–1T.

Payments of alimony in cash can also be made by checks and money orders payable on demand. Generally, transfers of services or property or the receiving spouse's use of property owned by the payor spouse do not qualify as alimony. Temp. Treas. Reg. § 1.71–1T, Question 5. However, payments to a third party for the benefit of the payee spouse will generally qualify, as long as all the other requirements are met. Payments to maintain property owned by the payor spouse do not qualify, however. Payments made by the payor spouse of life insurance premiums on the payor spouse's life will qualify as alimony to the extent that the payee spouse is the owner of the policy. Temp. Treas. Reg. § 1.71–1T, Question 6. Additionally, cash payments made by the payor spouse based on a specific written request of the payee spouse will qualify as alimony if all other requirements are met. Temp. Treas. Reg. § 1.71–1T, Question 7.

The alimony agreement must be in writing, and it must be in the form of (1) a decree of divorce or separate maintenance agreement, (2) a written instrument incident to such a decree, (3) a written separation agreement, or (4) a decree requiring a spouse to make payments for the support or maintenance of the other spouse. *See* 26 U.S.C. § 71(b)(2).

Further, there is no liability to make payments for any period after the death of the payee spouse and no liability to make any payment in cash or property as a substitute for such payments after the death of the payee spouse. 26 U.S.C. § 71(b)(1)(D). If the agreement provides that the payor spouse must make substitute payments after the death of the payee spouse, then the substitute payments as well as all other payments before the death of the payee spouse will fail to qualify as alimony. Temp. Treas. Reg. § 1.71–1T, Question 13.

The payor spouse will be required to recapture any "excess alimony payments." The payor spouse must include the amount of the excess payments in gross income in the third postseparation year, and the payee spouse is entitled to a corresponding deduction in computing adjusted gross income. If payments in the first postseparation year exceed

by more than $15,000 the average of the second-year payments (reduced by excess payments for that year) and the third-year payments, the excess amounts are subject to recapture. There are excess payments in the second year (which are also subject to recapture) if the second-year payments exceed the third-year payments by more than $15,000. *See* 26 U.S.C. § 71(f)(1)–(4). However, the recapture provisions will not be applicable—

1. to any spousal support under existing court-ordered temporary orders, 26 U.S.C. § 71(f)(5)(B); Temp. Treas. Reg. § 1.71–1T, Question 21;
2. to any fluctuating payments that are not within the control of the payor spouse, 26 U.S.C. § 71(f)(5)(C); and
3. when the payments of alimony cease by reason of the death of the payor spouse or the death or remarriage of the payee spouse, 26 U.S.C. § 71(f)(5)(A); Temp. Treas. Reg. § 1.71–1T, Question 25.

A number of contingencies that have frequently been included in alimony contracts, such as disability of the paying party or sale of specified real property, are not exceptions to the recapture rules.

A husband and wife may designate payments that would otherwise qualify as alimony to be nondeductible by the payor spouse and nontaxable to the payee spouse by so stating in a qualifying written agreement. 26 U.S.C. § 71(b)(1)(B); Temp. Treas. Reg. § 1.71–1T, Question 8. The designation must be in writing, and a copy of the written election must be attached to the payee spouse's first filed income tax return for each year in which the designation applies. Temp. Treas. Reg. § 1.71–1T, Question 8. If the payor spouse deducts the payment, the payee spouse is required to furnish to the payor spouse his or her Social Security number, which the payor spouse must report on the payor spouse's federal income tax return. Temp. Treas. Reg. § 1.215–1T, Question 1.

For information on the tax consequences of alimony, see IRS Publication 504 ("Divorced or Separated Individuals"), which can be found at **www.irs.gov/pub/irs-pdf/p504.pdf**.

§ 23.10 Attorney's Fees

Suits for Dissolution of Marriage: The court may award reasonable attorney's fees and expenses in a suit for dissolution of a marriage. The fees and expenses and any postjudgment interest may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name by any means available for the enforcement of a

judgment for debt. Tex. Fam. Code § 6.708(c). A spouse's legal fees in a divorce proceeding are not necessaries. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651, 655 (Tex. 2013).

Property Division: Attorney's fees are a factor to be considered in making an equitable division of the estate, considering the conditions and needs of the parties and all the surrounding circumstances. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981); *Carle v. Carle*, 234 S.W.2d 1002, 1005 (Tex. 1950). The court may award attorney's fees in making a just and right division of the community property. *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 667 (Tex. App.—San Antonio 1990, no writ). If there is no community-property estate, the court may not award attorney's fees to a party. *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied), *overruled on other grounds by Twyman v. Twyman*, 855 S.W.2d 619, 624 (Tex. 1993). However, the court can award attorney's fees when there is a negative community estate. *See Powell v. Powell*, 822 S.W.2d 181, 184 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Suits Affecting Parent-Child Relationship: In the suit affecting the parent-child relationship brought as part of a divorce proceeding, the court may render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to the attorney. A judgment for attorney's fees and expenses may be enforced in the attorney's name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 106.002.

In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, in addition to the attorney's fees that may be awarded under Family Code chapter 106, the following persons are entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit: (1) an attorney appointed as an amicus attorney or as an attorney ad litem for the child and (2) a professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate. Tex. Fam. Code § 107.023(a). A friend of the court is entitled to compensation for services rendered and for expenses incurred in rendering those services. Tex. Fam. Code § 202.005(a).

Attorney's Fees as Child Support: There is a split of authority on whether attorney's fees may be awarded as child support or in the nature of child support. See the discussion in section 40.16 in this manual.

Attorney's fees are discussed in chapter 20 of this manual.

§ 23.11 Suit Affecting Parent-Child Relationship

The final decree of divorce entered in proceedings involving minor children of the marriage must also contain all of those provisions of a final order entered in a suit affecting the parent-child relationship.

A detailed discussion of the final order in suits affecting the parent-child relationship can be found in chapter 40 of this manual.

§ 23.12 Managing Conservatorship

In a suit affecting the parent-child relationship, except as provided by Tex. Fam. Code § 153.004, the court may appoint joint managing conservators or may appoint a sole managing conservator. If the parents are or will be separated, the court shall appoint at least one managing conservator. A managing conservator must be a parent, a competent adult, the Department of Family and Protective Services, or a licensed child-placing agency. In making the appointment, the court must consider whether, before the suit was filed or while it is pending, a party engaged in a history or pattern of family violence, as defined by Code section 71.004; a party engaged in a history or pattern of child abuse or child neglect; or a final protective order was rendered against a party. Tex. Fam. Code § 153.005.

Provisions regarding the conservatorship of children can be found in Family Code chapter 153. For a detailed discussion of managing conservatorship, see chapter 40 of this manual.

§ 23.13 Possessory Conservatorship

If a managing conservator is appointed, the court may also appoint one or more possessory conservators. Tex. Fam. Code § 153.006(a).

Provisions regarding conservatorship can be found in Family Code chapter 153. For a detailed discussion of possessory conservatorship, see chapter 40 of this manual.

§ 23.14 Child Support Provisions

Provisions regarding child support can be found in Family Code chapter 154; subchapter C deals with the child support guidelines. For a detailed treatment of child support, see chapter 9 of this manual.

§ 23.15 Withholding from Earnings for Child Support

The trial court must order income withholding directly from the obligor's disposable earnings for the payment of child support. *See* Tex. Fam. Code § 158.001. Provisions regarding withholding from earnings for child support can be found in Family Code chapter 158. Section 158.011 contains procedures for filing a request by the obligor with the clerk of the court for voluntary withholding from earnings for child support. Subchapter D of chapter 158 deals with the issuance of judicial writs of withholding, and subchapter F deals with administrative writs of withholding in title IV-D cases. For a more detailed treatment of income withholding, see chapter 9 of this manual.

§ 23.16 Medical and Dental Expenses of Children

Section 154.183(c) requires the court to allocate between the parties, according to their circumstances, the reasonable and necessary health-care expenses, including vision and dental expenses, of a child that are not reimbursed by health or dental insurance or otherwise covered by ordered cash medical support, as well as insurance deductibles or copayments paid by either party for the child. Tex. Fam. Code § 154.183(c).

Provisions regarding medical and dental expenses for the child are contained in the child support discussions found in chapter 9 of this manual.

§ 23.17 Provisions for Possession and Access

It is the policy of Texas to encourage frequent contact between the child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and the child. Tex. Fam. Code § 153.251(b).

Provisions regarding conservatorship can be found in subchapters E and F of Family Code chapter 153. For additional discussion of possession and access, see chapter 40 and chapter 41 of this manual.

§ 23.18 Passport Application for Minors

Federal regulations control who may apply for a passport for a minor child. For a detailed discussion of these requirements, see section 40.25 in this manual.

§ 23.19 Mandatory Provisions in Decrees Affecting Children

Family Code section 105.006 requires that certain information and provisions be included in final orders entered in a suit affecting the parent-child relationship. For a detailed discussion of these requirements, see section 40.22 in this manual.

§ 23.20 Parent Education and Family Stabilization Course

In a suit affecting the parent-child relationship the court may order the parties to attend a parent education and family stabilization course if the court determines that the order is in the child's best interests. Tex. Fam. Code § 105.009(a). For additional information, see section 40.24 in this manual.

§ 23.21 Parenting Plan

The final order in a suit affecting the parent-child relationship must include a parenting plan. Tex. Fam. Code § 153.603. See the discussion in chapter 16 of this manual regarding parenting plans.

§ 23.22 Limits to Enforcement of Support and Conservatorship Agreements Regarding Minors

Family Code section 153.007(c) limits enforcement of terms of an agreed parenting plan regarding support or conservatorship of or access to a minor child to enforcement by all remedies available for enforcement of a judgment, including contempt, but not as a contract. Tex. Fam. Code § 153.007(c); *see also Hill v. Hill*, 819 S.W.2d 570, 572–73 (Tex. App.—Dallas 1991, writ denied) (contract seeking to fix permanently amount of child support held void as against public policy).

COMMENT: Despite the language of section 153.007(c) precluding the enforcement of orders for the support of children by contract, contracts entered into before September 1, 1995, remain enforceable.

§ 23.23 Necessity of Evidence for Final Hearing in Divorce Default

In a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer. Tex. Fam. Code § 6.701. The statute requires the petitioner, in a suit for divorce, to present proof to support the material allegations in the petition despite a

respondent's failure to answer. *O'Neal v. O'Neal*, 69 S.W.3d 347, 349 (Tex. App.—Eastland 2002, no pet.).

A petitioner's conclusions at a default final divorce hearing regarding character of property, division of property, periods of possession of the child, and child support are insufficient by themselves for a court to make a default judgment. Evidence must be introduced by the petitioner as to value of property, character of separate property, and income or financial ability to pay child support. *O'Neal*, 69 S.W.3d at 350. Without a proper valuation of the spouses' community assets and liabilities, the trial court cannot properly exercise its discretion in making a just and right division of the community estate. *Pena v. Pena*, No. 13-17-00585-CV, 2018 WL 3301920, at *3 (Tex. App.—Corpus Christi–Edinburg July 5, 2018, no pet.) (mem. op.). However, if the respondent fails to appear and properly assert his separate-property interests, the community-property presumption prevails; characterization of these interests as community property is not a divestiture of separate property but a necessary classification of property in compliance with the community-property presumption. *Pearson v. Fillingim*, 332 S.W.3d 361 (Tex. 2011) (per curiam).

If English is not the primary language of one of the parties, evidence should be presented that the non-English-speaking party either is able to understand the proceedings or has been provided a competent interpreter. *Chisholm v. Chisholm*, 209 S.W.3d 96 (Tex. 2006) (per curiam).

§ 23.24 Employment and Retirement Benefits

Retirement benefits accrued during a marriage are presumptively community property, but those accrued before or after marriage are not. *Howard v. Howard*, 490 S.W.3d 179, 184 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). A judge's intention to render a qualified domestic relations order (QDRO) in the future cannot be a present rendition of a QDRO. Family Code chapter 9 governs obtaining a QDRO when the trial court that rendered a final decree of divorce did not enter a QDRO or similar order permitting payment of benefits to an alternate payee or other lawful payee. *Araujo v. Araujo*, 493 S.W.3d 232, 237 (Tex. App.—San Antonio 2016, no pet.). Employment and retirement benefits are the subject of chapter 25 of this manual.

Provisions in a decree that is not a QDRO are not sufficient to affect a spouse's entitlement to benefits from an employee pension benefit plan governed by ERISA. The United States Supreme Court has addressed the issue of whether the terms of 29 U.S.C. § 1056(d)(1), barring the assignment or alienation of benefits, "invalidated the act of a

divorced spouse, the designated beneficiary under her ex-husband's ERISA pension plan, who purported to waive her entitlement by a federal common law waiver embodied in a divorce decree that was not a QDRO." *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 555 U.S. 285, 288 (2009). The Supreme Court held that "such a waiver is not rendered invalid by the text of the antialienation provision, but that the plan administrator properly disregarded the waiver owing to its conflict with the designation made by the former husband in accordance with plan documents." *Kennedy*, 555 U.S. at 288.

COMMENT: A client who is a participant in an ERISA plan must be advised to immediately make any desired beneficiary designations in accordance with the formalities required by the plan administrator if benefits under the plan are not addressed by a QDRO.

§ 23.25 Wills

A court may not prohibit a person from executing a new will, executing a codicil to an existing will, or revoking an existing will or codicil in whole or in part. Any portion of a court order that purports to prohibit a person from engaging in any of those actions is void and may be disregarded without penalty or sanction. Tex. Est. Code § 253.001.

[Sections 23.26 through 23.30 are reserved for expansion.]

II. Agreements Incident to Divorce

§ 23.31 Agreement Incident to Divorce—Generally

Purpose: Texas public policy encourages the amicable settlement of disputes in divorce cases. Accordingly, spouses may enter into a written agreement concerning the division of the property and liabilities of the spouses and maintenance of either spouse. *See* Tex. Fam. Code § 7.006(a). If minor children are involved, the agreement (called an "agreed parenting plan") may also contain provisions regarding child custody, visitation, and child support. *See* Tex. Fam. Code § 153.007. Once the court approves an agreement incident to divorce, the court will render an order in accordance with the agreement, either by setting forth the agreement in full within the order or by incorporating the agreement by reference in the final decree. Tex. Fam. Code §§ 7.006(b), 153.007(b). A final decree that provides that it was rendered after considering the evi-

dence, as well as the signed agreements and stipulations of the parties, is a valid consent judgment and, as such, is enforceable as both a judgment and a contract. *See Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986).

COMMENT: Agreements incident to divorce, when contained in a separate agreement, do not have to be filed with the court, and many attorneys choose not to file those agreements in order to protect the client's confidential information with regard to property. Whether in a separate document or included within the text of the decree, agreements incident to divorce must be used if the parties wish to agree to perform certain acts that the court may not order them to perform. Such agreements are contracts and should contain the elements of a contract in order to afford the remedies available under contract law. However, the attorney should avoid merely incorporating by reference provisions for the support, conservatorship, or visitation of minor children but should set forth these provisions with specific order language within the final decree itself. Any provisions of the agreement that will be subject to enforcement by contempt should be included in the actual court order.

Alimony: Parties may enter into agreements for the payment of alimony above and beyond in amount and duration that which the court could order as spousal maintenance. See section 23.9 above for an explanation of the tax implications of such an agreement.

The Family Code provides that the court may enforce by contempt maintenance agreements "voluntarily entered into between the parties and approved by the court." Tex. Fam. Code § 8.059(a). This provision applies only to agreements that qualify as maintenance in both amount and duration under Family Code chapter 8 (with a $5,000 monthly cap and, generally, a limit of five to ten years). *See In re Green*, 221 S.W.3d 645 (Tex. 2007) (orig. proceeding) (per curiam). See chapter 32 of this manual concerning enforcement of spousal maintenance provisions.

Additional Contractual Provisions: Although sections 153.007 and 154.124 preclude the enforcement as contracts of agreements regarding child support, certain provisions, such as agreements to pay for post-high school education, automobiles, wedding expenses, COBRA premiums, and so forth, are enforceable by contract and should be contained in an agreement incident to divorce or agreed decree containing the provisions of an agreement incident to divorce. *Burtch v. Burtch*, 972 S.W.2d 882, 885–90 (Tex. App.—Austin 1998, no pet.) (finding provisions of agreement incident to divorce contained in agreed decree requiring father to pay for college expenses of child were enforceable as contract).

§ 23.32 Property-Settlement Agreement

Once the property-settlement agreement is adopted by the decree, the judgment becomes a consent judgment, carrying with it the attributes and problems of a consent judgment. *See Peddicord v. Peddicord*, 522 S.W.2d 266, 267 (Tex. App.—Beaumont 1975, writ ref'd n.r.e.); *see also Lee v. Lee*, 509 S.W.2d 922 (Tex. App.—Beaumont 1974, writ ref'd n.r.e.). In rendering judgment on the parties' settlement agreement, the trial court may not supply terms, provisions, or conditions that were not previously agreed to by the parties. A consent judgment must be in strict compliance with the terms of the parties' settlement agreement. *Snider v. Snider*, 343 S.W.3d 453 (Tex. App.—El Paso 2010, no pet.).

The agreement may be revised or repudiated before rendition of the divorce unless it is binding under another rule of law. Tex. Fam. Code § 7.006(a); *see also* Tex. Fam. Code § 6.602(c) (requiring enforcement of mediated settlement agreements meeting specific statutory requirements); *Cayan v. Cayan*, 38 S.W.3d 161 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (divorce decree properly entered based on mediated settlement agreement despite husband's repudiation). *But see Boyd v. Boyd*, 67 S.W.3d 398, 404–05 (Tex. App.—Fort Worth 2002, no pet.) (husband's failure to disclose substantial community assets rendered mediated settlement agreement unenforceable, despite catch-all provision in the agreement).

The terms of the agreement are binding on the court if it finds that the agreement is just and right. An agreement approved by the court may be set forth in full or incorporated by reference in the final decree. An agreement incorporated by reference is not required to be filed with the court or the court clerk. Tex. Fam. Code § 7.006(b). If the court finds the agreement is not just and right, the court may request the spouses to submit a revised agreement or may set the case for a contested hearing. Tex. Fam. Code § 7.006(c).

Consent must exist at the time the consent judgment is rendered. A consent judgment must also be in strict compliance with the parties' agreement. When a consent judgment is rendered without consent or is not in strict compliance with the terms of the agreement, the judgment must be set aside. *Chisholm v. Chisholm*, 209 S.W.3d 96, 98 (Tex. 2006) (per curiam). Approval of a settlement does not necessarily constitute rendition of judgment. Judgment is rendered when the trial court officially announces its decision in open court or by written memorandum filed with the clerk. *S & A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995). The judge's intention to render judgment in the future cannot be a present rendition of judgment. The rendition of judg-

ment is a present act, either by spoken word or signed memorandum, that decides the issues on which the ruling is made. The words used by the trial court must clearly indicate the intent to render judgment at the time the words are expressed. *Leal*, 892 S.W.2d at 858. Words indicating what the trial judge "will grant" and "will approve" do not signify a present rendition of judgment. *Hall v. Hall*, No. 05-16-01141-CV, 2018 WL 1373951, at *2 (Tex. App.—Dallas Mar. 19, 2018, no pet.) (mem. op.).

However, even if a party repudiates its agreement before rendition of the divorce, the agreement incident to divorce may still be enforceable as a contract and the other party may be able to recover damages for its breach. *Cary v. Cary*, 894 S.W.2d 111, 112–13 (Tex. App.—Houston [1st Dist.] 1995, no writ).

Under the Texas Family Code, mediated settlement agreements meeting certain statutory formalities are binding on the parties and require rendition of a divorce decree adopting the parties' agreement. Tex. Fam. Code § 6.602(b), (c). To be binding, a mediated settlement agreement must provide, in a prominently displayed statement with boldfaced type or capital letters or underlined, that the agreement is not subject to revocation and must be signed by each party and the parties' attorneys, if any, present at the time the agreement is signed. Tex. Fam. Code § 6.602(b).

Parties to a mediated settlement agreement need not agree to all of the provisions to be contained in the divorce decree. *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.—Dallas 2006, no pet.). They are required only to reach an agreement as to all material terms, and a trial court has no discretion to enter a decree that varies from those terms. *Haynes*, 180 S.W.3d at 930; *In re Marriage of Joyner*, 196 S.W.3d 883, 890–91 (Tex. App.—Texarkana 2006, pet. denied). Terms necessary to effectuate and implement the parties' agreement do not affect the agreed substantive division of property and may be left to future articulation by the parties or consideration by the trial court. *Haynes*, 180 S.W.3d at 930.

A court applies contract principles to interpret a mediated settlement agreement's meaning. If an agreement can be given a certain or definite legal meaning, it is unambiguous. An unambiguous agreement must be enforced as written as a matter of law. *Toler v. Sanders*, 371 S.W.3d 477, 480 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

[Sections 23.33 through 23.40 are reserved for expansion.]

III. Tax Considerations

§ 23.41 Generally

COMMENT: When dealing with tax issues, the practitioner or client should consult with a certified public accountant, tax attorney, or other tax professional.

These notes are presented as a quick reference to the most common tax considerations in a divorce case. They are meant only to make the practitioner aware of the potential areas that may be affected and are by no means complete and do not exhaust the possible tax considerations in a divorce. They are meant to be helpful in calling the problems to mind for further consideration and research.

§ 23.42 Filing Status

A person's filing status is determined by his marital status as of the last day of the tax year. Thus, if a final decree of divorce is obtained on or before the last day of the tax year, the parties are considered unmarried for the entire year, cannot file jointly, and must file single returns. 26 U.S.C. § 7703(a); Treas. Reg. § 1.6013–4. Lower rates are available if a spouse meets the requirements of head of household. *See* 26 U.S.C. §§ 1(b), 2(b).

If a husband and wife are separated, they are considered married for the entire year if on the last day of the tax year no final decree of divorce has been obtained. Treas. Reg. § 1.6013–4. As married individuals, they may file jointly or as married filing separately; they may file a joint return even if one had no income or deductions. 26 U.S.C. § 6013; Treas. Reg. § 1.6013–1(a)(1).

However, a married person who is separated from the other spouse may elect to file as head of household if—

1. the taxpayer files a separate return;
2. the taxpayer's household was, for more than six months of the year, the principal residence of a child (as described in the statute) of the taxpayer;
3. the taxpayer provided more than one-half of the costs of maintaining the household; and
4. the taxpayer's spouse did not live in the home during the last six months of the year.

26 U.S.C. § 7703(b); *see also* 26 U.S.C. § 2(c).

The head-of-household filing status will also be available to the separated spouse if the separated spouse meets the tests set forth in items 1., 3., and 4. above and if the child resided with the taxpayer spouse for more than six months of the year.

The custodial parent has the right to file a return claiming head-of-household status even if that parent is not entitled to the dependency exemption for the child. 26 U.S.C. § 2(b).

Tax Returns: A joint return must include all income, exemptions, and deductions of both spouses. Generally, both spouses are jointly and severally liable for the tax due on a joint return. Treas. Reg. § 1.6013–4(b). Thus, a spouse may be liable for the entire tax even though all the income was earned by the other spouse. If the husband and wife file as married filing separately, each is liable only for the tax due on his or her own return. *See Edith Stokby*, 26 T.C. 912(A) (1956).

Generally, any income characterized by Texas law as community income is taxed half to each spouse; that is, the community income of both spouses is combined and half the total is included in each spouse's gross income, along with any separate income of that spouse. Effective for tax years after 1980, however, section 66 of the Internal Revenue Code eliminates the requirement that each spouse report one-half of the other's income and treats income as belonging to the spouse who earned it only if—

1. the spouses must live apart for the entire calendar year,
2. a joint return is not filed,
3. at least one spouse has "earned income" for the year (as distinguished from "passive" or "investment" income), and
4. no portion of the earned income was transferred between the spouses.

26 U.S.C. § 66(a).

The Internal Revenue Service (IRS) may disallow the benefits of any community-property law to a taxpayer with respect to any income if the taxpayer—

1. acted as if he or she were solely entitled to the income and
2. failed to notify the taxpayer's spouse before the due date for filing the return for the taxable year in which the income was derived of the nature and amount of such income.

26 U.S.C. § 66(b).

However, a spouse who meets the requirements of an "innocent spouse," as set forth in section 23.50 below, may be relieved of liability.

While forms 23-1 and 23-6 in this manual include provisions for addressing the division of tax liabilities for predivorce years, changes to the Internal Revenue Code and IRS regulations require careful consideration of the use of this or similar language if there is an entity taxed as a partnership for federal income tax purposes. The Bipartisan Budget Act of 2015 created a new centralized partnership audit regime that generally assesses and collects tax at the partnership level, not the partner level, resulting from an audit of the partnership. Pub. L. No. 114-74, § 1101, 129 Stat. 584 (2015). This new audit regime, set out in 26 U.S.C. §§ 6221–6241, commences with partnership tax years beginning in 2018. Partnership tax years before 2018 are governed by the old audit rules, while those beginning in 2018 are governed by the new audit rules. The new audit regime applies to any entity taxed as a partnership for federal income tax purposes. Thus, entities formed and taxed as partnerships are subject to the audit regime, as well as joint ventures and limited liability companies taxed as partnerships. Charles D. Pulman & Matthew L. Roberts, *New Partnership Tax Audit and Collection Rules Impact Divorce Property Settlements*, State Bar of Texas Family Law Section Report (Spring 2018). The new audit regime significantly changes the obligations and liabilities of the parties to divorce instruments with respect to the partnership interest and the economic consequences of an IRS audit of a partnership with the result that what should have been a predivorce year tax liability of the parties turns out to be a postdivorce year tax liability of the partnership arising out of an IRS audit of a predivorce year of the partnership. Charles D. Pulman & Matthew L. Roberts, *New Partnership Tax Audit and Collection Rules Impact Divorce Property Settlements*, State Bar of Texas Family Law Section Report (Spring 2018).

State law controls whether income is separate or community property. *United States v. Mitchell*, 403 U.S. 190 (1971); *Hopkins v. Bacon*, 282 U.S. 122 (1930). When the community's assets are divided between the spouses, any subsequent income and accumulations are separate income and taxable only to the spouse to whom they belong. For the tax year during which the community is dissolved, however, each spouse is still liable for taxes on half the community income for the part of the year before divorce.

For further information on whether to file jointly, separately, or as head of household and on the effect of community property when filing individual tax returns, see IRS Publication 504 ("Divorced or Separated Individuals"), which can be found at **www.irs.gov/pub/irs-pdf/p504.pdf**.

§ 23.43 Division of Property

The potential tax effects of property division require the most careful consideration.

COMMENT: When dealing with the federal tax implications of a proposed division of property, the practitioner or client should consult with a certified public accountant, tax attorney, or other tax professional.

No gain or loss is recognized when property is transferred between spouses or between former spouses "incident to the divorce." 26 U.S.C. § 1041(a). The spouse receiving the property has a tax basis equal to that of the transferring spouse just before the transfer regardless of the property's fair market value. 26 U.S.C. § 1041(b); Temp. Treas. Reg. § 1.1041–1T, Question 11. The loss disallowance rules of section 267 do not apply to such transfers. 26 U.S.C. § 267(g). Notwithstanding the nonrecognition rule of section 1041(a), the transferor must recognize gain under a transfer in trust to the extent that liabilities assumed by the trust exceed the transferor's basis. The transferee's basis is adjusted to take the gain into account. 26 U.S.C. § 1041(e). Gain must also be recognized when installment obligations are transferred to a trust. 26 U.S.C. § 453B(g).

The provisions of section 1041 are mandatory and not elective, and they will apply to all transfers between spouses regardless of whether a divorce is being contemplated and whether a divorce ever occurs. Temp. Treas. Reg. § 1.1041–1T, Question 2. (But see Temp. Treas. Reg. § 1.1041–1T, Question 9, relating to the transfer of property to a third party for or on behalf of a former or present spouse.)

The general rule regarding a transfer between present or former spouses applies to a transfer of any type of property but does not apply to a transfer of services. *See* 26 U.S.C. § 1041; Temp. Treas. Reg. § 1.1041–1T, Question 4.

The transferor of property under section 1041 recognizes no gain or loss on the transfer regardless of whether the property being transferred is characterized as separate or community property and regardless of whether the actual division of the property is equal or unequal. Temp. Treas. Reg. § 1.1041–1T, Question 10.

Transfers pursuant to an annulment will also qualify as a nontaxable event under section 1041. Temp. Treas. Reg. § 1.1041–1T, Question 8.

The term *incident to the divorce* is defined as (1) a transfer that occurs within one year after the date on which the marriage ceases or (2) a transfer that is related to the cessa-

tion of the marriage. 26 U.S.C. § 1041(c). The date on which the marriage ceases is determined by applicable state law.

A transfer of property is treated as related to the cessation of marriage if the transfer is pursuant to a decree of divorce, agreement incident to divorce, or separation agreement (including a modification or an amendment to the instrument) *and* the transfer occurs within six years after the marriage ceases. If either of those conditions is not met, the transfer of the property is presumed to be unrelated to the cessation of the marriage. This presumption may be rebutted only by showing that the transfer was made to effect the division of property owned by the former spouses at the time of the cessation of the marriage. Temp. Treas. Reg. § 1.1041–1T, Question 7.

The receiving party will recognize no gain or loss on a section 1041 transfer and takes the property with the adjusted basis of the transferring party regardless of the property's fair market value. Temp. Treas. Reg. § 1.1041–1T, Question 11.

Generally, the transfer alone will not cause the recapture of investment tax credit. Temp. Treas. Reg. § 1.1041–1T, Question 13. Further, tacking exists with respect to the recognition of a long-term capital gain or loss relating to the one-year holding period requirement. *See* 26 U.S.C. § 1223(2).

The transferring party must supply the receiving party with records sufficient to determine the adjusted basis, the holding period, and any amount and period for potential liability for investment tax credit recapture as of the date of the transfer. The receiving party is required to preserve these records. Temp. Treas. Reg. § 1.1041–1T, Question 14. There can be no partial elections with respect to the transfer of certain properties; once an election for nonrecognition of a transfer under an elective transitional rule is made, it is irrevocable. Temp. Treas. Reg. § 1.1041–1T, Question 17. An election is made by the transferring party's attaching to his first filed income tax return for the taxable year in which the first transfer occurs a statement signed by both parties that includes the Social Security number of each party. Both parties must keep a copy of the signed election, and the transferring party must attach a copy of the election with each tax return filed thereafter that involves the transitional election. Temp. Treas. Reg. § 1.1041–1T, Question 18.

Gift Tax Exclusion: If spouses or former spouses enter a written agreement relative to their marital and property rights and a divorce occurs within the three-year period beginning on the date one year before the agreement is entered (whether the decree approves the agreement or not), any transfer made pursuant to the agreement to either

spouse to settle marital or property rights or for child support is deemed a transfer for full and adequate consideration in money or money's worth. 26 U.S.C. § 2516.

Retirement Accounts: Transfers of a person's interest in an individual retirement account or individual retirement annuity under a divorce decree or written instrument incident to a divorce, in a qualified plan under a qualified domestic relations order, or in a qualified governmental or church plan are treated as nontaxable transfers. 26 U.S.C. §§ 408(d)(6), 414(p)(10), (p)(11).

Residence: An individual taxpayer may exclude up to $250,000 ($500,000 for certain joint returns) of gain on the sale or exchange of a residence if the residence has been owned and used by the taxpayer as the taxpayer's principal residence for at least two of the last five years. 26 U.S.C. § 121(a), (b).

An individual taxpayer who fails to satisfy these requirements by reason of a change of place of employment, health, or unforeseen circumstances may exclude a fraction of the taxpayer's realized gain based on the fraction of the two-year period that the property was owned and used by the taxpayer as the taxpayer's principal residence. The amount to be excluded is the lesser of a fraction of the maximum amount that could be excluded if the two-year ownership and use requirement had been met or the actual gain on the sale. 26 U.S.C. § 121(c).

Stock Options: Under IRS Revenue Ruling 2002–22, a taxpayer who transfers interests in nonstatutory stock options and nonqualified deferred compensation to the taxpayer's former spouse incident to divorce is not required to include an amount in gross income on transfer. The former spouse, and not the taxpayer, is required to include an amount in gross income when the former spouse exercises the stock options or when the deferred compensation is paid or made available to the former spouse.

§ 23.44 Alimony

For a discussion of the tax consequences of alimony, see section 23.9 above.

§ 23.45 Child Support Payments

Child support payments made for a minor child are not deductible by the payor and are not taxable to the payee.

§ 23.46 Dependency Exemption

Although there is currently no tax deduction for personal exemptions, eligibility to claim an exemption may be important for other reasons:

> **Exemption deduction suspended.** The deduction for personal exemptions is suspended for tax years 2018 through 2025 by the Tax Cuts and Jobs Act. Although the exemption amount is zero, eligibility to claim an exemption may make you eligible for other tax benefits. See Pub. 501 for details. Although taxpayers can't claim a deduction for exemptions, eligibility to claim an exemption for a child remains important for determining who may claim the child tax credit, the additional child tax credit, and the credit for other dependents, as well as other tax benefits. See the instructions and Pub. 501 for details.

IRS Form 8332 Rev. October 2018. *See* 26 U.S.C. § 151(d)(5), as added by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11041(a), 131 Stat. 2054 (2017).

Generally, the divorced or separated parent who has custody of a child for the greater portion of the calendar year is entitled to the dependency exemption for the child. 26 U.S.C. § 152(a), (e)(1). The child must be in the custody of one or both parents for more than half the year and must receive half his support during the year from his parents. 26 U.S.C. § 152(e)(1).

Parents of a child are considered divorced or separated if they are divorced or legally separated under a decree, they are separated under a written separation agreement, or they have lived apart at all times during the last six months of the calendar year. 26 U.S.C. § 152(e)(1)(A).

However, the custodial parent will not be entitled to the dependency exemption if (1) the noncustodial parent attaches to his or her income tax return for the year of the exemption a written declaration signed by the custodial parent stating that he or she will not claim the exemption, (2) a decree or agreement executed before January 1, 1985, specifically provides that the noncustodial parent shall have the exemption *and* the noncustodial parent pays $600 or more during the year as support for the child, or (3) a multiple-support agreement is in effect. 26 U.S.C. § 152(e)(2), (e)(3), (e)(5).

The release of the exemption by the custodial parent may be for a single year, for a number of specific years, or for all future years. IRS Form 8332 ("Release of Claim to Exemption for Child of Divorced or Separated Parents") may be used for this purpose.

If the release is for more than one year, the noncustodial parent must attach the original designation of release to the tax return for the first year in which the exemption is to be claimed and attach a copy of the release to the return for each succeeding taxable year in which the noncustodial parent claims the dependency exemption. Temp. Treas. Reg. § 1.152–4T, Question 4. Alternatively, the agreement incident to divorce may include language with regard to the release of the dependency exemption to the noncustodial parent. In that case, the applicable pages of the agreement can be sent with the federal income tax return in order to claim the exemption.

For further information claiming dependency exemptions, see IRS Publication 504 ("Divorced or Separated Individuals"), which can be found at **www.irs.gov/pub/irs-pdf/p504.pdf**.

§ 23.47 Medical and Dental Expense Deductions

Medical and dental expenses incurred for a child are deductible by either parent who has paid the medical or dental expenses regardless of which parent is entitled to the dependency exemption. 26 U.S.C. § 213(d)(5); Temp. Treas. Reg. § 1.152–4T, Question 5. Uncompensated medical expenses are deductible to the extent they exceed 10 percent of adjusted gross income. 26 U.S.C. § 213(a). (The floor is reduced to 7.5 percent for tax years 2017 and 2018. 26 U.S.C. § 213(f), as amended by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11027(a), 131 Stat. 2054 (2017).) *See also* 26 U.S.C. § 7703(b) (regarding married individuals who may be considered not married for federal income tax purposes). For information on deducting medical expenses, see IRS Publication 502 ("Medical and Dental Expenses"), which can be found at **www.irs.gov/pub/irs-pdf/p502.pdf**.

§ 23.48 Child Care Expenses

A divorced or separated taxpayer who is the "custodial parent" may be able to take a tax credit for expenses for household services and personal care that are necessary to enable the parent to be gainfully employed, even if that parent did not claim a dependency exemption. *See* 26 U.S.C. § 21(e)(5). For information on deducting child and dependent care expense, see IRS Publication 503 ("Child and Dependent Care Expenses"), which can be found at **www.irs.gov/pub/irs-pdf/p503.pdf**.

§ 23.49 Costs of Obtaining Divorce

Legal fees and court costs for obtaining a divorce are nondeductible personal expenses. *See United States v. Gilmore*, 372 U.S. 39 (1963). Provisions in effect for tax years before 2018 that allowed for deduction under 26 U.S.C. § 212(1), (3) of legal fees paid for tax advice in connection with divorce to obtain alimony includable in gross income have been temporarily suspended.

These and other "miscellaneous itemized deductions" are not allowed for any taxable year beginning after December 31, 2017, and before January 1, 2026. 26 U.S.C. § 67(g), as added by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11045, 131 Stat. 2054 (2017).

For further information about deducting the costs of getting a divorce, see IRS Publication 504 ("Divorced or Separated Individuals"), which can be found at **www.irs.gov/pub/irs-pdf/p504.pdf**.

§ 23.50 Innocent-Spouse Relief and Separate-Liability Election

A taxpayer filing a joint return may be shielded from tax liability under either the innocent-spouse relief or separate-liability election.

Under the innocent-spouse relief, an individual shall be relieved of a tax liability, including penalty and interest, to the extent the liability is attributable to an understatement of tax if—

1. a joint return was filed for the year;
2. there is an understatement of tax on the return attributable to erroneous items of the individual's spouse;
3. the individual establishes that, in signing the return, the individual did not know, and had no reason to know, of the understatement;
4. taking into account all the facts and circumstances, it would be inequitable to hold the individual liable for the deficiency attributable to the understatement; and
5. the individual elects the benefits of this provision no later than two years after the Internal Revenue Service has begun collection activities with respect to the individual.

26 U.S.C. § 6015(b).

The separate-liability election limits an individual's liability for any deficiency assessed with respect to a joint return to the portion of such deficiency properly allocable to the individual under rules specified in section 6015(d). This election is available if, when the election is filed, the individual is no longer married to, or is legally separated from, the spouse with whom the return was filed or has lived apart from the spouse for at least twelve months before filing the election. The election must be made not later than two years after the Internal Revenue Service has begun collection activities with respect to the individual. 26 U.S.C. § 6015(c).

For information about innocent spouse relief, see IRS Publication 971 ("Innocent Spouse Relief"), which can be found at **www.irs.gov/pub/irs-pdf/p971.pdf**.

[Sections 23.51 through 23.60 are reserved for expansion.]

IV. Useful Websites

§ 23.61 Useful Websites

The following websites contain information relating to the topic of this chapter:

IRS Publication 502 ("Medical and Dental Expenses") (§ 23.47)
www.irs.gov/pub/irs-pdf/p502.pdf

IRS Publication 503 ("Child and Dependent Care Expenses") (§ 23.48)
www.irs.gov/pub/irs-pdf/p503.pdf

IRS Publication 504 ("Divorced or Separated Individuals") (§§ 23.9, 23.42, 23.46, 23.49)
www.irs.gov/pub/irs-pdf/p504.pdf

IRS Publication 971 ("Innocent Spouse Relief") (§ 23.50)
www.irs.gov/pub/irs-pdf/p971.pdf

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Chapter 24

Closing Documents

In most divorces, collateral documents are used to effect portions of the decree of divorce, the agreement incident to divorce, or both. These practice notes cover some of the more commonly used documents.

I. Real Estate Conveyances

§ 24.1 Statutory Requirements

Written and Subscribed Instrument: A written instrument, subscribed and delivered by the conveyer or the conveyer's agent, is the customary method to convey real estate. Tex. Prop. Code § 5.021; *see Truitt v. Wilkinson*, 379 S.W.2d 400, 402 (Tex. App.—Texarkana 1964, no writ); *Gillman v. Martin*, 366 S.W.2d 89, 90 (Tex. App.—San Antonio 1963, writ ref'd). The conveyance is typically some form of a deed. It may not be recorded unless it is signed and acknowledged or sworn to by the grantor in the presence of two or more credible subscribing witnesses or acknowledged or sworn to before and certified by an officer authorized to take acknowledgments or oaths, as applicable. Tex. Prop. Code § 12.001(b). A certified copy of the decree of divorce can also be used to transfer real property, provided that the legal description of the property is contained in the decree. *See* Tex. Prop. Code § 12.013.

Words of Grant: The Texas Property Code provides a form for a conveyance of fee simple title to real estate, but use of the form is not required to effect a valid conveyance. The parties may use any form not in contravention of law. Tex. Prop. Code § 5.022(a), (c). Technical words are not necessary as long as there are operative words of grant demonstrating the grantor's intention to convey title to the land, the land is sufficiently described, and the deed is signed by the grantor. *See Harris v. Strawbridge*, 330 S.W.2d 911, 914–15 (Tex. App.—Houston 1959, writ ref'd n.r.e.).

Unless the deed expressly provides otherwise, use of the word *grant* or *convey* in a deed gives rise to the implied covenants that, before the execution of the conveyance, the grantor has not conveyed the estate or any interest in the estate to any person other than

the grantee and that, at the time of the execution of the conveyance, the estate is free from encumbrances. These implied covenants may be the basis for a lawsuit as if they had been expressed in the conveyance. Tex. Prop. Code § 5.023.

§ 24.2 General Requirements

Description of Property: A deed must accurately describe the land being conveyed. If the deed fails to furnish a means of determining with reasonable certainty the land intended to be covered by the deed, the deed is void. *Rubiolo v. Lytle*, 370 S.W.2d 202, 205 (Tex. App.—San Antonio 1963, writ ref'd n.r.e.). If the description in the deed, by extrinsic evidence, such as parol testimony, can be made to apply to a definite piece of property, the description is sufficient. *American Spiritualist Ass'n v. City of Dallas*, 366 S.W.2d 97, 102 (Tex. App.—Dallas 1963, no writ); *Ehlers v. Delhi-Taylor Oil Corp.*, 350 S.W.2d 567, 573 (Tex. App.—San Antonio 1961, no writ). If the description is sufficient for a party familiar with the locality to identify the premises with reasonable certainty, or if there is enough in the instrument to enable one, by pursuing an inquiry based on the information contained in the deed, to identify the particular property, the description will also be sufficient. *Oswald v. Staton*, 421 S.W.2d 174, 176 (Tex. App.—Waco 1967, writ ref'd n.r.e.).

Control of Grantee: Unless the deed has been placed within the control of the grantee by the grantor with the intention that it become operative as a conveyance and has been accepted by the grantee, it will not be effective to pass title. *Estes v. Reding*, 398 S.W.2d 148, 149 (Tex. App.—El Paso 1965, writ ref'd n.r.e.); *Young v. Jewish Welfare Federation*, 371 S.W.2d 767, 771 (Tex. App.—Dallas 1963, writ ref'd n.r.e.); *Wilson v. Olsen*, 336 S.W.2d 899, 901 (Tex. App.—El Paso 1960, no writ).

Consideration: Consideration is not necessary for a duly executed and delivered deed. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); *Cannon v. Wingard*, 355 S.W.2d 776, 781 (Tex. App.—Dallas 1962, writ ref'd n.r.e.).

§ 24.3 General Warranty Deed

A general warranty deed contains an express covenant of warranty that the grantor and his heirs, executors, and administrators will "warrant and forever defend all and singular the property to Grantee and Grantee's heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof." Its purpose is to indemnify the grantee against any loss or injury he

may sustain by a defect in the grantor's title, with the grantor warranting that he will (1) restore the purchase price to the grantee if the land is entirely lost; (2) discharge any liens or encumbrances incurred before the conveyance that are not assumed by the grantee; and (3) in the event of partial loss, repay the proportionate amount of the consideration that the amount of loss bears to the entire consideration paid. *City of Beaumont v. Moore*, 202 S.W.2d 448, 453 (Tex. 1947). The liability of the warrantor extends to all cases involving a failure of title to land purported to be conveyed by the terms of the deed. *Peavy-Moore Lumber Co. v. Duhig*, 119 S.W.2d 688, 690 (Tex. App.—Beaumont 1938), *aff'd*, 144 S.W.2d 878 (Tex. 1940). If a grantor has conveyed property he did not own by a deed containing a general covenant of warranty and, after the conveyance, actually acquires title to the property, title to the property will pass to his grantee, and the grantor and subsequent purchasers from him will be estopped from disputing the title of the grantee. This principle is known as the doctrine of after-acquired title. *Cherry v. Farmers Royalty Holding Co.*, 160 S.W.2d 908, 909 (Tex. 1942); *Baldwin v. Root*, 40 S.W. 3, 6 (Tex. 1897).

§ 24.4 Special Warranty Deed

A special warranty deed is used if the grantor wishes to limit his liability to persons claiming through him alone, rather than warranting the entire chain of title of the property from its inception to his grantee. By addition of the phrase "by, through, or under me, but not otherwise" to the general warranty clause, the general warranty deed is changed into a special warranty deed. *Owen v. Yocum*, 341 S.W.2d 709, 710 (Tex. App.—Fort Worth 1960, no writ). By limiting the general warranty clause in this manner, the grantor restricts his liability only to claims of title or right asserted through or under him and he has no liability for any defects in title that arose before his title. *Garrett v. Houston Land & Trust Co.*, 33 S.W.2d 775, 777 (Tex. App.—Galveston 1930, writ ref'd). Like a general warranty deed, a special warranty deed will also pass after-acquired title to the grantee named in the special warranty deed. *Breen v. Morehead*, 126 S.W. 650, 655 (Tex. App. 1910), *aff'd*, 136 S.W. 1047 (Tex. 1911).

Special Warranty Deed with Lien for Owelty: A special warranty deed with lien for owelty is given when one spouse receives the entire property and seeks to buy out the grantor spouse by refinancing through a third-party lender. The third-party lender will insist on a lien against the entirety of the property, not just a one-half interest. *See Sayers v. Pyland*, 161 S.W.2d 769, 771 (Tex. 1942).

§ 24.5 Quitclaim Deed

A quitclaim deed conveys only the grantor's right, title, and interest in the land described in the deed and not the land itself. *Cook v. Smith*, 174 S.W. 1094, 1095 (Tex. 1915); *Baldwin v. Drew*, 180 S.W. 614, 616 (Tex. App.—Beaumont 1915, no writ). If the grantor owns the property at the time of the execution and delivery of the quitclaim deed, the deed will pass title to the property to the grantee, but a quitclaim deed will not pass after-acquired title. *Halbert v. Green*, 293 S.W.2d 848, 851 (Tex. 1956); *Breen v. Morehead*, 126 S.W. 650, 656 (Tex. App. 1910), *aff'd*, 136 S.W. 1047 (Tex. 1911). A grantee under a quitclaim deed is charged with notice of outstanding claims against the property and is not protected as an innocent purchaser for value. *Cook*, 174 S.W. at 1095; *Threadgill v. Bickerstaff*, 29 S.W. 757, 758–59 (Tex. 1895). The foregoing is true even if the quitclaim deed is from a remote grantor in the grantee's chain of title and not from the grantee's grantor. *Houston Oil Co. v. Niles*, 255 S.W. 604, 610 (Tex. Comm'n App. 1923, judgm't adopted).

COMMENT: An ideal use of a quitclaim deed would be to extinguish any claim for economic contribution or reimbursement one spouse might have against the separate property of the other spouse.

§ 24.6 Mineral Royalty Interests

Grants and reservations in Texas are styled "oil, gas, and other minerals" or "all minerals in and under the land." Although the meanings of "oil" and "gas" are usually clear, adjudication has been required to determine what minerals are included in a conveyance of "minerals." The Supreme Court of Texas has held that "a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of the word, whether their presence or value is known at the time of severance." *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984). A royalty is the nonpossessory right to receive a cost-free share of production. Many oil companies require changes in ownership to be set forth in a preprinted document called a "division order," which is available from the company.

COMMENT: For additional information, see 1 *Texas Real Estate Forms Manual*, State Bar of Texas, ch. 12 (3rd ed. 2017).

§ 24.7 Timeshare

A "timeshare plan" is any arrangement, plan, scheme, or similar method (excluding an exchange program but including a membership agreement, sale, lease, deed, license, or right-to-use agreement) by which the purchaser, in exchange for consideration, receives an ownership right in or the right to use accommodations for a period of time less than a year during a given year, but not necessarily consecutive years. Tex. Prop. Code § 221.002(28). Once the timeshare plan is established, each timeshare interest may be separately conveyed or encumbered, and the title is recordable. Tex. Prop. Code § 221.012. A "timeshare interest" is a timeshare estate (an arrangement under which the purchaser receives a right to occupy a timeshare property and an estate interest in the real property) or timeshare use (an arrangement under which the purchaser receives a right to occupy a timeshare property but not an estate interest in the timeshare property). Tex. Prop. Code § 221.002(24), (25), (30).

COMMENT: For additional information, see 1 *Texas Real Estate Forms Manual*, State Bar of Texas, ch. 12 (3rd ed. 2017).

§ 24.8 Cemetery Lots

A general assignment of interest (see form 24-16 in this manual) should be sufficient to transfer ownership interest in cemetery lots, interment rights, and merchandise.

[Sections 24.9 and 24.10 are reserved for expansion.]

II. Real Estate—Debt and Security Instruments

§ 24.11 Real Estate Lien Note

Purpose of Instrument: The real estate lien note represents the maker's personal obligation to repay the debt. It sets out the terms and conditions of repayment, such as when and where payments are to be made and the interest rate.

"Negotiable Instrument": Ideally, real estate lien notes should be drafted to qualify as "negotiable instruments" under article 3 of the Uniform Commercial Code. To be a negotiable instrument, a promissory note must (1) contain an unconditional promise to pay a fixed sum of money (with or without interest or other charges described in the

note); (2) be payable to "order" (for example, "pay to the order of Mary Smith") or to "bearer"; (3) be payable on demand or at a definite time; and (4) not state any other undertaking or instruction by the obligor to do anything besides pay money.

The following provisions do not affect negotiability:

1. An undertaking by the obligor to give, maintain, or protect collateral.
2. A reference to another document (form 24-19 in this manual, for example, refers to the divorce decree).
3. An authorization of the holder to confess judgment or realize on or dispose of collateral.
4. A waiver of the benefit of any law intended to benefit the obligor.

Tex. Bus. & Com. Code §§ 3.104(a), 3.106; *see also* Tex. Bus. & Com. Code §§ 3.108, 3.109.

If the note's due date is determined by a future act, such as a spouse's remarriage or cohabitation, a sale of the property, or a child's death, the note will not qualify as a "negotiable instrument." The terms of the note will, however, be enforceable to the extent they could have been enforced in a pure contract action. If the holder of the note contemplates transferring it to a third party, such as an investor who buys promissory notes, this lack of negotiability will at least impair its value to that third party.

"Holder in Due Course": The primary advantage of negotiability is that only holders of negotiable instruments may benefit from the protection of holder-in-due-course status. The requirements for holder-in-due-course status are found at Business and Commerce Code section 3.302(a). *See* Tex. Bus. & Com. Code § 3.302(a). Holders in due course take the note free of all defenses to its enforcement except—

1. infancy of the obligor to the extent it is a defense to a simple contract;
2. duress, lack of legal capacity, or illegality of the transaction that, under other law, nullifies the obligation of the obligor;
3. fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms; or
4. discharge of the obligor in insolvency proceedings.

Tex. Bus. & Com. Code § 3.305(a), (b).

Unless the holder of the note qualifies for holder-in-due-course status, he is subject to any claim or defense the obligor may raise to a simple contract, such as failure of consideration, waiver, estoppel, undue influence, or accord and satisfaction, as well as a claim in recoupment against the original payee of the note. *See* Tex. Bus. & Com. Code § 3.305(a), (b).

Usury: The real estate lien note found at form 24-6 in this manual contains a usury savings clause (the paragraph beginning "Interest on the debt evidenced by this note will not exceed the maximum rate or amount of nonusurious interest . . ."). Texas courts have favored and enforced usury savings clauses. *See Woodcrest Associates v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 437–38 (Tex. App.—Dallas 1989, writ denied). Nonetheless, a usury savings clause will not protect the holder from a usury claim in which the interest rate stated in the note exceeds the statutory ceiling. *See* Tex. Fin. Code ch. 303 *et seq.* Finance Code chapter 303 sets the ceiling rates for loans on written contracts, including promissory notes. If a creditor contracts for, charges, or receives interest in excess of the statutory ceiling amount in connection with a transaction for personal, family, or household use, the statutory penalty is three times the amount of interest contracted for, charged, or received in excess of the allowable amount, except that the penalty cannot be less than the lesser of $2,000 or 20 percent of the principal; if the interest charged and received is more than double the maximum amount, the creditor also forfeits all principal on which the interest is charged and received and the interest and all other amounts charged and received. Tex. Fin. Code §§ 305.001(a), 305.002. The creditor is also liable for reasonable attorney's fees. Tex. Fin. Code § 305.005.

In subsequent negotiations or proceedings to enforce the note or the underlying transaction, the attorney should take care not to demand any amount not specifically allowed in the loan documents, such as a late charge, because such a demand also might constitute usury. *See Augusta Development Co. v. Fish Oil Well Servicing Co.*, 761 S.W.2d 538, 542 (Tex. App.—Corpus Christi–Edinburg 1988, no writ); *Moore v. Sabine National Bank*, 527 S.W.2d 209, 213–14 (Tex. App.—Austin 1975, writ ref'd n.r.e.).

§ 24.12 Deed of Trust

Effect: A deed of trust is merely a security instrument and does not convey title to land, although words of conveyance are usually used. *Fleming v. Adams*, 392 S.W.2d 491, 495 (Tex. App.—Houston 1965, writ ref'd n.r.e.). The mortgagee is not the owner and is not entitled to possession, rentals, or profits. *Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981). To be effective, the deed of trust must be delivered to the grantee.

Delivery may be established by the filing of the deed of trust for record in the proper office by the grantor on the request of or with the consent of the grantee. *West v. First Baptist Church*, 71 S.W.2d 1090, 1099 (Tex. 1934).

Description: The deed of trust must contain "the nucleus of description" that will allow the land to be identified with reasonable certainty. *Jones v. Mid-State Homes, Inc.*, 356 S.W.2d 923, 925 (Tex. 1962); *Crow v. Davis*, 435 S.W.2d 176, 178 (Tex. App.—Waco 1968, writ ref'd n.r.e.). Ambiguities in the deed of trust may be explained by parol evidence as long as the parol evidence does not contradict the language in the deed of trust. *Jasper State Bank v. Goodrich*, 107 S.W.2d 600, 603 (Tex. App.—Beaumont 1937, writ dism'd).

Existence of Debt: The existence of a debt is essential to the validity of a deed of trust or mortgage, the deed of trust or mortgage being incident to the note. *West*, 71 S.W.2d at 1098; *Rutland Savings Bank v. Seeger*, 125 S.W.2d 1113, 1115 (Tex. App.—Galveston 1939, writ dism'd judgm't cor.).

Priority of Liens: Generally, different liens on the same property have priority according to the time of their creation; that is, "first in time is first in right." *Windham v. Citizens National Bank*, 105 S.W.2d 348, 351 (Tex. App.—Austin 1937, writ dism'd). Even though a lien may attach prior in time to a later lien, the prior lien will be void as to the subsequent lien if the prior lien instrument was not acknowledged, sworn to, or proved and recorded and the subsequent lienholder acquired his lien for a valuable consideration without notice of the prior lien. Tex. Prop. Code § 13.001(a). Moreover, when a lienholder has on the date his lien attaches actual or constructive notice of an inchoate security interest in the property, his lien will be secondary to that security interest when it ripens into an effective lien. For example, a recorded deed of trust to secure future indebtedness will be a prior and superior lien to either a sale or encumbrance occurring after the deed of trust was recorded but before the incurring of indebtedness referred to in the deed of trust. *Jolly v. Fidelity Union Trust Co.*, 15 S.W.2d 68, 70–71 (Tex. App.—Fort Worth 1929, writ ref'd).

§ 24.13 Foreclosure and Sale under Deed of Trust

When Authorized: The power of sale given a trustee in a deed of trust is considered a harsh remedy and may be exercised only by strictly complying with the terms and conditions of the note and those imposed on the power of sale by the maker of the trust instrument. *Purnell v. Follett*, 555 S.W.2d 761, 763 (Tex. App.—Houston [14th Dist.] 1977, no writ). A sale is authorized only on default by the debtor. *Ford v. Emerich*, 343

S.W.2d 527, 531 (Tex. App.—Houston 1961, writ ref'd n.r.e.). A tender of arrearages due on a deed of trust containing an acceleration clause, before exercise by the holder of the deed of trust of his option to declare the entire debt due, prevents the exercise of acceleration. *Hiller v. Prosper Tex, Inc.*, 437 S.W.2d 412, 415 (Tex. App.—Houston [1st Dist.] 1969, no writ).

How Exercised: When the power of sale is validly exercised under the deed of trust, the sale must be made at a public auction held between 10:00 A.M. and 4:00 P.M. of the first Tuesday of a month (or the first Wednesday, if the first Tuesday occurs on January 1 or July 4). The sale must be made at the county courthouse or other place designated by the county's commissioners court in the county in which the real estate is located. If the property is located in more than one county, the sale may be made at the courthouse or other designated place in any county in which the property is located. The commissioners court shall designate the area at the courthouse or other designated place where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by that notice is to take place, and the sale must occur in that area. Tex. Prop. Code § 51.002(a), (a–1), (h).

Notice of the proposed sale, which must include a statement of the earliest time at which the sale will begin, must be given at least twenty-one days before the date of the sale. This notice must be given by a proper notice posted at the courthouse door of each county in which the property is located, designating the county in which the property will be sold; by a copy of the notice filed in the office of the county clerk in each such county; and by service of written notice of the sale by certified mail on each debtor. Tex. Prop. Code § 51.002(b). If the county maintains an Internet website, the county must post a notice of sale filed with the county clerk on the website on a page that can be viewed by the public without charge or registration. Tex. Prop. Code § 51.002(f–1). If the courthouse or the clerk's office is closed because of inclement weather, natural disaster, or other act of God, the posting or filing may be made up to forty-eight hours after the court or office reopens for business. Tex. Prop. Code § 51.002(b–1). The entire calendar day on which the notice of sale is given, regardless of the time of day at which it is given, is included in computing the twenty-one-day notice period, and the entire calendar day of the foreclosure sale is excluded. Tex. Prop. Code § 51.002(g). The sale must begin at the time stated in the notice of sale or not later than three hours after that time. Tex. Prop. Code § 51.002(c).

Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or contract lien and giving the debtor at least twenty days to cure the default before notice of sale can be given under Property Code section 51.002(b). The entire calendar day on which the notice to the debtor is given, regardless of the time of day at which the notice is given, is included in computing the twenty-day notice period, and the entire calendar day on which notice of sale is given under section 51.002(b) is excluded. Tex. Prop. Code § 51.002(d). Service of the notice by certified mail is completed when the notice, with postage prepaid and addressed to the debtor at the last known address, is deposited with the United States Postal Service. The affidavit of a person having knowledge of the facts to the effect that service was completed is prima facie evidence of service. Tex. Prop. Code § 51.002(e). The purpose of this statute is to provide a minimum level of protection for the debtor. *Hausmann v. Texas Savings & Loan Ass'n*, 585 S.W.2d 796, 799 (Tex. App.—El Paso 1979, writ ref'd n.r.e.).

Mortgagee's Entitlement: After a valid trustee's sale, the mortgagee is entitled to judgment for the amount of the note, interest, and attorney's fees, less the amount received at the trustee's sale and other legitimate credits. *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965).

§ 24.14 Recordation

Effect of Lack of Recordation: A conveyance of real property is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record. Tex. Prop. Code § 13.001(a). Therefore, a purchaser of land for value and without notice acquires title to the property as against a person claiming under a deed that has not been filed for record as required by law. *See Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802, 805 (Tex. App.—Amarillo 1952, writ ref'd n.r.e.). The same rule applies to a judgment creditor as to a perfected judgment lien against the grantor of an unrecorded deed—the lien will prevail over the unrecorded deed as long as the lien creditor did not have notice of the deed. *Paris Grocer Co. v. Burks*, 105 S.W. 174, 175 (Tex. 1907). An unrecorded instrument is binding, however, on a party to the instrument, the party's heirs, and a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument. Tex. Prop. Code § 13.001(b).

Similarly, all deeds of trust and mortgages are void as to creditors and subsequent purchasers for valuable consideration without notice, unless they have been acknowledged, sworn to, or proved and filed for record as required by law. Tex. Prop. Code § 13.001(a). Accordingly, the holder of a subsequent lien who does not have actual notice of a prior unrecorded lien has priority over the prior unrecorded lien. *Gordon-Sewall & Co. v. Walker*, 258 S.W. 233, 237 (Tex. App.—Beaumont 1924, writ dism'd w.o.j.).

Grantee's Address: A deed or other conveyance conveying an interest in real property executed after December 31, 1981, must contain the mailing address of each grantee appearing on the document itself or in a separate instrument signed by the grantor or grantee and attached to the document. Although failure to include the address does not affect the validity of the conveyance as between the parties, a failure to include it results in a penalty filing fee equal to the greater of twice the statutory recording fee or $25. Tex. Prop. Code § 11.003.

Place of Recording: To be effectively recorded, the deed or other conveyance must be eligible for recording and must be recorded in the county in which a part of the property is located. Tex. Prop. Code § 11.001(a).

§ 24.15 Homestead Exemption and Equitable Liens

The only valid liens that may be placed on the homestead are—

1. those liens for all or part of the purchase money for the homestead;
2. taxes due on the homestead;
3. an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of the family homestead in a divorce proceeding;
4. the refinancing of a lien against the homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;
5. work and material used in constructing new improvements on the homestead contracted for in writing and work and material used to repair or renovate existing improvements contracted for in writing with the proper consent of both spouses, if certain formal requirements are met;

6. certain extensions of credit (or extensions of credit that meet various requirements) commonly known as home equity loans;
7. reverse mortgages; and
8. the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property, including the refinance of the purchase price of the manufactured home, the cost of installing the manufactured home on the real property, and the refinance of the purchase price of the real property.

Tex. Const. art. XVI, § 50(a); *see also* Tex. Prop. Code § 41.001(b).

A homestead is subject to division in a divorce case, and the court has the authority to award one party the homestead and the other a judgment for a sum of money found by the court to represent the fair value of his or her interest in the homestead and to grant a lien to secure the judgment. *Brunell v. Brunell*, 494 S.W.2d 621, 623 (Tex. App.—Dallas 1973, no writ). The court may order one spouse to execute a general warranty deed to the spouse who will receive the homestead and order the spouse receiving the homestead to execute a note evidencing the deferred payments and a deed of trust securing payment of the note. *Ex parte McKinley*, 578 S.W.2d 437, 438 (Tex. App.—Houston [1st Dist.] 1979, orig. proceeding).

Even if the property in question is the separate property of one spouse, the court may award a judgment for reimbursement for community funds spent on the property and secure the judgment with an equitable lien. *Day v. Day*, 610 S.W.2d 195, 198 (Tex. App.—Tyler 1980, writ ref'd n.r.e.); *Smith v. Smith*, 187 S.W.2d 116, 120 (Tex. App.—Fort Worth 1945, no writ); *see also* Tex. Fam. Code § 3.406. *But see Heggen v. Pemelton*, 836 S.W.2d 145, 148 (Tex. 1992) (judgment cannot be secured by lien on separate-property homestead of one spouse unless specifically allowed under Texas Constitution).

Care must be taken in perfecting a lien that may be foreclosed against the homestead. The instruments creating the lien must establish that it falls within one of the constitutional and statutory exceptions discussed above and how much of the property falls within the exception. *See McGoodwin v. McGoodwin*, 671 S.W.2d 880, 881 (Tex. 1984); *Sayers v. Pyland*, 161 S.W.2d 769, 771 (Tex. 1942).

§ 24.16 Separate Property and Equitable Liens

When dividing marital property, trial courts may impose equitable liens on one spouse's separate property to secure the other spouse's claim for economic contribution or right

of reimbursement for community improvements to that property. *Heggen v. Pemelton*, 836 S.W.2d 145, 146 (Tex. 1992); *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772, 779 (Tex. App.—San Antonio 2004, pet. denied). Trial courts may not impress reimbursement liens simply to ensure a just and right division. *Heggen*, 836 S.W.2d at 146.

On dissolution of a marriage, the court may impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against that property by a contributing marital estate. Tex. Fam. Code § 3.406(a).

§ 24.17 Owelty Liens

One of the inherent rights of a cotenant is that, if the commonly owned property cannot be divided into equal shares without materially injuring its value, it may be divided into unequal shares and a lien be fixed for the difference against the larger share in favor of the recipient of the smaller share. Each cotenant has this valuable right, because otherwise the property might have to be sacrificed on an unfavorable market. The difference is usually referred to as owelty. The owelty so assessed is recognized as being in the nature of purchase money secured by a vendor's lien on the larger tract. *Sayers v. Pyland*, 161 S.W.2d 769, 772 (Tex. 1942).

The Texas Constitution and the Texas Property Code permit the forced sale of a homestead to collect a debt for "an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding." Tex. Const. art. XVI, § 50(a)(3); Tex. Prop. Code § 41.001(b)(4).

A lien may therefore be placed on a spouse's homestead to secure payment of an amount awarded to the other spouse, but the amount secured is limited to the amount of the homestead interest awarded to the other spouse. *Cole v. Cole*, 880 S.W.2d 477 (Tex. App.—Fort Worth 1994, no writ); *Smith v. Smith*, 836 S.W.2d 688, 693 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Wren v. Wren*, 702 S.W.2d 250, 252 (Tex. App.—Houston [1st Dist.] 1985, writ dism'd); *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. App.—Houston [1st Dist.] 1981, no writ). The lien may be imposed only for the specific amount that is to be paid. *Crockett v. McSwain*, No. 11-00-00374-CV, 2001 WL 34373604 (Tex. App.—Eastland Nov. 1, 2001, no pet.) (not designated for publication).

[Sections 24.18 through 24.20 are reserved for expansion.]

III. Personal Property

§ 24.21 Motor Vehicles

The owner designated on the title must transfer the ownership of the title in a manner prescribed by the Texas Department of Motor Vehicles that certifies that the purchaser is the owner of the vehicle and certifies that there are no liens or provides a release of each lien on the vehicle. Tex. Transp. Code § 501.071. For most vehicles less than ten years old, the transferor must also give the transferee a written disclosure of the odometer reading at the time of transfer in accordance with 49 U.S.C. § 32705. This disclosure must be made on a prescribed form that includes space for the signature and printed name of both transferor and transferee. Tex. Transp. Code § 501.072; *see* 49 C.F.R. § 580.3. The form currently appears on the reverse side of the certificate of title.

While the simplest method of transfer is to have the transferor execute the form on the back of the certificate of title, the transfer may also be accomplished with a power of attorney executed by the transferor, authorizing the attorney-in-fact designated in the power to transfer the vehicle. The transferee then files the signed certificate of title or power of attorney (if the assignment on the certificate of title was not executed by the transferor) with the county tax assessor-collector not later than thirty days after the assignment. Tex. Transp. Code § 501.145.

The transferee must present personal identification when applying for a new title using the form prescribed by the Department of Motor Vehicles. Tex. Transp. Code §§ 501.023, 501.0235. In order to establish personal identification, the transferee/applicant must present a current photo identification document that must be one of the nine documents specified by the Department, which include a driver's license, state identification certificate, and United States passport. See Texas Department of Motor Vehicles Registration and Title Bulletin #024-13 at **www.txdmv.gov/registration-and-title-bulletins/2013-06-20-22-56-27/024-13**. Then, after the required fees are paid, the county tax assessor-collector issues a title receipt to the transferee, which authorizes the transferee to operate the motor vehicle until the title is issued. Tex. Transp. Code § 501.024.

A certified copy of the decree of divorce can also be used to transfer the title of the vehicle to the party awarded the vehicle, provided that the vehicle is specifically described in the decree by make, year, and vehicle identification number. *See* Tex. Transp. Code § 501.074(a). In some circumstances, an application for title may also be required.

The Texas Tax Code provides for the imposition of taxes for certain transfers of motor vehicles. The tax is imposed on the sale of motor vehicles, on motor vehicles brought into the state by new Texas residents, on even exchanges of motor vehicles, and on most gifts of motor vehicles. *See* Tex. Tax Code §§ 152.021–.025.

COMMENT: Because the transfer of a motor vehicle in a divorce case is considered a transfer by court order, there should be no tax on the transfer.

§ 24.22 Motorboats, Jet Skis, and Outboard Motors

State-Registered Boats, Jet Skis, and Motors: Transfer of motorboats and outboard motors registered in Texas is handled by the Texas Department of Parks and Wildlife. The application for a certificate of title requires detailed information. *See* Tex. Parks & Wild. Code § 31.047(b). The application to transfer title to a boat is Texas Department of Parks and Wildlife form PWD 143. The application to transfer title to an outboard motor is form PWD 144. The form to transfer title to a boat with an inboard motor is PWD 143. Both forms may be downloaded at **http://tpwd.texas.gov/fishboat/boat/forms/**. The application must be accompanied with other evidence reasonably required by the department to establish entitlement of ownership to transfer a motorboat, jet ski, or outboard motor. A judgment of a court of competent jurisdiction with an affidavit evidencing ownership and reciting the required language is sufficient. Tex. Parks & Wild. Code § 31.047(c). Transfer of ownership pursuant to a divorce is a nontaxable event as long as the motorboat or outboard motor is used, not new.

U.S.–Registered Boats: Vessels that are U.S. Coast Guard–documented vessels are documented by the assignment by the U.S. Coast Guard of an official number and a certificate of documentation. The Coast Guard requires the applicant to submit an "Application for Initial Issue, Exchange or Replacement of Certificate of Documentation; Redocumentation," form CG-1258, available at **www.dco.uscg.mil/Portals/9/DCO%20Documents/NVDC/CG1258.pdf?ver=2017-05-09-113142-067**. The applicant must include a certified copy of the decree if the transfer is pursuant to a divorce or a "Bill of Sale," form CG-1340. The decree of divorce should include the make, model, hull number, and name of vessel to ensure transfer of a documented vessel pursuant to a divorce.

§ 24.23 Trailers

A title is required for all motor vehicles operated on a public highway in Texas. Tex. Transp. Code § 501.022(a). However, a trailer is not a motor vehicle unless it weighs

more than four thousand pounds. Tex. Transp. Code § 501.002(14)(B). Even though a title may not be required, the owner must register a trailer if it is to be used on a public highway in Texas. Tex. Transp. Code § 502.002.

§ 24.24 Travel Trailers

House trailers and camper trailers less than eight feet in width and less than forty feet in length and designed for use as temporary living quarters are classified as travel trailers and must be registered and titled regardless of weight. Tex. Transp. Code § 502.166. According to personnel of the Texas Department of Transportation, the procedure for the transfer of title to a travel trailer is the same as that for the transfer of title to a motor vehicle. The term *house trailer* means a trailer designed for human habitation and does not include manufactured housing. Tex. Transp. Code § 501.002(6).

§ 24.25 Manufactured Housing

The term *manufactured housing* refers to a structure that is transportable in one or more sections, and that, in the traveling mode, is or more than eight feet wide or forty or more feet in length or, when erected on site, is at least 320 square feet. If the housing was constructed before June 15, 1976, it is called a "mobile home." If it was constructed after that date, it is called a "HUD-code manufactured home." *See* Tex. Occ. Code § 1201.003(12), (20).

The Texas Department of Housing and Community Affairs (TDHCA) administers the Texas Manufactured Housing Standards Act, chapter 1201 of the Texas Occupations Code. *See* Tex. Occ. Code § 1201.001 *et seq.* Subchapters A through E detail the election process for when an owner of a manufactured home applies for a statement of ownership. Specifically, in completing an application for the issuance of a statement of ownership, an owner of a manufactured home shall indicate whether the owner elects to treat the home as real property. An owner may elect to treat a manufactured home as real property only if the home is attached to real property that is owned by the owner of the home or land leased to the owner of the home under a long-term lease. Tex. Occ. Code § 1201.2055(a).

If an owner elects to treat a manufactured home as real property, TDHCA shall issue to the owner a copy of the statement of ownership reflecting the real property election on its face. Within sixty days of the issuance of the statement, the owner must file the copy in the real property records of the county in which the home is located and notify TDHCA and the tax assessor-collector that the copy has been filed. The manufactured

home is not considered to be real property until the copy has been filed and TDHCA and the tax assessor-collector have been notified as required. After a real property election is perfected, the home is considered to be real property for all purposes; no additional issuance of a statement of ownership is required with respect to the manufactured home unless the home is moved from the location specified on the statement of ownership, the real property election is changed, or the use of the property is changed. Tex. Occ. Code § 1201.2055(d)–(g).

E-mail updates of changes to manufactured housing law and rules are available at **www.tdhca.state.tx.us/mh/index.htm**.

COMMENT: For additional information, see 1 *Texas Real Estate Forms Manual*, State Bar of Texas, ch. 12 (3rd ed. 2017).

§ 24.26 Aircraft

Registration of an aircraft is handled by the Aircraft Registration Branch of the Federal Aviation Administration. An aircraft registration application, AC form 8050-1, may be obtained from FAA Aircraft Registration Branch by calling 405-954-3116 or writing to FAA Aircraft Registration Branch, AFS-750, P.O. Box 25504, Oklahoma City, OK 73125-0504. Original applications, not photocopies or computer-generated copies, are required. The applicant's physical location or physical address must be given. Evidence of ownership, such as AC form 8050-2 (aircraft bill of sale) or its equivalent, must be provided and meet the requirements prescribed in part 47 of the Federal Aviation Regulations. If the applicant did not purchase the aircraft from the last registered owner, the applicant must submit conveyances completing the chain of ownership from the registered owner to the applicant. A certified copy of a decree of divorce should suffice to complete the chain of ownership.

§ 24.27 Animals

The following organizations should be contacted regarding the transfer of the following types of animals:

Dogs: American Kennel Club, 260 Madison Ave., New York City, NY 10016, 212-696-8200, **www.akc.org**.

Cats: The Cat Fanciers' Association, Inc., P.O. Box 1005, Manasquan, NJ 08736-0805, 732-528-9797, **www.cfainc.org**.

Horses: *Thoroughbreds:* The Jockey Club, Registry Office, 821 Corporate Drive, Lexington, KY 40503-2794, 859-224-2700, **www.jockeyclub.com**; *Arabians:* Arabian Horse Association (part and purebred), 10805 East Bethany Drive, Aurora, CO 80014, 303-696-4500, **www.arabianhorses.org**; *Quarter Horses:* American Quarter Horse Association, P.O. Box 200, Amarillo, TX 79168, 806-376-4811, **www.aqha.com**; *Palominos:* Palomino Horse Breeders of America, 15253 Skelly Drive, Tulsa, OK 74116-2620, 918-438-1234, **www.palominohba.com**; *Appaloosas:* Appaloosa Horse Club, P.O. Box 8403, Moscow, ID 83843, 208-882-5578, **www.appaloosa.com**.

Cattle: *Brahman:* American Brahman Breeders Association, 3003 South Loop West, Suite 140, Houston, TX 77054, 713-349-0854, **www.brahman.org**; *Beefmaster:* Beefmaster Breeder's United, 6800 Park Ten Blvd., Suite 290W, San Antonio, TX 78213, 210-732-3132, **www.beefmasters.org**; *Angus:* American Angus Association, 3201 Frederick Ave., St. Joseph, MO 64506, 816-383-5100, **www.angus.org**; *Longhorns:* Texas Longhorn Breeders Association of America, 2315 North Main Street, Suite 402, Fort Worth, TX 76106, 817-625-6241, **www.tlbaa.org**.

§ 24.28 Stock

Stock Held by Brokerage Firm: The transfer of outstanding shares of stock is ordinarily handled by a transfer agent. Transferring stock held in the vault by a brokerage firm, known as held in "safekeeping," is accomplished in the same way as certificated stock is transferred, as set out below. If the stock certificate is held in a "street name" and the actual certificate is not available, the transfer can be accomplished by written request from the transferor to the broker, such as a letter of authorization or "L.O.A."

Certificated Stocks: Two steps are necessary to transfer certificated stock: endorsement and delivery. Endorsement occurs when the transferor signs the back of the certificate or a separate "stock power" indicating a transfer of the security. To complete the transfer, delivery of the certificate and the stock power, if one is used, is necessary. To transfer stock held in safekeeping by a brokerage firm, the transferor must execute a transfer document, such as a stock power, and sign his or her name on the stock power exactly as it appears on the account or actual stock certificate. The agent will usually require that the signature of endorsement be guaranteed by a responsible institution, such as a national bank or member of the stock exchange. The transfer agent forwards the certificate or stock power and/or letter of authorization to a registrar, who cancels the old certificates, countersigns new ones, and forwards them to the transfer agent.

Chapter 8 of the Texas Business and Commerce Code deals with the issuance, purchase, and registration of investment securities.

§ 24.29 Retirement Benefits

For a discussion of the disposition of retirement benefits, see chapter 25 of this manual.

§ 24.30 Promissory Notes

There are no specific documents required to transfer a promissory note. Generally, a written assignment acknowledged by the assignor in the presence of a notary public is sufficient. Whether a transferred note qualifies as a negotiable instrument, giving the transferee special status as a holder in due course, is discussed in section 24.11 above.

§ 24.31 Security Agreement

§ 24.31:1 Definitions

A "security agreement" is an agreement that creates or provides for a security interest. Tex. Bus. & Com. Code § 9.102(a)(74). A "security interest" is an interest in personal property or fixtures that secures payment or performance of an obligation. Tex. Bus. & Com. Code § 1.201(b)(35). "Collateral" means the property subject to a security interest. Tex. Bus. & Com. Code § 9.102(a)(12). "Debtor" means the person who has a property interest, other than a security interest or other lien, in the collateral. Tex. Bus. & Com. Code § 9.102(a)(28)(A). "Obligor" means the person who owes payment or other performance of the obligation secured. Tex. Bus. & Com. Code § 9.102(a)(60)(i). "Secured party" means the person in whose favor there is a security interest. Tex. Bus. & Com. Code § 9.102(a)(73)(A).

§ 24.31:2 Classifications of Collateral

A security interest may be granted in the following types of collateral:

1. *Accounts*—a right to payment of a monetary obligation for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, for services rendered or to be rendered, and for other listed items, if not evidenced by chattel paper or an instrument. Tex. Bus. & Com. Code § 9.102(a)(2).

2. *Chattel paper*—a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, or a lease of specific goods. Tex. Bus. & Com. Code § 9.102(a)(11).

3. *Commercial tort claim*—a claim arising in tort if the claimant is an organization *or* if the claimant is an individual and the claim arose in the course of the claimant's business or profession and does not include damages arising out of personal injury or death. Tex. Bus. & Com. Code § 9.102(a)(13).

4. *Deposit account*—a demand, time, savings, passbook, or similar account maintained with a bank, including a nonnegotiable certificate of deposit. Tex. Bus. & Com. Code § 9.102(a)(29).

5. *Documents*—documents of title, such as bills of lading, dock warrants, dock receipts, warehouse receipts, or orders for the delivery of goods. Tex. Bus. & Com. Code §§ 1.201(b)(16), 7.201, 9.102(a)(30).

6. *Instrument*—a negotiable instrument, such as a draft, check, or certificate of deposit, or any other writing evidencing a right to the payment of money that, in the ordinary course of business, is transferred by delivery with any necessary indorsement or assignment. Tex. Bus. & Com. Code §§ 3.104(b), 9.102(a)(47).

7. *Investment property*—a certificated or uncertificated security (Tex. Bus. & Com. Code § 8.102(a)(15)); a security entitlement (Tex. Bus. & Com. Code § 8.102(a)(17)); a securities account (Tex. Bus. & Com. Code § 8.501); a commodity contract (Tex. Bus. & Com. Code § 9.102(a)(15)); or a commodity account (Tex. Bus. & Com. Code § 9.102(a)(14)). Tex. Bus. & Com. Code § 9.102(a)(49).

8. *Letter-of-credit right*—a right to payment or performance under a letter of credit. Tex. Bus. & Com. Code § 9.102(a)(51).

9. *General intangibles*—personal property (including things in action) other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. General intangibles include payment intangibles (a general intangible under which the account debtor's principal obligation is to pay money, Tex. Bus. & Com. Code § 9.102(a)(62)) and software (a computer program and supporting information, but not when it constitutes goods, Tex. Bus. & Com. Code § 9.102(a)(76)). Tex. Bus. & Com. Code § 9.102(a)(42).

10. *Promissory note*—an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain a bank's acknowledgment of receipt of money or funds for deposit. Tex. Bus. & Com. Code § 9.102(a)(66).

11. *Health-care insurance receivable*—an interest in or claim under an insurance policy that is a right to payment of a monetary obligation for health-care goods or services provided or to be provided. Tex. Bus. & Com. Code § 9.102(a)(46).

12. *Equipment*—goods that are not consumer goods, inventory, or farm products. Tex. Bus. & Com. Code § 9.102(a)(33). ("Goods" are all things that are movable when a security interest attaches, including certain embedded software. Tex. Bus. & Com. Code § 9.102(a)(44).)

13. *Consumer goods*—goods used or bought for use primarily for personal, family, or household purposes. Tex. Bus. & Com. Code § 9.102(a)(23).

14. *Farm products*—crops, livestock, supplies produced or used in farming operations, or products of crops or livestock in their unmanufactured states (for example, ginned cotton, wool-clip, maple syrup, milk, and eggs), with respect to which the debtor is engaged in farming operations. Tex. Bus. & Com. Code § 9.102(a)(34), (a)(35).

15. *Inventory*—goods, other than farm products, that are leased; that are held by a person for sale or lease or to be furnished under contracts of service or that the person has so furnished; or that are raw materials, work in process, or materials used or consumed in a business. Tex. Bus. & Com. Code § 9.102(a)(48).

§ 24.31:3 Description of Collateral

Any description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described. Tex. Bus. & Com. Code § 9.108(a). A description by collateral type alone is not sufficient if the collateral is a commercial tort claim or, in a consumer transaction, if the collateral is consumer goods, a security entitlement, a securities account, or a commodity account. Tex. Bus. & Com. Code § 9.108(e). A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or some such phrase does not reasonably identify the collateral in a security agreement, although such a description is sufficient in a financing statement. Tex. Bus. & Com. Code §§ 9.108(c), 9.504.

§ 24.31:4 Attachment

A security interest attaches when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment. Tex. Bus. & Com. Code § 9.203(a). Generally, a security interest may be enforced against the debtor and third parties only if—

1. value has been given;
2. the debtor has rights in the collateral or the power to transfer such rights to a secured party; and
3. one of these conditions is met:
    a. the debtor has authenticated a security agreement describing the collateral (and, if the collateral includes timber to be cut, describes the land concerned);
    b. the collateral is not a certificated security and is in the secured party's possession under Business and Commerce Code section 9.313 pursuant to the security agreement;
    c. the collateral is a certificated security and the security certificate has been delivered to the secured party under Business and Commerce Code section 8.301 pursuant to the security agreement; or
    d. the collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents and the secured party has control under Business and Commerce Code section 7.106, 9.104, 9.105, 9.106, or 9.107 pursuant to the security agreement.

Tex. Bus. & Com. Code § 9.203(b).

§ 24.31:5 Perfecting Security Interest

An attached security interest is effective between the parties, but it must be perfected to be effective against third parties. Only an attached security interest may be perfected. Tex. Bus. & Com. Code § 9.308(a). For a specific category of collateral, there may be several ways to perfect a security interest or only one. The basic methods of perfection are filing a properly completed financing statement, possession, and control. A few types of security interests are perfected on attachment. *See* Tex. Bus. & Com. Code § 9.309.

Filing Financing Statement: Filing a properly completed financing statement in the appropriate UCC filing office is the only method of perfecting a security interest in accounts, a commercial tort claim, and general intangibles, except for a security interest arising out of certain sales of accounts or payment intangibles. Filing is an alternative method to perfect a security interest in goods (other than those having a certificate of title or other form of registration), negotiable documents, instruments, chattel paper, and investment property. (If filing is an alternative method, a security interest perfected by another method generally (with certain exceptions for goods) may take priority over a security interest perfected by filing.)

A financing statement must set forth specific information required in Business and Commerce Code sections 9.502 and 9.516 identifying the debtor, the secured party, and the collateral. *See* Tex. Bus. & Com. Code §§ 9.502(a), 9.516(b)(3)–(5). For timber to be cut, as-extracted collateral, or fixtures (in a fixture filing), additional information is required concerning the related real property. *See* Tex. Bus. & Com. Code §§ 9.502(b), (c), 9.516(b)(3)(D). Except as provided by Business and Commerce Code section 9.516(b), a filing office that accepts written records may not refuse to accept a written initial financing statement on an industry standard form, including a national standard form or a form approved by the International Association of Commercial Administrators, adopted by rule by the secretary of state. Tex. Bus. & Com. Code § 9.5211.

Generally, the financing statement must be filed in only one office in a jurisdiction. If Texas law governs perfection, the filing office is the office of the secretary of state for most types of collateral. If the collateral is as-extracted collateral, timber to be cut, or fixtures (in a fixture filing), the filing is instead made in the real estate recording office for a mortgage on the related real property. Tex. Bus. & Com. Code § 9.501(a).

Filings generally expire after five years and must be continued within six months before the end of the five-year period by the filing of a continuation statement. Tex. Bus. & Com. Code § 9.515. Special transitional rules for continuing the effectiveness of filings made before July 1, 2001, are found at Acts 1999, 76th Leg., R.S., ch. 414, §§ 3.01–.08 (S.B. 1058), eff. July 1, 2001.

Federal and state statutes may provide a means of perfecting a security interest in vessels, aircraft, intellectual property, and titled goods; perfection by these means constitutes perfection by filing. *See* Tex. Bus. & Com. Code § 9.311(b).

Possession: A secured party may perfect a security interest by having possession, either by itself or through a third party, of certain collateral. Tex. Bus. & Com. Code § 9.313.

Possession is required to perfect a security interest in money. Tex. Bus. & Com. Code § 9.312(b)(3). A security interest in an instrument, in goods (except those subject to a certificate of title or other registration), in a tangible negotiable document, or in tangible chattel paper may be perfected by filing or by possession. Tex. Bus. & Com. Code §§ 9.312, 9.313(a). A secured party may perfect a security interest in a certificated security by taking delivery of the security under Business and Commerce Code section 8.301. Tex. Bus. & Com. Code § 9.313(a).

Control: A secured party may perfect a security interest in a deposit account or letter-of-credit right as original collateral only by obtaining control of the deposit account or letter-of-credit right. Tex. Bus. & Com. Code §§ 9.312(b), 9.314(a). A security interest in investment property or electronic chattel paper may be perfected by filing or by control. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a). A security interest in an electronic document may be perfected by control. Tex. Bus. & Com. Code § 9.314(a). Specific rules determine when a secured party has control of an electronic document (Business and Commerce Code section 7.106), a deposit account (Business and Commerce Code section 9.104), electronic chattel paper (Business and Commerce Code section 9.105), investment property (Business and Commerce Code section 9.106), and a letter-of-credit right (Business and Commerce Code section 9.107).

§ 24.32 Transfer of TUTMA Accounts

Section 141.010 of the Texas Property Code provides for the transfer of custodial property. *See* Tex. Prop. Code § 141.010. Custodial property that is held in the form of a certificate may be transferred by delivering the certificate (with any necessary endorsement) to the transferee together with an instrument similar to form 24-32 in this manual. Custodial property that is not evidenced by a certificate may be transferred by delivering any document necessary for transfer, with any necessary endorsement, to the transferee together with an instrument similar to form 24-32. The transferor should place the custodian in control of the custodial property as soon as practicable.

§ 24.33 Transfer of U.S. Savings Bonds

The redemption value of U.S. savings bonds is available on the Internet at **www.treasurydirect.gov/indiv/tools/tools_savingsbondcalc.htm**.

The bonds can be transferred from one spouse to the other on divorce or to one spouse if the bonds are in the names of both spouses, but only one will be the owner after the divorce. If the divorce decree awards the bonds, a certified copy of the decree and any property settlement agreement can be sent to Treasury Retail Securities Site, P.O. Box 299, Pittsburg, PA 15230-0299. It would be wise to call the agency at 1-800-245-2804 to get the latest detailed instructions. The transfer may also be made by completing and sending Form PD F 4000, which is available at **www.treasurydirect.gov/forms.htm**. Simply follow the instructions on the form.

§ 24.34 Estates Code Provisions Affecting Former Spouses

If, after the making of a will, the testator's marriage is dissolved, unless the will expressly provides otherwise, all provisions in the will, including fiduciary appointments, are read as if the former spouse had failed to survive the testator. Unless a court order or contract relating to the division of the marital estate, whenever executed, provides otherwise, all provisions in the will disposing of property to an irrevocable trust in which the former spouse is a beneficiary or is nominated as a trustee or other fiduciary or that confers a power of appointment on the former spouse are read to instead dispose of the property to a trust the provisions of which are identical to the irrevocable trust, except that (1) any provision in the irrevocable trust conferring a beneficial interest or power of appointment on the former spouse shall be treated as if the former spouse had disclaimed the interest granted in the provision and (2) any provision in the irrevocable trust nominating the former spouse as a trustee or other fiduciary shall be treated as if the former spouse had died immediately before the marriage dissolution. Tex. Est. Code § 123.001. References to the former spouse include relatives of the former spouse who are not relatives of the testator.

The dissolution of marriage revokes the provision in a revocable trust instrument that was executed by a divorced person as settlor before the dissolution and disposes of property to the former spouse or confers a power of appointment or nominates the former spouse as a personal representative, trustee, conservator, agent, or guardian or in any other fiduciary or representative capacity. These provisions do not apply if a court order, the express terms of a trust instrument executed before the dissolution, or the express provision of a contract relating to the division of the marital estate, whenever executed, provides otherwise. Tex. Est. Code § 123.052. References to the former spouse include relatives of the former spouse who are not relatives of the settlor.

On the death of a divorced person who is a settlor in a trust created under a trust instrument executed by that person and his former spouse during their marriage that revoca-

bly disposes of property to the former spouse or confers a power of appointment or nominates the former spouse as a personal representative, trustee, conservator, agent, or guardian or in any other fiduciary or representative capacity, the trustee must divide the trust into two trusts, each of which is composed of the property attributable to the contributions of one of the settlors. These provisions do not apply if a court order, the express terms of a trust instrument executed before the dissolution, or the express provision of a contract relating to the division of the marital estate, whenever executed, provides otherwise. Tex. Est. Code § 123.056. References to a former spouse include relatives of the former spouse who are not relatives of the settlor.

If a decedent established a P.O.D. account or other multiple-party account and the decedent's marriage is later dissolved, any payable on request after death designation provision or provision of a survivorship agreement with respect to the account in favor of the decedent's former spouse is not effective unless (1) the divorce decree designates the former spouse as the P.O.D. payee or beneficiary or reaffirms the survivorship agreement in favor of the former spouse; (2) after the dissolution the decedent redesignated the former spouse as the P.O.D. payee or beneficiary or reaffirmed the survivorship agreement in writing; or (3) the former spouse is designated to receive, or under the survivorship agreement would receive, the proceeds in trust for a child or dependent of the decedent or the former spouse. If the designation is not effective, notice of the dissolution must be given to the financial institution. If the provision of a survivorship agreement is not effective under these provisions, the former spouse or relative is treated as having predeceased the decedent. Tex. Est. Code § 123.151. References to the former spouse include relatives of the former spouse who are not relatives of the decedent.

An agent's authority under a power of attorney terminates when the agent's marriage to the principal is dissolved, unless the power of attorney provides otherwise. Tex. Est. Code § 751.132.

§ 24.35 Transfer on Death Deeds

An individual may transfer the individual's interest in real property to one or more beneficiaries, effective at the transferor's death, by a document called a "transfer on death deed." Tex. Est. Code § 114.051. Revocation of a transfer on death deed may be accomplished by a subsequent transfer of the property or an instrument that expressly revokes the transfer on death deed. To be effective, the revoking instrument must be filed in the deed records before the transferor's death. Tex. Est. Code § 114.057. If a marriage between the transferor and a designated beneficiary is dissolved after a transfer on death deed is recorded, a final judgment of the court dissolving the marriage

operates to revoke the transfer on death deed as to that designated beneficiary if notice of the judgment is recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed is recorded. Tex. Est. Code § 114.057(c).

[Sections 24.36 through 24.40 are reserved for expansion.]

IV. Virtual Assets and Intellectual Property

§ 24.41 Transfer of Domain Names

A domain name is transferred by first contacting the Web host online. Self-explanatory forms are available on the Web host's website. Completion of the form requires the action of both parties. There is a small fee.

§ 24.42 Transfer of Patent

A patent may be transferred by completing an assignment of any document of conveyance. For example, see form 24-16, Assignment of Interest, in this chapter. The assignment must be attached to Patent Office–prescribed form PTO-1595 and mailed to Mail Stop Assignment Recordation Services, Director of the USPTO, P.O. Box 1450, Alexandria, VA 22313–1450. There is a small fee. A patent may also be transferred on the Internet. A transfer cover sheet may be created and submitted by completing the on-line Web forms and attaching the supporting legal documentation as a TIFF image or a PDF file for submission via the Internet. The Web address is **http://epas.uspto.gov**.

§ 24.43 Transfer of Trademark

A trademark may be transferred by completing an assignment of any document of conveyance. For example, see form 24-16, Assignment of Interest, in this chapter. The assignment must be attached to Patent Office–prescribed form PTO-1594 and mailed to Mail Stop Assignment Recordation Services, Director of the USPTO, P.O. Box 1450, Alexandria, VA 22313–1450. There is a small fee. A trademark may also be transferred on the Internet. A transfer cover sheet may be created and submitted by completing the on-line Web forms and attaching the supporting legal documentation as a TIFF image or a PDF file for submission via the Internet. The Web address is **http://etas.uspto.gov**.

[Sections 24.44 through 24.50 are reserved for expansion.]

V. Useful Websites

§ 24.51 Useful Websites

The following websites contain information relating to the topic of this chapter:

Animals (§ 24.27)

Cats
www.cfainc.org

Cattle
www.angus.org (Angus)
www.beefmasters.org (Beefmaster)
www.brahman.org (Brahman)
www.tlbaa.org (Longhorns)

Dogs
www.akc.org

Horses
www.aqha.com (American Quarter Horses)
www.appaloosa.com (Appaloosas)
www.arabianhorses.org (Arabians)
www.palominohba.com (Palominos)
www.jockeyclub.com (Thoroughbreds)

Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation (form CG-1258) (§ 24.22)
www.dco.uscg.mil/Portals/9/DCO%20Documents/NVDC/CG1258.pdf?ver=2017-05-09-113142-067

Application to transfer Texas title to a boat (§ 24.22)
http://tpwd.texas.gov/fishboat/boat/forms/

Identification for motor vehicle transfer (§ 24.21)
www.txdmv.gov/registration-and-title-bulletins/2013-06-20-22-56-27/024-13

Manufactured housing (§ 24.25)
www.tdhca.state.tx.us/mh/index.htm

Redemption value of savings bonds (§ 24.33)
www.treasurydirect.gov/indiv/tools/tools_savingsbondcalc.htm

Savings bond transfer forms (§ 24.33)
www.treasurydirect.gov/forms.htm

Transfer of patent online (§ 24.42)
http://epas.uspto.gov

Transfer of trademark online (§ 24.43)
http://etas.uspto.gov

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Chapter 25

Employment and Retirement Benefits

I. Introduction

§ 25.1 Complexity of Drafting Orders

Drafting orders for the division of retirement and other such employee benefit plans is a complex undertaking. Generally, an order in addition to the decree is needed to divide the benefit. For plans governed by ERISA this order is a qualified domestic relations order (QDRO), but it may have a different title if it is for a non-ERISA plan. No single set of rules controls the division of these plans, and no simple form order can be used for all plans. Many types of plans exist; each must be approached on the basis of the particular rules and terminology that control it, which are found either in the plan documents or in the statutes and regulations governing the type of plan involved. Division of an individual retirement account (IRA) or a nonqualified plan does not require an order separate from the decree of divorce, and care must be taken when dividing the benefit and drafting the applicable decree language. However, some IRA providers may want an additional order or assignment of interest.

§ 25.2 Scope of Chapter

These practice notes concentrate on the division of retirement, employee benefit, and other plans, which are usually incident to employment of some sort. There is some discussion of various attributes of the plans, but the emphasis is on the rules of division, the benefits that may be divided, and the orders required to accomplish the division.

[Sections 25.3 through 25.10 are reserved for expansion.]

II. Retirement Benefits Divisible on Divorce

§ 25.11 Divisibility on Divorce

The general rule is that the part of a spouse's retirement benefits earned during the marriage constitutes community property subject to division in a divorce. *Allard v. Frech*, 754 S.W.2d 111, 114 (Tex. 1988); *Berry v. Berry*, 647 S.W.2d 945, 946 (Tex. 1983); *Valdez v. Ramirez*, 574 S.W.2d 748, 749 (Tex. 1978); *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977); *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976); *Herring v. Blakeley*, 385 S.W.2d 843, 846 (Tex. 1965). These benefits should be valued on the date of divorce. *Berry*, 647 S.W.2d at 947.

Although retirement benefits should be valued on the date of divorce, the portion to which an employee's former spouse will be entitled can change after the divorce, if the employee later becomes eligible for a new benefit as a result of his or her employment during the marriage. *See Howard v. Howard*, 490 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). At time of divorce, the husband in *Howard* would have been entitled only to reimbursement of his payroll contributions to his retirement plan, because his interest had not yet vested. The decree of divorce awarded the wife a portion of "all sums related to" benefits "existing by reason of [husband]'s employment during the marriage." When the husband's interest in the plan vested after divorce and a new benefit—here, a deferred retirement option program—was added to which the husband was entitled because of employment during the marriage, the wife was entitled to a portion of the new benefit.

Social Security benefits are not divisible on divorce, but rather are exempt from the just and right division of the community property, regardless of whether the benefits were received during the marriage. Federal law expressly preempts state law with respect to the treatment of Social Security benefits. *Everse v. Everse*, 440 S.W.3d 749, 752–55 (Tex. App.—Amarillo 2013, no pet.); *see* 42 U.S.C. § 407.

COMMENT: The attorney should ensure that the plan permits the proposed division of benefits.

COMMENT: The attorney should determine if a previous qualified domestic relations order (QDRO) has been entered dividing any portion of the retirement benefits currently being considered for division.

§ 25.12 Methods of Division

There are two types of plans. The first, called private plans, are governed by the Employment Retirement Income Security Act (ERISA), the Internal Revenue Code (IRC), or both. The second, called governmental plans or church plans, are governed by statutes. A private plan may be a defined contribution plan, a defined benefit plan, or a hybrid plan (for example, a money purchase pension plan or a target benefits plan).

There are a number of ways to divide retirement benefits on divorce. The simpler private benefit plan to divide is a defined contribution plan, in which there is an account established for each participant—for example, a 401(k). The separate-property interest of a spouse in a defined contribution retirement plan may be traced using the tracing and characterization principles that apply to a nonretirement asset. Tex. Fam. Code § 3.007(c). Section 3.007(c) gives statutory authority to trace separate-property assets within a defined contribution plan. The attorney should address in the decree of divorce and the QDRO the date for the division of the plan (sometimes called the "valuation date"), whether the alternate payee will receive gains and losses on the portion of any defined contribution plan awarded to the alternate payee, and the date from which the gains and losses will be calculated. The assets of many defined contribution plans are invested in mutual funds and stocks, making the value of the plan market driven and, thus, subject to gains of the particular stocks and mutual funds that compose the assets of the retirement plan. Also, there is usually an interval of time between the valuation date and the date that the plan is actually divided by the plan administrator (sometimes called the "segregation date"). Failure to specifically award gains and losses on the alternate payee's portion to the alternate payee for the period between the valuation date and the segregation date could result in the alternate payee's losing the gains and the participant's receiving the gains from the alternate payee's portion.

The most difficult private plans to divide are defined benefit plans because these plans often include survivor annuities, cost-of-living adjustments, and early retirement subsidies. It is important to realize that there are plans that are a hybrid of defined contribution plans and defined benefit plans, such as money purchase pension plans and target benefit plans. Cash balance pension plans are now being used by employers who may convert the traditional pension plan to a cash balance plan or simply terminate the traditional pension plan and start a cash balance plan. The practitioner should inquire as to the plan(s) and types to ensure no benefits are left undivided.

Within the context of awarding a portion of the participant's share of the retirement benefit in a defined benefit plan, the court is limited to an award that does not exceed

the interest of the community estate in the retirement benefit. These benefits are the most difficult to divide. The "holy trinity" of cases pertaining to identification and division of the community estate's interest in the employee spouse's retirement benefits are *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983); *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977); and *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976). For a defined benefit plan or retirement annuity that has a guaranteed minimum benefit, any nonguaranteed portion of the benefit should also be divided by the court if there is sufficient evidence of the value of the nonguaranteed portion. *In re Marriage of Hardin*, 572 S.W.3d 310, 314–15 (Tex. App.—Amarillo 2019, no pet. h.).

Fundamental conclusions can be drawn from these cases:

1. A nonvested defined benefit that is not in pay status is an asset subject to division by the court.

2. The proper method of ascertaining the interest of the community estate in a benefit that was earned partially during marriage and partially outside marriage is on the basis of time spent by the employee earning the benefit.

3. The value of the benefit that is to be apportioned within the community estate is the value of the benefit as of the date of divorce.

4. The proper time apportionment fraction is that in which the numerator is the credited service time of the employee during marriage and the denominator is the credited service time of the employee through the date of divorce (or date of retirement if retirement occurs before divorce). These fractions have become commonly known as the "Berry" fraction if the party is not retired at the time of divorce and the "Taggart" fraction if the party has already retired at the time of divorce. These fractions yield the community estate's share of the retirement benefit.

The *Taggart* formula has withstood the challenge of subsequent proposed apportionment methodologies. *See Parliament v. Parliament*, 860 S.W.2d 144 (Tex. App.—San Antonio 1993, writ denied).

It is important to note that, in most plans, orders to divide retirement benefits may also be used for payment of child support, spousal maintenance, and alimony.

[Sections 25.13 through 25.20 are reserved for expansion.]

III. General Definitions

§ 25.21 Qualified Domestic Relations Order (QDRO)

The term *qualified domestic relations order* (QDRO) is used to describe the order that divides some, but not all, retirement, profit-sharing, and other such qualified plans. *See* 26 U.S.C. § 414(p)(1)(A); 29 U.S.C. § 1056(d)(3)(B)(i); Tex. Gov't Code § 804.001(4). This term is not used to describe all such orders. It is a term of art used in the Internal Revenue Code, the Employee Retirement Income Security Act (ERISA), and the Texas Government Code. It applies to private retirement plans and Texas government and church plans, but it does not apply to military retirement plans, federal civil service plans, and railroad retirement plans. Using the term *qualified domestic relations order* where it does not belong may result in rejection of the order by the plan administrator. It is important to note that, in some nonqualified plans, the practitioner will discover that the plan administrator will require an order, possibly a QDRO, to divide the plan in addition to the decree, even though not applicable.

§ 25.22 Defined Benefit and Defined Contribution Plans

The practitioner must first determine whether the plan is a defined benefit plan, a defined contribution plan, or a combination of both. Those terms are defined in the Internal Revenue Code and ERISA. *See* 26 U.S.C. § 414(i), (j); 29 U.S.C. § 1002(34), (35). The terms do not apply to all plans, but they describe the basic types of plans.

A defined contribution plan provides for an individual account for each participant and consists of employee and/or employer contributions. The account also includes any income, expenses, gains and losses, and any forfeitures of accounts of other participants that may be allocated to the participant's account. 26 U.S.C. § 414(i); 29 U.S.C. § 1002(34). The apportionment formula in *Berry*, which divides defined benefit plans, is inappropriate for the division of a defined contribution plan. *Iglinsky v. Iglinsky*, 735 S.W.2d 536, 537–38 (Tex. App.—Tyler 1987, no writ) (citing *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983)).

A defined benefit plan is any plan that is not a defined contribution plan. 26 U.S.C. § 414(j); 29 U.S.C. § 1002(35). A defined benefit plan usually involves the payment of benefits according to a formula. The formula takes into account the contributions, if any, made by the member of the plan; the time accredited to employment; the highest salary of the member; and the contributions made by the employer. Dividing a defined benefit plan usually, but not always, involves some sort of formula. A formula may not

be needed if the plan is a defined benefit plan with a cash balance, called a cash balance pension plan. If the member has retired and the amount of the benefits is known, that amount may be divided. If the member has not retired, there are unknowns in the formula. The member may not be able to retire or may not meet the prerequisites of retirement. The amount to be contributed by the member, the salary, the contributions by the employer, and the length of employment are unknown.

If there are unknowns, a formula must be used to divide the defined benefit plan, and there are differing approaches. One approach is to determine what the participant in the plan would receive per month at the age when he was first qualified to retire if the participant did not work past the date of divorce; that amount is then divided between the spouses. *Berry*, 647 S.W.2d at 946–47; *In re Marriage of Rister*, 512 S.W.2d 72, 73–74 (Tex. App.—Amarillo 1974, no writ). Another approach sometimes used is to determine the proportion of the benefit earned during the marriage and award a fraction of that proportion to the nonemployee spouse. Various other methods may be used, depending on the particular circumstances of the case.

Valuation and Apportionment of Defined Benefit Plan If Employee Spouse Is Retired at Time of Divorce: The community-property interest in a defined benefit plan, if the employee spouse is already retired at the time of divorce, is calculated in accordance with the following formula: number of months married under the plan divided by number of months employed under the plan (before and during marriage) times value of the retirement benefits (for example, the monthly annuity) as of the date of retirement equals the extent of the community-property interest. *See Taggart v. Taggart*, 552 S.W.2d 422, 424 (Tex. 1977).

Valuation and Apportionment of Defined Benefit Plan If Employee Spouse Is Not Retired at Time of Divorce: If a couple divorces before retirement, the value of the retirement benefits of a defined benefit plan is determined as of the date of divorce. *May v. May*, 716 S.W.2d 705, 710 (Tex. App.—Corpus Christi–Edinburg 1986, no writ). The nonemployee spouse (alternate payee) may not share in any of the employee spouse's (participant's) postdivorce earning and efforts. The community-property interest in the defined benefit plan if the benefits are contingent at the time of the divorce, because the employee spouse is still employed, is calculated in accordance with the following formula: number of months married under the plan divided by number of months employed under the plan as of the date of divorce times value of the retirement benefits (for example, the monthly annuity) as of the date of divorce equals the extent of the community-property interest. *Berry*, 647 S.W.2d at 946–47. Also, see *Albrecht v. Al-brecht*, 974 S.W.2d 262 (Tex. App.—San Antonio 1998, no writ), holding that the

Berry formula, not the *Taggart* formula, should be used when an employee has not retired as of the time of divorce. The *Taggart* formula is used when a party has already retired at the time of divorce.

[Sections 25.23 through 25.30 are reserved for expansion.]

IV. Continuing Jurisdiction for Order Dividing Plan

§ 25.31 Continuing Jurisdiction for Order Dividing Retirement Plans

The court that rendered the final decree maintains continuing, exclusive jurisdiction to render and correct enforceable QDROs or similar orders permitting payment of pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee. Unless prohibited by federal law, a suit seeking such an order applies to a previously divided pension, retirement plan, or other employee benefit divisible under Texas or federal law, whether the plan or benefit is private, state, or federal. Tex. Fam. Code § 9.101.

A party may petition a court to render a QDRO if the court that rendered a final decree of divorce dividing retirement benefits did not provide a QDRO permitting payment of benefits to an alternate payee. *See* Tex. Fam. Code § 9.103. If the order dividing a plan has been rejected by the plan or agency, the trial court retains continuing, exclusive jurisdiction to render a corrected QDRO that will qualify with the plan. Tex. Fam. Code § 9.104. However, if the court has lost plenary power, any petition requesting an original or amended QDRO is governed by the Texas Rules of Civil Procedure that apply to the filing of an original lawsuit. *See* Tex. Fam. Code § 9.102. *See also Araujo v. Araujo*, 493 S.W.3d 232 (Tex. App.—San Antonio 2016, no pet.).

In rendering a QDRO based on a prior divorce decree, the court cannot change the substantive division of the retirement benefits made in the original decree. *Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003). However, a residuary clause in a divorce decree awarding a party 50 percent of the community property interest in any retirement benefits existing by reason of the other party's past and present employment as of the date of divorce has been held sufficient to uphold the trial court's subsequent rendering of a QDRO dividing the other party's Federal Employees Retirement System benefits. *Helm v. Hauser*, No. 04-17-00232-CV, 2018 WL 2943823 (Tex. App.—San Antonio June 13, 2018, pet. denied), *petition for cert. filed* (U.S. Sept. 6, 2019) (No. 19-5958).

A court that renders a divorce but fails to divide retirement benefits can later divide the undivided property. Tex. Fam. Code §§ 9.201–.205. In *In re Marriage of Malacara*, the divorce decree did not specifically address retirement benefits but provided that "all community property not listed on any schedule . . . shall be owned by Husband and Wife as equal co-tenants." After the husband retired and began receiving benefits, the wife sued for her share. The court of appeals held that the trial court could award a portion of the benefits already distributed as back payments pursuant to sections 9.009 and 9.010(b) of the Family Code. *In re Marriage of Malacara*, 223 S.W.3d 600 (Tex. App.—Amarillo 2007, no pet.) (per curiam).

Amendment of QDRO: A court that renders a QDRO retains continuing, exclusive jurisdiction to amend the order to correct it *or* clarify its terms to effectuate the division of property ordered by the court. Such an amended domestic relations order must be submitted to the plan administrator or equivalent to determine whether the amended order satisfies the requirements of a QDRO. If the order is rejected by the plan, the court retains continuing, exclusive jurisdiction to render a corrected QDRO that will qualify with the plan. Tex. Fam. Code § 9.1045; *see* Tex. Fam. Code § 9.104.

In amending a QDRO, however, the court may not amend, modify, alter, or change the division of property made or approved in the decree. *See* Tex. Fam. Code § 9.007. Where both the decree and the amended QDRO expressly stated that the amounts to be transferred were for child support, the amended QDRO did not change the substantive property division by naming the child, instead of the wife, as alternate payee; by specifying that the husband would be responsible for payment of taxes associated with the payment; or by including provision for payment of the remainder to the child's beneficiary if the child died before receiving the full amount. *Quijano v. Quijano*, 347 S.W.3d 345 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *see also Gourley v. Gourley*, No. 02-17-00228-CV, 2018 WL 2976431 (Tex. App.—Fort Worth June 14, 2018, no pet.) (nunc pro tunc divorce decree that substantively changed division of husband's retirement benefits void).

Attorney's Fees: In a proceeding to obtain an enforceable order as provided by sections 9.101 through 9.105 of the Family Code, the court may award reasonable attorney's fees incurred by a party to a divorce or annulment against the other party to the divorce or annulment and order that they be paid directly to the attorney. The attorney may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 9.106.

[Sections 25.32 through 25.40 are reserved for expansion.]

V. Private Retirement Plans

§ 25.41 No Standard Forms

No standard forms for QDROs exist, because each retirement plan is different. Even the plan's model QDRO may not serve the needs of every client and should be closely scrutinized by the attorney. These are not fill-in-the-blank forms and can be rejected if the person using the form does not understand how the plans or model QDROs work. The plan may not require the attorney to use its form. The plan's model may secure the needs of the participant or employer. An order that might be approved by the administrator of one plan may be rejected by the administrator of another. Whenever possible, the proposed order should be submitted to the particular plan administrator for prequalification before the order is signed by the judge. If this is not possible, the QDRO can be corrected under Family Code section 9.104. *See* Tex. Fam. Code § 9.104.

COMMENT: Many plan administrators assess fees for the review of QDROs. Moreover, many plans assess higher fees for the review of QDROs that differ from the plans' model QDROs. The attorney should determine and consider the amount of such fees that will be assessed in evaluating whether to use a particular plan's model QDRO. However, the attorney should not use a model QDRO that does not protect the client or conform to the agreed-to division in order to save on review fees.

COMMENT: In drafting a settlement agreement or proposed order that will require a QDRO, the attorney should also consider whether the settlement agreement or proposed order should include specific terms regarding the allocation between the parties of fees assessed by the plan for review of the QDRO.

§ 25.42 Variety of Plans

To be qualified under the Internal Revenue Code and ERISA, a plan must meet certain requirements. Beyond meeting those requirements, the plans may differ from company to company.

In drafting a QDRO dividing the benefits of a qualified plan, it is best that the attorney have a copy of the summary plan description and/or the formal plan document.

The numerous requirements of qualification will be discussed only insofar as they affect the division of benefits on divorce.

§ 25.43 Definitions Applicable to Private Plans

Specific definitions set out in the Internal Revenue Code and ERISA apply to qualified private retirement plans.

Defined contribution plan: A defined contribution plan is one that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account and any income, expenses, gains and losses, and any forfeitures of accounts of other participants that may be allocated to the participant's account. 26 U.S.C. § 414(i).

Defined benefit plan: A defined benefit plan is any plan that is not a defined contribution plan. 26 U.S.C. § 414(j).

Domestic relations order: A domestic relations order is any judgment, decree, or order (including approval of a property settlement agreement) that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant and is made in accordance with a state domestic relations law (including a community-property law). 26 U.S.C. § 414(p)(1)(B); 29 U.S.C. § 1056(d)(3)(B).

Qualified Domestic Relations Order (QDRO): A QDRO is a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under a plan and meets the requirements for a QDRO. 26 U.S.C. § 414(p)(1)(A); 29 U.S.C. § 1056(d)(3)(B)(i).

Participant: The participant is the employee who is or may become eligible to receive a benefit of any type from an employee benefit plan that is qualified under the federal statutes. 29 U.S.C. § 1002(7).

Alternate payee: An alternate payee is any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable under a plan with respect to the participant. 26 U.S.C. § 414(p)(8); 29 U.S.C. § 1056(d)(3)(K).

Qualified joint and survivor annuity: A qualified joint and survivor annuity is an annuity for the life of the participant with a survivor annuity for the life of the spouse that is not less than 50 percent and not more than 100 percent of the amount of the annuity that is payable during the joint lives of the participant and spouse and that is the

actuarial equivalent of a single annuity for the life of the participant. 26 U.S.C. § 417(b); 29 U.S.C. § 1055(d).

Qualified preretirement survivor annuity: A qualified preretirement annuity is an annuity for a spouse in a situation in which the participant was eligible to retire but had not retired before the participant's death. The preretirement annuity must be for the life of the spouse and must be not less than 50 percent and not more than 100 percent of the amount of the annuity that would have been payable to the participant. 26 U.S.C. § 417(c); 29 U.S.C. § 1055(e).

§ 25.44 Requirements of QDRO for Private Plans

To be a QDRO, the order must include the following information: (1) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order, (2) the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee or the manner in which the amount or percentage is to be determined, (3) the number of payments or period to which the order applies, and (4) each plan to which the order applies. 26 U.S.C. § 414(p)(2); 29 U.S.C. § 1056(d)(3)(C).

A domestic relations order meets the requirements of a QDRO only if the order (1) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan; (2) does not require the plan to provide increased benefits (determined on the basis of actuarial value); and (3) does not require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO. 26 U.S.C. § 414(p)(3); 29 U.S.C. § 1056(d)(3)(D).

§ 25.45 Survivor Benefits for Private Plans

In most cases a qualified defined benefit plan requires a joint and survivor annuity and a preretirement survivor annuity. 26 U.S.C. § 401(a)(11)(A); 29 U.S.C. § 1055(a). These survivor annuities are most common in defined benefit plans but may exist in a defined contribution plan that contains annuity provisions, called a hybrid plan.

Unless the participant has elected the joint and survivor annuity option under the plan, the benefits payable to the alternate payee will cease on the participant's death if the participant is retired at the time of divorce. If the participant is not retired at the time of divorce, without the joint and survivor annuity, the alternate payee's benefit payments

may cease at the participant's death. The benefits would not cease if the QDRO is written so that the alternate payee's life is the measuring life. This type of QDRO is called a separate-interest QDRO. If the participant's life is the measuring life, this type of QDRO is called a shared-payment QDRO and would require the annuity for the alternate payee's benefits to continue after the participant's death. The qualified joint and survivor annuity provides payments that are at least 50 percent and not more than 100 percent of the annuity that is received by the participant. 26 U.S.C. § 417(b); 29 U.S.C. § 1055(d).

If the participant dies after becoming eligible to retire but before retirement, the preretirement annuity provides payments to the beneficiary that are at least 50 percent and not more than 100 percent of the annuity that would have been received by the participant. 26 U.S.C. § 417(c); 29 U.S.C. § 1055(e). This annuity needs to be awarded if the QDRO is a shared-payment QDRO and sometimes if it is a separate-interest QDRO. The alternate payee's benefits will be lost if no preretirement survivor annuity is awarded in the QDRO and the participant dies before reaching the earliest retirement age.

The QDRO must address these survivor benefits in dividing the plan benefits, or the survivor benefits may be lost forever. The attorney should realize that in most defined benefit plans, a QDRO can be drafted to provide an alternate payee with a benefit over his or her lifetime (with the alternate payee's life as the measuring life), also called a separate-interest QDRO, or over the lifetime of the participant (with the participant's life as the measuring life), also called a shared-payment QDRO. A single life annuity allows the alternate payee to begin to receive benefits when the participant reaches the earliest retirement age and will more than likely yield a different monthly benefit amount. The alternate payee's benefits are actuarially adjusted over the life of the alternate payee. The shared-interest approach requires the alternate payee to wait to receive benefits until the participant begins to receive benefits. The alternate payee's benefits would be paid over the life of the participant, and on the death of the participant, the alternate payee's benefits would cease unless survivor benefits were awarded. The amount of the benefits to the alternate payee can vary tremendously depending on the type of annuity chosen. The qualified joint and survivor annuity requires the participant's benefits to be reduced at the time of retirement to pay for the annuity.

The qualified joint and survivor annuity and the qualified preretirement annuity may be waived during the marriage. If those benefits are not agreed to and awarded in the QDRO, they are forfeited. During marriage a waiver can be accomplished only after a written explanation of the benefits is provided, and the spouse must join in the election

to waive. The election must be in writing and signed by the participant and the spouse. 26 U.S.C. § 417(a); 29 U.S.C. § 1055(c).

COMMENT: The attorney for the alternate payee should verify with the plan whether any waivers have occurred and whether they may be revoked.

COMMENT: If these survivor benefits are not covered in the QDRO, they can be lost forever. *See* 26 U.S.C. § 414(p)(5).

§ 25.46 Shared-Payment (Shared-Interest) QDRO vs. Separate-Interest QDRO for Defined Benefit Plan QDROs

All plans allow the shared-payment approach, and it is unusual to find a plan that does not allow the separate-interest approach. The separate interest is the most widely used approach today but may not be best for the alternate payee. It is wise to have the alternate payee select the form of payment in writing after the client has obtained advice from the appropriate professional.

The shared-payment QDRO generally operates as follows:

- The alternate payee cannot commence benefits early. The alternate payee must wait for the participant to retire.
- The alternate payee's benefits are not actuarially adjusted to his lifetime. The alternate payee simply shares in each monthly pension payment payable to the participant. However, because the benefit is being paid over two lives, rather than one, and because of postretirement survivor protection, the entire initial monthly benefit will be reduced to pay for the postretirement survivor protection. Some plans have a subsidized joint and survivor annuity.
- Preretirement survivorship protection is also necessary to protect the alternate payee's interest if the participant dies before the alternate payee commences benefits. This annuity is known as the qualified preretirement survivor annuity (QPSA) and must be included in the QDRO to afford the alternate payee protection.
- Postretirement survivorship protection is also necessary to protect the alternate payee's interest if the participant dies after the alternate payee commences benefits. This annuity is known as the qualified joint and survivor annuity (QJSA) and must be included in the QDRO to afford the alternate payee protection.

- Any preretirement and postretirement survivor annuity benefits will be payable in lieu of, and not in addition to, any other benefit payments under the QDRO.

- The alternate payee's benefits *usually* revert to the participant if the alternate payee dies first.

- If the participant is in pay status, the parties must use a shared-payment QDRO, and the form of benefit usually cannot be changed. Any survivor benefits waived at retirement are no longer available.

The separate-interest QDRO generally operates as follows:

- The alternate payee can commence benefits early before the participant actually retires but only on an unsubsidized basis—meaning that the alternate payee's benefits will be reduced for early commencement.

- The alternate payee's benefits are actuarially adjusted to his lifetime so the alternate payee is guaranteed to receive benefits for the alternate payee's life. Accordingly, the alternate payee's benefits may be reduced to a lower monthly number to pay for a longer lifespan of the alternate payee or to a higher monthly number to reflect the shorter lifespan of the alternate payee. This adjustment is in addition to the adjustment for early commencement.

- The participant and alternate payee's benefits are completely severed, and each can take their benefits in whatever form they choose under most plans. In addition, if the participant remarries, he or she can elect a joint and survivor benefit for his or her new spouse.

- Preretirement survivorship protection may be, but is often not, necessary to protect the alternate payee's interest if the participant dies before the alternate payee commences benefits. Verify if the plan requires that the QPSA must be included in the QDRO to afford the alternate payee protection.

- Any preretirement survivor annuity benefits will be payable in lieu of, and not in addition to, any other benefit payments under the QDRO.

- Postretirement survivorship protection is not necessary, because once the alternate payee commences his benefit, the alternate payee is receiving benefits based on the alternate payee's lifetime, and the participant's death does not affect the alternate payee's benefit.

- Benefits *may* revert to the participant if the alternate payee dies before the alternate payee's commencement of benefits.
- Benefits do not revert to the participant if the alternate payee dies after the alternate payee's commencement of benefits. As most plans will not allow the alternate payee to elect a beneficiary, the alternate payee's benefits inure to the plan; however, the alternate payee's ability to elect a beneficiary usually depends on the form of benefit elected by the alternate payee. An alternate payee may not elect a joint and survivor benefit with a new spouse as the joint annuitant.
- Separate-interest QDROs cannot be used if the participant is in pay status.

The primary difference in the two approaches is that the alternate payee's benefits are either actuarially adjusted for the alternate payee's lifetime (the separate-interest QDRO) or not (the shared-payment QDRO). This is critical, and the alternate payee should have a professional calculate the benefits under both approaches.

§ 25.47 Early Retirement Subsidy

The vast majority of defined benefit plans include early retirement provisions that afford participants the opportunity to retire before their normal retirement age. The early retirement subsidy is part and parcel of the participant's accrued benefit and is a marital asset subject to division on divorce. The alternate payee should be entitled to receive a pro rata share of any early retirement subsidy payable to the participant under the plan. If agreed to by the parties, the QDRO should contain language regarding a recalculation of the benefits should the participant subsequently elect to retire early under the plan after the alternate payee has already commenced benefits. The QDRO should instruct the plan administrator to recalculate the alternate payee's benefits to provide a pro rata share of any early retirement subsidy received by the participant on the date of retirement, if allowed by the plan. If the alternate payee is not awarded a proportionate share of the early retirement subsidy, the alternate payee will not recoup the alternate payee's early retirement reduction, and the funds will be paid to the participant or inure to the plan.

§ 25.48 Cost-of-Living Adjustment

If the participant is in pay status at the time of divorce, the QDRO should include language that provides the alternate payee with a pro rata share of cost-of-living adjustments (COLAs). *Harrell v. Harrell*, 700 S.W.2d 645, 647–48 (Tex. App.—Corpus

Christi–Edinburg 1986, no writ); *Neese v. Neese*, 669 S.W.2d 388, 390 (Tex. App.—Eastland 1984, writ ref'd n.r.e.). If the participant is not in pay status, some COLAs may not be divisible if, for example, they are based on the participant's services or continued employment. *See May v. May*, 716 S.W.2d 705, 711 (Tex. App.—Corpus Christi–Edinburg 1986, no writ); *Dunn v. Dunn*, 703 S.W.2d 317, 320–21 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). However, COLAs that are subject to community-property division are those that are not attributable to postdivorce raises, promotions, services rendered, or contributions but instead are based on inflation or investment increases. *See Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

[Sections 25.49 and 25.50 are reserved for expansion.]

VI. Texas Public Retirement System

§ 25.51 Generally

The retirement programs for officers or employees of the state, political subdivisions, and agencies and instrumentalities of the state and political subdivisions, including those participating in the optional retirement program governed by chapter 830 of the Texas Government Code, are governed by title 8 of the Texas Government Code. *See* Tex. Gov't Code §§ 801.001(2), 830.001.

The public retirement system includes the Employees Retirement System of Texas, the Judicial Retirement System of Texas Plan One, the Judicial Retirement System of Texas Plan Two, the Teacher Retirement System of Texas, the Texas County and District Retirement System, the Texas Municipal Retirement System, and any other continuing, organized program of service retirement, disability retirement, or death benefits for officers or employees of the state, a political subdivision, and an agency or instrumentality of the state or a political subdivision and includes the optional retirement program governed by chapter 830 of the Government Code. Tex. Gov't Code § 804.001(3).

Benefits provided by a statewide retirement system, the optional retirement program, and those public retirement systems that have elected to adopt the provisions of subchapter A and subchapter C of chapter 804 of the Government Code may be divided only by a QDRO. *See* Tex. Gov't Code §§ 804.002, 804.003.

§ 25.52 Definitions for State Retirement Systems

The following definitions apply to the division of Texas public retirement system plans covered by chapter 804 of the Texas Government Code.

Domestic relations order: A domestic relations order means any judgment, decree, or order, including approval of a property settlement agreement, that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a member or retiree and is made pursuant to a domestic relations law, including a community-property law of Texas or of another state. Tex. Gov't Code § 804.001(2).

Qualified Domestic Relations Order (QDRO): A QDRO is a domestic relations order that creates, recognizes, or assigns to an alternate payee the right to receive benefits, that directs the public retirement system to disburse the benefits to the alternate payee, and that meets the requirements of section 804.003 of the Government Code. Tex. Gov't Code § 804.001(4).

Alternate payee: In a divorce case the alternate payee is the former spouse of a member or retiree who is recognized by a QDRO as having a right to receive all or a portion of the benefits payable by a public retirement system with respect to the member or retiree. Tex. Gov't Code § 804.001(1).

Statewide retirement system: The term *statewide retirement system* means the following retirement systems: Employees Retirement System of Texas, Judicial Retirement System of Texas Plan One, Judicial Retirement System of Texas Plan Two, Teacher Retirement System of Texas, Texas County and District Retirement System, and Texas Municipal Retirement System. Tex. Gov't Code § 804.001(5).

Public retirement system: The term *public retirement system* includes the same entities as the statewide retirement system plus any other continuing, organized program of service retirement, disability retirement, or death benefits for officers or employees of the state or a political subdivision or of any agency or instrumentality of the state or a political subdivision; it includes the optional retirement program under Government Code chapter 830. Tex. Gov't Code § 804.001(3).

§ 25.53 Requirements of QDRO

To be "qualified," a domestic relations order must satisfy the following requirements:

Identifying information: The order must clearly specify the name and last known mailing address of the member or retiree and each alternate payee covered by the order. It must also specify the Social Security number, or an express authorization for the parties to use an alternate method acceptable to the retirement system to verify the Social Security number, of the member or retiree and each alternate payee covered by the order. Tex. Gov't Code § 804.003(f)(1).

Division of benefits: The order must clearly specify the amount or percentage of the member's or retiree's benefits to be paid by a public retirement system to each alternate payee or the manner in which the amount or percentage is to be determined. Tex. Gov't Code § 804.003(f)(2).

Payment specifics: The order must clearly specify the number of payments or the period to which the order applies. Tex. Gov't Code § 804.003(f)(3).

Identity of retirement system: The order must clearly specify that the order applies to a designated public retirement system. Tex. Gov't Code § 804.003(f)(4).

No benefits or options not in plan: The order may not require the public retirement system to provide any type or form of benefit or any option not otherwise provided for under the plan. Tex. Gov't Code § 804.003(f)(5).

No increase based on actuarial value: The order may not require the public retirement system to provide increased benefits determined on the basis of actuarial value. Tex. Gov't Code § 804.003(f)(6).

No double payment to alternate payees: The order may not require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO. Tex. Gov't Code § 804.003(f)(7).

No payments before certain events: The order may not require the payment of benefits to an alternate payee before the retirement of a member, the distribution of a withdrawal of contributions by a member, or other distribution to a member required by law. Tex. Gov't Code § 804.003(f)(8).

§ 25.54 Statutory Reasons for Rejection by Retirement System

A state public retirement system may reject a domestic relations order as a QDRO if the order does not meet the following criteria:

Reduction before normal retirement age: The order may be rejected by the system unless the order provides for a proportional reduction of the amount awarded to the alternate payee in the event of the retirement of the member before normal retirement age. Tex. Gov't Code § 804.003(g)(1).

Beneficiary on death of member: The order may be rejected by the system if the order purports to require the designation of a particular person as the recipient of benefits in the event of a member's or annuitant's death. Tex. Gov't Code § 804.003(g)(2).

Selection of payment plan or option: The order may be rejected by the system if the order purports to require the selection of a particular benefit payment plan or option. Tex. Gov't Code § 804.003(g)(3).

Clear provisions for benefit distribution: The order may be rejected by the system unless it provides clearly for each possible benefit distribution under the plan provisions. Tex. Gov't Code § 804.003(g)(4).

Actions contrary to law or plan: The order may be rejected by the system if the order requires any action on the part of the retirement system contrary to its governing statutes or plan provision other than the direct payment of the benefit awarded to an alternate payee. Tex. Gov't Code § 804.003(g)(5).

Award contingent on condition other than provided in plan: The order may be rejected by the system if the award is contingent on any condition other than those conditions resulting in the liability of a retirement system for payments under its plan provisions. Tex. Gov't Code § 804.003(g)(6).

Future benefit increases: The order may be rejected by the system if the order purports to award any future benefit increases that are provided or required by the legislature. Tex. Gov't Code § 804.003(g)(7).

Reduction of benefits: The order may be rejected by the system if the order does not provide for a proportional reduction of the amount awarded to an alternate payee if benefits available to the retiree or member are reduced by law. Tex. Gov't Code § 804.003(g)(8).

Model order: The order may be rejected by the system if the order does not conform to a model order adopted by the retirement system, if the system so requires. Tex. Gov't Code § 804.003(g)(9).

§ 25.55 Payments to Alternate Payee

Payments to an alternate payee pursuant to a QDRO are generally if, as, and when received by the retiree member. They are governed by the form of benefit elected by the member. *See* Tex. Gov't Code § 804.003.

The public retirement system may, by rule, direct that the actuarial equivalent of the share of the benefit awarded to the alternate payee shall be paid in the form of either an annuity payable in equal monthly installments for the life of the alternate payee or a single lump sum. Except with respect to the Employees Retirement System of Texas and the Teacher Retirement System of Texas, the decision to pay by one of these alternative means is within the sole discretion of the public retirement system. *See* Tex. Gov't Code § 804.004(a), (b).

Alternate payees of members of the Employees Retirement System of Texas or the Teacher Retirement System of Texas may elect to receive the actuarial equivalent of the share of benefits awarded to them by a QDRO paid in the form of a straight life annuity for the life of the alternate payee, provided the member has not retired but is eligible to retire. *See* Tex. Gov't Code § 804.005(b).

§ 25.56 Death Terminates Interest of Alternate Payee

The alternate payee's death terminates the alternate payee's interest in the public retirement system. Tex. Gov't Code § 804.101. The constitutionality of this statute has been upheld. *See Kunin v. Feofanov*, 69 F.3d 59, 159–60 (5th Cir. 1995).

§ 25.57 Optional Retirement Program

The optional retirement program applies to faculty members employed in state-supported institutions of higher education. Tex. Gov't Code § 830.001. Investments in this program may be in any type of investment authorized under sections 401(g) and 403(b) of the Internal Revenue Code. Tex. Gov't Code § 830.002(a). These plans are usually defined contribution plans but may include some part as a defined benefit plan.

§ 25.58 Qualification Process

A certified copy of the domestic relations order must be sent to the public retirement system. On receipt of the domestic relations order, the administrative head of the public retirement system or his designee (or applicable carrier, if under the optional retirement

program) shall determine whether the order is a QDRO. The member, retiree, or any alternate payee shall be notified of the determination. Tex. Gov't Code § 804.003(h). With respect to the Texas County and District Retirement System and the Texas Municipal Retirement System, the designated "domestic relations liaison" is required to give prompt written confirmation of receipt of the domestic relations order to all parties. 34 Tex. Admin. Code §§ 109.3, 129.3. If the domestic relations liaison determines, on receipt of the order, that the order may not be a "qualified" order, the liaison shall so state in the confirmation letter. Within ninety days of the date of the confirmation letter, the parties must commence action to bring the order into compliance. If that action is not commenced within the ninety-day period, a nonqualification determination will be made. 34 Tex. Admin. Code §§ 109.9(a), 129.9(a).

If an order or decree is found to be a QDRO, the public retirement system (or applicable carrier, if under the optional retirement program) shall pay the segregated amounts without interest to the person or persons entitled to them and shall thereafter pay benefits under the order. Tex. Gov't Code § 804.003(j).

A "nonqualification" determination may be appealed. Alternatively, the dissatisfied party may seek amendment of the domestic relations order by the court that issued the domestic relations order or by a court that would otherwise have jurisdiction over the matter. Tex. Gov't Code § 804.003(h); *Conti v. Conti*, 866 S.W.2d 671, 672–73 (Tex. App.—Houston [14th Dist.] 1993, writ denied). If the court renders an amended order that addresses the objections to qualification stated by the plan, a certified copy of the amended order must be sent to the public retirement system. The qualification process then begins again. With respect to the Texas County and District Retirement System and the Texas Municipal Retirement System, the risk of a "nonqualification" determination can be avoided by use of a "pre-approved" QDRO. These forms are authorized by 34 Tex. Admin. Code § 109.13(a) for the Texas County and District Retirement System and by 34 Tex. Admin. Code § 129.13(a) for the Texas Municipal Retirement System.

The public retirement system may assess administrative fees on a party who is subject to a domestic relations order for the review of the order and, as applicable, for the administration of payments under an order that is determined to be qualified. In addition to other methods of collecting fees, the system may deduct the fees from payments made under the order. Tex. Gov't. Code § 804.003(p).

COMMENT: In drafting a settlement agreement or proposed order that will require a QDRO, the attorney should also consider whether the settlement agreement or pro-

posed order should include specific terms regarding the allocation between the parties of fees assessed by the plan for review of the QDRO.

§ 25.59 Appeal of Nonqualification Determination

If an order is determined not to be a QDRO, the member or retiree or any alternate payee named in the order may appeal the determination. Tex. Gov't Code § 804.003(h). Appeal is to the board of trustees of the public retirement system. By rule, the board of trustees of a statewide retirement system may waive appeal to the board and may provide that appeal shall be to the administrative head of the system. A nonqualification determination by the Teacher Retirement System of Texas is deemed a final decision by the system and cannot be appealed to the board of trustees. However, a party adversely affected by a nonqualification determination made by the system may, within twenty days of the date of the nonqualification determination, file a motion for reconsideration. 34 Tex. Admin. Code § 47.6. Procedures for review of a nonqualification determination made by the Texas County and District Retirement System or the Texas Municipal Retirement System are set forth at 34 Tex. Admin. Code §§ 109.9–.11 for the Texas County and District Retirement System and 34 Tex. Admin. Code §§ 129.9–.11 for the Texas Municipal Retirement System.

An appeal is a contested case under Government Code chapter 2001, and the standard of review is by substantial evidence. Tex. Gov't Code § 804.003(b). A court does not have jurisdiction to require a public retirement system to recognize an order as a QDRO. Tex. Gov't Code § 804.003(c).

§ 25.60 Special Decree Language to Change TRS Beneficiary Designation

The Teacher Retirement System (TRS) allows a retiree to elect, instead of a standard service retirement annuity, an optional annuity that provides reduced payments to the retiree during his life and, at death, continued payments to and throughout the life of a designated beneficiary. Only one beneficiary can be designated, and changing the designation is restricted, since the value of the optional annuity, and hence the cost to TRS, depend on the beneficiary's longevity. To revoke the beneficiary designation, the retiree must strictly follow the TRS requirements: prescribed forms must be used, and either (1) a divorce court must approve or order the revocation or (2) the beneficiary spouse must sign a notarized consent to the revocation. *See* Tex. Gov't Code §§ 824.101(c), 824.1012, 824.1013. Provisions in a divorce decree that awarded the retiree all retire-

ment benefits and divested the beneficiary spouse of all right to the benefits did not constitute an order for a change of beneficiary and was not accepted by TRS. *Holmes v. Kent*, 221 S.W.3d 622 (Tex. 2007) (per curiam). The decree must clearly order a change of beneficiary or a revocation of the spouse as beneficiary and a substitution of a new beneficiary.

Note: The foregoing paragraph only applies to TRS participants who are in pay status and have elected a joint survivor annuity.

§ 25.61 Lien on Benefits

A reimbursement lien imposed on the interest awarded to the nonmember spouse in a retirement account in the Teacher Retirement System (TRS) is not prohibited by the nonassignability statute applicable to TRS benefits or the Employee Retirement Income Security Act (ERISA). The purpose of section 821.005 of the Texas Government Code is to protect the interests in the teacher retirement fund from a member's creditors, not from the community property division in favor of another spouse. The lien did not violate the antialienation provisions of ERISA, because ERISA specifically excludes "government plans" from its coverage (29 U.S.C. § 1003(b)(1)). TRS falls neatly into the definition of a governmental plan and is not, therefore, subject to title 1 of ERISA. *Chacon v. Chacon*, 222 S.W.3d 909 (Tex. App.—El Paso 2007, no pet.).

[Sections 25.62 through 25.70 are reserved for expansion.]

VII. Uniformed Services Former Spouses' Protection Act

§ 25.71 Historical Perspective

Texas courts have long held that military retirement benefits are community property and that the trial court must consider those benefits in a division of the estate of the parties. *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976); *Mora v. Mora*, 429 S.W.2d 660, 662 (Tex. App.—San Antonio 1968, writ dism'd); *Kirkham v. Kirkham*, 335 S.W.2d 393, 394 (Tex. App.—San Antonio 1960, no writ). In 1981, however, the United States Supreme Court held that federal law preempted state law regarding the division or apportionment of military retirement and that military-related benefits (that is, retired pay and survivorship benefits) were not divisible on divorce and could not be

considered in dividing the property of the parties. *McCarty v. McCarty*, 453 U.S. 210 (1981).

In 1982, in direct response to *McCarty*, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), which reversed the effect of *McCarty* such that military retired pay, at least, became divisible as a divorce asset. Survivorship benefits, however, continued to be subject to federal preemption until November 14, 1986, when Congress amended the USFSPA to allow trial courts to order the service member to designate his then spouse as a "former spouse beneficiary" of his Survivor Benefit Plan (SBP) to afford the surviving "former spouse" some measure of security if the service member predeceased the former spouse.

The issue of whether the USFSPA authorized trial courts to divide "gross retired pay" (GRP) or "disposable retired pay" (DRP) was decided by the United States Supreme Court in 1989 in *Mansell v. Mansell*, 490 U.S. 581 (1989). It held that trial courts are authorized to divide only DRP. As a result, the government finance office administering the implementation of the USFSPA, the Defense Finance and Accounting Service (DFAS), will pay the former spouse only the court-ordered percentage of the service member's DRP, regardless of whether the parties were to agree that the former spouse should receive a percentage of the service member's GRP. Thus, as far as the DFAS is concerned, the USFSPA, as amended and interpreted by *Mansell*, now governs the division of military retired pay on divorce.

Congress has enacted major changes to the military retirement system in recent years. In 2016, Congress amended the USFSPA to include the "Frozen Benefit Rule," which requires courts to freeze a servicemember's retired pay base and years of service on the date of divorce. *See* 10 U.S.C. § 1408(a)(4)(B). This method of retirement calculation has been the law in Texas since 1983, and as a result of the amendment, the division of DRP in a divorce using a *time rule* formula is no longer permitted in any state.

In 2015, Congress established the Blended Retirement System, which took effect on January 1, 2018, for any person who entered military service on or after that date. Some other active duty service members and reservists were allowed to opt in to the Blended Retirement System or remain in the previous system, now known as the "legacy retirement system." See the discussion at section 25.73 below.

The relevant and controlling provisions of the USFSPA are found in 10 U.S.C. § 1408. The following sections in this chapter of the manual are concerned with the division of the military retirement benefits in a current divorce and do not treat retroactivity issues,

which may be particularly troublesome if arising from divorce decrees that predate the enactment of the USFSPA.

§ 25.72 Definitions

The terms *qualified domestic relations order*, *alternate payee*, and other such terms are not applicable to military retirement, whether enforceable under the USFSPA or not, and should not be used in an order dividing military retirement. Because military retirement does not come within the purview of ERISA, a division order can never be a "qualified" order; instead, "Military Retirement Pension Division Order" (MRPDO) should be used. Additionally, the following terms, as defined in the USFSPA, should be used in the MRPDO.

Court order: As applicable in Texas, the term *court order* means a final decree of divorce, dissolution, or annulment issued by a Texas court under Texas law that divides the military retirement benefit, including a property settlement incident to the decree and approved by the court. The division of the retirement benefit may be expressed in dollars or as a percentage of the disposable retired pay of a member to be paid to the spouse or former spouse of the member. *See* 10 U.S.C. § 1408(a)(2).

Final decree: The term *final decree* means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking appeal or a decree from which an appeal has been taken and finally decided. 10 U.S.C. § 1408(a)(3).

Disposable retired pay: The term *disposable retired pay* means the total monthly retired pay to which a member is entitled (called "gross retired pay" on the member's retiree account statement) less several items involving money owed or forfeited to the government. In determining the disposable retired pay, the "total monthly retired pay to which the member is entitled" is the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the divorce, as increased by each cost-of-living adjustment that occurs between the time of the divorce and the time of the member's retirement. 10 U.S.C. § 1408(a)(4)(A), (a)(4)(B); *see* 10 U.S.C. § 1401a(b). Under the USFSPA, military retirement benefits are generally divisible at divorce if they are community property. 10 U.S.C. § 1408(c)(1); *Mansell v. Mansell*, 490 U.S. 581, 584 (1989). However, divisible benefits are limited to "disposable retired pay," which is defined to exclude, among other things, disability pay, including retired pay that may be waived in order to receive VA disability compensation and those computed using the percentage of disability on the date a person in the military is placed on

the Temporary Disability Retirement List or on permanent disability. 10 U.S.C. § 1408(a)(4)(C); *Mansell*, 490 U.S. at 589; *Thomas v. Piorkowski*, 286 S.W.3d 662, 666 (Tex. App.—Corpus Christi–Edinburg 2009, no pet.); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 16–17 (Tex. App.—Waco 2002, no pet.). Combat-related special compensation (CRSC) is a form of disability pay that an eligible member can elect to receive in lieu of full retirement pay and concurrent retirement disability pay. CRSC, like VA disability benefits, is not disposable retired pay and, under federal preemption, cannot be divided by a state court. *Jackson v. Jackson*, 319 S.W.3d 76 (Tex. App.—San Antonio 2010, no pet.); *Sharp v. Sharp*, 314 S.W.3d 22 (Tex. App.—San Antonio 2009, no pet.).

Member: The term *member* includes a former member entitled to retired pay. 10 U.S.C. § 1408(a)(5).

Spouse or former spouse: The term *spouse or former spouse* means the husband or wife or former husband or wife of a member who, on or before the date of a court order, was married to that member. 10 U.S.C. § 1408(a)(6).

§ 25.73 Divisible Benefits

A court may treat (that is, may consider and divide or apportion) disposable retired pay payable to a member as property of the member and spouse in accordance with Texas law. 10 U.S.C. § 1408(c)(1). The court may not so treat (that is, may not divide or apportion) the retired pay if the divorce was granted before June 25, 1981, and the retired pay was not divided or otherwise reserved for future treatment or division. *Havlen v. McDougall*, 22 S.W.3d 343, 346–48 (Tex. 2000).

Disposable retired pay does *not* include retired pay waived to receive veterans disability compensation; the USFSPA does not grant state courts the power to treat as property divisible on divorce military retired pay that has been waived to receive veterans disability benefits. *Mansell v. Mansell*, 490 U.S. 581, 589 (1989). Veterans disability benefits have not been divisible in Texas (that is, they have been the member's separate property) since at least 1979. *Hagen v. Hagen*, 282 S.W.3d 899, 903 (Tex. 2009); *Ex parte Burson*, 615 S.W.2d 192, 194–95 (Tex. 1981) (orig. proceeding); *Ex parte Johnson*, 591 S.W.2d 453, 454 (Tex. 1979) (orig. proceeding). As such, a state court is without the power or authority to enter an order that prohibits a service member from waiving retired pay to receive veterans disability compensation, such as prohibiting the service member, postdivorce, from making any election of benefits that may reduce the amount of the benefit the court has awarded the spouse. *See* 10 U.S.C. § 1408(c)(1); *Mansell*, 490 U.S. at 589; *Ex parte Burson*, 615 S.W.2d at 196; *Gillin v. Gillin*, 307

S.W.3d 395 (Tex. App.—San Antonio 2009, no pet.); *Loria v. Loria*, 189 S.W.3d 797 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Freeman v. Freeman*, 133 S.W.3d 277 (Tex. App.—San Antonio 2003, no pet.); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 16–17 (Tex. App.—Waco 2002, no pet.); *Press v. Press*, No. 03-97-00432-CV, 1998 WL 271054 (Tex. App.—Austin May 29, 1998, no pet.) (mem. op., not designated for publication); *Wallace v. Fuller*, 832 S.W.2d 714, 719 (Tex. App.—Austin 1992, no writ); *Gallegos v. Gallegos*, 788 S.W.2d 158, 160 (Tex. App.—San Antonio 1990, no writ).

In *Hagen*, the Texas Supreme Court, while reaffirming that veterans disability benefits are not divisible, went even further, holding that the term *military retired pay*, even when used in an agreed divorce decree, does not include retired pay that a service member may, long after the parties' divorce decree is signed, waive to elect veterans disability compensation. *Hagen*, 282 S.W.3d at 905–06. Furthermore, the United States Supreme Court has held that state courts "may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits." *Howell v. Howell*, 137 S. Ct. 1400 (2017).

However, in *Rudolph v. Jamieson*, No. 03-17-00693-CV, 2018 WL 2648514 (Tex. App.—Austin June 5, 2018, pet. denied) (mem. op.), the parties' agreed divorce decree awarded the wife a portion of the husband's *disposable retired pay*. The decree specified that this award included "all amounts of retired pay [husband] actually or constructively waives or forfeits in any manner and for any reason or purpose" and "any sum taken by [husband] in addition to or in lieu of retirement benefits, including . . . any other form of compensation attributable to separation from military service instead of or in addition to payment of the military benefits normally payable to a retired member." Due to injuries sustained in combat, the husband was later determined to be disabled and placed on the Army's Permanent Disability Retired List, and he retired. As a result of the veterans disability benefits paid to the husband, he did not receive any of the *disposable retired pay* that he ordinarily would have received based on his years of service. The wife later filed suit for enforcement, alleging that the husband had not paid her any portion of his retirement benefits. The trial court rendered an order clarifying and enforcing the divorce decree, and the husband appealed. Although the husband cited federal case law supporting his argument that state courts are prohibited from dividing a military retiree's retirement pay waived in order to receive veterans disability benefits, the court of appeals affirmed the trial court's ruling because the husband agreed to the provisions of the divorce decree and did not appeal the divorce decree. Therefore, the husband could not collaterally attack the division of his retirement pay

after the appellate deadlines passed, even if the division provided by the decree was allegedly unlawful.

Similarly, combat-related special compensation (CRSC) elected under 10 U.S.C. 1413a is not retirement pay and is not divisible. *Sharp v. Sharp*, 314 S.W.3d 22 (Tex. App.—San Antonio 2009, no pet.). A servicemember's election to receive CRSC does not constitute a breach of fiduciary duty or other obligation created by a divorce decree awarding the former spouse an interest in the servicemember's disposable retired or retainer pay if, as, and when received and appointing the servicemember a trustee of that entitlement to the extent it was not paid to the former spouse by DFAS. *Jackson v. Jackson*, 319 S.W.3d 76 (Tex. App.—San Antonio 2010, no pet.).

The National Defense Authorization Act (NDAA) for Fiscal Year 2017 required that court orders for the division of military retirement (for active duty or reserve members entering after September 8, 1980) contain the High-36 calculation of the hypothetical retired pay at the time of divorce for valuation purposes. *See* Pub. L. No. 114-328, § 641, 130 Stat. 2164 (2016); 10 U.S.C. § 1408(a)(4)(B).

The NDAA for Fiscal Year 2016 created the new Blended Retirement System for servicemembers entering service on or after January 1, 2018; for active duty servicemembers with twelve years or less of creditable service as of December 31, 2017, who opted in to the new retirement system by December 31, 2018; and for reservists who had earned fewer than 4,320 points as of December 31, 2017, who opted in by December 31, 2018. The Blended Retirement System makes significant changes to the former legacy retirement system by lowering the longevity percentage from 0.025 to 0.020 and providing for enhanced participation in the Thrift Savings Plan, the potential for a mid-career "continuation" bonus, and an option to receive a lump-sum amount of retired pay (subject to conditions) at retirement. *See* Pub. L. No. 114-92, §§ 631–35, 129 Stat. 842 (2015).

§ 25.74 Jurisdiction of Member

A court may not divide the disposable retired pay of a member unless the court has jurisdiction over the member by reason of residence, domicile, or his consent to the jurisdiction of the court. The residence is not sufficient for jurisdiction if it is because of military assignment in the territorial jurisdiction of the court. 10 U.S.C. § 1408(c)(4). However, if the member is the petitioner or appears but does not "specially appear" as to the military retirement, he has consented to the court's jurisdiction.

Special care should be taken to ensure that the trial court has "USFSPA jurisdiction" over the service member if a default divorce is being taken. If the record and findings do not reflect that the trial court had USFSPA jurisdiction over the service member, the DFAS will not honor the order if the former spouse is otherwise entitled to receive that former spouse's share of the retired pay directly from the DFAS. See section 25.75 below.

§ 25.75 Payment to Former Spouse

Payments by DFAS: When the court order has been properly served on the DFAS, the DFAS will make payments from the member's disposable retired pay to the former spouse in accordance with the court order. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, the payments shall begin no later than ninety days after the date on which the member first becomes entitled to receive retired pay. 10 U.S.C. § 1408(d)(1).

Ten-Year Rule: If the former spouse to whom the payments are to be made was not married to the member for a period of ten years or more during which the member performed at least ten years of service creditable in determining the member's eligibility for retired pay, payments may not and will not be made to the former spouse by the DFAS. 10 U.S.C. § 1408(d)(2). This limitation does not mean that the retired pay is not divisible or is not payable as divided; it means only that the DFAS will not make the payments to the former spouse. The former spouse must obtain the awarded share of the retired pay directly from the member.

Monthly Payments: Payments by the DFAS shall not be made more frequently than once each month. The DFAS may not be required to vary normal pay and disbursement cycles for retired pay to comply with a court order. 10 U.S.C. § 1408(d)(3).

Termination of Payments: Payments shall terminate in accordance with the terms of the court order but not later than the date of death of the member or the date of death of the former spouse to whom the payments are being made, whichever occurs first. 10 U.S.C. § 1408(d)(4).

More Than One Order: The total amount of the disposable retired pay of a member payable under all court orders may not exceed 50 percent of the member's disposable retired pay. In the event of effective service of more than one court order providing for payment to a spouse and one or more former spouses or to more than one former

spouse, the eligible disposable retired pay of the member shall be used to satisfy the court orders on a first-come, first-served basis. 10 U.S.C. § 1408(e)(1), (e)(2).

§ 25.76 Notice to Member

A person (DFAS employee) receiving effective service of a court order must, as soon as possible but not later than thirty days after the date on which effective service is made, send a written notice of the order (together with a copy of the order) to the member affected by the court order at the last known address of the member. 10 U.S.C. § 1408(g).

§ 25.77 Sending Order to DFAS

Payments to the former spouse are made by the DFAS. For additional information, see **www.dfas.mil/garnishment/usfspa/apply.html**.

To register an order that divides or partitions a portion of the member's military retirement to the former spouse for an active or reserve member, whether the member is presently retired and receiving retired pay or is still on active duty or is an active reservist but expected to receive retired pay in the future, the former spouse should submit a "registration package" that includes (1) a completed Application for Former Spouse Payments from Retired Pay (DD Form 2293); (2) a copy of the operative order that has been certified within ninety days preceding its receipt by the DFAS; (3) a Certificate of Finality, which is a certification by the former spouse or the former spouse's attorney that the operative order is a "final judgment"; (4) a W-4 Employee's Withholding Allowance Certificate or a W-4P Withholding Certificate for Pension or Annuity Payments; and (5) a Former Spouse Direct Deposit form. These forms, in a fillable PDF format, are available and can be downloaded from the DFAS website.

The application package, when assembled, should be sent to the following offices, as applicable:

Army, Navy, Air Force, Marine Corps: Attn: DFAS-HGA-CL, Assistant General Counsel for Garnishment Operations, P.O. Box 998002, Cleveland, OH 44199-8002. The application package can be served by fax to 877-622-5930 (toll free). The DFAS may be contacted by telephone at 877-332-7411.

U.S. Coast Guard: Commanding Officer (1GL), United States Coast Guard Personnel Service Center, 444 SE Quincy Street, Topeka, KS 66683-3591. The application

package can also be served by fax to 785-339-3788. This office may be contacted by telephone at 800-772-8724.

U.S. Public Health Service: Attn: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001.

National Oceanic and Atmospheric Administration: The same address as for the U.S. Coast Guard should be used.

Survivor Benefit Plan: To register an order for SBP coverage for the former spouse of an Army, Navy, Air Force, or Marine Corps member: Defense Finance and Accounting Service, U.S. Military Retirement Pay, 8899 E. 56th Street, Indianapolis IN 46249-1200; telephone: 800-321-1080. The SBP registration request must be received by the DFAS' office within one year of the date the order awarding the former spouse coverage is signed.

§ 25.78 Benefits to Abuse Victims

Retired pay benefits are available for abuse victims even if the right to receive retired pay of the member has been forfeited because of abuse of the spouse or dependent child. 10 U.S.C. § 1408(h). Thus, abuse victim retired pay benefits are available to the abuse victim spouse if the member or former member, while a member of the armed forces and after becoming eligible to retire, engaged in abuse of the spouse or of a dependent child of the member and the spouse and if that member was required to forfeit retired pay entitlement *because of* the abusive conduct. 10 U.S.C. § 1408(h). For instance, if a military court-martial found the retirement-eligible member guilty of abusive conduct toward the member's then spouse or child and, as a sentence, ordered the member's discharge (probably dishonorable) and the forfeiture of the member's retired pay entitlement, the abused spouse or the nonmember spouse parent of the abused child would be entitled to retired pay under this provision.

§ 25.79 Survivor Benefit Plan

If elected, the SBP provides a monthly annuity to survivors of deceased military retiree participants. The "premium" for the plan is 6.5 percent of the selected base amount and is deducted from the gross retired pay. If the plan is not elected, retired pay payments to the former spouse cease at the military retiree's death; if the plan is elected, the designated beneficiary will continue to receive a portion of the retired pay—that is, presump-

tively 55 percent of the base amount—in the form of a monthly SBP annuity. The minimum base amount is $300 per month.

In a divorce, dissolution, or annulment proceeding, the court may order a person to elect (or to enter into an agreement to elect) SBP coverage to provide an annuity to a former spouse (or to both a former spouse and a child). 10 U.S.C. § 1450(f)(4). Additionally, a member may voluntarily elect under certain circumstances to provide an annuity to a former spouse (or former spouse and child) (10 U.S.C. § 1448(b)(2), (b)(3)(A), (b)(3)(B), (b)(4)); to a special needs trust (10 U.S.C. § 1448(b)(6)); or to a person with a natural insurable interest (10 U.S.C. § 1448(b)(1)).

If a service member has elected to provide an annuity to a former spouse, whether the election was under a court order or a voluntary written agreement, the member (although it may be done by the attorney for the former spouse or by the former spouse) must provide the DFAS with a written statement in the form prescribed by the DFAS (DD Form 2656-1) and signed by both the member and the former spouse setting forth whether the election was made under the requirement of a court order or under a voluntary written agreement. 10 U.S.C. § 1448(b)(5).

If the service member entered into a voluntary written agreement to elect to provide the survivor annuity to a former spouse and the agreement has been incorporated in or ratified by court order or if the service member has been required by court order to make the election and he fails or refuses to do so, the member will be deemed to have made the election if the DFAS receives a written request on the form prescribed by the DFAS (DD Form 2656-10) from the former spouse requesting that the election be deemed to have been made. The DFAS must also receive a certified copy of the court order, regular on its face, that requires the election or incorporates, ratifies, or approves the written agreement for the service member to make the election. 10 U.S.C. § 1450(f)(3)(A).

The election will not be deemed to have been made unless the DFAS receives DD Form 2656-10, together with a certified copy of the operative court order, from the former spouse within one year of the date of the court order authorizing or requiring the election. 10 U.S.C. § 1450(f)(3)(C). If the request to deem the election is not timely made—that is, is not made within one year of the date of the divorce decree—the DFAS will refuse to deem the election, and the former spouse's entitlement will fail as a matter of federal law.

§ 25.80 Medical and Commissary Benefits for Former Spouse

Medical and Dental Benefits for Former Spouses of Active Duty Members: Dependents are entitled to receive the types of medical and dental care listed in 10 U.S.C. § 1077 in medical and dental facilities of the uniformed services subject to availability of space and facilities and the capabilities of the medical and dental staff. 10 U.S.C. § 1076. The Code lists three categories of former spouses who qualify as "dependents."

The first category applies to an unremarried former spouse of a service member or former service member who, on the date of the final decree of divorce, dissolution, or annulment, had been married to the service member for a period of at least twenty years, during which period the service member performed at least twenty years of creditable service, and who does not have medical coverage under an employer-sponsored health plan. 10 U.S.C. § 1072(2)(F). These unremarried former spouses are sometimes called "20-20-20" former spouses. On remarriage, this category of former spouse will lose entitlement to these medical benefits forever and cannot have them reinstated.

The second category applies to an unremarried former spouse whose date of final decree of divorce, dissolution, or annulment was *before* April 1, 1985; who was previously married to a service member or former service member who performed at least twenty years of creditable service; whose marriage to the service member lasted for a period of at least twenty years, of which at least fifteen but fewer than twenty were during the period when the service member performed creditable service toward retirement; and who does not have medical coverage under an employer-sponsored health plan. 10 U.S.C. § 1072(2)(G). On remarriage, this category of former spouse will also lose entitlement to these medical benefits forever and cannot have them reinstated.

The third category applies to an unremarried former spouse whose date of decree of divorce, dissolution, or annulment was *on or after* April 1, 1985; who was previously married to a service member or former service member who performed at least twenty years of creditable service; whose marriage to the service member lasted for a period of at least twenty years, of which at least fifteen but fewer than twenty were during the period when the service member performed creditable service toward retirement; and who does not have medical coverage under an employer-sponsored health plan. The entitlement of such an unremarried former spouse (that is, one whose divorce occurred *on or after* April 1, 1985) to medical benefits ends after a one-year period beginning on the date of the final decree. 10 U.S.C. § 1072(2)(H).

Former spouses who do not qualify for medical coverage pursuant to the foregoing provisions may be entitled to coverage through the Continued Health Care Benefit Plan (CHCBP) for a period of up to thirty-six months from the later of the date the divorce occurs (that is, the effective date of divorce on the divorce decree) and, if applicable, the date the one-year coverage under section 1072(2)(H) expires. 10 U.S.C. § 1078a. DD Form 2837 is used to apply for this coverage.

Medical and Dental Benefits for Former Spouses of Reserve Component Members: Former spouses who qualify as dependents under the provisions of section 1072(2)(F) are entitled to the same medical and dental care as a former spouse (dependent) of an active duty member once the reserve component member attains age sixty. 10 U.S.C. § 1076(b)(1).

If the reserve component member dies before attaining age sixty, but, at the time of the reserve component member's death, the member was not eligible for retired pay solely because he was under sixty years of age, the former spouse becomes entitled to medical and dental care to the same extent as a dependent described in section 1072(2)(F) when the reserve component member would have attained age sixty. 10 U.S.C. § 1076(b)(2).

Medical, Dental, and Vision Benefits for Former Spouses of Retirees: For former spouses who meet the requirements for continued medical and dental benefits, vision coverage became available through the Office of Personnel Management Federal Employees Dental and Vision Insurance Program effective on January 1, 2019. See **https://benefeds.com**.

Commissary and Exchange Privileges for Former Spouses: The unremarried former spouse is entitled to commissary and military exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the Uniformed Services if, on the date of the final decree of divorce, dissolution, or annulment, the unremarried spouse had been married to the member or former member for a period of at least twenty years, during which period the member or former member performed at least twenty years of creditable service toward eligibility for retired or retainer pay. *See* 10 U.S.C. §§ 1062, 1072(2)(F). The rule for commissary and exchange privilege benefits for former spouses is often referred to as the 20-20 Rule or the 20-20-20 Rule—twenty years of creditable or qualifying military service, twenty years of marriage, and twenty years of overlap or concurrence of the two.

Date of Final Decree: The term *date of final decree of divorce, dissolution, or annulment* is the date the decree was signed or is the date the decree was judicially rendered

if the decree is "ministerially signed" on a later date and the decree so provides. The former choice of "signing dates" is the better choice for a former spouse desiring extended medical coverage when not a 20-20-20 former spouse.

§ 25.81 Military Retirement Resources

For an in-depth discussion of military retirement benefits, see the articles by James N. Higdon in the course books for the 2018 State Bar of Texas Marriage Dissolution Institute (chapter 25.1), the 2013 Advanced Family Law Drafting Course (chapter 20); the 2009 and 2007 State Bar of Texas Advanced Family Law Courses (chapters 63 and 55.3, respectively); and the 2010 and 2008 State Bar of Texas Marriage Dissolution Courses (chapters 12 and 15, respectively). These articles address the military retired pay benchmarks necessary to calculate retired pay for an active duty member and for a member of the reserve component, as well as the information needed not only at trial but also to prepare a domestic relations order for an active duty member, a retired active duty member, a reserve component/national guard member, and a retired reserve component/national guard member. Explanations are given on how to calculate gross retired pay and disposable retired pay. The articles contain a thorough analysis of cost-of-living adjustments, the SBP, and medical and commissary benefits, as well as very useful appendices. A careful and complete study of these articles is necessary to adequately represent a service member or the spouse of a service member.

For a comprehensive discussion of the recent changes to the laws concerning military retirement benefits, including the Blended Retirement System, see the article entitled "Winds of Change: New Rules for Dividing the Military Pension at Divorce," by Brentley Tanner and Amelia Kays, published in volume 30 (2018) of the *Journal of the American Academy of Matrimonial Lawyers*, available at **http://aaml.org/sites/default/files/MAT206_8.pdf**.

Additional information can be obtained by reading the articles comprising the *Symposium on Military Law* published in the 2009 Summer (Vol. 43, No. 2) and Fall (Vol. 43, No. 3) editions of the ABA Family Law Quarterly, as well as Mark Sullivan's *The Military Divorce Handbook* and Marshal S. Willick's *Military Retirement Benefits in Divorce*, all published by and available from the ABA Family Law Section.

[Sections 25.82 through 25.90 are reserved for expansion.]

VIII. Civil Service Retirement System and Federal Employees Retirement System

§ 25.91 Generally

Federal retirement benefits under the Civil Service Retirement System and the Federal Employees Retirement System are community property and are divisible on divorce. *Valdez v. Ramirez*, 574 S.W.2d 748, 749 (Tex. 1978); *Hoppe v. Godeke*, 774 S.W.2d 368, 370 (Tex. App.—Austin 1989, writ denied). The payment of those benefits under the divorce court order is governed by the appropriate federal statutes. The Civil Service Retirement System (CSRS) is governed by 5 U.S.C. §§ 8301–8351. The Federal Employees Retirement System (FERS) is governed by 5 U.S.C. §§ 8401–8480. Both systems are administered by the Office of Personnel Management. 5 U.S.C. § 8347(a) (CSRS), § 8461 (FERS). Administration of the two systems is virtually identical. (Members of Congress are covered in these retirement systems, but the provisions relating to them are not discussed here.)

§ 25.92 Definitions

The terms *qualified domestic relations order*, *alternate payee*, and other such terms are not applicable under the CSRS and the FERS and should not be used in an order dividing federal retirement benefits. (In fact, using the term *qualified domestic relations order* to describe the order dividing civil service retirement might result in rejection of that order by the Office of Personnel Management. *See* 5 C.F.R. § 838.302(a).)

The following definitions, based on the statutes and regulations, should be used in an order dividing these benefits.

Court order: The term *court order* means any judgment or property settlement issued or approved by any court of any state in connection with, or incident to, the divorce or annulment of a federal employee or retiree. 5 C.F.R. § 838.103.

Court order acceptable for processing: The term *court order acceptable for processing* means a court order that meets the requirement in the Code of Federal Regulations for dividing retirement benefits under the CSRS or the FERS. 5 C.F.R. § 838.103.

Former spouse: The term *former spouse* means a former spouse of an individual if the individual was an employee, as defined below, who has performed at least eighteen

months of service and if the former spouse was married to the individual for at least nine months. 5 U.S.C. §§ 8331(23), 8401(12); *see also* 5 C.F.R. § 838.103.

Annuity: The term *annuity* is often used in the statutes but is not defined. The plan whereby monthly retirement benefits are paid is referred to as an annuity. See, for instance, U.S.C. title 5, sections 8331(9) and 8401(2), which define an annuitant as one who meets all requirements for entitlement to an annuity and files a claim for an annuity; sections 8331(10) and 8401(28), which define a "survivor" as an individual entitled to an annuity based on the service of a deceased employee or annuitant; and sections 8345, 8433, and 8434, which concern the benefits to be paid as an annuity.

Employee: An *employee* is an individual covered by the CSRS, as described in 5 U.S.C. § 8331(1), or an employee covered by the FERS, as described in 5 U.S.C. § 8401(11). *See also* 5 C.F.R. § 838.103.

Annuitant: The term *annuitant* means a former employee who, on the basis of service, meets the requirements for entitlement to an annuity and files a claim for that annuity. 5 U.S.C. §§ 8331(9), 8401(2).

Gross annuity: The term *gross annuity* means the amount of monthly annuity payable after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deductions. Unless the court order expressly provides otherwise, the term *gross annuity* also includes any lump-sum payments made to the retiree under 5 U.S.C. sections 8343a or 8420a. 5 C.F.R. § 838.103.

Net annuity: The term *net annuity* means the amount of monthly annuity after deducting from the gross annuity any amounts that are (1) owed by the retiree to the United States; (2) deducted for health benefit premiums under 5 U.S.C. § 8906 and 5 C.F.R. §§ 891.401 and 891.402; (3) deducted for life insurance premiums under 5 U.S.C. § 8714a(d); (4) deducted for Medicare premiums; (5) properly withheld for federal or state income taxes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which the retiree was entitled; or (6) already payable to another person based on a court order acceptable for processing or a child-abuse judgment enforcement order. Unless the court order expressly provides otherwise, the term *net annuity* also includes any lump-sum payments made to the retiree under 5 U.S.C. sections 8343a or 8420a. 5 C.F.R. § 838.103.

Self-only annuity: The term *self-only annuity* means the recurring payments under the CSRS or the FERS to a retiree who has elected not to provide a survivor annuity to anyone. *See* 5 C.F.R. § 838.103.

Survivor: The term *survivor* means an individual entitled to an annuity based on the service of a deceased employee or annuitant. 5 U.S.C. §§ 8331(10), 8401(28).

Survivor annuitant: The term *survivor annuitant* means a survivor who files a claim for an annuity. 5 U.S.C. § 8331(11).

Qualifying retirement benefits court order: The term *qualifying retirement benefits court order* refers to an order dividing an account under the Thrift Savings Plan. *See* 5 C.F.R. § 1653.2. Note that this term is used only under the Thrift Savings Plan and does not apply to an annuity under the CSRS or the FERS. See section 25.95 below.

Participant: The term *participant* under the Thrift Savings Plan means an individual for whom an account has been established under the plan. 5 U.S.C. § 8471(3).

Pro rata share: The term *pro rata share* means one-half of the fraction whose numerator is the number of months of federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of federal civilian and military service performed by the employee. 5 C.F.R. § 838.621(a).

§ 25.93 Payments under Court Order

Payments under the CSRS or the FERS that would otherwise be made to an employee or annuitant based on service shall be paid (in whole or in part) to another person in accordance with a proper state court order. In Texas, the order is a decree of divorce or annulment; a court order approving a property settlement agreement on divorce or annulment; a court order specifically treating the benefit, such as a domestic relations order signed in conjunction with a decree of divorce or annulment, incorporated by reference in such a decree, or both; or a court order or similar process in the nature of garnishment for the enforcement of a judgment rendered against the employee or annuitant for child abuse. Payments are required only after the court order or other process has been received by the Office of Personnel Management. 5 U.S.C. §§ 8345(j)(1), (j)(2), 8467(a), (b).

§ 25.94 Survivor Annuities

Both the CSRS and the FERS provide for survivor annuities. *See* 5 U.S.C. §§ 8341, 8441–8445. A survivor annuity may be paid whether the employee dies before or after retirement. A former spouse is entitled to a portion of that survivor annuity to the extent provided in any decree of divorce or annulment or any court order or court-approved

property settlement agreement incident to the divorce. 5 U.S.C. §§ 8341(h), 8445. The maximum amount of the survivor annuity is 55 percent of the annuity the employee would have been entitled to receive if retired on the date of death or the annuity being paid on the date of the employee annuitant's death under CSRS and 50 percent under FERS. 5 U.S.C. §§ 8341(b), (h)(2), 8445(b); 5 C.F.R. § 831.641(a).

§ 25.95 Thrift Savings Plan

The Federal Employees' Retirement System Act of 1986 also includes a Thrift Savings Plan. *See* 5 U.S.C. § 8437. The Thrift Savings Plan is a defined contribution plan. All amounts contributed by an employee or by the governmental agency are held in trust for the employee in an individual account identified by name and Social Security number. The Thrift Savings Plan is administered by the Federal Retirement Thrift Investment Board. 5 U.S.C. § 8472.

An order dividing an account with the Thrift Savings Plan is called a "qualifying retirement benefits court order." *See* 5 C.F.R. § 1653.2. The community property amount in the account can be divided between the parties, and, as a general rule, no formulas are required.

§ 25.96 Addresses for Sending Court Orders

The address for sending CSRS and FERS court orders by mail is:

Office of Personnel Management
Retirement and Insurance Group
P.O. Box 17
Washington, DC 20044-0017

The address for delivery of court orders by process servers, express carriers, or other forms of handcarried delivery is:

Court-Ordered Benefits Section
Allotments Branch
Retirement and Insurance Group
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415-0002

5 C.F.R. app. A to subpt. A of pt. 838.

[Sections 25.97 through 25.100 are reserved for expansion.]

IX. Railroad Retirement

§ 25.101 Generally

The Railroad Retirement Act of 1974, title 45, chapter 9, subchapter IV, of the United States Code, governs the various federal retirement benefits available to railroad employees. *See* 45 U.S.C. ch. 9, subch. IV. The railroad retirement system provides two levels of benefits called "tiers." Tier I is calculated using Social Security benefit formulas and includes earnings both in the railroad industry and in employment covered by the Social Security Act. Tier II is based on railroad earnings alone. *See* 45 U.S.C. §§ 231a(a), 231b.

Tier I benefits are not divisible on divorce. 45 U.S.C. § 231m; *Kamel v. Kamel*, 721 S.W.2d 450, 452–53 (Tex. App.—Tyler 1986, no writ). Tier II benefits under the railroad retirement system may be divided in a decree of divorce or annulment or in a court-approved property settlement incident to such a decree. 45 U.S.C. § 231m. The decree must be a final decree. 20 C.F.R. § 295.2.

Citations from the Railroad Retirement Act for those components of a railroad retirement annuity that may be divided in connection with a proceeding for dissolution of marriage are as follows:

1. The tier II annuity component is provided for in section 3(b) of the Act (45 U.S.C. § 231b(b)).
2. The vested dual benefit is provided for in section 3(h) of the Act (45 U.S.C. § 231b(h)).
3. The supplemental annuity is provided for in section 3(e) of the Act (45 U.S.C. § 231b(e)).
4. The overall minimum increase is provided for in section 3(f)(1) of the Act (45 U.S.C. § 231b(f)(1)).

Additionally, a divorced spouse who is not remarried is eligible for a divorced spouse annuity separate from the tier II benefits awarded to that spouse if that spouse meets the requirements of section 216(d) of the Social Security Act (42 U.S.C. § 416(d)) and section 202(b) of the Social Security Act (42 U.S.C. § 402(b)). The divorced spouse annu-

ity is not divisible on divorce but is automatically payable to the divorced spouse if the spouse is eligible and makes application for payment. Basically, the spouse must be married to the railroad employee for a minimum of ten years at divorce to be eligible. The eligibility requirements are the same as those for a divorced spouse benefit under the Social Security Act. Railroad retirement is administered by the Railroad Retirement Board. 45 U.S.C. § 231f. The Railroad Retirement Board will provide on written request a statement showing the amount of tier I and tier II benefits earned by the railroad employee and the amount of the divorced spouse benefit to be paid to the divorced spouse.

See Railroad Retirement Board form IB-2 (2-11), Railroad Retirement and Survivor Benefits, available at **www.rrb.gov/forms/opa/ib2/ib2_overview.asp**.

§ 25.102 Definitions

The vocabulary used in the railroad retirement system is different from that used in any other retirement system. The following terms are used by the Railroad Retirement Board and in the regulations governing railroad retirement.

Annuity: The term *annuity* means a monthly sum that is payable on the first day of each calendar month for the accrual during the preceding calendar month. 45 U.S.C. § 231(p).

Tier I: Annuities under the Railroad Retirement Act are composed of independently calculated segments known as "tiers." Tier I is calculated using Social Security benefit formulas and includes earnings in the railroad industry and in employment covered by the Social Security Act. *See* 45 U.S.C. § 231b.

Tier II: Tier II is an annuity based on railroad retirement earnings alone. *See* 45 U.S.C. § 231b.

Employee: The term *employee* means the employee under the railroad retirement system. 45 U.S.C. § 231(b); 20 C.F.R. § 295.2.

Spouse or former spouse: The term *spouse or former spouse* means the husband or wife or former husband or wife of an employee who, on or before the date of a court order, was married to the employee. 20 C.F.R. § 295.2.

Court: As applicable in this discussion, the term *court* means a court with jurisdiction to hear divorce cases. *See* 20 C.F.R. § 295.2.

Court decree: The term *court decree* means a final decree of divorce, dissolution, or annulment in accordance with state law. 20 C.F.R. § 295.2.

Final decree: The term *final decree* means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the applicable laws or from which an appeal has been taken and finally decided. 20 C.F.R. § 295.2.

Property settlement: The term *property settlement* means an agreement between the parties to a suit for divorce, dissolution, or annulment in which they expressly agree to a division of their property rights and which is incorporated in the final decree. The property settlement must be filed with the court in connection with the suit or otherwise presented to the court in a suit in accordance with the law of the jurisdiction. An agreement assigning or transferring property between spouses is not a property settlement unless it is subsequently approved by a court in connection with a divorce, dissolution, or annulment. 20 C.F.R. § 295.2.

§ 25.103 Requirements for Court Decree

The Railroad Retirement Board will honor a court decree or a property settlement that meets the following criteria:

1. *Award of benefits.* The court decree or property settlement must provide that the spouse or former spouse is awarded payments from railroad retirement annuities payable to the railroad employee. 20 C.F.R. § 295.3(a)(1).

2. *Specific amount.* The court decree or property settlement must specify an amount to be paid to the spouse or former spouse. 20 C.F.R. § 295.3(a)(2).

3. *Obligation of board to pay.* The court decree or property settlement must obligate the Railroad Retirement Board to make payments directly to the spouse or former spouse. 20 C.F.R. § 295.3(a)(3).

4. *Identification of parties.* The court decree or property settlement must clearly identify both the employee and the spouse or former spouse to whom payments are to be made. 20 C.F.R. § 295.3(a)(4).

5. *Recently certified copy.* The court decree or property settlement submitted to the Railroad Retirement Board must be a recently certified copy of the document filed with the court. In the case of a court-approved property settlement,

both the settlement and any decree or order incorporating or approving the settlement must be provided. 20 C.F.R. § 295.3(a)(5).

The court decree should state the date on which it was signed. *See* 20 C.F.R. § 295.3(b); Tex. R. Civ. P. 306a. See Railroad Retirement Board form G-177d (09/10), Partition of Annuities by Court Decree, available at **https://www.rrb.gov/sites/default/files/2017-03/G177D.pdf**.

§ 25.104 Procedure

The division of railroad retirement non–tier I benefits can be included in the body of the decree of divorce or the property settlement agreement. The property settlement agreement must be on file and approved by the court granting the divorce. Also, the division can be accomplished by a separate QDRO. The Railroad Retirement Board has an approved QDRO form available on request.

Warning: It is important that the divisible benefits be identified in the order as "non–tier I" benefits instead of "tier II" benefits only. The former identification allows the ex-spouse of the railroad employee to receive that person's share of all divisible components under the Railroad Retirement Act, that is, the tier II component, the supplemental annuity (if the railroad employee is eligible), the vested dual benefit (if the railroad employee is eligible), and any overall minimum increase in the annuity. If the divided benefits are identified only as tier II benefits in the order, the divorced spouse is limited to receiving only a portion of the tier II benefits and will not receive any of the other divisible components even if the employee is eligible for these benefits.

If the non–tier I benefits are divided in the actual decree of divorce or property settlement agreement, a certified copy of the divorce decree and property settlement agreement (if the division is made in that instrument) must be submitted to the General Counsel, Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611-1275. 20 C.F.R. § 295.3(d).

If the division is made in a separate QDRO, a certified copy of the QDRO and the divorce decree must also be submitted to the above address. Currently, preapproval may be obtained by faxing the proposed QDRO to 312-751-7102.

§ 25.105 Private Retirement Plans Associated with Railroad Employees

In addition to the federally created railroad retirement benefits, each union and each railroad may have additional private plans that involve significant assets and that should not be overlooked.

§ 25.106 Cessation of Divorced Spouse Benefits

Benefits for the divorced spouse end—

1. on the last day of the month before the month in which the divorced spouse dies;
2. on the date on which the employee annuity terminates;
3. on the date required by the court decree or property settlement;
4. when the employee dies (the divorced spouse may qualify for a surviving divorced spouse annuity at this time);
5. when the divorced spouse remarries;
6. when the divorced spouse becomes entitled to a Social Security benefit based on the divorced spouse's own earnings and on which the Social Security benefit (before any reductions are made) is greater than the maximum amount of the annuity that he was entitled to receive; or
7. when the divorced spouse becomes entitled to a spouse's annuity, a remarried widow(er)'s annuity, or a surviving divorced spouse's annuity under a different Railroad Retirement Board claim number that is greater than the amount that he was entitled to as a divorced spouse.

See 20 C.F.R. § 295.5; General Conditions under Which a Person Is Entitled to a Railroad Retirement Divorced Spouse Annuity (G-177C (08-07)), available at **https://www.rrb.gov/sites/default/files/2017-03/G177C_0.pdf**.

§ 25.107 Conversion of Annuity Received as Divorced Spouse to Annuity Received as Surviving Spouse

There is no need for the surviving divorced spouse to file a new application if the divorced spouse was in receipt of an annuity in the month before the month in which the employee dies. *See* 20 C.F.R. § 217.8(o). On notification of the death of an employee, the divorced spouse's annuity will be converted to a surviving divorced

spouse's annuity, if survivor benefits are payable by the board. If not, the case will be transferred to the Social Security Administration for payment of a surviving divorced spouse's annuity under the Social Security Act.

§ 25.108 Entitlement as Remarried Widow(er)

Section 216.63 of the Railroad Retirement Board's regulations defines a remarried widow(er) as a widow(er) of a railroad employee with at least ten years of service and who had a current connection with the railroad industry and—

1. has remarried either after attaining age sixty (or age fifty if disabled) or before age sixty if the marriage has terminated;
2. is not entitled to a Social Security benefit that is equal to or higher than the remarried widow(er)'s benefit;
3. has attained retirement age;
4. is at least age fifty but less than age sixty if disabled;
5. has not attained retirement age but has a minor or disabled child of the employee in her or his care or custody; or
6. is at least age sixty but has not attained retirement age (in which case the annuity is reduced for age).

20 C.F.R. § 216.63(a).

§ 25.109 Other Documentation

On request, the former spouse must submit additional documentation the board requires, including but not limited to—

1. identifying information concerning the employee, such as Social Security number, railroad retirement claim number, full name, date of birth, and current address;
2. identifying information concerning the former spouse, such as Social Security number, full name, and current address;
3. a statement that no condition of the law of the jurisdiction in which the decree was entered or the property settlement approved and no condition contained in the decree or agreement that requires termination of payment has occurred and,

if any such condition does occur, that the former spouse will immediately notify the Railroad Retirement Board; and

4. a statement that the spouse agrees to repay any erroneous payment arising from the occurrence of any such condition.

20 C.F.R. § 295.3(c).

§ 25.110 Delivery of Court Decree to Board

Any court decree or property settlement must be delivered by certified or registered mail, return receipt requested, or by personal service to the General Counsel of the Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611. 20 C.F.R. § 295.3(d).

[Sections 25.111 through 25.120 are reserved for expansion.]

X. Stock Options and Restricted Stock

§ 25.121 Stock Options and Restricted Stock

Section 3.007 of the Family Code provides guidance about how to characterize an employee spouse's stock options or restricted stock when employment both during and outside the period of marriage is required to reap the benefit. The formula used to calculate the percentage of community interest is basically the same formula set forth in *In re Marriage of Nelson*, 177 Cal. App. 3d 150, 222 Cal. Rptr. 790 (1986).

The applicable methodology depends on the "grant date" of the option or restricted stock. If the date of grant occurs during the marriage but continued employment following the date of dissolution of the marriage is required for vesting or exercise, the calculation will yield the percentage of the separate interest, even though the right is not vested and the right to exercise has not yet occurred. *See* Tex. Fam. Code § 3.007(d)(2). If the date of grant occurred before marriage but continued employment during marriage is required for vesting or exercise, the character of the option or stock right will be calculated in a similar manner. *See* Tex. Fam. Code § 3.007(d)(1). The applicable formulas are shown below.

Grant before marriage (with required employment during marriage):

$$\text{Separate-property interest} = \frac{\text{Period from date of grant until marriage (}\textit{plus}\text{, if applicable, period from date of dissolution of marriage until date grant could be exercised or restriction removed)}}{\text{Period from date of grant until date grant could be exercised or restriction removed}}$$

Grant during marriage (with required employment after dissolution of marriage):

$$\text{Separate-property interest} = \frac{\text{Period from date of dissolution until date grant could be exercised or restriction removed}}{\text{Period from date of grant until date grant could be exercised or restriction removed}}$$

Obviously, the remaining percentage balance will be considered the community interest. It will be necessary to use the formulas above for each different set (grant dates) of stock options or restricted stock grants. The computations described above apply to each component of the benefit requiring varying periods of employment before the grant could be exercised or the restriction removed. Tex. Fam. Code § 3.007(e).

[Sections 25.122 through 25.130 are reserved for expansion.]

XI. Useful Websites

§ 25.131 Useful Websites

The following websites contain information relating to the topic of this chapter:

Defense Finance and Accounting Service (§ 25.77)
www.dfas.mil/garnishment/usfspa/apply.html

Railroad Retirement Board form IB-2 (2-05) ("Railroad Retirement and Survivor Benefits") (§ 25.101)
www.rrb.gov/forms/opa/ib2/ib2_overview.asp

Railroad Retirement Board form G-177d ("Partition of Annuities by Court Decree") (§ 25.103)
https://www.rrb.gov/sites/default/files/2017-03/G177D.pdf

Railroad Retirement Board form G-177C ("General Conditions under Which a Person Is Entitled to a Railroad Retirement Divorced Spouse Annuity") (§ 25.106)
https://www.rrb.gov/sites/default/files/2017-03/G177C_0.pdf

Chapter 26

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Chapter 26

Posttrial Proceedings and Appeals

§ 26.1 Final Order

Generally: There can be only one final judgment, which settles all legal issues and rights between the parties and which is appealable. Tex. R. Civ. P. 301; *Johnson v. Ventling*, 132 S.W.3d 173, 177 (Tex. App.—Corpus Christi–Edinburg 2004, no pet.). When the trial court renders a judgment after a conventional trial on the merits (whether by jury or bench trial) and there is no order for separate trials, there is a presumption (known as the "*Aldridge* presumption") that the judgment disposes of all issues and parties. *John v. Marshall Health Services*, 58 S.W.3d 738, 740 (Tex. 2001) (per curiam); *North East ISD v. Aldridge*, 400 S.W.2d 893, 897–98 (Tex. 1966). When the *Aldridge* presumption applies, the judgment is treated as final for purposes of appeal. *See John*, 58 S.W.3d at 740; *see, e.g.*, *Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d 621, 627 (Tex. App.—Dallas 2001, pet. denied) (judgment ostensibly rendered after full trial on merits, which contained Mother Hubbard clause denying all relief not granted, was final).

Judgment vs. Rendition: Before an appeal may be pursued, a final order must be signed by the court. A judgment routinely goes through three stages: rendition, reduction to writing, and entry. *Oak Creek Homes, Inc. v. Jones*, 758 S.W.2d 288, 290 (Tex. App.—Waco 1988, no writ).

Rendition of judgment occurs when the trial judge officially announces a decision on the law as to the matters at issue, either orally in open court or by written memorandum filed with the clerk. *Garza v. Texas Alcoholic Beverage Commission*, 89 S.W.3d 1, 6 (Tex. 2002).

The subsequent reduction of the pronouncement to writing, signed and dated by the court, is a ministerial act of the court. *Oak Creek Homes*, 758 S.W.2d at 290. The reduction of the pronouncement to writing does not change the date of a prior rendition to the date of the signing of the written draft. *Knox v. Long*, 257 S.W.2d 289, 292 (Tex. 1953), *overruled in part on other grounds*, *Jackson v. Hernandez*, 285 S.W.2d 184, 191 (Tex. 1955). After a trial judge orally renders judgment, the subsequent written judgment

may be signed by a different judge; this signing is a ministerial act and does not affect the rendition or the written judgment. *Townsend v. Vasquez*, 569 S.W.3d 796, 805 (Tex. App.—Houston [1st Dist.] 2018, pet. denied), *cert. denied*, 2019 WL 5686565 (U.S. Nov. 4, 2019) (No. 19-5783).

A judgment is "entered" when it is spread on the minutes of the trial court by a purely ministerial act of the clerk of the court, and "entered" is synonymous with neither "signed" nor "rendered" when used in relation to a judgment or the date of the judgment. *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978).

The trial court's rendition is fully effective for all purposes, except calculation of the time by which an appeal must be perfected. Tex. R. App. P. 26.1; *see Galbraith v. Galbraith*, 619 S.W.2d 238, 240 (Tex. App.—Texarkana 1981, no writ). Once the trial court renders its decision, the court's orders are valid from that time forward until vacated or set aside. *Ex parte Cole*, 778 S.W.2d 599, 600 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding).

Oral rendition is proper if the words state the pronouncement to be a present rendition of judgment. *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976) (orig. proceeding). The Texas Supreme Court has found that the court rendered judgment after approving a settlement agreement in open court. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874–75 (Tex. 1982) (per curiam). The Texas Supreme Court has also held that, when the trial court specifies the terms of the judgment on the docket sheet along with the words "decree to be entered," rendition has occurred. *See Burnaman v. Heaton*, 240 S.W.2d 288, 290–91 (Tex. 1951). Judges' oral pronouncements, however, are often necessarily tentative and may not cover all the details of a final decree, since judges know that they will review the draft of the judgment before signing it. *Stallworth v. Stallworth*, 201 S.W.3d 338, 349 (Tex. App.—Dallas 2006, no pet.) (judge orally announced fifty-fifty division of retirement benefits, but decree awarded each party own retirement benefits).

Trial courts sometimes issue memorandum or letter rulings that can raise questions regarding whether the ruling is a final judgment for appellate purposes. A memorandum ruling will be accorded final judgment status triggering appellate deadlines if (1) the ruling describes the decision with certainty as to the parties and effect, (2) it requires no further action to memorialize the ruling and contains the name and cause number of the case, (3) the court's diction is affirmative rather than anticipatory of a future ruling, (4) the ruling bears a date, (5) it was signed by the court, and (6) it was filed with the

district clerk. *In re B.D.*, No. 05-17-00674-CV, 2017 WL 3765848 (Tex. App.—Dallas Aug. 31, 2017, no pet.) (mem. op.).

Docket sheet entries alone, without a decree of divorce or a record, are insufficient to constitute a judgment or decree of the court. A docket sheet entry is a memorandum made for the convenience of the trial court and the court clerk. Docket sheet entries are inherently unreliable because they lack the formality of orders and judgments. *Bailey-Mason v. Mason*, 122 S.W.3d 894, 897 (Tex. App.—Dallas 2003, pet. denied).

Agreed Judgments: An agreed judgment must be interpreted as if it were a contract between the parties, and its interpretation is governed by the laws relating to contracts, rather than laws relating to judgments. However, an agreed judgment is accorded the same degree of finality and binding force as a final judgment rendered at the conclusion of an adversary proceeding. *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979) (per curiam). A court is bound by the express stated intent of the parties as manifested within the four corners of the instrument itself, absent any allegations of ambiguity. *See National Union Fire Insurance Co. v. CBI Industries*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam).

A Mother Hubbard clause is a clause in a judgment reciting that "all relief not expressly granted is denied" or containing similar language purporting to dispose of all parties and all issues in the suit. *In re J.G.W.*, 54 S.W.3d 826, 831, n.4 (Tex. App.—Texarkana 2001, no pet.). If a judgment contains language such as a Mother Hubbard clause that purports to grant or deny relief that disposes of all claims or parties, regardless of the intent of the parties or the trial court, that judgment is final as to all claims and all parties. *See In re J.G.W.*, 54 S.W.3d at 831. *But see Wilson v. Shamoun & Norman, LLP*, 523 S.W.3d 222 (Tex. App.—Dallas 2017, pet. denied) (denial of transfer order with Mother Hubbard clause not final order).

Attorney's Fees: A trial court's failure to award attorney's fees in a suit affecting the parent-child relationship affects the finality of a judgment. *In re K.M.B.*, 148 S.W.3d 618 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

Pending Sanctions: A judgment does not have to resolve pending sanctions issues to be final, and sanctions may not be imposed after the expiration of a trial court's plenary jurisdiction. *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308, 311–12 (Tex. 2000).

Collateral Attack on Judgments: A collateral attack is an attempt to avoid the binding force of a judgment in a separate proceeding brought for some other purpose. *John-*

son, 132 S.W.3d at 177. To prevail in a collateral attack, a party to the original judgment must show that the complained-of judgment is void, not simply voidable. *Gainous v. Gainous*, 219 S.W.3d 97, 105 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In general, as long as the court that enters a judgment has jurisdiction of the parties and the subject matter and does not act outside its capacity as a court, the judgment is not void. *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003). All other errors make the judgment merely voidable so that it may be corrected only through a direct attack. *Reiss*, 118 S.W.3d at 443. One may raise a collateral attack challenging a void order at any time, and res judicata is not a bar to the attack. In a collateral attack the challenged order is presumed valid, and the party challenging it has the burden to show that it is void. *Gainous*, 219 S.W.3d at 106.

In a collateral attack on a judgment, extrinsic evidence may not be used to establish a lack of jurisdiction. *Johnson*, 132 S.W.3d at 177–78. A collateral attack fails if the judgment contains jurisdictional recitals, even if other parts of the record show a lack of jurisdiction. *Johnson*, 132 S.W.3d at 178. Plain jurisdiction recitals of personal jurisdiction in a judgment must be accorded absolute verity. *Armentor v. Kern*, 178 S.W.3d 147 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A divorce judgment, unappealed and regular on its face, is not subject to a collateral attack in a subsequent suit. *Hardin v. Hardin*, 597 S.W.2d 347, 350 (Tex. 1980).

Collateral Attack on QDRO: The court that rendered a divorce decree or any other final order dividing property retains continuing, exclusive jurisdiction to render an enforceable qualified domestic relations order (QDRO) or similar order permitting payment of divisible pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee. As with any postdivorce enforcement or clarification order, a QDRO may not amend, modify, alter, or change the division of property made or approved in the decree. If the provisions of the QDRO and the divorce decree conflict, the QDRO's provisions are void, unenforceable, and subject to collateral attack. *See Gainous*, 219 S.W.3d at 106–07.

§ 26.2 Posttrial Pleadings

To preserve a complaint for appeal, a party must first have presented the complaint to the trial court through a timely, specific request, objection, or motion and obtained a ruling. *See* Tex. R. App. P. 33.1; *In re M.M.W.*, 536 S.W.3d 611 (Tex. App.—Texarkana 2017, no pet.) (objections must be sufficiently specific).

COMMENT: After the trial, the attorney must review the case and determine if the court did or did not do anything that his client wants to complain about on appeal. If the attorney failed to timely and specifically object or failed to obtain a ruling on an objection, the attorney may still be able to preserve the error through the use of a posttrial motion. Also, some complaints may be made for the first time only in a posttrial motion.

§ 26.3 New Trial

§ 26.3:1 Generally

A motion for new trial asks the trial court to reconsider and correct a trial error either in its rulings or in the jury's findings and to grant the movant a new trial. The primary reasons for filing a motion for new trial are to give the trial court a chance to correct any mistakes, to preserve error for appeal, and to extend the appellate deadlines.

New trials may be granted and judgment set aside for good cause on the motion of any party or on the court's own motion on the terms the court directs. If it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that the part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only. Tex. R. Civ. P. 320. A trial court in a divorce proceeding has discretion to grant a new trial within the time frame that the court has plenary jurisdiction, even if one party dies after the divorce decree is entered. *Nichols v. Nichols*, 907 S.W.2d 6, 10 (Tex. App.—Tyler 1995, writ denied). The negligence, inadvertence, or mistake of an attorney is attributable to his client so that the attorney's failure to defend the case properly or to develop fully the available evidence does not constitute "good cause" authorizing a new trial. A motion for new trial may not be used as a vehicle by which the case may be tried over and differently. *Scheffer v. Chron*, 560 S.W.2d 419, 420 (Tex. App.—Beaumont 1977, writ ref'd n.r.e.). A motion for new trial may be filed only by a party to the underlying suit. *In re Trevino*, 329 S.W.3d 906 (Tex. App.—Dallas 2010, orig. proceeding).

Granting a new trial has the legal effect of vacating the original judgment and returning the case to the trial docket as though there had been no previous trial or hearing; the original judgment is set aside, and the parties may proceed without prejudice from previous proceedings. *Markowitz v. Markowitz*, 118 S.W.3d 82, 88 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Thus, when the trial court grants a motion for new trial, the court essentially wipes the slate clean and starts over. *Wilkins v. Methodist Health Care System*, 160 S.W.3d 559, 563 (Tex. 2005). However, even though a trial

court may not sever the property division from the divorce when it grants a new trial, when the appellate court remands for a new trial for a division of the property, the marriage relationship is not prolonged until the decree is final after the remand. *Herschberg v. Herschberg*, 994 S.W.2d 273, 277 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.).

§ 26.3:2 Format of Motion

The motion must be in writing and signed by the attorney or the party. Tex. R. Civ. P. 320. Each point relied on in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given the jury or charge refused, admission or rejection of evidence, or other proceedings that are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court. Tex. R. Civ. P. 321. Grounds of objection couched in general terms shall not be considered by the court. Tex. R. Civ. P. 322. The motion must specifically request a new trial; if the request is for a different judgment, it is not a motion for new trial. *See Mercer v. Band*, 454 S.W.2d 833, 836 (Tex. App.—Houston [14th Dist.] 1970, no writ).

Motions for new trial on which evidence must be heard, such as those based on newly discovered evidence or jury misconduct, require a verification and one or more affidavits or, in the case of jury misconduct, a reasonable explanation and excuse why an affidavit may not be secured. *See Zuniga v. Zuniga*, 13 S.W.3d 798, 803 n.4 (Tex. App.—San Antonio 1999, no pet.), *disapproved on other grounds*, *In re Z.L.T.*, 124 S.W.3d 163, 166 (Tex. 2003); *Brown v. Hopkins*, 921 S.W.2d 306, 310–11 (Tex. App.—Corpus Christi–Edinburg 1996, no writ) (newly discovered evidence); *Ramsey v. Lucky Stores, Inc.*, 853 S.W.2d 623, 636 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (jury misconduct).

§ 26.3:3 Filing for Appellate Purposes

A motion for new trial is not necessary to preserve error in either a jury or a nonjury case, except under very limited circumstance. *See* Tex. R. Civ. P. 324(a). After either a jury or a nonjury trial, a motion for new trial is necessary to preserve posttrial complaints on which evidence must be heard, such as newly discovered evidence or failure to set aside a default judgment (Tex. R. Civ. P. 324(b)(1)) and complaints that were not brought to the trial court's attention during the trial (Tex. R. Civ. P. 324(b)(2)–(5)).

The motion for new trial, however, does not negate the need for the party to have objected at trial.

After a jury trial, a party must file a motion for new trial to preserve certain types of complaints on appeal, including the following:

1. Posttrial complaints on which evidence must be heard (such as jury misconduct). Tex. R. Civ. P. 324(b)(1).
2. Complaints of incurable jury argument if the trial court has not otherwise made a ruling on it. Tex. R. Civ. P. 324(b)(5).
3. Complaints of factual insufficiency of the evidence to support a jury finding or that the jury finding is against the great weight and preponderance of the evidence. Tex. R. Civ. P. 324(b)(2), (b)(3); *In re A.B.*, 548 S.W.3d 81, 83–84 (Tex. App.—Beaumont 2018, no pet.); *In re A.M.*, 385 S.W.3d 74, 79 (Tex. App.—Waco 2012, pet. denied).
4. Complaints of legal insufficiency. *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988). However, if a party raises legal insufficiency for the first and only time in a motion for new trial, the party is not entitled to a rendition by the appellate court, only to a remand to the trial court. *Horrocks v. Texas Department of Transportation*, 852 S.W.2d 498, 499 (Tex. 1993) (per curiam).
5. Complaints that the jury's damages are inadequate or excessive. Tex. R. Civ. P. 324(b)(4).

If a motion for new trial is a prerequisite of appeal, error not complained of in the motion is waived. *Beacon National Insurance Co. v. Young*, 448 S.W.2d 812, 814 (Tex. App.—Dallas 1969, writ ref'd n.r.e.). A party whose motion for judgment on verdict of a jury is denied may forgo the filing of a motion for new trial and predicate his points of error on appeal on matters included in the motion. The party following that course may complain on appeal only of denial of the motion for judgment. *Abbott v. Earl Hayes Chevrolet Co.*, 384 S.W.2d 782, 784 (Tex. App.—Tyler 1964, no writ).

The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, regardless of whether there is any sound or reasonable basis for the conclusion that a further motion is necessary. *Old Republic Insurance Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993) (per curiam).

§ 26.3:4 Newly Discovered Evidence

A party seeking a new trial on the ground of newly discovered evidence must establish that (1) the evidence has come to the party's knowledge since the trial, (2) the failure to

discover the new evidence was not for want of due diligence, (3) it is not cumulative evidence, and (4) the evidence is so material that it would probably produce a different result if a new trial were granted. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983), *overruled on other grounds*, *Moritz v. Preiss*, 121 S.W.3d 715, 720–21 (Tex. 2003). *See, e.g., In re Calzadias*, 484 S.W.3d 574, 576 (Tex. App.—Amarillo 2016, orig. proceeding) (new evidence strongly showed original order would seriously adversely affect interest and welfare of children, and presentation of that evidence at another trial would probably change result). The granting of a motion for new trial on the ground of newly discovered evidence will not be disturbed on appeal absent an abuse of discretion.

In denying a motion for new trial on the ground of newly discovered evidence, the trial court should take into consideration the weight and the importance of the new evidence and its bearing in connection with the evidence received at trial. The inquiry is not whether, according to the evidence in the record, the application should have been granted in the particular case, but whether the refusal to grant the application has involved the violation of a clear legal right or a manifest abuse of judicial discretion. Every reasonable presumption will be made on review in favor of orders of the trial court refusing new trials. *Jackson*, 660 S.W.2d at 809. In reviewing a trial court's decision refusing a new trial, appellate courts recognize the well-established principle that courts do not favor motions for new trial on the ground of newly discovered evidence, and such motions are reviewed with careful scrutiny. *Brown v. Hopkins*, 921 S.W.2d 306, 311 (Tex. App.—Corpus Christi–Edinburg 1996, no writ). Review of a trial court's action under the abuse of discretion criteria is a question of law. *Jackson*, 660 S.W.2d at 809.

Each element of a motion for new trial on the ground of newly discovered evidence must be established by affidavit. *Brown*, 921 S.W.2d at 310–11; *Fulton v. Duhaime*, 525 S.W.2d 62, 64 (Tex. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). This is true even though the motion is verified and not controverted. *Steelman v. Rosenfeld*, 408 S.W.2d 330, 335 (Tex. App.—Dallas 1966, no writ). Specifically, the attached affidavit must contain a statement that, with the exercise of due diligence, the newly discovered evidence could not have been discovered before the hearing. *Jackson*, 660 S.W.2d at 810. Furthermore, the motion must be accompanied by an affidavit of the person by whom the expected proof is to be made, and that witness must be called to testify on the hearing of the motion. *Steelman*, 408 S.W.2d at 335.

§ 26.3:5 After Default Judgment

Generally, there are two types of default judgments: (1) those granted without the respondent's receiving proper notice of the suit, hearing, or trial and (2) those granted after the respondent receives proper notice of the suit, hearing, or trial but fails to appear because of a mistake or accident.

Improper Service: If the trial court grants a default judgment without the defendant's receiving proper service, the defendant should challenge any deficiencies in the citation (*see* Tex. R. Civ. P. 15, 99), the service (*see Wood v. Brown*, 819 S.W.2d 799, 800 (Tex. 1991) (per curiam)), the return (*see* Tex. R. Civ. P. 107), and the petitioner's pleadings (*see Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494 (Tex. 1988)). There are no presumptions in favor of valid issuance, service, or return of citation. *Creaven v. Creaven*, 551 S.W.3d 865, 870 (Tex. App.—Houston [14th Dist.] 2018, no pet.). A default judgment is improper against a defendant who has not been served in strict compliance with the law, even if he has actual knowledge of the lawsuit. *In re T.J.T.*, 486 S.W.3d 675, 678–79 (Tex. App.—Texarkana 2016, no pet.) (citation served on father failed to inform him that answer was required or that he would risk default judgment if he failed to answer). However, if the defendant's counsel appears at a motion to quash service, his client has entered an appearance, and a default judgment is proper if that party does not appear at trial. *In re A.M.*, 351 S.W.3d 395, 398 (Tex. App.—El Paso 2011, no pet.). There is no longer a requirement that a party obtain a new citation when amending a petition. The party only has to serve a defendant under rule 21a of the Texas Rules of Civil Procedure. *In re E.A.*, 287 S.W.3d 1, 4 (Tex. 2009).

No Notice of Trial: Because, without notice, a respondent cannot intentionally or with conscious indifference fail to appear, if the respondent proves that a default judgment was granted without proper notice of the trial or hearing, he satisfies the first prong of the test set forth in *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124, 126 (Tex. 1939). *Texas Sting, Ltd. v. R.B. Foods*, 82 S.W.3d 644, 650–52 (Tex. App.—San Antonio 2002, pet. denied).

Proving lack of notice of the trial also relieves the respondent from needing to establish the remainder of the *Craddock* factors because, once the respondent enters an appearance, the respondent is entitled to notice of the trial setting as a matter of due process. *LBL Oil Co. v. International Power Services*, 777 S.W.2d 390, 390–91 (Tex. 1989) (per curiam).

Failure to Appear after Receipt of Proper Notice of Trial: A defendant challenging a default judgment must show that (1) the failure of the defendant to answer before judgment was not intentional or the result of conscious indifference but was due to a mistake or an accident, (2) the motion for new trial set up a meritorious defense, and (3) the motion was filed at a time when to grant it would cause no delay or otherwise work an injury to the plaintiff. *Bank One, Texas v. Moody*, 830 S.W.2d 81, 82–83 (Tex. 1992) (interpreting three-pronged test set out in *Craddock*, 133 S.W.2d at 126).

But *Craddock* applies only to default judgments and not to judgments rendered after an adversarial trial, even when a party participates in the trial without his lawyer because of a calendaring error. *In re G.B.A.*, 528 S.W.3d 815 (Tex. App.—Texarkana 2017, no pet.).

Conscious Indifference: "Conscious indifference" means a failure to take some action that would seem indicated to a person of reasonable sensibilities under the same or similar circumstances. *Sharpe v. Kilcoyne*, 962 S.W.2d 697, 701 (Tex. App.—Fort Worth 1998, no pet.) A failure to appear is not due to conscious indifference merely because it was intentional or deliberate; it must also be without adequate justification. *State v. Sledge*, 982 S.W.2d 911, 914 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

The courts have liberally interpreted the first *Craddock* prong in favor of the movant. *See Gotcher v. Barnett*, 757 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ). The absence of a purposeful or bad-faith failure to answer is the "controlling fact" and is satisfied by even a slight excuse. *Gotcher*, 757 S.W.2d at 401. Negligence alone will not preclude setting aside a default judgment. *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966); *Ferguson & Co. v. Roll*, 776 S.W.2d 692, 697 (Tex. App.—Dallas 1989, no writ); *see also* Michael A. Pohl and David Hittner, *Judgment by Default in Texas*, 37 Sw. L.J. 421, 433 (1983) ("[t]he defendant's burden of demonstrating the accidental or mistaken nature of his failure to answer may often result in an admission of negligence."). Thus, it appears that some excuse, even if not strong, is sufficient under the *Craddock* rationale to warrant setting aside a default judgment, provided that the defendant's failure to answer was, in fact, accidental. *Craddock*, 133 S.W.2d at 125; *Ferguson*, 776 S.W.2d at 695.

Evidence of extrinsic fraud also satisfies the first *Craddock* prong. *See Rhamey v. Fielder*, 203 S.W.3d 24, 29 (Tex. App.—San Antonio 2006, no pet.). Extrinsic fraud is wrongful conduct practiced outside the adversary trial, such as keeping a party away from court or making false promises of compromise, that affects the manner in which

the judgment is procured. *Rhamey*, 203 S.W.3d at 29; *see also Browning v. Prostok*, 165 S.W.3d 336, 347 (Tex. 2005).

A party's failure to answer because of a heavy workload or preoccupation with other activities can satisfy *Craddock*'s first prong. *See Southland Paint Co. v. Thousand Oaks Racket Club*, 724 S.W.2d 809, 811 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (late answer due to staff shortage at defendant's insurance broker's office); *Evans v. Woodward*, 669 S.W.2d 154, 155 (Tex. App.—Dallas 1984, no writ) (no conscious indifference when answer not filed due to confusion in attorney's office); *Drake v. McGalin*, 626 S.W.2d 786, 788 (Tex. App.—Beaumont 1981, no writ) (failure to answer due to accident or mistake when answer prepared by secretary presumably lost by volunteer exchange student who was assisting defendant's attorney as an "office boy"); *Dallas Heating Co. v. Pardee*, 561 S.W.2d 16, 19 (Tex. App.—Dallas 1977, writ ref'd n.r.e.) (suit papers inadvertently misplaced in defendant's office sufficient to negate conscious indifference); *Leonard v. Leonard*, 512 S.W.2d 771, 773 (Tex. App.—Corpus Christi–Edinburg 1974, writ dism'd w.o.j.) (no conscious indifference when attorney misplaced file); *Schindler v. Schindler*, No. 13-16-00483-CV, 2018 WL 3151857 (Tex. App.—Corpus Christi–Edinburg June 28, 2018, no pet.) (mem. op.) (finding of conscious indifference affirmed when husband failed to appear after being properly served and complying with court's temporary orders).

Meritorious Defense: To set up a meritorious defense, the motion must allege facts that in law would constitute a defense to the cause of action asserted by the plaintiff, and it must be supported by affidavits or other evidence proving prima facie that the defendant has such a meritorious defense. *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993) (quoting *Ivy*, 407 S.W.2d at 214). The movant must do more than merely assert that it has a meritorious defense, *Ivy*, 407 S.W.2d at 214; however, it need not prove the defense in order to meet *Craddock*'s second prong.

To satisfy this requirement, the defaulting party need only assert, but not prove, facts that, if true, would cause a different result on retrial. *Gotcher*, 757 S.W.2d at 403. A meritorious defense, however, is not limited to one that, if proved, would lead to an entirely opposite result. It is sufficient if at least a portion of the judgment would not be sustained at retrial. *HST Gathering Co. v. Motor Service, Inc.*, 683 S.W.2d 743, 745 (Tex. App.—Corpus Christi–Edinburg 1984, no writ).

The trial court may not try the defensive issues in deciding whether to set aside the default judgment and should not consider counter affidavits or conflicting testimony offered to refute the movant's factual allegations. *Estate of Pollack*, 858 S.W.2d at 392.

If a defendant had no actual or constructive notice of a trial setting and a default judgment is entered against him, he is not required to show that he had a meritorious defense, because such a requirement violates his due-process rights under the Fourteenth Amendment to the United States Constitution. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86–87 (1988).

No Delay or Injury: To set aside a default judgment, the defendant must also prove that a new trial would occasion no delay or otherwise work an injury to the plaintiff. *Craddock*, 133 S.W.2d at 126. In determining whether the granting of a new trial would injure the plaintiff or occasion delay, the court should deal with the facts on a case-by-case basis. *Angelo v. Champion Restaurant Equipment Co.*, 713 S.W.2d 96, 98 (Tex. 1986). One way a defendant may show that the granting of a new trial will not injure the plaintiff is by showing that he is ready to proceed to trial and that he has offered to reimburse the plaintiff for expenses incurred in obtaining the default judgment. *Gotcher*, 757 S.W.2d at 404. Although reimbursement of costs in obtaining default judgment and the defendant's ability to go to trial immediately may both be important factors in avoiding delay or injury to a plaintiff, neither factor is so indispensable that a new trial cannot be granted without it. *Angelo*, 713 S.W.2d at 98.

In determining whether to grant a motion for new trial, the court may not consider expenses accrued by a party after the filing of the opponent's motion for new trial. The court similarly may not consider a change of position to the nonmovant's detriment if that change of position relied on the validity of the judgment after the filing of the motion for new trial. *Burns v. Burns*, 568 S.W.2d 669, 672 (Tex. App.—Fort Worth 1978, writ ref'd n.r.e.).

After Service by Publication: When a default judgment is sought after service by publication, the trial court must appoint an attorney ad litem to defend the case and that attorney must be paid a reasonable fee for his services for the trial. Tex. R. Civ. P. 244. After the court renders judgment, the court must also approve and sign a statement of evidence, which is separate and apart from the reporter's record. Tex. R. Civ. P. 244; *Montgomery v. R.E.C. Interests, Inc.*, 130 S.W.3d 444, 446–47 (Tex. App.—Texarkana 2004, no pet.). A motion for new trial after service by publication is equivalent to an equitable bill of review and must be verified by affidavit. Tex. R. Civ. P. 329; *Stock v. Stock*, 702 S.W.2d 713, 714 (Tex. App.—San Antonio 1985, no writ).

In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by attorney of his own selection, the court may grant a new trial on the defendant's petition showing good cause, supported

by affidavit, filed within two years after the judgment was signed. Tex. R. Civ. P. 329. However, a judgment that terminates parental rights of a person served by publication, notwithstanding rule 329, is not subject to a direct or collateral attack after the sixth month after the date the order was signed. Tex. Fam. Code § 161.211(b).

COMMENT: It is unclear whether Tex. Fam. Code § 161.211(b) applies to both motions for new trial and bills of review or just to motions for new trial. If the six-month period has ended and there has been clear extrinsic fraud, the practitioner should consider filing a bill of review.

Respondent in Military Service: A person against whom a default judgment is entered in a proceeding during the person's period of military service or within sixty days thereafter may apply to the court to reopen the judgment for the purpose of allowing the servicemember to defend the action. The servicemember must show a meritorious or legal defense and that the servicemember's ability to defend the action was materially affected by the military service. The application must be filed within ninety days after military service ends. *See* 50 U.S.C. § 3931(g). A servicemember of the Texas military forces who is ordered to state active duty or to state training and other duty is entitled to the same benefits and protections provided to U.S. military servicemembers by the foregoing provisions of 50 U.S.C. § 3931. Tex. Gov't Code § 437.213.

§ 26.3:6 Time for Filing Motions

A motion for new trial must be filed before or within thirty days after the judgment or other order complained of is signed. Tex. R. Civ. P. 329b(a). Within that same thirty-day period, a party may file one or more amended motions for new trial without leave of court as long as the trial court has not already overruled an earlier motion for new trial. Tex. R. Civ. P. 329b(b). With leave of the court, a party may file an amended motion even if the court has overruled an earlier motion for new trial. This rule also applies to supplemental motions. *See Equinox Enterprises, Inc. v. Associated Media, Inc.*, 730 S.W.2d 872, 875 (Tex. App.—Dallas 1987, no writ).

Motions, whether original, amended, or supplemental, filed after this thirty-day period are a nullity and cannot be considered by appellate courts. *Equinox*, 730 S.W.2d at 875. A court may not lengthen the period for taking any action under the Texas Rules of Civil Procedure relating to new trials except as stated in those rules. Tex. R. Civ. P. 5. A court is without authority to grant leave to file an amended motion for new trial after this thirty-day period. *Lind v. Gresham*, 672 S.W.2d 20, 22 (Tex. App.—Houston [14th Dist.] 1984, no writ). Although a motion for new trial filed more than thirty days after

the trial court signs its judgment is untimely, a trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before it loses plenary power. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003). A prematurely filed motion for new trial is deemed to be filed on the date of, but subsequent to, the time that the court signs the judgment. Tex. R. Civ. P. 306c. The judgment date still serves as the date from which the appellate timetable begins.

COMMENT: Although the Texas Rules of Civil Procedure require that a motion for new trial be filed within thirty days of the judgment, the rules do not address the filing of a brief in support of the motion. Therefore, the practitioner should consider filing such a brief if it is later determined that more detail or explanation is needed that was inadvertently omitted from the motion for new trial.

Exceptions to the general rule requiring filing of the motion within thirty days of the signing of the judgment apply when a party receives a late notice of judgment (*see* Tex. R. Civ. P. 306a), when the trial court signs a judgment rendered after citation by publication (*see* Tex. R. Civ. P. 329(a)), or when a party files an original petition in a Texas court to enforce a foreign judgment (*see* Tex. Civ. Prac. & Rem. Code § 35.003(b), (c)).

To invoke the extended deadline to file a notice of appeal due to receiving late notice of judgment under Tex. R. Civ. P. 306a(4), a movant must establish a specific date on which he or his attorney received notice or obtained actual knowledge of the judgment. The deadline to file a motion for new trial "runs from the date the party or the party's attorney receives notice from the clerk of the court or acquires actual knowledge that the trial court signed the order, whichever occurs first, as long as that date is not more than ninety days after the trial court signed the order." *In re Mitchell*, No. 05-17-00734-CV, 2017 WL 3392768, at *2 (Tex. App.—Dallas Aug. 8, 2017, orig. proceeding) (mem. op.).

Citation by Publication: A motion for new trial after citation by publication, if the defendant has not appeared, is timely if filed within two years after the judgment is signed. Tex. R. Civ. P. 329(a). However, the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed. Tex. Fam. Code § 161.211(b).

§ 26.3:7 Plenary Power

The trial court has thirty days from the date a final order is signed, without a motion, to change any part of the order. Tex. R. Civ. P. 329b(d). This plenary power may be extended in certain instances. Tex. R. Civ. P. 329b(c), (g) (motion for new trial or to modify, correct, or reform a judgment), 306a(4) (no notice of judgment). An order that purports to dispose of all issues and all parties is a final appealable order. Judicial action taken after the court's jurisdiction over a cause has expired is a nullity. *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 485–86 (Tex. 1995) (per curiam).

Only a motion for new trial filed by a party of record automatically extends the trial court's plenary power. A motion for new trial filed by a nonparty is simply an unofficial plea to the trial court to exercise its discretion allowed under rule 320 to set aside the judgment during the court's plenary power. *State & County Mutual Fire Insurance Co. v. Kelly*, 915 S.W.2d 224, 227 (Tex. App.—Austin 1996, no writ). If a motion for new trial is denied on the same day the judgment is signed, the trial court loses plenary power thirty days later unless another motion extending plenary power (for example, a motion to modify, correct, or reform the judgment) is filed. *In re Brookshire Grocery Co.*, 250 S.W.3d 66 (Tex. 2008) (orig. proceeding).

Even after a trial court's plenary power has expired, a court may still sign an order in that case under the following limited circumstances:

1. the order is a judgment nunc pro tunc to correct a clerical error; or
2. the order declares the prior judgment void because—
    a. the prior order was signed after the expiration of the court's plenary power;
    b. the court lacked subject-matter jurisdiction to render the judgment;
    c. a complete failure or lack of service violated due process; or
    d. there is any ground allowing a collateral attack on the judgment.

In re Martinez, 478 S.W.3d 123, 127–28 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding).

§ 26.3:8 Order on Motion for New Trial

An order granting a motion for new trial must be written and signed. *In re Lovito-Nelson*, 278 S.W.3d 773, 775–76 (Tex. 2009) (per curiam). A docket entry is not an

order and may not be considered as part of the record. *Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Services*, 960 S.W.2d 334, 336 (Tex. App.—Corpus Christi–Edinburg 1997, pet. denied). An order granting a new trial must be entered before the trial court loses plenary power. An order is insufficient unless it clearly states that the trial court has granted the motion for new trial. *See In re Nguyen*, 155 S.W.3d 191, 194 (Tex. App.—Tyler 2003, orig. proceeding) ("Here, the scheduling order does not contain any reference to the pending motion for new trial and does not expressly grant a new trial. Consequently, we conclude that the scheduling order does not constitute a written, signed order granting a new trial."). A letter ruling stating the court "will sign" an order granting motion for new trial may also be insufficient. *See, e.g., In re Johnson*, 557 S.W.3d 740 (Tex. App.—Waco 2018, orig. proceeding).

The order on the motion for new trial must specifically state the reason for the granting of the new trial. It is insufficient to set aside a jury verdict for the order to simply state "in the interests of justice and fairness." *In re Columbia Medical Center of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 211 (Tex. 2009) (orig. proceeding).

Until recently, the rule was that a trial court retains the power to vacate or "ungrant" a new trial and reinstate the original judgment only during the seventy-five day period when it continues to have plenary power over the original judgment. *Porter v. Vick*, 888 S.W.2d 789, 789–90 (Tex. 1994) (orig. proceeding) (per curiam). However, the Texas Supreme Court has acknowledged and overruled its precedent in *Porter v. Vick*, concluding that it had based that opinion on (1) a version of Texas Rule of Civil Procedure 329b that was changed in 1981 and (2) a hypothetical situation assuming that a vacated judgment became final. *See In re Baylor Medical Center at Garland*, 280 S.W.3d 227, 230 (Tex. 2008). The supreme court ultimately quoted the following reasoning of federal courts and commentators: "'There is no sound reason why the court may not reconsider its ruling [granting] a new trial' at any time." *Baylor Medical Center*, 280 S.W.3d at 232.

§ 26.4 Motion to Modify, Correct, or Reform Judgment

A motion to modify, correct, or reform the judgment is filed to request the trial court to change its judgment. *See* Tex. R. Civ. P. 329b(g). It should be filed to correct any error in the judgment, such as when the trial court does not award attorney's fees or does not award the correct amount of attorney's fees (*see Texas Education Agency v. Maxwell*, 937 S.W.2d 621, 623 (Tex. App.—Eastland 1997, writ denied)) or when the judgment does not award costs or awards an incorrect amount (*see Portland Savings & Loan*

Ass'n v. Bernstein, 716 S.W.2d 532, 541 (Tex. App.—Corpus Christi–Edinburg 1985, writ ref'd n.r.e.), *overruled on other grounds*, *Dawson-Austin v. Austin*, 968 S.W.2d 319, 323 (Tex. 1998)).

Format of Motion: The motion must be in writing and signed by the party or his attorney and must specify what aspects of the judgment should be modified, corrected, or reformed. Tex. R. Civ. P. 329b(g).

Filing Motion: The motion to modify, correct, or reform the judgment must be filed within thirty days of the date the court signed the judgment. Tex. R. Civ. P. 329b(g). A party may file a motion to modify, correct, or reform the judgment even if the court has already overruled a motion for new trial as long as it is filed within the thirty-day period following the court's signing of the judgment. *L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 443 (Tex. 1996) (per curiam).

Motion to Modify, Correct, or Reform Judgment vs. Motion for Judgment Non Obstante Veredicto: Although a motion for judgment non obstante veredicto is not one of the motions listed in rule 26.1 of the Texas Rules of Appellate Procedure as one of the motions that extends the appellate timetable, the San Antonio court of appeals has held that it also extends the appellate timetable. *Kirschberg v. Lowe*, 974 S.W.2d 844, 847–48 (Tex. App.—San Antonio 1998, no pet.). No other jurisdiction has done so.

COMMENT: The better practice is to clearly delineate these motions, especially if the practitioner is relying on the motion to modify, correct, or reform the judgment to extend the appellate timetable.

Motion to Modify, Correct, or Reform vs. Motion to Clarify: A motion to modify differs from a motion to clarify. A court may clarify an order rendered by the court if the court finds, on the motion of a party or on the court's own motion, that the order is not specific enough to be enforced by contempt. Tex. Fam. Code §§ 9.008, 157.421(a); *Lundy v. Lundy*, 973 S.W.2d 687, 688 (Tex. App.—Tyler 1998, pet. denied). A court, however, may not change the substantive provisions of an order to be clarified, and a substantive change is not enforceable. Tex. Fam. Code § 157.423; *Lundy*, 973 S.W.2d at 688; *see* Tex. Fam. Code § 9.006.

The only basis for clarifying a prior decree is when a provision is ambiguous and non-specific. *Lundy*, 973 S.W.2d at 688; *see Bina v. Bina*, 908 S.W.2d 595, 598 (Tex. App.—Fort Worth 1995, no writ). In the absence of an ambiguity, the trial court is without authority to modify the judgment. *Lundy*, 973 S.W.2d at 688–89. A court may not

modify the original judgment under the guise of clarification. *Dunn v. Dunn*, 708 S.W.2d 20, 23 (Tex. App.—Dallas 1986, no writ), *citing McGehee v. Epley*, 661 S.W.2d 924, 925 (Tex. 1983) (per curiam). A motion to clarify does not extend the time to file the notice of appeal. *See* Tex. R. App. P. 26.1. A motion to clarify is analogous to a judgment nunc pro tunc in that it may not substantively change a final order. *In re Marriage of Ward*, 137 S.W.3d 910, 913 (Tex. App.—Texarkana 2004, no pet.).

Clarifying orders may more precisely specify the manner of carrying out the property division previously ordered, as long as the substantive division of the property is not altered. Tex. Fam. Code § 9.006(b); *In re Marriage of McDonald*, 118 S.W.3d 829, 832 (Tex. App.—Texarkana 2003, pet. denied).

The trial court may not render an order to clarify the property division made or approved in the decree before the thirtieth day after the date the final judgment is signed. If a timely motion for new trial or to vacate, modify, correct, or reform the decree is filed, the trial court may not render an order to clarify the property division made or approved in the decree before the thirtieth day after the date the order overruling the motion is signed or the motion is overruled by operation of law. Tex. Fam. Code § 9.007(c).

Motion to Modify, Correct, or Reform vs. Judgment Nunc Pro Tunc: A motion to modify, correct, or reform the judgment may be used to correct either a judicial error or a clerical error within the first thirty days following entry of the judgment. After the first thirty days following the signing of the judgment, if an order is entered to correct a judicial error in the guise of judgment nunc pro tunc, that order is void. The only ground for a motion for judgment nunc pro tunc is to correct a clerical error made in entering the judgment as opposed to a judicial error made in rendering the judgment. *See Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). A clerical error may be corrected at any time. *See* Tex. R. Civ. P. 316. If it is corrected after the court loses plenary jurisdiction, the appellate timetable is not extended for any complaint about the original judgment. Tex. R. Civ. P. 306a(6).

A clerical error is a discrepancy between the entry of a judgment in the official record and the judgment as it was actually rendered. *Universal Underwriters Insurance Co. v. Ferguson*, 471 S.W.2d 28, 29–30 (Tex. 1971) (orig. proceeding). A clerical error does not result from judicial reasoning or determination. *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986) (per curiam). A clerical error includes a variance between the judgment signed and the judgment the court intended to sign. *Delaup v. Delaup*, 917 S.W.2d 411,

413 (Tex. App.—Houston [14th Dist.] 1996, no writ) (judgment did not reflect settlement agreement made in open court).

When deciding whether an error in a judgment is clerical or judicial, the court must look to the judgment actually rendered and not the judgment that should have been rendered. Whether an error is judicial or clerical is a question of law. *Escobar*, 711 S.W.2d at 231–32. A split of authority exists as to what amount of evidence is required to prove that the error was clerical rather than judicial. *Woodward v. Woodward*, No. 14-18-00039-CV, 2019 WL 3943020, at *3 (Tex. App.—Houston [14th Dist.] Aug. 20, 2019, no pet. h.) (mem. op.) (applying "some probative evidence" standard articulated in *Escobar*, while noting that First and Thirteenth Courts of Appeals have applied "clear and convincing evidence" standard).

In *In re A.M.R.*, 528 S.W.3d 119 (Tex. App.—El Paso 2017, no pet.), the trial court orally granted the father's request to impose a geographic restriction on the child's residence to El Paso County, Texas. The trial court subsequently entered a final written order that stated the geographic restriction would be lifted if the father failed to reside within El Paso County, Texas. The father filed a motion for judgment nunc pro tunc and requested the provision be removed because he did not live in El Paso County, Texas, and the court's oral rendition of judgment did not contain such a stipulation on the child's geographic restriction. The trial court granted the request and entered a judgment nunc pro tunc that deleted the contested provision. The mother appealed, arguing the judgment nunc pro tunc was void because it impermissibly corrected a judicial error rather than clerical error. The appellate court affirmed, holding that the trial court's removal of the provision lifting the geographic restriction if the father did not live in El Paso County constituted clerical error, not a judicial error, because the trial court did not intend for the geographic restriction to be conditioned on the father's residence when the court orally rendered judgment.

Correction of the start date for child support to comport with the date of divorce is a correction of a judicial error, not of a clerical error. *Rawlins v. Rawlins*, 324 S.W.3d 852, 856–57 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding).

§ 26.5 Request for Findings of Fact and Conclusions of Law

A trial judge has the authority and duty to file requested findings of fact and conclusions of law where there has been an evidentiary hearing to the court or a bench trial on the merits. This duty does not extend to requests for findings and conclusions from postjudgment hearings. Also, a dismissed complaint imposes no duty on the trial judge

to file findings of fact and conclusions of law. *Zimmerman v. Robinson*, 862 S.W.2d 162, 164 (Tex. App.—Amarillo 1993, no writ). If the case is tried in part to a jury and in part to the court, findings and conclusions are available in the nonjury portion of the trial. Additionally, when the judgment of the court differs substantially from or exceeds the scope of the jury verdict, findings are available. *Roberts v. Roberts*, 999 S.W.2d 424, 433 (Tex. App.—El Paso 1999, no pet.).

If the trial judge dies before filing findings of fact and conclusions of law in a case pending at his death, the judge's successor may file them. Tex. Civ. Prac. & Rem. Code § 30.002(b). A successor judge may make findings of fact and conclusions of law when the preceding judge has died, resigned, or become disabled during his term of office. *See* Tex. R. Civ. P. 18. However, a successor judge who takes the bench after defeating his predecessor in an election lacks authority to issue findings of fact and conclusions of law for a trial heard by his predecessor. *Ad Villarai, LLC v. Pak*, 519 S.W.3d 132 (Tex. 2017) (per curiam).

The Government Code defines "retired judge" to mean a person who has retired under one of the judicial retirement systems of Texas (i.e., a "retiree") or the county and district retirement system. Tex. Gov't Code § 74.041(3), (6). A "former judge," on the other hand, is a person who has served as an active judge in Texas but is *not* a retired judge. Tex. Gov't Code § 74.041(5). Any retiree may elect to be a judicial officer and is then designated a "senior judge." Tex. Gov't Code § 75.001. A former appellate judge may also elect to serve as a judicial officer, but a senior appellate judge can be assigned to more courts in a broader geographic area. *Compare* Tex. Gov't Code § 75.002 (assignment of retiree) *and* Tex. Gov't Code § 75.003 (assignment of former judge). A judge's status is fixed when he leaves office. If neither article 30.002 nor rule 18 applies to a case that requires findings of fact and conclusions of law, the case must be remanded for a new trial. *In re J.D.H.*, No. 05-14-00504-CV, 2016 WL 3946822, at *6 (Tex. App.—Dallas July 18, 2016, no pet.) (mem. op.).

In a nonjury trial, findings of fact serve the same purpose that the jury's answers to the jury's questions do; they resolve the factual disputes in the case. Conclusions of law are the court's statement of the legal bases that it applied to resolve the facts in the case. Findings of fact governed by rule 296 of the Texas Rules of Civil Procedure should be requested by the party who loses; otherwise, facts are deemed in favor of the judgment. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam).

When It Is Necessary to Request Findings of Fact: Requests for findings of fact are necessary (1) in any case tried without a jury (Tex. R. Civ. P. 296), (2) in a nonjury case

that is resolved by a judgment after the petitioner rests (*Qantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988)), and (3) when the jury omits elements of an issue (*see* Tex. R. Civ. P. 296). When part of the case is tried to a jury and part is tried to the court, findings of fact should be requested on the issues decided by the court. *Roberts*, 999 S.W.2d at 433–34.

When Findings of Fact Are Helpful: Findings of fact are helpful (1) when the court rules on jurisdiction challenges after an evidentiary hearing (*see Goodenbour v. Goodenbour*, 64 S.W.3d 69, 76 (Tex. App.—Austin 2001, pet. denied)), (2) after the court holds a hearing on motion to transfer venue (*see Challenger Sales & Supply v. Haltenberger*, 730 S.W.2d 453, 455 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.)), and (3) after an evidentiary hearing on a motion for new trial (*see Higginbotham v. General Life & Accident Insurance Co.*, 796 S.W.2d 695, 695 (Tex. 1990)).

When Findings of Fact Are Inappropriate: Findings of fact are inappropriate and will not extend the time within which to perfect the appeal (1) when issues are tried to a jury, (2) when the court renders a summary judgment, (3) when the court grants a directed verdict in a jury trial, and (4) when the court grants a judgment non obstante veredicto. *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997).

When Request for Findings of Fact Should Be Made:

Child support: Without regard to rules 296 through 299 of the Texas Rules of Civil Procedure, in rendering an order of child support, the court shall make findings of fact if (1) a party files a written request with the court before the final order is signed, but not later than twenty days after the date of rendition of the order, (2) a party makes an oral request in open court during the hearing, or (3) the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines under section 154.125 or 154.129, as applicable. Tex. Fam. Code § 154.130(a). Findings under section 154.130 are not required if a trial court merely denies a request for modification of child support. *Hardin v. Hardin*, 161 S.W.3d 14, 19–20 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

COMMENT: Section 154.130 is unclear as to the mechanism by which a party should obtain the mandatory findings when the amount of the child support order varies from the amount computed by applying the percentage guidelines. Since without the findings an appellate court will not know the basis of the court order or that the child support order varies, to preserve error a written request for the findings should be requested

before the order is signed, as part of a rule 296 request, or in a motion to modify, correct, and reform the judgment.

Possession: In all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, including a possession order for a child under three years of age, on request by a party, the court shall state in writing the specific reasons for the variance from the standard order. A request for findings of fact under this provision must conform to the Texas Rules of Civil Procedure. Tex. Fam. Code § 153.258. A party may ask for these findings any time the trial court's possession order varies from the standard possession order. *See In re Rangel*, No. 04-17-00060-CV, 2017 WL 1161173, at *2 (Tex. App.—San Antonio Mar. 29, 2017, orig. proceeding) (mem. op.) (despite timely request, trial court failed to include mandatory findings in temporary order that varied from standard possession order). Under the rules, the first request for findings of fact must be filed within twenty days of the date that the court signs the judgment. *See* Tex. R. Civ. P. 296.

Marital property/tort claims: Unlike findings of fact for child support and possession, the timetable for findings of fact associated with the division of the marital property and tort claims is not subject to special provisions set forth in the Texas Family Code. Accordingly, rule 296 of the Texas Rules of Civil Procedure applies, and the first request for findings of fact must be filed within twenty days of the date that the court signs the judgment. *See* Tex. R. Civ. P. 296.

Trial Court's Response: It is the clerk's duty to immediately call the request to the attention of the judge who tried the case. Tex. R. Civ. P. 296. The trial court shall file findings of fact within twenty days of receiving the request. Tex. R. Civ. P. 297.

The courts of appeals are split on whether an appellate court may consider findings included in the final order but not in findings of fact and conclusions of law. The Amarillo court of appeals in *Hill* held that if the findings in the judgment do not conflict with the findings of fact and conclusions of law, those in the judgment have effect. *Hill v. Hill*, 971 S.W.2d 153, 157 (Tex. App.—Amarillo 1998, no pet.). A Houston court of appeals reached a different conclusion, stating that the purpose of rule 299a is clear. Findings of fact and conclusions of law shall not be recited in a judgment. If they are, they cannot form the basis of a claim on appeal. *Frommer v. Frommer*, 981 S.W.2d 811, 814 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd). In *Tate v. Tate*, the El Paso court of appeals noted that findings of fact and conclusions of law were not filed and that the appellee's attorney had drafted the decree that included the findings. The court

therefore concluded that the appellee had waived any complaint regarding the invalidity of those findings. *Tate v. Tate*, 55 S.W.3d 1, 7 n.4 (Tex. App.—El Paso 2000, no pet.).

Second Request for Findings of Fact and Conclusions of Law: If the trial court fails to file findings of fact within twenty days after the first request, the requesting party has thirty days from the date of the original request to file a notice of past due findings of fact and conclusions of law. The clerk must immediately call the notice to the court's attention. Tex. R. Civ. P. 297. If the requesting party fails to file a notice of past due findings of fact and conclusions of law, the right to complain of the court's failure to file findings of fact and conclusions of law is waived. *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 231–32 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Once a party files a notice of past due findings of fact and conclusions of law, the trial court has forty days from the filing of the party's first request to file findings and conclusions. Tex. R. Civ. P. 297.

Appeal from Interlocutory Order: In an appeal from an interlocutory order, which is an accelerated appeal, the trial court need not file findings of fact and conclusions of law; however, it may file findings and conclusions within thirty days of the date of the signing of the order. *See* Tex. R. App. P. 28.1(c).

Request for Additional or Amended Findings of Fact and Conclusions of Law: Once the trial court files findings and conclusions, either party has ten days to request additional or amended findings or conclusions. Tex. R. Civ. P. 298. If the court omitted a finding on a material fact, the requesting party must submit a specific proposed finding. *See Alvarez v. Espinoza*, 844 S.W.2d 238, 241–42 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.) (per curiam).

Effect of Trial Court's Failure to File Findings of Fact and Conclusions of Law after Proper Request: If a party timely and properly files a request for findings of fact, the trial court has a mandatory duty to file findings of fact and harm will be presumed unless the record on appeal affirmatively shows no injury to the complaining party. *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989). If the record shows, however, that the appellant suffered no harm, this presumption may be rebutted. *Roberts*, 999 S.W.2d at 436–37. Whether the requesting party suffers harm rests on whether the circumstances of a particular case require an appellant to guess the reason or reasons that the trial court ruled against him. *See Thomas James Associates v. Owens*, 1 S.W.3d 315, 319 (Tex. App.—Dallas 1999, no pet.).

Effect of Parties' Failure to Request Findings of Fact and Conclusions of Law: If no party requests findings of fact and conclusions of law, the appellate court is compelled to uphold the judgment of the trial court on any theory of law applicable to the case. All facts should be deemed found against the appealing party and in support of the portion of the judgment from which he appeals. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987) (per curiam). The appellate court can consider only the evidence most favorable to the implied factual findings and will disregard all opposing or contradictory evidence. *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (Tex. 1950).

Effect of Filing Request for Findings of Fact: In a case in which findings of fact are appropriate, a timely filed request for findings and conclusions extends the deadline for filing a notice of appeal. Tex. R. App. P. 26.1; *see also IKB Industries (Nigeria) Ltd.*, 938 S.W.2d at 443. A request for findings of fact, however, does not extend a trial court's plenary power. *In re Gillespie*, 124 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding); *see also Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308, 310 (Tex. 2000). Even though its plenary power has expired, the trial court is not prevented from entering properly requested findings and conclusions. *Robles v. Robles*, 965 S.W.2d 605, 610–11 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). *But see Sonnier v. Sonnier*, 331 S.W.3d 211, 214 (Tex. App.—Beaumont 2011, no pet.).

Effect of Trial Court's Filing of Belated Findings of Fact and Conclusions of Law: The procedural rules establishing the time limits for the requesting and filing of findings of fact and conclusions of law do not preclude the trial court from issuing belated findings. *Robles*, 965 S.W.2d at 610. When a court files belated findings the only issue that arises is the injury to the appellant, not the trial court's jurisdiction to make the findings. *Morrison v. Morrison*, 713 S.W.2d 377, 381 (Tex. App.—Dallas 1986, writ dism'd). Unless they can show injury, litigants have no remedy if a trial court files untimely findings and conclusions. Injury may be in one of two forms: (1) the litigant was unable to request additional findings or (2) the litigant was prevented from properly presenting his appeal. If injury is shown, the appellate court may abate the appeal so as to give the appellant the opportunity to request additional or amended findings in accordance with the rules. *Robles*, 965 S.W.2d at 610.

§ 26.6 Findings of Fact and Conclusions of Law

Child Support: If findings are required, the court shall state whether the application of the guidelines would be unjust or inappropriate and shall state (1) the amount of the obligor's net resources per month, (2) the amount of the obligee's net resources per month, (3) the percentage applied to the obligor's net resources for child support, and (4) if applicable, the specific reasons the amount ordered varies from the amount computed by applying the percentage guidelines under section 154.125 or 154.129, as applicable. Tex. Fam. Code § 154.130(b). Findings concerning the amount of the obligee's net resources per month are required only if evidence of such resources has been offered. Tex. Fam. Code § 154.130(c).

COMMENT: If it becomes necessary to seek findings of fact in regard to the amount of child support, note that the monthly net resources of the obligee is a mandatory finding. Accordingly, such information should be sought and obtained during discovery in case it becomes an issue at trial. Typically, when this information is requested during discovery in cases in which the obligor is not seeking custody, a relevance objection is raised. However, this information is clearly relevant to an obligor's decision to seek a variance from guideline support.

The court's failure to make these findings on proper request constitutes reversible error. *Hanna v. Hanna*, 813 S.W.2d 626, 628 (Tex. App.—Houston [1st Dist.] 1991, no writ). The requirement to make these findings does not extend to orders denying a motion to modify child support and effectively ordering the continued payment of child support set in the original order. *In re Striegler*, 915 S.W.2d 629, 635 (Tex. App.—Amarillo, 1996, writ denied).

Possession: The requirement to make findings under section 153.258 is mandatory on proper request. *See* Tex. Fam. Code § 153.258. Under section 153.258, the trial court must state in writing specific reasons for the variance from the standard possession order. The court may not simply state that the special needs of the child render the application of the standard possession order unworkable and inappropriate. *Voros v. Turnage*, 849 S.W.2d 353, 354–55 (Tex. App.—Houston [1st Dist.] 1992) (per curiam), *on appeal after remand*, 856 S.W.2d 759 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Requiring a court to state specific reasons for variance is functionally equivalent to making findings of fact. *In re T.J.S.*, 71 S.W.3d 452, 458–59 (Tex. App.—Waco 2002, pet. denied).

Property Division: In a suit for dissolution of marriage in which the court orders a division of the estate, on a party's request the court shall state in writing its findings of fact and conclusions of law, including the characterization and value of all assets, liabilities, claims, and offsets on which disputed evidence has been presented. The request for findings of fact and conclusions of law must conform to the Texas Rules of Civil Procedure. These findings of fact and conclusions of law are in addition to any other findings or conclusions required or authorized by law. Tex. Fam. Code § 6.711.

§ 26.7 Formal Bill of Exception

To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception. Tex. R. App. P. 33.2. There is no specific form for the bill; however, the objection to the court's ruling must be stated with enough specificity to make the trial court aware of the complaint. Tex. R. App. P. 33.2(a). A formal bill of exception must be filed no later than thirty days after the filing party's notice of appeal is filed. Tex. R. App. P. 33.2(e).

§ 26.8 Relief Pending Appeal

Suspension of Judgment: The filing of the notice of appeal does not suspend enforcement of the judgment, and enforcement of the judgment may proceed, unless the judgment is superseded in accordance with rule 24 of the Texas Rules of Appellate Procedure. Tex. R. App. P. 25.1(h)(1). In a divorce action, a judgment requiring a party to take a specific action, such as signing a special warranty deed, stock transfers, a qualified domestic relations order, or any other type of document to effectuate a property transfer, or to pay a money judgment would need to be superseded in order to stay the enforcement of that judgment. A party has an absolute right to supersede a money judgment pending appeal. Tex. R. App. P. 24.1; *Ex parte Kimbrough*, 146 S.W.2d 371, 372 (Tex. 1941) (orig. proceeding); *State ex rel. State Highway & Public Transportation Commission v. Schless*, 815 S.W.2d 373, 375 (Tex. App.—Austin 1991, orig. proceeding) (per curiam). The judgment creditor may supersede the judgment by (1) filing with the trial court clerk a written agreement with the judgment creditor for suspending the enforcement of the judgment, (2) filing with the trial court clerk a good and sufficient bond, (3) making a deposit with the trial court clerk in lieu of a bond, or (4) providing alternate security ordered by the court. Tex. R. App. P. 24.1(a). Once a judgment is superseded, enforcement of a judgment is suspended and, if already begun, must cease. If execution has been issued, the clerk will promptly issue a writ of supersedeas. Tex. R. App. P. 24.1(f). However, if the clerk has not issued a writ of execution, the trial court

has discretion in issuing a writ of supersedeas. *In re Fuentes*, 530 S.W.3d 244 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding).

The trial court may not render an order to assist in the implementation of or to clarify the property division made or approved in the decree before the thirtieth day after the date the final judgment is signed. If a timely motion for new trial or to vacate, modify, correct, or reform the decree is filed, the trial court may not render an order to assist in the implementation of or to clarify the property division made or approved in the decree before the thirtieth day after the date the order overruling the motion is signed or the motion is overruled by operation of law. Tex. Fam. Code § 9.007(c).

In a suit involving conservatorship or custody of a child, an appeal from a final order, with or without a supersedeas bond, does not suspend the order unless suspension is ordered by the court rendering the order. The appellate court, on a proper showing, may permit the order to be suspended except in proceedings to terminate the parent-child relationship brought by certain governmental agencies. Tex. Fam. Code § 109.002(c); Tex. R. App. P. 24.2(a)(4); *Nixon v. Attorney General*, No. 05-17-01080-CV, 2018 WL 2126823, at *1 (Tex. App.—Dallas May 8, 2018 [mand. denied]) (mem. op.) (father claimed he would suffer irrevocable harm and hardship without suspension of judgment but did not elaborate on claim, so no abuse of discretion in not suspending enforcement).

Suit for Divorce, for Annulment, or to Declare Marriage Void: On the court's motion or on that of a party and after notice and hearing, the trial court may render a temporary order as considered equitable and necessary for the preservation of the property and for the protection of the parties during an appeal, including an order directed toward one or both parties. In addition to other matters, an order may require the support of either spouse, require the payment of reasonable and necessary attorney's fees and expenses, appoint a receiver for the preservation and protection of the parties' property, award one spouse exclusive occupancy of the parties' residence pending the appeal, enjoin a party from dissipating or transferring the property awarded to the other party in the trial court's property division, or suspend the operation of all or part of the property division that is being appealed. Tex. Fam. Code § 6.709(a).

A motion seeking an original temporary order under section 6.709 may be filed before trial and may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(h). The trial court retains jurisdiction to conduct a hearing and sign an original temporary order until the sixtieth day after the date any eligible party has filed

a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(i). The trial court retains jurisdiction to modify and enforce a temporary order unless the appellate court, on a proper showing, supersedes the trial court's order. Tex. Fam. Code § 6.709(j).

On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the preservation of the property or for the protection of the parties during the appeal. Tex. Fam. Code § 6.709(k). A party may seek review of the trial court's temporary order by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case, proper assignment in the party's brief, or petition for writ of mandamus. Tex. Fam. Code § 6.709(*l*). A temporary order rendered under section 6.709 is not subject to interlocutory appeal. Tex. Fam. Code § 6.709(m).

A temporary order pending appeal enjoining a party from dissipating or transferring the property awarded to the other party in the trial court's property division may be rendered without the issuance of a bond between the spouses or an affidavit or a verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result. The temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. The temporary order may not prohibit a party's use, transfer, conveyance, or dissipation of the property awarded to the other party in the trial court's property division if the use, transfer, conveyance, or dissipation of the property is for the purpose of suspending the enforcement of the property division that is the subject of the appeal. Tex. Fam. Code § 6.709(b).

A temporary order that suspends the operation of all or part of the property division that is the subject of the appeal may not be rendered unless the trial court takes reasonable steps to ensure that the party awarded property in the trial court's property division is protected from the other party's dissipation or transfer of that property. Tex. Fam. Code § 6.709(c). In considering a party's request to suspend the enforcement of the property division, the trial court shall consider whether any relief granted under section 6.709(a) is adequate to protect the party's interest in the property awarded to the party or the party who was not awarded the property should also be required to provide security for the appeal in addition to any relief granted under section 6.709(a). Tex. Fam. Code § 6.709(d).

If the trial court determines that the party awarded the property can be adequately protected from the other party's dissipation of assets during the appeal only if the other party provides security for the appeal, the trial court shall set the appropriate amount of security, taking into consideration any relief granted under section 6.709(a) and the amount of security that the other party would otherwise have to provide by law if relief under section 6.709(a) was not granted. Tex. Fam. Code § 6.709(e).

In rendering a temporary order that suspends enforcement of all or part of the property division, the trial court may grant any relief under section 6.709(a), in addition to requiring the party who was not awarded the property to post security for that part of the property division to be suspended. The trial court may require that the party who was not awarded the property post all or only part of the security that would otherwise be required by law. Tex. Fam. Code § 6.709(f).

Section 6.709 does not prevent a party who was not awarded the property from exercising that party's right to suspend the enforcement of the property division as provided by law. Tex. Fam. Code § 6.709(g).

These temporary orders must be supported by the evidence presented at the temporary order hearing. *See In re Fuentes*, No. 01-16-00951-CV, 2017 WL 3184760 (Tex. App.—Houston [1st Dist.] July 27, 2017, orig. proceeding) (mem. op.) (temporary spousal support not required to maintain party's standard of living); *In re Fuentes*, 506 S.W.3d 586, 593–94 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

A relator may challenge temporary orders pending appeal obtained pursuant to section 6.709 by mandamus only if the trial court's order constitutes an abuse of discretion and the pending appeal provides an inadequate remedy. *In re Merriam*, 228 S.W.3d 413 (Tex. App.—Beaumont 2007, orig. proceeding) (per curiam).

If a party fails to comply with temporary orders pending appeal, the court of appeals may dismiss the appeal. *Rodriguez v. Borrego*, 536 S.W.3d 16 (Tex. App.—El Paso 2016, pet. denied) (appeal dismissed after husband given multiple opportunities to comply with temporary orders pending appeal failed to do so).

Suit Affecting Parent-Child Relationship: The court may, on its own motion or that of any party and after notice and hearing, make any order necessary to preserve and protect the safety and welfare of the child during the pendency of an appeal as the court may deem necessary and equitable. To establish that the temporary orders are for the safety and welfare of the child, the requesting party need only show that the party "has primary responsibility of the children and for the care and upkeep of and the debt on the

children's principal home." *Marcus v. Smith*, 313 S.W.3d 408, 418 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

In addition to other matters, an order may appoint temporary conservators for the child and provide for possession of the child, require the temporary support of the child by a party, enjoin a party from molesting or disturbing the peace of the child or another party, prohibit a person from removing the child beyond a geographical area identified by the court, require payment of reasonable and necessary attorney's fees and expenses, or suspend the operation of the order or judgment that is being appealed (except an order or judgment terminating the parent-child relationship in a suit brought by certain governmental agencies). Tex. Fam. Code § 109.001(a), (d).

A temporary order pending appeal enjoining a party from molesting or disturbing the peace of the child or another party may be rendered without the issuance of a bond between the parties or an affidavit or a verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result. The temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. Tex. Fam. Code § 109.001(b).

A motion seeking an original temporary order under section 109.001 may be filed before trial and may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.001(b–1). The trial court retains jurisdiction to conduct a hearing and sign a temporary order until the sixtieth day after the date any eligible party has filed a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.001(b–2).

The court retains jurisdiction to modify and enforce these orders unless the appellate court, on a proper showing, supersedes the court's order. Tex. Fam. Code § 109.001(b–3). On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the safety and welfare of the child. Tex. Fam. Code § 109.001(b–4).

The temporary orders rendered by the trial court pending appeal are not subject to interlocutory appeal. Tex. Fam. Code § 109.001(c). A party may seek review of the trial

court's temporary order under section 109.001 by petition for writ of mandamus or proper assignment in the party's brief. Tex. Fam. Code § 109.001(b–5).

Attorney's Fees on Appeal: The trial court has the discretion to order one spouse to pay the other spouse attorney's fees pending appeal. *See Love v. Bailey-Love*, 217 S.W.3d 33, 36 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

But in a suit for dissolution of marriage, the award of appellate attorney's fees to the appellee must be conditioned on an appellant's unsuccessful appeal. *Moroch v. Collins*, 174 S.W.3d 849, 870 (Tex. App.—Dallas 2005, pet. denied). Further, in suit for dissolution of marriage, a trial court may not order a party to prepay the other party's conditional appellate attorney's fees into the registry of the court or include an unconditional award of appellate attorney's fees in the amount of a supersedeas bond. *In re Christensen*, No. 01-16-00893-CV, 2017 WL 1485574 (Tex. App.—Houston [1st Dist.] Apr. 25, 2017, orig. proceeding) (mem. op.). An unconditional award of appellate attorney's fees serves as an improper deterrent to appellate review. *In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding). Further, such a penalty improperly chills a party from exercising his legal rights. *Ford Motor Co.*, 988 S.W.2d at 722. A party may not be penalized for taking a successful appeal. *Siegler v. Williams*, 658 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1983, no writ).

An appellee may not recover attorney's fees for work performed on any issue of the appeal where the appellant was successful. However, an appellee may still recover attorney's fees for work performed on any issue of the appeal where the appellant was unsuccessful. If a party is entitled to attorney's fees from the adverse party on one claim but not another, the party claiming attorney's fees must segregate the recoverable fees from the unrecoverable fees. *Robertson v. Robertson*, No. 13-16-00309-CV, 2017 WL 6546005, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 21, 2017, no pet.) (mem. op.).

In a suit affecting the parent-child relationship, an award of appellate attorney's fees is not required to be conditioned on a successful appeal. *In re Jafarzadeh*, No. 05-14-01576-CV, 2015 WL 72693, at *2 (Tex. App.—Dallas Jan. 2, 2015, orig. proceeding) (mem. op.).

In *In re Jafarzadeh*, while acknowledging that at least three other courts of appeal have reached a contrary conclusion, the Dallas court of appeals held that in a suit affecting the parent-child relationship (SAPCR) deferring the fee award until resolution of an appeal is impractical because it fails to provide the resources necessary to the appellee

to defend the appeal. An award of attorney's fees in a SAPCR, unlike in other civil cases, is not based on a punitive or damages rationale, but rather on the rationale that the award is in the best interest of the child. Because both parents are responsible for providing for the child's needs, attorney's fees in a SAPCR may be imposed on either parent. Conditioning the award on an unsuccessful appeal may defeat the ability of the parent who prevailed in the trial court from defending an order that was in the best interest of the child. *In re Jafarzadeh*, 2015 WL 72693, at *2.

Attorney's fees on appeal are more fully discussed in section 20.23 in this manual.

§ 26.9 Motion to Withdraw Exhibits

The court may order a filed exhibit to be withdrawn by any party only on the party's leaving on file a certified copy, photocopy, or other reproduced copy of the exhibit. Tex. R. Civ. P. 75b.

§ 26.10 Motion to Seal Court Documents

The provisions of rule 76a of the Texas Rules of Civil Procedure concerning the sealing of court records specifically exclude documents filed in an action originally arising under the Family Code. Tex. R. Civ. P. 76a(2)(a)(3). The court, on the motion of a party or on the court's own motion, may order the sealing of the file, the minutes of the court, or both, in termination and adoption suits. *See* Tex. Fam. Code §§ 161.210, 162.021(a).

§ 26.11 Writ of Habeas Corpus Not Appealable Order

A writ of habeas corpus is reviewable only by mandamus.

> [T]he Legislature intended to effect a substantial change in the prior practice which permitted a habeas corpus proceeding to put in issue anew the right to custody. The Legislature intended a limited habeas corpus proceeding to compel obedience to existing court orders. *Standley v. Stewart*, 539 S.W.2d 882 (Tex. 1976); *Lamphere v. Chrisman*, 554 S.W.2d 935 (Tex. 1977); *McElreath v. Stewart*, 545 S.W.2d 955 (Tex. 1977); *Saucier v. Pena*, 559 S.W.2d 654 (Tex. 1978); *Trader v. Dear*, 565 S.W.2d 233 (Tex. 1978). It is for this reason, no doubt, that the Legislature did not provide for an appeal from such orders. The time exhausted by an appeal would tend to thwart the purpose of a limited proceeding.

Gray v. Rankin, 594 S.W.2d 409, 409 (Tex. 1980) (per curiam).

§ 26.12 Rules Governing Appeal

Rules of Appellate Procedure: The rules of appellate procedure govern procedure in appellate courts and before appellate judges. Tex. R. App. P. 1.1. Although an appellate court may not alter the time for perfecting an appeal in a civil case, it may on a party's motion or on its own initiative suspend a rule's operation in a particular case and order a different procedure. Tex. R. App. P. 2.

Local Rules: A court of appeals may promulgate rules governing its practice that are not inconsistent with the rules of appellate procedure. Tex. R. App. P. 1.2(a). Half of the fourteen courts of appeal in Texas have local rules of which attorneys must be aware when filing appeals in those courts. At the same time that a notice of appeal is filed, the attorney should request a copy of the local rules for the appellate court in which the appeal is to be filed. Some of the local rules may be found on the website for the specific court (**www.txcourts.gov**). Among other information, the local rules designate the number of copies of motions and briefs that should be filed in that appellate court; how to request oral argument in that appellate court; that appellate court's policy regarding requesting extensions of time; and how that specific appellate court handles various other matters. A court of appeals must not dismiss an appeal for noncompliance with a local rule without giving the noncomplying party notice and reasonable opportunity to cure the noncompliance. Tex. R. App. P. 1.2(c).

§ 26.13 Types of Appeals Available Other than Regular Appeal

Interlocutory Appeals: An interlocutory appeal is filed during the course of the proceedings. It has a very limited application, especially in family law cases. Section 51.014 of the Texas Civil Practice and Remedies Code sets forth the rules from which a party may file an interlocutory appeal. Tex. Civ. Prac. & Rem. Code § 51.014. Except in the rarest of cases the only orders routinely entered in family law cases from which an interlocutory appeal may be taken are the appointment of a receiver or trustee or the overruling of a motion to vacate an order that appoints a receiver or trustee. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(1), (a)(2). In these instances, the filing of an interlocutory appeal will stay the commencement of a trial in the trial court pending resolution of the appeal. Tex. Civ. Prac. & Rem. Code § 51.014(b). An appeal from an interlocutory order, when allowed, will be accelerated. Tex. R. App. P. 28.1(a). Provisions for permissive appeals of interlocutory orders under Tex. Civ. Prac. & Rem. Code

§ 51.014(d) do not apply to actions brought under the Family Code. Tex. Civ. Prac. & Rem. Code § 51.014(d–1).

Accelerated Appeal: Accelerated appeals are given preference over other appeals and are put on a faster track in the appellate court. *See* Tex. R. App. P. 26.1. An appeal from an interlocutory order, when allowed, must be accelerated. Tex. R. App. P. 28.1; *see Stanton v. University of Texas Health Sciences Center*, 997 S.W.2d 628, 629 n.1 (Tex. App.—Dallas 1998, pet. denied). Appeals required by statute to be accelerated or expedited and appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed are also accelerated appeals. Tex. R. App. P. 28.1(a). All appeals in parental termination and child protection cases are governed generally by the rules for accelerated appeals. Tex. R. App. P. 28.4. See the discussion at section 26.16 below. However, even though a bill of review challenges the termination of a father's parental rights, because a bill of review is a separate cause of action, an appeal of the bill of review is not accelerated. *In re A.A.S.*, 367 S.W.3d 905, 909–10 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

COMMENT: If a case involves child custody or support issues, the appellant should consider the filing of an accelerated appeal, which, although it involves onerous deadlines, can decrease the time in the appellate court from approximately two years in the larger courts of appeal to six to eight months. *See Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (per curiam) (justice demands speedy resolution of child custody and child support issues) (although the case involved mandamus, the principles enunciated would also support acceleration in the interest of justice if an erroneous custody or possession order is not in the best interest of the child); Tex. Fam. Code § 105.004 (although the statute does not specifically relate to appeals, it clearly enunciates the legislature's intent to place cases involving the best interest of children before routine civil matters).

Restricted Appeal: Restricted appeals replace writ of error appeals to the court of appeals. Statutes pertaining to writ of error appeals to the court of appeals apply equally to restricted appeals. Tex. R. App. P. 30. A restricted appeal is a direct attack on the judgment of a trial court. *See O'Neal v. O'Neal*, 69 S.W.3d 347, 348 (Tex. App.—Eastland 2002, no pet.). The requirements for the filing of a restricted appeal are jurisdictional "and will cut off a party's right to seek relief by way of a restricted appeal if they are not met." *Clopton v. Pak*, 66 S.W.3d 513, 515 (Tex. App.—Fort Worth 2001, pet. denied).

A restricted appeal requires that (1) the appellant filed notice within six months after the judgment or order appealed from was signed; (2) the appellant was a party to the underlying suit; (3) the appellant did not timely file a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; (4) the appellant did not participate, either in person or through counsel, in the actual trial of the case; and (5) the trial court erred, and the error is apparent from the face of the record. Tex. R. App. P. 30; *Wright Bros. Energy Inc. v. Krough*, 67 S.W.3d 271, 273 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see also* Tex. R. App. P. 26.1(c); *Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam).

Review by restricted appeal affords an appellant the same scope of review as an ordinary appeal, that is, a review of the entire case. The only restriction on the scope of the restricted appeal is that the error must appear on the face of the record. The face of the record consists of all the papers on file in the appeal, including the reporter's record. *In re E.M.V.*, 312 S.W.3d 288, 290 (Tex. App.—Dallas 2010, no pet.). A restricted appeal requires error that is *apparent*, not error that may be *inferred*. *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004) (per curiam).

In addition to citation and service issues, a restricted appeal confers jurisdiction on the appellate court to review whether the evidence is legally and factually sufficient to support the judgment. *Norman Communications*, 955 S.W.2d at 270. The record must affirmatively show strict compliance with the rules for service of citation in order for a default judgment to withstand a direct attack. If strict compliance is not affirmatively shown, the service of process is invalid. There are no presumptions in favor of valid issuance, service, or return of citation in the face of a restricted appeal attack on a default judgment. *Hercules Concrete Pumping Service, Inc. v. Bencon Management & General Contracting Corp.*, 62 S.W.3d 308, 309–10 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Additionally, the trial court's discretion to divide the community estate unequally must be supported by evidence at trial, including values of the divided property. *In re E.M.V.*, 312 S.W.3d at 291.

Participation in trial: The nature and extent of participation precluding a restricted appeal in any particular case is a matter of degree, because trial courts decide cases in a myriad of procedural settings. The issue is whether the appellant participated in the decision-making event resulting in the judgment adjudicating the appellant's rights. It is the fact of nonparticipation, not the reason for the nonparticipation, that determines the right to a restricted appeal. *Texaco, Inc. v. Central Power & Light Co.*, 925 S.W.2d 586, 589–90 (Tex. 1996). Courts must liberally construe the nonparticipation requirement for restricted appeals in favor of the right to appeal. *Pike-Grant v. Grant*, 447 S.W.3d

884, 886 (Tex. 2014) (per curiam) (recitation in divorce decree that mother appeared conflicted with court's docket sheet and reporter's record).

The law is clear that signing a waiver of service alone is not sufficient to constitute participation for purposes of a restricted appeal. *See, e.g., Stubbs v. Stubbs*, 685 S.W.2d 643, 645 (Tex. 1985). This is true even when the language of the waiver indicates that by signing, one is entering an appearance as a substitute for going to trial, giving a judge permission to make decisions in the case without further notice to the signor, and waiving the making of a record of testimony. *In re Marriage of Butts*, 444 S.W.3d 147, 151 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Postjudgment motion: If a postjudgment answer does not seek to set aside an existing judgment and request litigation of the issue, it does not constitute a motion for new trial or postjudgment motion that would preclude the filing of a restricted appeal. *See Barry v. Barry*, 193 S.W.3d 72, 74 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Error on face of record: If the return of service does not include an endorsement on the process of the day and hour of its receipt by the officer for service, there is error on the face of the record. *In re Z.J.W.*, 185 S.W.3d 905, 907 (Tex. App.—Tyler 2006, no pet.). If the court grants a party more relief than the party requested in his petition, there is error on the face of the record. *Binder v. Joe*, 193 S.W.3d 29, 33 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also In re B.M.*, 228 S.W.3d 462 (Tex. App.—Dallas 2007, no pet.) (father requested only temporary relief regarding conservatorship and custody, and trial court entered final order granting him sole managing conservatorship and custody of child). If the decree states that the parties waived the making of a record, but one party did not appear at trial, error is apparent on the face of the record. *Arbogust v. Graham*, No. 03-17-00800-CV, 2018 WL 3150996 (Tex. App.—Austin June 28, 2018, no pet.) (mem. op.). Service on a party's attorney who is not an attorney of record—that is, one who has filed pleadings or appeared in court—is not proper service and constitutes error on the face of the record. *Moreno v. Moreno*, No. 04-17-00586-CV, 2018 WL 3440713, at *2 (Tex. App.—San Antonio July 18, 2018, no pet.) (mem. op.).

The law presumes that a trial court hears a case only after proper notice to the parties. If the record is silent as to whether notice of a trial setting was given, no error appears on the face of the record. Absence of notice from the clerk's record of trial setting is not proof that a party did not get notice, especially when the judgment includes a recitation that due notice was given. *Richardson v. Sims*, No. 01-15-01115-CV, 2016 WL 5787291, at *2 (Tex. App.—Houston [1st Dist.] Oct. 4, 2016, no pet.) (mem. op.).

§ 26.14 Notice of Appeal

A party perfects an appeal by filing a written notice of appeal with the trial court clerk. If the party mistakenly files the notice of appeal with the appellate court, the notice is deemed to be filed with the trial court clerk on that same day, and the appellate clerk must immediately send the trial court clerk a copy of the notice. The filing of a notice of appeal invokes the jurisdiction of the appellate court. The party that is seeking to alter the trial court's judgment is the person who files the notice of appeal. Parties whose interests are aligned may file a joint notice of appeal. Tex. R. App. P. 25.1(a)–(c). The notice of appeal may be combined with a motion for new trial. *In re J.M.*, 396 S.W.3d 528, 530 (Tex. 2013) (per curiam).

The notice should (1) identify the trial court and the cause number and style of the case; (2) state the date of judgment or order from which the party is appealing; (3) state that the party desires to appeal; (4) designate the court to which the appeal is taken, unless the appeal is to either the first or fourteenth court of appeals, in which case the notice must state that the appeal is to either of those courts; (5) state the name of each party filing the notice; and (6) state, if applicable, that the appellant is presumed indigent and may proceed without paying costs. Tex. R. App. P. 25.1(d)(1)–(5), (d)(8).

In an accelerated appeal, the notice must also state that the appeal is accelerated and state whether it is a parental termination or child protection case. Tex. R. App. P. 25.1(d)(6). In a restricted appeal, the notice must also state that the appellant is a party affected by the judgment but that he did not participate in the hearing resulting in the judgment; state that the appellant did not file a timely postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and be verified by the appellant if the appeal is pro se. Tex. R. App. P. 25.1(d)(7).

The appellant is not required to specify issues in a general or restricted notice of appeal under Tex. R. App. P. 25.1(d). *Vazquez v. Vazquez*, 292 S.W.3d 80 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

The appellant must serve the notice of appeal on all parties to the trial court's final judgment and deliver a copy of the notice of appeal to each court reporter responsible for preparing the reporter's record. Tex. R. App. P. 25.1(e).

Although a cost bond is not required, the court clerk and the court reporter are not responsible for preparing, certifying, and timely filing the record unless the appellant either has paid the fees, is entitled to appeal without paying the fees, or has "made satisfactory arrangements" to pay the fees. Tex. R. App. P. 35.3. Although it remains to be

decided, a bond to secure payment should be a "satisfactory arrangement" in most cases. Supersedeas bonds, deposits in lieu of bond, and alternative security are allowed. *See* Tex. R. App. P. 24.1. If the appeal is from a money judgment, the bond, deposit, or security must include costs, but the amount may not exceed the lesser of 50 percent of the judgment debtor's current net worth or 25 million dollars. Tex. R. App. P. 24.2(a)(1).

Although the trial court clerk is responsible for timely filing the clerk's record and the official or deputy reporter is responsible for filing the reporter's record (Tex. R. App. P. 35.3), the appellate court may dismiss the appeal if the appellant is at fault for the failure to file. Tex. R. App. P. 37.3.

COMMENT: An amicus attorney represents the trial court, which is not a party to the suit. Therefore, an amicus attorney has no basis for filing a notice of appeal or filing a brief in the appellate court. *See O'Connor v. O'Connor*, 245 S.W.3d 511 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

§ 26.15 Time for Filing Notice of Appeal

Caution: Since all termination cases and all cases involving placement of children under the care of the Texas Department of Family and Protective Services (TDFPS) are subject to accelerated appeals, the applicable deadlines for filing the notice of appeal must be met, or appellate rights are waived. See the deadlines set forth below in this section and the discussion in section 26.16 below.

§ 26.15:1 Deadline for Filing Accelerated Appeal

In an accelerated appeal, the notice of appeal must be filed within twenty days after the judgment or order is signed. Tex. R. App. P. 26.1(b). Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal within the time allowed by rule 26.1(b) or as extended by rule 26.3. Tex. R. App. P. 28.1(b). (Extension of time under rule 26.3 is discussed in section 26.15:6 below). Filing a motion for new trial, any other posttrial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal. Tex. R. App. P. 28.1(b).

Certain statutes and rules mandate the acceleration of certain types of appeals and require that the appeal be placed on a shortened time-table for filing of the notice of appeal, filing of the record, briefs, and submission. There are two grounds for acceleration:

1. *Mandatory:* Acceleration of the appeal may be mandatory because of some statute or rule, including (1) appeals in suits in which termination of the parent-child relationship is ordered (*see* Tex. Fam. Code § 109.002; Tex. R. App. P. 28.4 (termination "at issue"); *In re J.C.*, 146 S.W.3d 741 (Tex. App.—Texarkana 2004, no pet.) (appeal dismissed because notice not filed within twenty days of judgment)); (2) appeals of final orders rendered under chapter 263, placement of children under the care of TDFPS (*see* Tex. Fam. Code § 263.405(a); Tex. R. App. P. 28.4); (3) appeals of cases involving the Uniform Child Custody Jurisdiction and Enforcement Act, which must be in accordance with accelerated appellate procedures as in other civil cases (*see* Tex. Fam. Code § 152.314; *In re K.L.V.*, 109 S.W.3d 61, 67 (Tex. App.—Fort Worth 2003, pet. denied) (appeal dismissed because notice of appeal filed outside deadline provided by Texas Rules of Appellate Procedure)); and (4) appeals from interlocutory orders (*see* Tex. R. App. P. 28.1(a)), which would include in the family law context an order that appoints a receiver or trustee, an order that grants or denies a temporary injunction, and an order that grants or denies a defendant's special appearance made under rule 120(a) of the Texas Rules of Appellate Procedure (*see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(1), (a)(4), (a)(7)) and an order denying the intervention or joinder of parties (Tex. Civ. Prac. & Rem. Code § 15.003).

2. *Preference in Interests of Justice:* Appeals may also be accelerated in the interests of justice. The Texas Supreme Court has held that justice demands a speedy resolution of child custody and child support issues. *See Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (per curiam). Although *Proffer* involved a mandamus, the principles enunciated would also support acceleration in the interest of justice if an erroneous custody or possession order is not in the best interest of the child. The Family Code also recognizes that, in cases involving children, if ordinary scheduling practices will unreasonably affect the best interest of the children, the case should be given a preferential setting. *See* Tex. Fam. Code § 105.004. Although the statute does not specifically relate to appeals, it clearly enunciates the legislature's intent to place cases involving the best interest of children before routine civil matters.

COMMENT: In cases involving children, the attorney should always consider requesting that the appeal be accelerated in the interests of justice. Although the rules of appellate procedure do not expressly address how to obtain an accelerated appeal on this basis, it is suggested that the practitioner file a verified motion or attach an affidavit

setting forth facts that would warrant an acceleration of the appeal in the interests of justice.

§ 26.15:2 Deadline for Filing Regular Appeal

Usually, a notice of appeal must be filed within thirty days after the judgment is signed. However, the notice must be filed within ninety days after the judgment is signed if any party timely files a motion for new trial, a motion to modify the judgment, a motion to reinstate after a dismissal for want of prosecution, or a request for findings of fact and conclusions of law if findings and conclusions are required by the rules of civil procedure or, if not required, could be properly considered by the appellate court. Tex. R. App. P. 26.1(a).

Specifically, under the following circumstances, findings of fact and conclusions of law are not appropriate and the time to file the notice of appeal will not be extended beyond thirty days: (1) after a jury trial, on issues tried to the jury, *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997); (2) after the trial court renders a summary judgment, *IKB*, 938 S.W.2d at 441–42; (3) in a case tried to a jury but resolved by a directed verdict, *IKB*, 938 S.W.2d at 443; (4) after the trial court renders a judgment notwithstanding the verdict, *IKB*, 938 S.W.2d at 443; or (5) after the trial court renders a judgment based upon an agreed statement of facts as provided under rule 263 of the Texas Rules of Civil Procedure, *City of Galveston v. Giles*, 902 S.W.2d 167, 170 n.2 (Tex. App.—Houston [1st Dist.] 1995, no writ).

An appellant is not required to wait for a ruling on his motion for new trial before filing his notice of appeal. *In re Norris*, 371 S.W.3d 546, 553 (Tex. App.—Austin 2012, orig. proceeding).

§ 26.15:3 Deadline for Filing Restricted Appeal

In a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed. Tex. R. App. P. 26.1(c). A party who did not participate, either in person or through counsel, in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request findings of fact and conclusions of law or a notice of appeal within the deadlines set forth in rule 26.1(a) may file a restricted appeal. Tex. R. App. P. 30.

§ 26.15:4 Citation by Publication

The time to file a notice of appeal on a motion for new trial filed more than thirty days after judgment following citation by publication runs as if the judgment were signed on the date the motion for new trial was filed. Tex. R. App. P. 4.4; Tex. R. Civ. P. 306a(7). The parties adversely interested shall be cited as in other cases. Tex. R. Civ. P. 329(a). The citation form would ordinarily require an answer on the "Monday next following the expiration of twenty days" after service. *See* Tex. R. Civ. P. 99(c).

COMMENT: The trial court may not be able to grant a new trial because of service problems, but the rules do not excuse the movant from filing the notice of appeal within ninety days of filing the motion for new trial.

§ 26.15:5 Filing Notice of Appeal in Parental Notification Suit

A minor whose application to allow consent for an abortion without notification to or consent of a parent, managing conservator, or guardian has been denied may appeal to the court of appeals having jurisdiction over civil matters in the county in which the application is filed. On receipt of a notice of appeal, the clerk of the court that denied the application shall deliver a copy of the notice of appeal and record on appeal to the clerk of the court of appeals. On receipt of the notice and record, the clerk of the court of appeals shall place the appeal on the docket of the court. Tex. Fam. Code § 33.004(a). The court of appeals shall rule on such an appeal not later than 5:00 P.M. on the fifth business day after the date the notice of appeal is filed with the court denying the application unless the minor requests an extension. Tex. Fam. Code § 33.004(b). An expedited appeal shall be available to any pregnant minor to whom a court of appeals denies an application to authorize the minor to consent to the performance of an abortion without notification to or consent of a parent, managing conservator, or guardian. Tex. Fam. Code § 33.004(f).

COMMENT: The Texas Rules of Appellate Procedure do not address parental notification suits and contain no designated deadlines for filing the notice.

§ 26.15:6 Extension of Time for Filing of Notice of Appeal

The appellate court may extend the time to file the notice of appeal, including those for restricted appeals, if, within fifteen days after the deadline for filing the notice of appeal, the party files in the trial court the notice of appeal and files in the appellate court a motion requesting the extension. Tex. R. App. P. 26.3; *Wray v. Papp*, 434

S.W.3d 297, 299 (Tex. App.—San Antonio 2014, no pet.). Filing of the notice of appeal within fifteen days of the date that it was due implies a motion requesting an extension. The appellant, however, must still provide a reasonable explanation for the late filing. *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). A reasonable explanation means any plausible statement of circumstances indicating that the failure to file within the required time period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance. Any conduct short of deliberate or intentional noncompliance—even if that conduct can be characterized as professional negligence—qualifies as inadvertence, mistake, or mischance and would be accepted as a reasonable explanation. *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669–70 (Tex. 1989). General allegations of workload, standing alone, do not constitute good cause for an extension of time to file a brief and, therefore, may not constitute good cause for filing an extension of time to file the notice of appeal. *See Pool v. Texas Department of Family & Protective Services*, 227 S.W.3d 212 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

In *Weik v. Second Baptist Church of Houston*, 988 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), the appellant's explanation for failing to timely file the notice of appeal was based on advice from his attorney. The attorney told the appellant that, if he appealed while the trial court still had authority to reinstate the case and it did reinstate the case, the appellant would have a difficult time prosecuting his claim because of the trial court's displeasure. The attorney agreed to file the motion only after the trial court's plenary power expired. The court held this showed an intentional decision by the appellant to delay filing. Accordingly, the court dismissed the appeal for want of jurisdiction. *Weik*, 988 S.W.2d at 439.

In *Rodman v. State*, 47 S.W.3d 545 (Tex. App.—Amarillo 2000, no pet.), the court of appeals found the appellant's excuse was not reasonable when, after the state disclosed its intent to indict the appellant for other crimes after expiration of the time for giving notice of appeal, the appellant decided to appeal and preserve his eligibility for probation in the upcoming trials. The court found this demonstrated the appellant's intentional, deliberate decision not to file a notice of appeal within the time frame required by the rules. *Rodman*, 47 S.W.3d at 548.

In *Hykonnen v. Baker Hughes Business Support Services*, 93 S.W.3d 562 (Tex. App.—Houston [14th Dist.] 2002, no pet.), the appellate court held that the inability of the appellant to retain counsel to represent him on appeal due to a lack of funds was not a reasonable explanation for the need to obtain an extension of time to file his notice of appeal since the appellant did not contend he did not know of the deadline; rather, the appellant deliberately failed to file the notice until he found an attorney willing to repre-

sent him at little or no cost. The appellant presented no evidence of his diligence in securing counsel, and the notice of appeal was filed on the last day of the grace period. Additionally, the appellant had other options available, such as filing a pro se notice of appeal instead of seeking an extension of the due date. *Hykonnen*, 93 S.W.3d at 563–64.

Restricted appeals are exempted from the rule allowing for an extension of time for perfecting the appeal beyond the six-month period. Tex. R. App. P. 4.2(a)(2); *Maldonado v. Macaluso*, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.) (per curiam).

§ 26.15:7 Premature Filing of Notice of Appeal

"In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal." Tex. R. App. P. 27.1(a).

§ 26.15:8 Appellee's Notice of Appeal

If a party timely files a notice of appeal, any other party may file a notice of appeal within the applicable period, as provided in rule 26.1(a)–(c), or fourteen days after the first filed notice of appeal, whichever is later. Tex. R. App. P. 26.1(d).

§ 26.16 Appeals in Parental Termination and Child Protection Cases

The Texas Family Code provides that an appeal of a final order rendered under chapter 263, which addresses the placement of children under the care of the Texas Department of Family and Protective Services, is governed by the procedures for accelerated appeals in civil cases under the Texas Rules of Appellate Procedure. *See* Tex. Fam. Code § 263.405(a). A final order rendered under chapter 263 must contain a statement prescribed in section 263.405 regarding the right to appeal, application of the rules for accelerated appeals, and the possible result of failure to follow those rules. *See* Tex. Fam. Code § 263.405(b).

Amendments to the Texas Rules of Appellate Procedure made in accordance with these provisions of the Family Code provide that appeals in *all* parental termination cases (not just those brought by a governmental agency) and child protection cases are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Tex. R. App. P. 28.4. *See* Tex. R. App. P. 28.4(a)(1). A "parental termination case" is a suit in which termination of the parent-child relationship is in issue. Tex. R. App. P. 28.4(a)(2)(A). A "child protection case" is a suit affecting the parent-child

relationship filed by a governmental entity for managing conservatorship. Tex. R. App. P. 28.4(a)(2)(B).

In an accelerated appeal, notice of appeal in compliance with Tex. R. App. P. 25.1 must be filed within the time allowed by Tex. R. App. P. 26.1(b) (twenty days after the judgment or order is signed) or as extended by Tex. R. App. P. 26.3. Tex. R. App. P. 28.1(b). (Extension of time is discussed in section 26.15:6 above.) The appellate record must be filed within ten days after the notice of appeal is filed. Tex. R. App. P. 35.1(b). The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed and may extend the time if requested by the clerk or reporter; each extension must not exceed ten days. Tex. R. App. P. 35.3(c).

Several exceptions to the general rules for accelerated appeals apply to appeals in a parental termination or child protection case. The cumulative extensions of time to file the appellate record under Tex. R. App. P. 35.3(c) may not exceed sixty days unless there are extraordinary circumstances. Tex. R. App. P. 28.4(b)(2). When the reporter's responsibility to prepare, certify, and timely file the reporter's records arises under Tex. R. App. P. 35.3(b), the trial court must direct the reporter to immediately commence preparing the reporter's record and must arrange for a substitute reporter, if necessary. Tex. R. App. P. 28.4(b)(1). The restrictions in Tex. Civ. Prac. & Rem. Code § 13.003 on provision of a free statement of facts and transcript do not apply to these appeals. Tex. R. App. P. 28.4(b)(3).

If the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to begin the new trial no later than 180 days after the appellate court mandate is issued. Tex. R. App. P. 28.4(c).

The appellate courts should, as far as reasonably possible, ensure that the appeal of a parental termination or child protection suit is brought to final disposition (1) in the court of appeals, within 180 days of the date the notice of appeal is filed, and (2) in the Texas Supreme Court, within 180 days of the date the petition for review is filed. Tex. R. Jud. Admin. 6.2.

§ 26.17 Appointment of Attorney on Appeal

In cases filed by a governmental entity under subtitle E of title 5 of the Family Code in which termination of the parent-child relationship or appointment of a conservator is requested, the court must appoint an attorney ad litem to represent a parent in certain circumstances, including indigency. Tex. Fam. Code § 107.013(a). In such cases, the

court must require a party who claims indigency to file an affidavit of indigency (now called a statement of inability to afford payment of court costs) in accordance with rule 145(b) of the Texas Rules of Civil Procedure before the court may conduct a hearing to determine the parent's indigence. The court may consider additional evidence at the hearing and, if it determines that the parent is indigent, must appoint an attorney ad litem. Tex. Fam. Code § 107.013(d). A parent determined to be indigent is presumed to remain indigent for the duration of the suit and any appeal, unless the court on later motion determines that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances. Tex. Fam. Code § 107.013(e); *see* Tex. R. App. P. 20.1(b). The attorney ad litem continues to serve throughout the appeal process unless relieved of his duties or replaced. *See* Tex. Fam. Code § 107.016; *In re G.P.*, 501 S.W.3d 252, 253 (Tex. App.—Texarkana 2016, no pet.) (appointed counsel's duty extends through exhaustion or waiver of all appeals); *In re A.M.*, 495 S.W.3d 573, 582 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (appointed counsel's duty extends through exhaustion or waiver of all appeals). The attorney ad litem appointed under these provisions is entitled to reasonable fees and expenses. Tex. Fam. Code § 107.015(a), (c). No other provision in the Family Code provides for the appointment or payment of an attorney on appeal to assist an indigent parent.

The right to counsel under Family Code section 107.013(a)(1) through the exhaustion of appeals under section 107.016(3)(B) includes all proceedings in both the court of appeals and the Texas Supreme Court, including the filing of a petition for review. Once appointed by the trial court, counsel should be permitted to withdraw only for good cause and on appropriate terms and conditions. Mere dissatisfaction of counsel or client with each other is not good cause. Nor is counsel's belief that the client has no grounds to seek further review from the court of appeals' decision. *In re P.M.*, 520 S.W.3d 24, 27–28 (Tex. 2016).

Counsel's obligation to the client may still be satisfied by filing an appellate brief meeting the standards set in *Anders v. California*, 386 U.S. 738 (1967), that includes an assertion that on examination of the record and applicable law, the attorney has concluded that the appeal was frivolous. *See In re N.F.M.*, 582 S.W.3d 539, 545–46 (Tex. App.—San Antonio 2018, no pet.) (striking *Anders* brief because it failed to meet briefing requirements). An *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature. *See, e.g.*, *In re J.S.*, 584 S.W.3d 622, 639 (Tex. App.—Houston [1st Dist.] 2019, no pet. h.). Courts have a duty to see that withdrawal of counsel will not result in foreseeable prejudice to the client. If a court of appeals allows an attorney to withdraw, it must provide for the

appointment of new counsel to pursue a petition for review. In the Texas Supreme Court, appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief. *In re P.M.*, 520 S.W.3d at 27–28.

§ 26.18 Costs of Appeal—Indigence

Rule 20.1 of the Texas Rules of Appellate Procedure provides rules under which indigent parties may proceed without payment of filing fees in the appellate court. Fees charged for preparation of the appellate record are governed by rule 145 of the Texas Rules of Civil Procedure. Tex. R. App. P. 20.1(a).

Filing Fees in Appellate Court: A determination of indigence in the trial court carries forward to appeal in all cases, and there are also some other circumstances in which a party may be allowed to proceed in the appellate court without paying filing fees.

If statement was filed in trial court: A party who filed a statement of inability to afford payment of costs in the trial court under rule 145 of the Texas Rules of Civil Procedure is not required to pay filing fees in the appellate court unless the trial court overruled the party's claim of indigence in an order complying with rule 145, and the party is not required to pay the fees if the trial court ordered the party to pay partial costs or to pay costs in installments. Tex. R. App. P. 20.1(b)(1). Rule 145 allows the defendant or clerk to contest a statement of indigence by filing a written contest with notice to all parties; if the contest is granted, the trial court's order must state the reasons for which the court found the defendant could indeed afford the costs of the action. Tex. R. Civ. P. 145(f). A contest may be sustained when the allegedly indigent party presents no evidence indicating that payment of the costs would affect his ability to meet his own basic needs. *In re J.S.*, No. 05-17-00341-CV, 2017 WL 1455406 (Tex. App.—Dallas Apr. 20, 2017, no pet.) (mem. op.).

Thus, no new statement is required to be filed in the appellate court unless the trial court made affirmative findings under rule 145 that the party is able to afford all court costs and to pay those costs as they are incurred, and there is no provision in rule 20.1 for contesting the party's indigence. In an appeal from the trial court, the party must communicate in writing to the appellate court clerk—in the notice of appeal and in the docketing statement—that the party is presumed indigent. Tex. R. App. P. 20.1(b)(2).

A party who does not qualify under rule 20.1(b)(1) may proceed without paying filing fees if he establishes that his financial circumstances have materially changed since the date of the trial court's order under rule 145. The party must file a motion in the appel-

late court alleging that his financial circumstances have materially changed and file a *current* statement of inability to afford payment of court costs that complies with rule 145. (The statement filed in the trial court does not suffice.) The appellate court may decide the motion based on the record or may refer the motion to the trial court with instructions to hear evidence and issue findings of fact. In the latter situation, the appellate court must review the trial court's findings and the record of the hearing before ruling on the motion. Tex. R. App. P. 20.1(b)(3).

If no statement was filed in trial court: The appellate court may permit a party who did not file a statement of inability to afford payment of court costs in the trial court to proceed without paying filing fees. The appellate court may require the party to file such a statement in the appellate court. If the appellate court denies the party's request to proceed without paying filing fees, the court must do so in a written order. Tex. R. App. P. 20.1(c).

Preparation of Appellate Record: Rule 145 of the Texas Rules of Civil Procedure provides rules under which a party may proceed without paying costs. Costs addressed in rule 145 include fees charged by the clerk or court reporter for preparation of the appellate record. *See* Tex. R. Civ. P. 145(c).

The party must file a statement of inability to afford payment of costs on a form approved by the Texas Supreme Court, or the statement must include the information required by the court-approved form. The statement must be sworn to before a notary or made under penalty of perjury, and the clerk may refuse to file a statement that does not meet this requirement, but no other defect is a ground for refusing to file a statement or requiring the party to pay costs. The court may direct the party filing a statement with a material defect or omission to correct or clarify the statement. Tex. R. Civ. P. 145(a), (b), (d).

The statement must say that the party cannot afford to pay costs, and the party must provide evidence of that inability, such as evidence that the party (1) receives means-tested benefits from a government entitlement program, (2) is being represented by an attorney providing free legal services through a provider funded by the Texas Access to Justice Foundation or the Legal Services Corporation or a nonprofit providing civil legal services to those meeting certain poverty standards, (3) has applied for free legal services through a provider described in (2) and was found financially eligible but was declined representation, or (4) does not have funds to afford payment of costs. Tex. R. Civ. P. 145(e).

When a party has filed a statement of inability to afford payment of costs, the court may order the party to pay costs only under certain circumstances. The following provisions are relevant as concerns the appellate record. The clerk or any party may move to require payment of costs only if the motion contains sworn evidence (not merely on information or belief) that the statement of inability to afford payment of costs was materially false when made or that, because of changed circumstances, it is no longer true in material respects. The court reporter may move to require the party to prove the inability to afford costs if the party requests the preparation of a reporter's record but cannot make arrangements to pay for it. The court on its own motion may require the party to prove the inability to afford costs if evidence comes before the court that the party may be able to afford costs. Before the party who filed the statement may be required to pay costs, there must be an oral evidentiary hearing, with ten days' notice to the party, either written and served in accordance with rule 21a or given in open court. At the hearing, the burden is on the party who filed the statement to prove the inability to afford costs. An order requiring payment of costs must be supported by detailed findings that the party can afford to pay costs. The court may order that the party pay part of the costs or pay in installments. Tex. R. Civ. P. 145(f).

Only the party filing the statement may challenge a trial court order under rule 145. On this challenge, accomplished by motion filed in the court of appeals, neither related filing fees nor costs for providing the record on the trial court proceedings on the claim of indigence may be charged. Tex. R. Civ. P. 145(g).

In addition to the requirements of rule 145, a party seeking to obtain free or reduced-cost clerk's and reporter's records must also comply with section 13.003 of the Civil Practice and Remedies Code. *See Pena v. Garza*, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.) (rules of procedure are general rules; statutes are specific). A court reporter shall provide without cost a statement of facts and a clerk of a court shall prepare a transcript for appealing a judgment from the court only if (1) an affidavit of inability to pay the cost of the appeal has been filed under the Texas Rules of Appellate Procedure and (2) the trial judge finds that the appeal is not frivolous and that the statement of facts and the clerk's transcript are needed to decide the issue presented by the appeal. Tex. Civ. Prac. & Rem. Code § 13.003(a). In determining whether an appeal is frivolous, a judge may consider whether the appellant has presented a substantial question for appellate review. Tex. Civ. Prac. & Rem. Code § 13.003(b). A proceeding is "frivolous" when it lacks an arguable basis either in law or in fact. *See* Tex. Civ. Prac. & Rem. Code § 13.001(b)(2); *Johnson v. Lynaugh*, 796 S.W.2d 705, 706 (Tex. 1990). Necessarily, therefore, both questions of fact and questions of law may be involved in a

determination that an appeal is frivolous. *De La Vega v. Taco Cabana*, 974 S.W.2d 152, 154 (Tex. App.—San Antonio 1998, no pet.).

§ 26.19 Appellate Record

The appellate record consists of the clerk's record and, if necessary, the reporter's record. Tex. R. App. P. 34.1.

Clerk's Record: The trial court clerk, or in some counties the district clerk, is responsible for preparing, certifying, and timely filing the clerk's record if a notice of appeal has been filed and the appellant has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee. Tex. R. App. P. 35.3(a). The appellate court may dismiss the appeal for want of prosecution if the appellant has failed to pay or make arrangements to pay the clerk to prepare the record. Tex. R. App. P. 37.3(b).

The clerk's record must include all pleadings on which the trial was held; the court's docket sheet; the jury charge and verdict or the court's findings of fact and conclusions of law; the court's judgment or other order that is being appealed; any request for findings of fact and conclusions of law, any postjudgment motion, and the court's order on the motion; the notice of appeal; any formal bill of exception; any request for a reporter's record; any request for preparation of the clerk's record; and a certified bill of costs, including the cost of preparing the clerk's record, showing credit for payments made. Tex. R. App. P. 34.5.

At any time before the clerk's record is prepared, any party may file with the trial court clerk (or in some counties the district clerk) a written designation of the specific items to be included in the clerk's record. *See* Tex. R. App. P. 34.5(b), (c). No formal request is required for the preparation of this record, but the clerk may consult with the parties concerning the contents of the record. *See* Tex. R. App. P. 34.5(h).

Reporter's Record: A record should be made as in civil cases generally unless waived by the parties with the consent of the court. Tex. Fam. Code § 105.003(c). A party may waive the making of a record by express written agreement or by failing to object to the lack of a record during the hearing. If a party does not appear at a hearing he is unable to object, and his absence cannot be construed as a waiver to the making of a record. One party cannot waive another party's right to a record. Without a reporter's record, a defendant would be unable to obtain a record of the evidence to

present to an appellate court for review. *Thompson v. Thompson*, No. 02-13-00292-CV, 2014 WL 3865951 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.).

If the proceedings were stenographically recorded, the reporter's record consists of the court reporter's transcription of so much of the proceedings, and any of the exhibits, that the parties to the appeal designate. Tex. R. App. P. 34.6(a)(1). At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter prepare the reporter's record, must designate the exhibits to be included, and must designate the portions of the proceedings to be included. Tex. R. App. P. 34.6(b)(1). If only a partial reporter's record has been transcribed, the appellant cannot appeal based on legal or factual sufficiency of the evidence. *Sareen v. Sareen*, 350 S.W.3d 314, 316–17 (Tex. App.—San Antonio 2011, no pet.).

§ 26.20 Limiting Scope of Appeal

An appellant may request a partial reporter's record; if he does so, the appellant must include in the request a statement of the points or issues relied on and will then be limited to those points or issues. Tex. R. App. P. 34.6(c)(1); *see also Melton v. Toomey*, 350 S.W.3d 235 (Tex. App.—San Antonio 2011, no pet.). Other parties may request other parts of the record. Tex. R. App. P. 34.6(c)(2). Additions requested by another party must be included in the reporter's record at the appellant's cost. But if the trial court finds that all or part of the designated additions are unnecessary to the appeal, the trial court may order the other party to pay the costs for the preparation of the unnecessary additions. The appellate court, however, may tax costs differently. Tex. R. App. P. 34.6(c)(3). The appellate court "must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues." Tex. R. App. P. 34.6(c)(4).

There is no specific requirement that the request for preparation of the reporter's record be served on other parties, but it must be filed with the trial court clerk (Tex. R. App. P. 34.6(b)(2)) and included in the clerk's record. Tex. R. App. P. 34.5(a)(9). The record may be freely supplemented without motion or leave of the appellate court. Tex. R. App. P. 34.6(d), 37.2.

§ 26.21 Docketing Statement

The appellant, promptly upon filing the notice of appeal, must file with the court of appeals a docketing statement containing specified information. Tex. R. App. P. 32.1.

The rules do not prescribe a standard form for the statement, and the courts of appeals have developed various forms, which can be downloaded from the websites of the individual courts of appeals. (See section 26.28 below.) The rules do not provide a specific process for compelling the filing of the docketing statement. If the appellant's failure to file the docketing statement is deemed to constitute want of prosecution or a failure to comply with a requirement of the appellate rules, a court order, or a deadline of the appellate court, dismissal of the appeal or affirmance of the appealed judgment or order may be ordered. *See* Tex. R. App. P. 42.3.

§ 26.22 Mediation

In accordance with the general policy of the state of Texas, mediation is also an option at the appellate level. For example, the Dallas court of appeals, as a part of the docketing statement, asks whether the parties have mediated and, if so, the name of the mediator and whether mediation would be appropriate at this stage of the litigation. Several of the courts of appeals will order the parties to mediation even over the objection of the appellee. Other appellate courts ask the parties if they want to mediate and will order it unless a party objects. The attorney should check each court's policy in this regard at the specific court's website. See section 26.28 below.

§ 26.23 Estoppel to Appeal

Estoppel to appeal is also known as the "acceptance-of-benefits doctrine." A litigant cannot treat a judgment as both right and wrong. Thus, a party who has voluntarily accepted the benefits of a judgment cannot appeal from that judgment. *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950); *see Texas State Bank v. Amaro*, 87 S.W.3d 538, 544 (Tex. 2002). The acceptance-of-benefits doctrine applies in direct appeals, direct appeals by writ of error (now restricted appeals), and equitable bill of review proceedings. *See Carle*, 234 S.W.2d at 1003 (direct appeal); *Bloom v. Bloom*, 935 S.W.2d 942, 946–47 (Tex. App.—San Antonio 1996, no writ) (direct appeal by writ of error); *Biggs v. Biggs*, 553 S.W.2d 207, 209 (Tex. App.—Houston [14th Dist.] 1977, writ dism'd) (bill of review).

The burden is on the appellee to prove that the appellant is estopped by the acceptance-of-benefits doctrine. *See Gonzalez v. Gonzalez*, 614 S.W.2d 203, 204 (Tex. App.—Eastland 1981, writ dism'd); *Mallia v. Mallia*, No. 14-07-00695-CV, 2009 WL 909588, at *1 (Tex. App.—Houston [14th Dist.] Apr. 5, 2009, no pet.) (mem. op.). For the court to consider whether a party is estopped from appealing, the record must

reflect the relevant facts showing voluntary acceptance of the benefits of the judgment. *Rogers v. Rogers*, 806 S.W.2d 886, 889 (Tex App.—Corpus Christi–Edinburg 1991, no writ); *Miller v. Miller*, 569 S.W.2d 592, 593 (Tex. App.—San Antonio 1978, no writ).

The acceptance-of-benefits doctrine frequently arises in divorce cases, because a spouse tends to take and use the property awarded to him or her in the divorce while appealing from the divorce judgment. *See, e.g., Roye v. Roye*, 531 S.W.2d 242 (Tex. App.—Tyler 1975, no writ). However, even if an appealing party accepts a portion of a divorce judgment, the appealing party is not necessarily estopped from appealing the entire judgment. In *Roa v. Roa*, 970 S.W.2d 163, 166 (Tex. App.—Fort Worth 1998, no pet.), the appellate court held that even though the appealing party had accepted the decree of divorce and division of property, she had not accepted those portions of the judgment addressing child custody, visitation, and support. The appellate court also recognized that issues related to the custody of children are severable from the remainder of a divorce decree. *Roa*, 970 S.W.2d at 166.

In *Kramer v. Kastleman*, the Texas Supreme Court examined the acceptance-of-benefits doctrine in a marital dissolution case for the first time in over sixty-five years since its decision in *Carle*, 234 S.W.2d 1002. In *Kramer*, the wife had appealed a final decree of divorce that divided the parties' $30 million marital estate. Before the appeal was final, the wife collected rental income of over $20,000 per month that was generated by properties awarded to her in the divorce decree. She also refinanced loans secured by properties allocated to her in the decree, among other things. The husband moved to dismiss the appeal based on the wife's acceptance of benefits under the divorce decree. The court of appeals granted the motion and dismissed the wife's appeal without reaching the merits. *Kastleman v. Kastleman*, No. 03-13-00133-CV, 2014 WL 3809759 (Tex. App.—Austin July 30, 2014), *rev'd*, *Kramer v. Kastleman*, 508 S.W.3d 211 (Tex. 2017). In reversing, the supreme court found that in the years since *Carle*, the doctrine had been "applied irregularly," that it had "become unmoored from its equitable underpinnings," and that "[t]he jurisprudence trends away from the doctrine's root principles." *Kramer*, 508 S.W.3d at 213. The court acknowledged that the doctrine is a fact-dependent, estoppel-based doctrine that should be focused on preventing unfair prejudice to the opposing party, stating:

> [B]efore denying a merits-based resolution to a dispute, courts must evaluate whether, by asserting dominion over assets awarded in the judgment under review, the appealing party clearly intended to acquiesce in the judgment; whether the assets have been so dissipated as to prevent their recovery if the judgment is reversed or modified; and whether the opposing party will be

> unfairly prejudiced. Equity simply will not tolerate a Catch-22 that involves a choice between relinquishing possession and control of community property and relinquishing the right to appeal.

Kramer, 508 S.W.3d at 227.

The court held that the following nonexclusive factors inform the estoppel inquiry: (1) whether acceptance of benefits was voluntary or was the product of financial duress; (2) whether the right to joint or individual possession and control preceded the judgment on appeal or exists only by virtue of the judgment; (3) whether the assets have been so dissipated, wasted, or converted as to prevent their recovery if the judgment is reversed or modified; (4) whether the appealing party is entitled to the benefit as a matter of right or by the nonappealing party's concession; (5) whether the appeal, if successful, may result in a more favorable judgment but there is no risk of a less favorable one; (6) if a less favorable judgment is possible, whether there is no risk the appellant could receive an award less than the value of the assets dissipated, wasted, or converted; (7) whether the appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment; (8) whether the issue on appeal is severable from the benefits accepted; (9) the presence of actual or reasonably certain prejudice; and (10) whether any prejudice is curable. *Kramer*, 508 S.W.3d at 228–29.

COMMENT: An appellant might be able to avoid the acceptance-of-benefits doctrine by asking for temporary orders pending appeal that allow the use of certain monies or property during the pendency of the appeal for living expenses and attorney's fees. In any case, the appellant could put on evidence that without the use of some of the monies or property awarded to him or her, he or she will not be able to pay necessary living expenses and attorney's fees needed to pursue an appeal. Therefore, if the acceptance is subsequently raised by the appellee, the appellant can justify by citation to the record.

Texas courts have declined to consider an appeal from a custody decree when the appealing party refuses to obey the adverse judgment. *See Baker v. Baker*, 588 S.W.2d 677 (Tex. App.—Eastland 1979, writ ref'd n.r.e.). In *Baker*, after the wife filed suit and the husband answered, the husband absconded from the state with the minor child and continued to withhold the child from the wife, who had been named managing conservator. The husband did not personally appear at the hearing but appeared by attorney of record. Under these circumstances, the appellate court dismissed the husband's appeal. *Baker*, 588 S.W.2d at 678.

§ 26.24 Modification Suit Pending Appeal

Generally, a trial court has no jurisdiction to vacate or change a judgment once the case has been appealed. *Robertson v. Ranger Insurance Co.*, 689 S.W.2d 209, 210 (Tex. 1985) (per curiam). The Family Code, however, expressly provides a trial court with continuing, exclusive jurisdiction to modify an order regarding child-related issues even if that order has been appealed. Tex. Fam. Code Ann. §§ 155.003(a), 156.001; *In re Reardon*, 514 S.W.3d 919, 922–24 (Tex. App.—Fort Worth 2017, orig. proceeding); *Blank v. Nuszen*, No. 01-13-01061-CV, 2015 WL 4747022 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.); *Hudson v. Markum*, 931 S.W.2d 336 (Tex. App.—Dallas 1996, no pet.). *But see In re E.W.N.*, 482 S.W.3d 150, (Tex. App.—El Paso 2015, no pet.).

In *Hudson* the mother sued the father to establish paternity of her minor daughter and for child support and other damages. While that case was pending on appeal, the father filed a motion to modify child support payments in the trial court. The trial court dismissed the motion for want of jurisdiction, and the father appealed. *Hudson*, 931 S.W.2d at 336. The Dallas court of appeals held that the father's motion to modify filed during the pendency of his appeal from the order he sought to modify did not alter the trial court's jurisdiction. Because the Family Code vested the trial court with continuing, exclusive jurisdiction to hear the father's motion to modify child support, the trial court erred in dismissing the motion. *Hudson*, 931 S.W.2d at 338.

Further, a petition to modify an existing order affecting the parent-child relationship is a new lawsuit. Tex. Fam. Code Ann. § 156.004; *Normand v. Fox*, 940 S.W.2d 401, 403 (Tex. App.—Waco 1997, no writ); *Hudson*, 931 S.W.2d at 338 n.5 (noting that 1995 recodification of Family Code refers to "a suit for modification" rather than "a motion to modify," which emphasized that legislature intended trial courts to continue to treat motions to modify as original lawsuits). The entry of an appealable order in a previous modification proceeding concludes those proceedings, and each subsequent filing of a new motion to modify requires issuance of citation and observation of the formalities of due process. *See* Tex. Fam. Code Ann. §§ 156.003, 156.004; *Rose v. Rose*, 117 S.W.3d 84, 88 (Tex. App.—Waco 2003, no pet.) (distinguishing motions to enforce existing judgments from motions to modify SAPCRs).

On the other hand, in *In re E.W.N.* the trial court appointed the parents joint managing conservators and ordered the father to pay child support. He appealed. While his appeal was pending, he filed a petition in the trial court to reduce his child support obligation, and the trial court entered temporary orders. On the mother's motion, the

trial court dismissed the father's modification without prejudice because the appellate court had the exclusive "power" of the cause. The father appealed, arguing that because the trial court had continuing, exclusive jurisdiction, it had jurisdiction over the parent-child relationship regardless of whether an appeal was pending. *In re E.W.N.*, 482 S.W.3d at 152.

The El Paso court of appeals affirmed the trial court, reasoning that section 109.001 of the Family Code authorizes a trial court to enter temporary orders during the pendency of an appeal under certain circumstances. If the continuing, exclusive jurisdiction of a trial court to enter orders affecting a child was automatically retained during the pendency of an appeal, section 109.001 would be unnecessary. *In re E.W.N.*, 482 S.W.3d at 154.

The El Paso court of appeals also noted that there are remedies available to petitioners who need emergency relief to protect a child during the pendency of an appeal. For example, section 109.002 of the Family Code provides that an appellate court may, on a proper showing, permit the trial court's order to be suspended. Additionally, pursuant to Tex. R. App. P. 10, a litigant may file a motion with the court of appeals explaining the circumstances that require abatement of an appeal to permit the trial court to set an emergency hearing to protect the child. *In re E.W.N.*, 482 S.W.3d at 156–57.

§ 26.25 Bankruptcy during Appeal

During the pendency of the appeal, any party may file a notice that the party is in bankruptcy. Tex. R. App. P. 8.1. The filing of bankruptcy suspends the appeal and all time periods set forth in the Texas Rules of Appellate Procedure from the date when the bankruptcy petition is filed until the appellate court reinstates or severs the appeal. A period that had begun to run at the time of the filing of the appeal, but had yet to expire at the time the proceeding was suspended, begins anew when the proceeding is either reinstated or severed. A document filed by a party while the proceeding is suspended will be deemed to have been filed on the same day as, but after the time, that the court reinstates or severs the appeal and will not be considered ineffective because it was filed while the proceeding was suspended. Tex. R. App. P. 8.2. If an appeal has been suspended by a bankruptcy filing, a party may move that the appellate court reinstate the appeal if allowed by federal law or the bankruptcy court. If the bankruptcy court has lifted or terminated the stay, a certified copy of the order must be attached to the motion. Tex. R. App. P. 8.3(a).

COMMENT: A motion to reinstate is the only method provided in the Texas Rules of Appellate Procedure to move the appeal along. Accordingly, if the party who filed the bankruptcy is the appellant and that party fails to file a motion to reinstate within a reasonable period of time following the termination or lifting of the stay, the appellee should consider filing a motion to dismiss the appeal.

§ 26.26 Family Law Appellate Timetable

TRIGGERING EVENT	STATUTE/RULE	PLEADING	FILING DEADLINE
Final trial or date court signs judgment	Tex. Fam. Code §§ 6.709, 109.001	Motion for temporary orders pending appeal	By date party required to file notice of appeal; may be filed before trial. Court retains jurisdiction to sign original temporary order pending appeal until 60th day after any eligible party has filed notice of appeal.
If child support ordered	Tex. Fam. Code § 154.130(a), without regard to Tex. R. Civ. P. 296–299	Findings of fact ("FOF")	Orally in court during hearing, or file written request with court not later than 20 days after date of rendition of order.
In all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, including order for child younger than three years	Tex. Fam. Code § 153.258	FOF	Request conforming to Texas Rules of Civil Procedure.

TRIGGERING EVENT	STATUTE/RULE	PLEADING	FILING DEADLINE
Date court signs the judgment	Tex. R. Civ. P. 296	FOF and conclusions of law ("COL")	Written request within 20 days after judgment is signed. Court has 20 days from date of request to file FOF/COL.
	Tex. R. Civ. P. 297	Notice of past-due FOF/COL	If court doesn't file FOF/COL, attorney **must file** written request for past-due FOF/COL within 30 days of original request. Court has 40 days from date of original request to file FOF/COL.
	Tex. R. Civ. P. 298	Additional or amended FOF/COL	After court files FOF/COL, either party has 10 days from date of filing to file written request. Court has 10 days from date of request for additional or amended FOF/COL.
	Tex. R. Civ. P. 329b	Motion for new trial ("MNT")	Within 30 days after judgment or other order complained of is signed. No extensions available.
	Tex. R. Civ. P. 329b	Motion to modify/correct/reform judgment ("MCRJ")	Within 30 days after judgment or other judgment complained of is signed.
	Tex. R. App. P. 26.1	Notice of accelerated appeal	Within 20 days after judgment or order is signed.
	Tex. R. App. P. 26.1	Notice of appeal ("NOA")	If no FOF requested or MNT or MCRJ filed, within 30 days after judgment or order is signed. If FOF requested or MNT or MCRJ filed, within 90 days after judgment or order is signed.

§ 26.27 Effect of Remand

When an appellate court remands a case and limits a subsequent trial to a particular issue, the trial court is restricted to a determination of that particular issue. *In re Marriage of Stein*, 190 S.W.3d 73, 75 (Tex. App.—Amarillo 2005, no pet.). An appellate court cannot reverse only one piece of a property division but instead must remand the entire community estate for a new division. *Bufkin v. Bufkin*, 259 S.W.3d 343 (Tex. App.—Dallas 2008, pet. denied). The only relief that an appellate court may grant an appellant who argues factual insufficiency is a remand for a new trial; it may not reverse and render judgment in favor of the other party. *In re S.K.H.*, 324 S.W.3d 156, 159 (Tex. App.—El Paso 2010, no pet.).

COMMENT: If the appellate court orders a partial remand for a new trial, counsel should ensure that the appellate court affirms the granting of the divorce to avoid having that matter raised as an issue in the new trial.

§ 26.28 Internet Resources

The Office of Court Administration, in conjunction with the Judicial Committee on Information Technology, maintains a website with links to the Supreme Court of Texas, the Texas Court of Criminal Appeals, and all the appellate courts, which may be found at **www.txcourts.gov**.

§ 26.29 Useful Websites

The following websites contain information relating to the topic of this chapter:

Court of Criminal Appeals
http://www.txcourts.gov/cca.aspx

Links to individual Texas court sites (§ 26.28)
http://www.txcourts.gov/

Texas appellate courts (§§ 26.12, 26.22)
http://www.txcourts.gov/

Texas courts of appeals:

First Court of Appeals (Houston)
http://www.txcourts.gov/1stcoa.aspx

Second Court of Appeals (Fort Worth)
http://www.txcourts.gov/2ndcoa.aspx

Third Court of Appeals (Austin)
http://www.txcourts.gov/3rdcoa.aspx

Fourth Court of Appeals (San Antonio)
http://www.txcourts.gov/4thcoa.aspx

Fifth Court of Appeals (Dallas)
http://www.txcourts.gov/5thcoa.aspx

Sixth Court of Appeals (Texarkana)
http://www.txcourts.gov/6thcoa.aspx

Seventh Court of Appeals (Amarillo)
http://www.txcourts.gov/7thcoa.aspx

Eighth Court of Appeals (El Paso)
http://www.txcourts.gov/8thcoa.aspx

Ninth Court of Appeals (Beaumont)
http://www.txcourts.gov/9thcoa.aspx

Tenth Court of Appeals (Waco)
http://www.txcourts.gov/10thcoa.aspx

Eleventh Court of Appeals (Eastland)
http://www.txcourts.gov/11thcoa.aspx

Twelfth Court of Appeals (Tyler)
http://www.txcourts.gov/12thcoa.aspx

Thirteenth Court of Appeals (Corpus Christi)
http://www.txcourts.gov/13thcoa.aspx

Fourteenth Court of Appeals (Houston)
http://www.txcourts.gov/14thcoa.aspx

Texas Supreme Court
http://www.txcourts.gov/supreme.aspx

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Mandamus

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Chapter 27

Mandamus

I. Mandamus in General

§ 27.1 General Considerations

Mandamus is a suit brought in a court of competent jurisdiction to order an inferior court to do or not do an act. The functions of a mandamus action are to set in motion and to compel action. Mandamus is a legal remedy, but it is governed to some extent by equitable principles. Although it is an extraordinary remedy, the Texas Rules of Civil Procedure apply. *Vondy v. Commissioners Court of Uvalde County*, 620 S.W.2d 104, 108 (Tex. 1981). One such equitable principle mandates the use of diligence: equity aids the diligent, not those who sleep on their rights. For this reason, unjustified delay in seeking a writ of mandamus may result in the loss of this remedy. *In re Abney*, 486 S.W.3d 135, 138 (Tex. App.—Amarillo 2016, orig. proceeding). The person seeking relief by mandamus is the "relator." Tex. R. App. P. 3.1(f), 52.2. The person against whom relief is being sought is the "respondent." Tex. R. App. P. 3.1(h)(2), 52.2. A person whose interest would be directly affected by the relief sought is a "real party in interest" and a party to the case. Tex. R. App. P. 52.2.

§ 27.2 Standard of Review

Generally, mandamus will lie to prevent a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy provided by law. The reviewing court, therefore, acts in excess of its writ power (abuses its discretion) when it grants mandamus relief absent these circumstances. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). To authorize the issuance of the writ of mandamus, it must appear that—

1. the relator has a clear legal right to performance of the particular duty to be enforced or sought to be enforced and

2. there is no other plain, adequate, and complete method of redressing the wrong or of obtaining the relief to which the relator is entitled, so that, without the issuance of the writ, there would be a failure of justice.

Ramirez v. Flores, 505 S.W.2d 406, 411 (Tex. App.—San Antonio 1973, writ ref'd n.r.e.) (per curiam). Mandamus may not be used to establish or enforce an uncertain or disputed claim. *In re Torres*, 130 S.W.3d 409, 413–14 (Tex. App.—Corpus Christi–Edinburg 2004, orig. proceeding).

No Adequate Remedy by Appeal: In order to determine whether a writ should issue, the court of appeals must first decide whether the relator had an adequate remedy by appeal. Mandamus is intended to be an extraordinary remedy, available only in limited circumstances. *Walker*, 827 S.W.2d at 840. The writ will issue "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding) (citation omitted). An appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ. *Walker*, 827 S.W.2d at 842. Delay until appeal is more than a mere inconvenience if the matter at issue has a profound impact on the parent-child relationship or if there is a threat of irreparable harm to the children. *See In re Office of Attorney General*, 276 S.W.3d 611, 622 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding [mand. denied]); *In re R.R.*, 26 S.W.3d 569, 573 (Tex. App.—Dallas 2000, orig. proceeding).

A party does not need to seek de novo review before seeking mandamus relief. However, if a party does not seek de novo review, the associate judge's temporary orders become orders of the referring court, which becomes the respondent in the mandamus proceeding. *See In re Eaton*, No. 02-14-00239-CV, 2014 WL 4771608, at *3 (Tex. App.—Fort Worth Sept. 25, 2014, orig. proceeding) (mem. op.).

In 2004, the Texas Supreme Court expanded the scope of mandamus review:

> The operative word, "adequate," has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation.

> Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.
>
> This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue.

In re Prudential Insurance Co., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

Legal Right to Performance: Mandamus also lies to enforce the performance of a nondiscretionary act or duty and will issue only when the act or duty is ministerial in character. An act is ministerial when the law clearly spells out the duty to be performed with such certainty that nothing is left to the exercise of discretion or judgment. *Forbes v. City of Houston*, 356 S.W.2d 709, 711 (Tex. App.—Houston 1962, orig. proceeding). A trial court's act of giving consideration to a properly filed and pending motion is a ministerial act. *In re Maasoumi*, No. 05-08-01074-CV, 2008 WL 4881328, at *3 (Tex. App.—Dallas Nov. 13, 2008, orig. proceeding) (mem. op.). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. This standard has different applications in different circumstances. *Walker*, 827 S.W.2d at 839.

With respect to resolution of factual issues or matters committed to the trial court's discretion, the reviewing court may not substitute its judgment for that of the trial court. *Walker*, 827 S.W.2d at 839. The relator must establish that the trial court could reasonably have reached only one decision. *Walker*, 827 S.W.2d at 840. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and capricious. *Walker*, 827 S.W.2d at 840.

On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court has no "discretion" in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial

court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal by extraordinary writ. *Walker*, 827 S.W.2d at 840. A trial court's wrong decision in applying or analyzing the law, even in an unsettled area of the law, is an abuse of discretion. *See Huie v. DeShazo*, 922 S.W.2d 920, 927–28 (Tex. 1996) (orig. proceeding).

§ 27.3 Constitutional and Statutory Bases

Supreme Court of Texas: The legislature may confer original jurisdiction on the supreme court to issue writs of mandamus in such cases as may be specified, except as against the governor. Tex. Const. art. V, § 3. The court may issue writs of mandamus, agreeable to the principles of law regulating those writs, against a statutory county court judge, statutory probate court judge, district judge, court of appeals or justice of a court of appeals, or any officer of the state except the governor or the court of criminal appeals or its judges. The court (or, if the court is in vacation, any justice of the court) may also issue the writ of mandamus to compel a statutory county court judge, statutory probate court judge, or district court judge to proceed to trial and judgment in a case agreeable to the principles and usages of law. Tex. Gov't Code § 22.002(a), (b).

Courts of Appeals: The courts of appeals shall have "such other jurisdiction, original and appellate, as may be prescribed by law." Tex. Const. art. V, § 6(a). The courts of appeals or their judges may issue writs of mandamus and all other writs necessary to enforce their jurisdiction. Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against a judge of a district, statutory county, statutory probate, or county court in the court of appeals district and against an associate judge of a district or county court appointed by a judge under chapter 201 of the Family Code in the court of appeals district for the judge who appointed the associate judge. Tex. Gov't Code § 22.221(a), (b).

§ 27.4 Jurisdiction

Under the statutes, original proceedings for a mandamus action can be filed in both the courts of appeals and the Supreme Court of Texas. All rules relating to original proceedings in these courts are consolidated in rule 52 of the Texas Rules of Appellate Procedure.

If the court of appeals has concurrent jurisdiction of an original proceeding, the petition should first be presented to the court of appeals unless there is a compelling reason not to do so. If the petition was not first presented to the court of appeals, the petition in the

supreme court must state the compelling reason that the petition was not first presented to the court of appeals. Tex. R. App. P. 52.3(e).

§ 27.5 Pleadings

In an action for mandamus, the pleadings require greater certainty than in ordinary civil cases, and necessary facts must be stated clearly, fully, and unreservedly by direct and positive allegation. *Alice National Bank v. Edwards*, 383 S.W.2d 482, 484 (Tex. App.—Corpus Christi–Edinburg 1964, writ ref'd n.r.e.) (per curiam). The petition for mandamus must be verified by affidavit, and a verification merely reciting that the facts contained in the petition are true to the best of the affiant's knowledge and belief is insufficient. Further, if the sworn allegations in a respondent's answer to a petition for mandamus are not denied, the allegations in the respondent's answer must be accepted as true. *Cantrell v. Carlson*, 313 S.W.2d 624, 626 (Tex. App.—Dallas 1958, orig. proceeding). On the motion of any party or on its own initiative, an appellate court may impose sanctions on a party or attorney who is not acting in good faith. Tex. R. App. P. 52.11.

§ 27.6 Procedure

Mandamus is an original proceeding in the appellate court. The petition is captioned "*In re* [**name of party seeking relief**], Relator." Tex. R. App. P. 52.1.

Rule 52.3 sets out in detail the contents of the petition. *See* Tex. R. App. P. 52.3. If the petition is filed in the supreme court after the same relief was requested in the court of appeals, the petition must give details of the action in the lower court. Tex. R. App. P. 52.3(d)(5). If the petition is filed first in the supreme court, the petition must state the compelling reason that the petition was not first presented to the court of appeals. Tex. R. App. P. 52.3(e).

The person filing the petition must certify that he has reviewed it and concluded that every factual statement in it is supported by competent evidence included in the appendix or record. Tex. R. App. P. 52.3(j).

Any party may file a response, but it is not mandatory. Tex. R. App. P. 52.4. The court may deny relief without requesting or receiving a response. *See* Tex. R. App. P. 52.8(a). However, the court must request a response before granting relief. Tex. R. App. P. 52.8(b).

If temporary relief is requested (such as a motion for emergency stay), the relator must notify or show a diligent effort to notify all parties by expedited means of the motion for the emergency temporary relief; further, the relator must so certify to the court. Tex. R. App. P. 52.10.

When it grants relief, the court must write an opinion. Tex. R. App. P. 52.8(d).

Any party may file a motion for rehearing within fifteen days after the final order is rendered. Tex. R. App. P. 52.9.

[Sections 27.7 through 27.10 are reserved for expansion.]

II. Subjects of Mandamus

§ 27.11 Alternative Dispute Resolution

Arbitration: A trial court's order that erroneously stays arbitration is subject to mandamus. *Kilroy v. Kilroy*, 137 S.W.3d 780 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding).

When a trial court denies arbitration under the Texas Arbitration Act, the order is subject to interlocutory appeal, whereas when a trial court denies arbitration under the Federal Arbitration Act, relief must be sought in a petition for writ of mandamus. *In re Pham*, 314 S.W.3d 520, 523 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding [mand. denied]).

Mediated Settlement Agreements: If a trial court fails to enter a judgment consistent with the mediated settlement agreement, a mandamus may be sought. *See In re Minix*, 543 S.W.3d 446 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding [mand. denied]).

§ 27.12 Attorney Disqualification

Under appropriate circumstances, a mandamus may be sought to review a trial court's order or an appellate court's order, granting or denying a motion to disqualify an attorney. A party "is not required to simply hope that the pending case is concluded without disclosure of its confidences," nor is a party "required to wait until any damage will

have been done and will be irremediable." *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996) (orig. proceeding).

Attorney disqualification is discussed at section 8.13 in this manual.

§ 27.13 Bill of Review

Mandamus relief may be appropriate when a trial court grants a bill of review and pleadings fail to meet the initial requirements for bringing the bill of review, which are an allegation in the pleading that the prior judgment was rendered as the result of fraud, accident, or wrongful act of the opposing party or official mistake and an allegation of sworn facts that constitute a meritorious defense. *In re Attorney General*, 184 S.W.3d 925, 929 (Tex. App.—Beaumont 2006, orig. proceeding) (per curiam). Mandamus relief is also appropriate when a trial court grants a bill of review based on a misrepresentation that constitutes intrinsic, not extrinsic, fraud. *In re Office of Attorney General*, 193 S.W.3d 690, 692–93 (Tex. App.—Beaumont 2006, orig. proceeding) (per curiam).

There is a split among the courts of appeals as to whether mandamus relief is available to challenge the granting of a bill of review. Several of the courts of appeals have held that the erroneous granting of a bill of review is effectively a void order granting a new trial, so mandamus relief is available. In addition to the Ninth Court of Appeals in Beaumont, the First, Fourth, Fifth, Seventh, Tenth, and Thirteenth Courts of Appeals allow parties to seek mandamus relief. *See In re Office of Attorney General*, 276 S.W.3d 611, 620–21 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding) (paternity only); *In re J.M. IV*, 373 S.W.3d 725, 728 (Tex. App.—San Antonio 2012, orig. proceeding); *In re Reedle*, No. 05-16-01483-CV, 2017 WL 944030, at *1 (Tex. App.—Dallas Mar. 10, 2017, orig. proceeding) (mem. op.); *In re Epps*, No. 07-14-00420-CV, 2014 WL 7448497, at *1 (Tex. App.—Amarillo Dec. 31, 2014, orig. proceeding) (mem. op.); *In re Spiller*, 303 S.W.3d 426, 431 (Tex. App.—Waco 2010, orig. proceeding); *In re Estrada*, 492 S.W.3d 42, 46–49 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.). However, the First Court of Appeals does not allow mandamus relief, except in paternity cases. *Patrick O'Connor & Associates, L.P. v. Wang Investment Networks, Inc.*, No. 01-12-00615-CV, 2013 WL 1451358, at *2 (Tex. App.—Houston [1st Dist.] Apr. 9, 2013, orig. proceeding) (mem. op.). Additionally, the Third and the Fourteenth Courts of Appeals do not allow mandamus relief at all to challenge the granting of a bill of review. However, neither of these courts has addressed the issue in a family-law matter, so maybe an argument can still be made that mandamus relief should be available. *See Ott v. Files*, No. 03-00-00612-CV, 2000 WL 1675737, at *1 (Tex. App.—Austin Nov.

9, 2000, no pet.) (per curiam); *In re Moreno*, 4 S.W.3d 278, 280–81 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

§ 27.14 Contempt

A contempt judgment is reviewable only via a petition for writ of habeas corpus (if the contemner is confined) or a petition for writ of mandamus (if no confinement is involved). *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding) (per curiam). When contempt is punished by a fine, mandamus is the only remedy available to the relators. *Ex parte Sealy*, 870 S.W.2d 663, 667 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding). If fines and confinement are both imposed, they may not be considered separately and therefore may not be challenged by mandamus even if suspended. *Deramus v. Thornton*, 333 S.W.2d 824, 826–27 (Tex. 1960) (orig. proceeding). Additionally, where contempt is also sanctioned by an award of attorney's fees, mandamus is the only means to review such a sanction. *Ex parte Sealy*, 870 S.W.2d at 667. Further, a contempt order that orders only community supervision does not restrain the party's liberty; thus, mandamus is the proper remedy. *In re C.F.*, 576 S.W.3d 761, 767–68 (Tex. App.—Fort Worth 2019, orig. proceeding).

Decisions in contempt proceedings cannot be reviewed on appeal because contempt orders are not appealable, even when appealed along with a judgment that is appealable. *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 671 (Tex. App.—Fort Worth 2001, pet. denied).

A timely objection to a show cause order that could lead to a contempt order is also a proper subject for a mandamus. *Dunn v. Street*, 938 S.W.2d 33, 35 (Tex. 1997) (orig. proceeding) (per curiam).

In *Blair v. Blair*, 408 S.W.2d 257 (Tex. App.—Dallas 1966, no writ), the mother filed a motion to enforce child support by contempt. The trial court denied the motion stating that it did not have jurisdiction to hear the motion because the child had already reached the age of eighteen. The mother appealed. The court of appeals dismissed, holding, "In the instant case the motion for contempt was denied. A release from jail is not involved, so the remedy of habeas corpus is not applicable. But the order of the court is not appealable. Appellant's remedy, if she has one, is by mandamus." *Blair*, 408 S.W.2d at 257.

Pursuant to sections 157.066 and 157.115(b) of the Texas Family Code, a trial court is prohibited from holding a party in contempt by default. If a respondent fails to appear,

the trial court may order a capias be issued but may not hold the party in contempt. Additionally, violating sections 157.066 and 157.115 of the Texas Family Code renders the contempt order void, as does a trial court's failure to admonish the party of the right to counsel in accordance with section 157.163 of the Texas Family Code. On both bases, a party may seek mandamus relief. *In re Daniels*, No. 05-17-01260-CV, 2017 WL 6503107 (Tex. App.—Dallas Dec. 19, 2017, orig. proceeding) (mem. op.). See section 27.33 below for a discussion of void orders.

§ 27.15 Continuance

Legislative Continuance: A trial court's refusing to grant or erroneously granting a legislative continuance may be challenged by mandamus. *See Amoco Production Co. v. Salyer*, 814 S.W.2d 211, 213 (Tex. App.—Corpus Christi–Edinburg 1991, orig. proceeding); *Waites v. Sondock*, 561 S.W.2d 772, 776 (Tex. 1977) (orig. proceeding) (trial court abused discretion in granting continuance rather than recognizing due-process exception; right to child support could not be enforced by any other means).

Legislative continuance is discussed at section 19.4 in this manual.

Nonlegislative Continuance: The granting or denial of a motion for continuance is within the trial court's sound discretion. Mandamus is generally not available to review such a ruling. Similarly, the denial of a motion for continuance is an incidental trial ruling ordinarily not reviewable by mandamus. In the absence of any other error, a court will not grant mandamus relief merely to revise a trial judge's scheduling order.

Only under special circumstances will mandamus relief be available. *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997) (orig. proceeding) (trial court abused discretion in not granting continuance to allow for jury trial because trial court had already determined that multiple interruptions in trial were anticipated and continuance would not have injured other party); *see also Union Carbide Corp. v. Moye*, 798 S.W.2d 792, 792–93 (Tex. 1990) (orig. proceeding) (denial of continuance to allow defendant to supplement record with more affidavits and discovery products pertinent to motion for change of venue effectively denied right to reasonable discovery); *In re Shulman*, 544 S.W.3d 861 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (trial court abused discretion in abating case for five years to allow for IRS ruling on taxes, because abatement effectively vitiated defendant attorney's ability to present claim or defense); *Fountain v. Knebel*, 45 S.W.3d 736, 740 (Tex. App.—Dallas 2001, no pet.) (trial court abused discretion by not granting continuance so that major asset of community, husband's interest in law firm, could be valued; such valuation necessary

for just and right division of marital estate); *Harrell v. Fashing*, 562 S.W.2d 544, 545–46 (Tex. App.—El Paso 1978, orig. proceeding) (per curiam) (trial court did not abuse discretion by granting continuance to allow for mental and physical exam and was not limited to contempt proceedings).

Withdrawal of Counsel: The trial court has wide discretion in granting or denying a motion for continuance. When the ground for a continuance is withdrawal of counsel, the movant must show that the lack of counsel is not due to their own fault or negligence. When an attorney is permitted to withdraw, the trial court must give the party time to secure new counsel and time for new counsel to investigate the case and prepare for trial. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *In re Posadas USA, Inc.*, 100 S.W.3d 254, 258 (Tex. App.—San Antonio 2001, orig. proceeding).

§ 27.16 De Novo Hearings

In a de novo hearing, which is mandatory when properly requested, the parties may present witnesses on the issues specified in the request for hearing, and the referring court may also consider the record from the hearing before the associate judge. The trial court abuses its discretion if it relies solely on the transcript of the hearing before the associate judge if the appealing party wants to present witnesses on the issues specified in the request for the hearing. *In re R.R.*, 537 S.W.3d 621 (Tex. App.—Austin 2017, orig. proceeding).

§ 27.17 Discovery

Pretrial Discovery: A party is entitled to full, fair discovery within a reasonable period. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam). Mandamus is available in some circumstances to protect a party against an order compelling a response to a discovery request or to require a trial court to compel a party to respond. In the discovery context, the three situations in which a remedy by appeal will be inadequate are—

1. if the appellate court would not be able to cure the trial court's discovery error—for example, the trial court erroneously orders the disclosure of privileged information that will materially affect the rights of the aggrieved party;

2. if the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error; and

3. if the trial court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make it part of the record, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it.

Walker v. Packer, 827 S.W.2d 833, 843–44 (Tex. 1992) (orig. proceeding). In other words, if the denied discovery goes to the heart of the case, there is no adequate remedy at law. *See In re Colonial Pipeline*, 968 S.W.2d at 942.

Mandamus relief is appropriate to compel discovery. Texas law does not allow a party to evade discovery requests by simply asserting that the other party already has the information. Not only do such requests ensure that the parties have the same basic documents, requiring the opponent to produce certain documents enables the party seeking discovery to activate the automatic authentication rights provided by rule 193.7 of the Texas Rules of Civil Procedure. *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *7 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.).

When a discovery order potentially violates First Amendment rights, there is no adequate remedy by appeal and mandamus is appropriate. *In re Maurer*, 15 S.W.3d 256, 259 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Mandamus is the only remedy when a protective order shields the witnesses from deposition and thereby prevents the evidence from being part of the record. *See Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 558 (Tex. 1990) (orig. proceeding). The blanket denial of all discovery from a witness in a civil case, when that witness is also a defendant in a pending criminal case arising out of the same facts and the witness is also expected to testify in that criminal case, is subject to mandamus. *See In re R.R.*, 26 S.W.3d 569, 574 (Tex. App.—Dallas 2000, orig. proceeding).

Additionally, in suits involving the establishment of parentage in which an acknowledgment of paternity has been signed, until the acknowledgment of paternity is set aside genetic testing is premature discovery and is not relevant. An order for such testing may be challenged by mandamus. *See In re Attorney General*, 195 S.W.3d 264, 270 (Tex. App.—San Antonio 2006, orig. proceeding).

Discovery Sanctions: Generally, discovery sanctions are not appealable until the district court renders a final judgment and an appeal is an adequate remedy for review of discovery sanctions. However, if the imposition of monetary sanctions threatens a party's continuation of the litigation, appeal affords an adequate remedy only if payment of the sanctions is deferred until final judgment is rendered and the party has the

opportunity to supersede the judgment and perfect his appeal. *Braden v. Downey*, 811 S.W.2d 922, 928–29 (Tex. 1991) (orig. proceeding). An appeal of sanctions is also inadequate in situations requiring the expenditure of time, such as the ordering of an attorney to perform community service during the pendency of the litigation. Nor can the attorney recover damages for service the district court may have erred in requiring him to perform. *Braden*, 811 S.W.2d at 930.

§ 27.18 Grandparent Possession and Access

The trial court may not award grandparents possession and access unless there is evidence that the child's parent is unfit, that the child's health or emotional well-being would suffer if the court deferred to the parent's decisions, or that the parent intended to exclude the grandparents from access to the child. An order for grandparent access in such circumstances may be challenged by mandamus. *In re Chambless*, 257 S.W.3d 698 (Tex. 2008) (orig. proceeding) (per curiam); *In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006) (orig. proceeding) (per curiam).

§ 27.19 Habeas Corpus

The trial court may not deny the writ of habeas corpus based on the best interests of the child. On proof of the prior order, absent dire emergency, the grant of the writ of habeas corpus should be automatic, immediate, and ministerial, based on proof of the bare legal right to possession. *Schoenfeld v. Onion*, 647 S.W.2d 954, 955 (Tex. 1983) (orig. proceeding) (per curiam); *see also In re deFilippi*, 235 S.W.3d 319 (Tex. App.—San Antonio 2007, orig. proceeding) (per curiam) (even though father suspect in mother's death, such evidence of wrongdoing speculative and not dire emergency to children). If the trial court fails to grant the writ of habeas corpus, mandamus is the proper remedy to compel enforcement of a relator's right in habeas corpus proceedings to custody of a child. *Lamphere v. Chrisman*, 554 S.W.2d 935, 938 (Tex. 1977) (orig. proceeding); *In re Lau*, 89 S.W.3d 757, 759 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding); *see also Greene v. Schuble*, 654 S.W.2d 436, 437–38 (Tex. 1983) (orig. proceeding).

§ 27.20 In Interest of Justice

Mandamus is proper when a matter involves a complex child custody suit and even an accelerated appeal will not provide an adequate remedy because the ultimate placement of the children is uncertain and an appeal will unnecessarily prolong a final resolution

of the case. *In re T.R.B.*, 350 S.W.3d 227, 231 (Tex. App.—San Antonio 2011, orig. proceeding).

§ 27.21 Intervention

Mandamus is proper when a trial court strikes an intervention in the absence of a motion to strike. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 660 (Tex. App.—Dallas 2010, pet. dism'd).

§ 27.22 Jurisdiction

Jurisdictional Conflict: Mandamus will lie to settle a jurisdictional conflict created when two courts interfere with each other by issuing conflicting orders or injunctions. *In re Cornyn*, 27 S.W.3d 327, 335 (Tex. App.—Houston [1st Dist.] 2000, orig. proceeding); *see also HCA Health Services v. Salinas*, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (per curiam) (no adequate remedy by appeal for litigation deadlocked when two courts attempted to exercise jurisdiction). Mandamus is proper when there is a jurisdictional conflict under the Uniform Child Custody Jurisdiction and Enforcement Act. *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005) (orig. proceeding); *In re Forlenza*, 140 S.W.3d 373 (Tex. 2004) (orig. proceeding).

Lack of Standing: A component of subject-matter jurisdiction, standing is a constitutional prerequisite to maintaining a suit under Texas law. Mandamus will lie to challenge a party's lack of standing. *In re Smith*, 262 S.W.3d 463, 465 (Tex. App.—Beaumont 2008, orig. proceeding [mand. denied]) (per curiam); *In re Roxsane R.*, 249 S.W.3d 764, 775 (Tex. App.—Fort Worth 2008, orig. proceeding).

Personal Jurisdiction: Denial of a special appearance in family law cases is subject to mandamus review because section 51.014(a)(7) of the Texas Civil Practice and Remedies Code precludes an interlocutory appeal. *Knight Corp. v. Knight*, 367 S.W.3d 715, 723 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding); *In re J.W.L.*, 291 S.W.3d 79, 83 (Tex. App.—Fort Worth 2009, orig. proceeding [mand. denied]); *see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(7).

§ 27.23 Lis Pendens

Mandamus is proper to challenge the trial court's grant or denial of a motion seeking to remove or void a lis pendens. *In re Collins*, 172 S.W.3d 287 (Tex. App.—Fort Worth 2005, orig. proceeding) (challenge to trial court's grant of motion to void lis pendens);

In re Med Plus Equity Investments, L.P., No. 05-05-00404-CV, 2005 WL 1385238 (Tex. App.—Dallas June 13, 2005, orig. proceeding) (mem. op.) (because property is only collaterally involved in plaintiff's claims, lis pendens is void, and trial court erred when it refused to cancel lis pendens); *In re Kroupa-Williams*, No. 05-05-00375-CV, 2005 WL 1367950 (Tex. App.—Dallas June 10, 2005, orig. proceeding) (mem. op.) (trial court erred when it ordered dissolution of lis pendens without conditioning that dissolution on making of deposit required by section 12.008 of Texas Property Code).

§ 27.24 Mandatory Findings of Fact Regarding Possession

Mandamus is proper when a trial court imposes restrictions on a conservator's periods of possession without providing a means to remove those restrictions and, although timely requested, fails to make the mandatory findings required by section 153.128 of the Texas Family Code. *In re Rangel*, No. 04-17-00060-CV, 2017 WL 1161173 (Tex. App.—San Antonio Mar. 29, 2017, orig. proceeding) (mem. op.).

§ 27.25 Order on Motion for New Trial

A trial court's failure to specifically state the reason for granting a new trial after a jury verdict may be challenged by mandamus. *In re Columbia Medical Center of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204 (Tex. 2009) (orig. proceeding). A trial court grant of a motion for new trial when the movant was not a party in the underlying suit affecting the parent-child relationship may be challenged by mandamus. *In re Trevino*, 329 S.W.3d 906 (Tex. App.—Dallas 2010, orig. proceeding).

§ 27.26 Protection of Constitutional Rights

If an order violates the relator's state constitutional rights and the relator has no other legal remedy, mandamus is the appropriate vehicle to assail the order.

Relator Not Required to Violate Order and Subject Self to Contempt: When no appealable order has been entered and the relator may test the order only by violating it and subjecting himself to contempt, there is no adequate remedy. *San Antonio Express-News v. Roman*, 861 S.W.2d 265, 266–67 (Tex. App.—San Antonio 1993, orig. proceeding) (per curiam). The Texas Supreme Court has acknowledged that mandamus may issue where the legal process itself would violate the relator's constitutional rights. *See Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996) (orig. proceeding); *In re Aubin*, 29 S.W.3d 199, 203 (Tex. App.—Beaumont 2000, orig. proceeding).

Due-Process Right to Notice: Mandamus may issue to correct an abuse of discretion in imposing sanctions without notice or meaningful hearing in violation of due process. *In re Acceptance Insurance Co.*, 33 S.W.3d 443, 448 (Tex. App.—Fort Worth 2000, orig. proceeding); *see also In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (orig. proceeding) (per curiam) (court of appeals abused discretion by issuing writ of mandamus directing trial court to vacate sanctions order where sanctioned counsel were afforded due process by being given notice of trial court's intent to consider sanctions and opportunity to respond).

Due-Process Right to Trial: A trial court has no authority to refuse to set a trial and stay proceedings until interim attorney's fees are paid. Although an appellate court does not have mandamus power to compel the trial judge to reach a result that necessarily involves his discretion, it may mandamus him to hold a trial or hearing and to exercise his discretion. *In re Flores*, 135 S.W.3d 863 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding).

Prior Restraints on Speech: Mandamus may be used to challenge a gag order prohibiting discussion of a civil case outside the courtroom. Without findings supported by evidence that imminent or irreparable harm to the judicial process will deprive the parties of a just resolution of their dispute and that the gag order is the least restrictive means to prevent the harm, a trial court's issuance of a gag order instructing parties' counsel not to interview discharged jurors is an unconstitutional prior restraint on speech. *In re State Farm Lloyds*, 254 S.W.3d 632, 634 (Tex. App.—Dallas 2008, orig. proceeding).

The same principle applies to restraints on speech that are frequently present in temporary restraining orders and standing orders in family law cases. In *Grigsby v. Coker*, 904 S.W.2d 619, 621 (Tex. 1995) (per curiam), the supreme court determined that even in child custody cases the court's broad power to grant injunctive relief regarding the disparagement of a party must still have constitutional constraints. Such injunctions are valid only when an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute and the injunctive relief is the least restrictive means to prevent that harm. *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992).

§ 27.27 Protective Orders

Mandamus is the proper appellate procedure to review complaints about a protective order that is in effect while the parties' divorce proceeding or suit affecting the parent-child relationship remains pending in the trial court. *In re Goddard*, No. 12-18-00355-

CV, 2019 WL 456866, at *2 (Tex. App.—Tyler Feb. 6, 2019, orig. proceeding); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.); *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam).

With two exceptions, protective orders issued under subtitle B of title 4 of the Family Code may be appealed. A protective order rendered against a party in a suit for dissolution of marriage may not be appealed until the final decree of dissolution becomes a final, appealable order. A protective order rendered against a party in a suit affecting the parent-child relationship may not be appealed until an order providing for support of the child or possession of or access to the child becomes a final, appealable order. Tex. Fam. Code § 81.009.

§ 27.28 Refusal to Rule

Although a referring court has discretion with respect to *how* it chooses to act on an associate judge's proposed order or judgment, it cannot refuse to take any action. *In re Clark*, No. 01-15-00729-CV, 2016 WL 3541704, at *4 (Tex. App.—Houston [1st Dist.] June 28, 2016, orig. proceeding) (mem. op.). A trial court has a ministerial duty to consider and rule within a reasonable time on a motion brought to the court's attention. *In re Bonds*, 57 S.W.3d 456, 457 (Tex. App.—San Antonio 2001, orig. proceeding). Refusal to rule on a pending motion within a reasonable amount of time can be remedied by mandamus. *See In re Shredder Co.*, 225 S.W.3d 676, 679 (Tex. App.—El Paso 2006, orig. proceeding) (citing *In re Greenwell*, 160 S.W.3d 286, 288 (Tex. App.—Texarkana 2005, orig. proceeding)). Whether a reasonable time has elapsed depends on the circumstances of each case. *In re Blakeney*, 254 S.W.3d 659, 662 (Tex. App.—Texarkana 2008, orig. proceeding). "Determining what time period is reasonable is not subject to exact formulation. . . . Moreover, no bright line separates a reasonable time period from an unreasonable one." *In re Blakeney*, 254 S.W.3d at 662 (citing *In re Keeter*, 134 S.W.3d 250, 253 (Tex. App.—Waco 2003, orig. proceeding)). Periods of eighteen months, thirteen months, six months, and three months have been held to be too long for a trial court not to rule. *See In re Hines*, No. 05-19-00243-CV, 2019 WL 1615363, at *1 (Tex. App.—Dallas Apr. 15, 2019, orig. proceeding); *In re Kleven*, 100 S.W.3d 643, 644–45 (Tex. App.—Texarkana 2003, orig. proceeding); *In re Ramirez*, 994 S.W.2d 682, 684 (Tex. App.—San Antonio 1998, orig. proceeding); *Kissam v. Williamson*, 545 S.W.2d 265 (Tex. App.—Tyler 1976, orig. proceeding) (per curiam).

§ 27.29 Temporary Orders

Since temporary orders are not subject to an interlocutory appeal, except appointment of receiver and injunctive relief, mandamus is an appropriate remedy to attack the issuance of temporary orders in a suit affecting the parent-child relationship. *See Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (per curiam); *In re Lemons*, 47 S.W.3d 202, 203–04 (Tex. App.—Beaumont 2001, orig. proceeding) (per curiam).

A relator may challenge temporary orders pending appeal obtained pursuant to Family Code section 6.709 by mandamus when the trial court's order constitutes an abuse of discretion and the pending appeal provides an inadequate remedy. *In re Merriam*, 228 S.W.3d 413 (Tex. App.—Beaumont 2007, orig. proceeding) (per curiam); *see* Tex. Fam. Code § 6.709(*l*)(3).

If the temporary orders provide for performance before the date of the de novo hearing, a party may seek a stay of those orders by mandamus. *In re E.M.*, No. 02-14-00403-CV, 2015 WL 128739 (Tex. App.—Fort Worth Jan. 9, 2015, orig. proceeding) (mem. op.).

A trial court abused its discretion when it entered temporary orders changing the designation of the person with the right to designate the primary residence of the child, because there was no evidence that the child's present living environment endangered her physical health or significantly impaired her emotional development. *In re Levay*, 179 S.W.3d 93 (Tex. App.—San Antonio 2005, orig. proceeding); *see also* Tex. Fam. Code § 156.006; *In re Coker*, No. 03-17-00862-CV, 2018 WL 700033 (Tex. App.—Austin Jan. 23, 2018, orig. proceeding) (mem. op.) (imposing geographic restriction when previously none had existed has effect of changing conservator with right to determine child's primary residence); *In re Tindell*, No. 03-18-00274-CV, 2018 WL 3405035 (Tex. App.—Austin July 12, 2018, orig. proceeding) (mem. op.) (mother's frequent moves insufficient to support temporary orders changing person with exclusive right to determine child's residence); *In re G.P.*, 495 S.W.3d 927, 931 (Tex. App.—Fort Worth 2016, orig. proceeding) (restriction regarding temporary orders changing person with right to designate child's residence did not apply because no final order previously granted that right).

A trial court abused its discretion when it entered temporary orders confirming the father as the joint managing conservator with the right to determine domicile and enjoining the mother from visiting with the child outside the county instead of enforcing a Canadian order, obtained pursuant to the Hague Convention, that the father return

the child to the mother in Canada. *In re Lewin*, 149 S.W.3d 727 (Tex. App.—Austin 2004, orig. proceeding).

A trial court abused its discretion when it refused to dismiss the husband's posttrial motion for contempt pending appeal, because the trial court's power to issue such an order (to assist in enforcing the terms of the property division in the decree) is abated pursuant to section 9.007(c) of the Texas Family Code. *In re Fischer-Stoker*, 174 S.W.3d 268 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

A trial court abused its discretion by issuing a temporary order granting custody to the mother without setting a date for the end of the mother's custody or for another hearing. *In re Bradshaw*, 273 S.W.3d 851, 859–60 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding [mand. denied]).

A trial court abused its discretion when it rendered temporary orders regarding conservatorship of a child without notice and without a hearing. *In re Chester*, 357 S.W.3d 103, 106–07 (Tex. App.—San Antonio 2011, orig. proceeding).

A trial court abused its discretion when it rendered temporary orders that deprived a parent of the physical possession of her child when the pleading seeking termination of the mother's rights neither was verified nor had an attached affidavit as required by section 105.001(c) of the Texas Family Code. *In re Barrera*, No. 03-18-00271-CV, 2018 WL 1916023 (Tex. App.—Austin Apr. 23, 2018, orig. proceeding) (mem. op.).

A trial court abused its discretion when it issued temporary orders pending appeal ordering the father to pay the mother appellate attorney's fees based on the best interest of the child, rather than based on the safety and welfare of the child as required by sections 105.001(a)(5) and 109.001(a)(5) of the Texas Family Code. Additionally, even if the trial court had applied the correct standard, there was no evidence to support that the fees were necessary for the safety and welfare of the child. *In re Mansfield*, No. 04-19-00249-CV, 2019 WL 2439104, at *2–3 (Tex. App.—San Antonio June 12, 2019, orig. proceeding).

§ 27.30 Third-Party Actions for Fraud on Community

Mandamus was found to be proper in a situation where the trial court had severed out a third-party action involving fraud on the community. Third-party actions involving fraud on the community should not be severed and should be tried with, or before, the divorce action. *See In re Burgett*, 23 S.W.3d 124, 127–28 (Tex. App.—Texarkana 2000, orig. proceeding).

§ 27.31 Turnover Order during Pendency of Divorce

Mandamus was found to be proper when the husband was ordered to turn over funds in the trial court's registry to pay the wife's attorney's fees in an ongoing divorce action. Without a final judgment, a turnover order is void. Further, a trial court may not include in a turnover order a nonjudgment third party, such as the wife's attorney. *In re Alsenz*, 152 S.W.3d 617 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding).

§ 27.32 Venue

Venue determinations generally are incidental trial rulings that are correctable on appeal and are not appropriate for mandamus relief. *Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals*, 929 S.W.2d 440, 441 (Tex. 1996) (orig. proceeding) (per curiam). Exceptions to the general rule include the following.

Supplementation of Record: The trial court abuses its discretion when it fails to afford a party seeking a transfer under rule 257 of the Texas Rules of Civil Procedure a reasonable opportunity to supplement the venue record before the venue hearing with affidavits and discovery products. *See Union Carbide Corp. v. Moye*, 798 S.W.2d 792, 793 (Tex. 1990) (orig. proceeding).

Suit Affecting the Parent-Child Relationship: The Family Code provides for mandatory transfer of a suit affecting the parent-child relationship in certain circumstances. *See* Tex. Fam. Code §§ 103.002, 155.201, 155.301. If the trial court refuses to transfer a case, in violation of the mandatory provisions, the proper remedy is mandamus. *See Leonard v. Paxson*, 654 S.W.2d 440, 441 (Tex. 1983) (orig. proceeding). Mandamus is available to compel mandatory transfer in suits affecting the parent-child relationship. *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (per curiam); *Arias v. Spector*, 623 S.W.2d 312, 313 (Tex. 1981) (orig. proceeding) (per curiam).

Transfer of a case to a county in which the child has resided for more than six months is a mandatory ministerial duty under section 155.201 of the Texas Family Code. "Parents and children who have a right under the mandatory venue provisions to venue in a particular county should not be forced to go through a trial that is for naught. Justice demands a speedy resolution of child custody and child support issues." *Proffer*, 734 S.W.2d at 673. If parties are sharing custody of a child on an every-other-week or similar basis and live in two different counties, suit must be brought in the county in which the parent in actual possession of the child on the date of the filing of the cause of action resides. *See In re Narvaiz*, 193 S.W.3d 695, 700 (Tex. App.—Beaumont 2006, orig.

proceeding) (per curiam). When siblings live in different counties, transfer as to some, but not all, children may be appropriate, and section 155.207 of the Texas Family Code clearly contemplates severance in those instances because it prescribes the procedure for handling the case files when one child is transferred and another child is not. *In re Yancey*, 550 S.W.3d 671, 675 (Tex. App.—Tyler 2017, orig. proceeding).

If children are placed in foster care for six months or longer before a suit affecting the parent-child relationship is filed, the trial court has a mandatory duty to transfer the suit to the county in which the children reside with the foster parents. *In re Kerst*, 237 S.W.3d 441, 444–45 (Tex. App.—Texarkana 2007, orig. proceeding).

Under UIFSA, once a Texas court that has jurisdiction enters a child support order, that court is the only court entitled to modify the decree as long as it retains continuing, exclusive jurisdiction. The trial court abused its discretion when it transferred a suit to modify the support order to Illinois where the father lived when the mother continued to reside in Texas. Although a court of another state may enforce the Texas support decree, that court has no authority to modify the support order as long as one of the parties remains in Texas, the issuing state. UIFSA, unlike the UCCJEA, provides no mechanism for the issuing tribunal of a support order to decline to exercise continuing exclusive jurisdiction and transfer jurisdiction to modify a support order to a court in another state. *In re Meekins*, 550 S.W.3d 729 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding).

Failure to Give Notice of Hearing: It is an abuse of discretion, correctable by mandamus, for a trial court to rule on a motion to transfer venue without giving the parties the notice required by rule 87(1) of the Texas Rules of Civil Procedure. *Henderson v. O'Neill*, 797 S.W.2d 905, 905 (Tex. 1990) (orig. proceeding) (per curiam).

§ 27.33 Void Orders

Mandamus is proper to correct a void order, one which a trial court has no power to render. *Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex. 1994) (orig. proceeding) (per curiam); *Urbish v. 127th Judicial District Court*, 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding); *Erbs v. Bedard*, 760 S.W.2d 750, 753–54 (Tex. App.—Dallas 1988, orig. proceeding). Mandamus will lie to nullify an order entered without legal authority. *See Eckels v. Gist*, 743 S.W.2d 330, 330 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding); *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 143 (Tex. App.—Dallas 1987, orig. proceeding). If a trial court enters an order that it does not have the constitu-

tional, statutory, or inherent authority to enter, mandamus will lie. *See Shelvin v. Lykos*, 741 S.W.2d 178, 185 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding).

Mandamus will lie when a trial court acts after its plenary power has expired. *In re Lovito-Nelson*, 278 S.W.3d 773, 776 (Tex. 2009) (orig. proceeding) (per curiam). Mandamus is also appropriate when a trial court grants relief against an entity not before the court. *In re Ashton*, 266 S.W.3d 602, 604 (Tex. App.—Dallas 2008, orig. proceeding).

When an assigned judge overrules a timely objection to his assignment, all of the judge's subsequent orders are void and the objecting party is entitled to mandamus relief. *In re Canales*, 52 S.W.3d 698, 701 (Tex. 2001) (orig. proceeding). Similarly, if a foreign judgment creditor seeks to enforce its judgment in Texas, it must comply with the statutory requirements for enforcing a foreign judgment. The trial court has jurisdiction to enforce the judgment only when the creditor complies with the statutory requirements. *Allen v. Tennant*, 678 S.W.2d 743, 744 (Tex. App.—Houston [14th Dist.] 1984, orig. proceeding). If the creditor fails to do so, all orders pertaining to the foreign judgment should be set aside as void. *Allen*, 678 S.W.2d at 744. Mandamus is proper in the absence of an adequate remedy when a district court fails to observe a mandatory statutory provision, and its failure to comply with the mandatory provision renders its order or judgment void. *Allen*, 678 S.W.2d at 745.

Contempt orders violating the automatic bankruptcy stay are void. *In re Small*, 286 S.W.3d 525 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding). Mandamus is also proper when a court fails to grant a statutorily required motion to dismiss. *In re Department of Family & Protective Services*, 273 S.W.3d 637, 645 (Tex. 2009).

Contempt orders holding someone in contempt for nonpayment of a debt are unconstitutional. *See Tucker v. Thomas*, 419 S.W.3d 292, 297 (Tex. 2013) ("The Texas Constitution prohibits a trial court from confining a person under its contempt powers as a means of enforcing a judgment for debt."); *In re Green*, 221 S.W.3d 645, 647 (Tex. 2007) (orig. proceeding) (per curiam); *In re Henry*, 154 S.W.3d 594, 597–98 (Tex. 2005) (orig. proceeding); *Ex parte Hall*, 854 S.W.2d 656, 656–57 (Tex. 1993) (orig. proceeding). A commitment order that violates the Texas Constitution is beyond the court's power and is void. *In re Henry*, 154 S.W.3d at 596.

In *In re C.F.*, the court held the wife in contempt for failing to pay a student-loan debt. When a divorce court finds an asset exists and awards it in the divorce to one spouse, the other spouse who holds the asset is not indebted to the spouse owning the asset but is a constructive trustee and can be held in contempt. However, here there was no indi-

cation in the divorce decree that the wife was awarded funds in the divorce from which to pay the student-loan debt; she was therefore not a constructive trustee or fiduciary subject to contempt for her failure to pay it. Therefore, the order was void and mandamus was the proper remedy. *See In re C.F.*, 576 S.W.3d 761, 769–70 (Tex. App.—Fort Worth 2019, orig. proceeding).

Voidable orders are readily appealable and must be attacked directly, but void orders may be circumvented by collateral attack or remedied by mandamus. *Sanchez v. Hester*, 911 S.W.2d 173, 176 (Tex. App.—Corpus Christi–Edinburg 1995, orig. proceeding). Appeal is therefore wholly unnecessary to establish the invalidity of a void order. *See Sanchez*, 911 S.W.2d at 177. An attack may be made in any proceeding having as its general objective a finding that such judgment was void when entered; mandamus is a proper mode of attack on a void judgment. *Thomas v. Miller*, 906 S.W.2d 260, 262–63 (Tex. App.—Texarkana 1995, orig. proceeding).

§ 27.34 Withdrawal of Counsel

Withdrawal of counsel is an appropriate subject of a mandamus proceeding. *In re Posadas USA, Inc.*, 100 S.W.3d 254, 256 (Tex. App.—San Antonio 2001, orig. proceeding).

§ 27.35 Generally

A writ of mandamus will not lie to prohibit the enforcement of a temporary injunction that has been issued in a case before the court of appeals on appeal, as it would interfere with that court's jurisdiction. *See Bray v. Schultz*, 376 S.W.2d 82, 85 (Tex. App.—Amarillo 1963, orig. proceeding) (per curiam).

Generally, a writ of mandamus will not issue to control or correct rulings or judgments on motions or pleas that are merely incidental to the normal trial process when there is an adequate remedy by appeal for correction of any erroneous ruling or judgment. However, a writ of mandamus will issue directing a district judge to enter or set aside a particular judgment or order when the directed course of action is the only proper course and the relator has no other adequate remedy. *State ex rel. Pettit v. Thurmond*, 516 S.W.2d 119, 121 (Tex. 1974) (orig. proceeding).

Since temporary injunctions are subject to interlocutory appeal, mandamus is not appropriate. *In re Sigmar*, 270 S.W.3d 289, 296 (Tex. App.—Waco 2008, orig. proceeding [mand. denied]).

[Chapters 28 through 30 are reserved for expansion.]

Chapter 31
Enforcement—Property

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Chapter 31

Enforcement—Property

I. Enforcement Procedures

§ 31.1 Filing Suit to Enforce

A party affected by a decree of divorce or annulment providing for the division of marital property, including a division of property and any contractual provisions under the terms of an agreement incident to divorce or annulment that was approved by the court, may file a suit requesting enforcement in the court that rendered the decree. A trial court retains authority to enforce its judgment after its plenary power expires. *Bhardwaj v. Pathak*, No. 05-14-01030-CV, 2015 WL 4882522 (Tex. App.—Dallas Aug. 17, 2015, no pet.) (mem. op.). If the enforcement proceeding is a claim for breach of contract, the suit may be filed in any district court. *Chavez v. McNeely*, 287 S.W.3d 840, 845 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

Affected parties include third-party creditor beneficiaries. *Stine v. Stewart*, 80 S.W.3d 586, 590 (Tex. 2002) (per curiam). The suit to enforce is governed by the Texas Rules of Civil Procedure applicable to original lawsuits. A party whose rights, duties, powers, or liabilities may be affected by the suit is entitled to receive notice by citation. The deadline and rules for answering apply as in other civil cases. Tex. Fam. Code § 9.001; *Ackerly v. Ackerly*, 13 S.W.3d 454, 456 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.).

§ 31.2 Limitations

Neither the discovery rule, the doctrine of fraudulent concealment, nor a breach of fiduciary duty claim can avoid a statute of limitations defense when the plaintiff, after notification of the injury, fails to file a claim within the statutory period. *Treuil v. Treuil*, 311 S.W.3d 114 (Tex. App.—Beaumont 2010, no pet.).

Tangible Property: A suit to enforce the division of tangible property in existence at the time the decree is signed must be filed before the second anniversary of the date the decree is signed or becomes final after appeal, whichever is later. Tex. Fam. Code § 9.003(a). *See Chakrabarty v. Ganguly*, 573 S.W.3d 413, 417 (Tex. App.—Dallas 2019, no pet.) (money and stocks are not tangible personal property, so two-year statute of limitations does not apply).

Contempt: The two-year limitations period of section 9.003(a) governing suits to enforce the division of tangible property may not apply to contempt actions. *See Burton v. Burton*, 734 S.W.2d 727, 729 (Tex. App.—Waco 1987, no writ) ("The two-year limitation in section 3.70(c) [now section 9.003] does not expressly apply to motions for contempt under section 3.76 [now section 9.012], and this court will not add that limitation."). *But see Dechon v. Dechon*, 909 S.W.2d 950, 961 (Tex. App.—El Paso 1995, no writ) (determining that section 3.70(c) [now section 9.003] "makes little sense unless it applies to all methods of enforcement," including contempt).

Rights to Property in Future: A suit to enforce the division of future property not in existence at the time the decree is signed must be filed before the second anniversary of the date the right to the property matures or accrues or the decree becomes final, whichever is later. Tex. Fam. Code § 9.003(b). Installment payments have been deemed future property not in existence at the time of divorce. Therefore, the statute of limitations runs from the date any installment payment becomes due. *Kent v. Holmes*, 139 S.W.3d 120, 131 (Tex. App.—Texarkana 2004), *rev'd on other grounds*, *Holmes v. Kent*, 221 S.W.3d 622 (Tex. 2007). A suit to enforce a mediated settlement agreement is a breach-of-contract claim and is subject to a four-year statute of limitations, even if it involves a claim for future retirement benefits. *Helm v. Hauser*, No. 04-17-00232-CV, 2018 WL 2943823 (Tex. App.—San Antonio June 23, 2018, pet. denied) (mem. op.), *petition for cert. filed*, Sept. 6, 2019 (No. 19-5958).

Judgments: A decree of divorce and agreement incident to divorce may be governed by the ten-year statute applicable to the enforcement and revival of judgments. *See* Tex. Civ. Prac. & Rem. Code §§ 31.006, 34.001; *In re Marriage of Ward*, 806 S.W.2d 276, 277 (Tex. App.—Amarillo 1991, writ denied) (only those payments due and unpaid more than ten years before filing of motion to reduce claims to judgment are barred by limitations; case decided under prior version of Texas Civil Practice and Remedies Code section 31.006). *See also Abrams v. Salinas*, 467 S.W.3d 606, 611 (Tex. App.—San Antonio 2015, no pet.).

§ 31.3 Pleadings

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

§ 31.4 Clear and Specific Language

The order to be enforced must spell out the details of compliance in clear, specific, and unambiguous terms so that the person subject to the order will readily know exactly what duties or obligations are imposed on him. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding). Each obligation for which enforcement by contempt is requested must be set forth in clear, specific, and unambiguous terms. The order must clearly specify the act to be performed, together with the time and place of performance. The fact that a respondent has defeated the intent of an order is not sufficient to support contempt. The relator must have violated a command to do or not do a specific act.

If the terms of the original order are not clear or specific enough to be enforceable by contempt, the court may render a clarifying order specific enough to be enforced by contempt. See section 31.21 below.

§ 31.5 Written Order

The order to be enforced must be written and signed. *Ex parte Wilkins*, 665 S.W.2d 760, 760–61 (Tex. 1984) (orig. proceeding); *Ex parte Padron*, 565 S.W.2d 921, 924 (Tex. 1978) (orig. proceeding).

§ 31.6 No Change of Division of Property

A court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. An order to enforce the division is limited to an order in aid or clarification of the prior order and may not alter or change the substantive division. Tex. Fam. Code § 9.007(a); *Dalton v. Dalton*, 551 S.W.3d 126, 140–42 (Tex. 2018); *Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003). The court may specify more precisely the manner of effecting the property division previously made or approved if the substantive division is not altered or changed. Tex. Fam. Code § 9.006(b). An enforcement order that amends, modifies, alters, or changes the actual, substantive division of property is beyond the power of the trial court and is unenforceable. Tex. Fam. Code § 9.007(b); *Pierce v. Pierce*, 850 S.W.2d 675, 679 (Tex. App.—El

Paso 1993, writ denied); *see also Perry v. Perry*, 512 S.W.3d 523, 529 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (appointment of receiver with authority to sell home "in his sole discretion . . . upon terms and conditions reasonable to him" was improper modification of decree requiring house to be sold at reasonable time and for reasonable price); *Contreras v. Contreras*, 974 S.W.2d 155, 158 (Tex. App.—San Antonio 1998, no pet.).

A provision in a decree awarding 100 percent of an asset to the party not in possession if the asset is determined to be undervalued is not enforceable if the asset was otherwise awarded in the decree, because such enforcement would constitute an alteration or change of the substantive division in violation of Tex. Fam. Code § 9.007. *In re W.L.W.*, 370 S.W.3d 799, 806–07 (Tex. App.—Fort Worth 2012, orig. proceeding [mand. denied]).

A "residuary clause" ordering that any asset not disclosed by a party is awarded to the party not in possession is enforceable in accordance with the value of the asset on the date of divorce and not on the date of purchase. *Meyer v. Meyer*, No. 05-14-00655-CV, 2016 WL 446895, at *4 (Tex. App.—Dallas Feb. 4, 2016, pet. denied) (mem. op.). Additionally, undisclosed property may be considered an asset even though encumbered by debt. *Meyer*, 2016 WL 446895, at *3.

Ordering the return of overpayments does not amend, modify, alter, or change the division of property in a decree. *Garcia v. Alvarez*, 367 S.W.3d 784, 787–88 (Tex. App.—Houston [14th Dist.] 2012, no pet.). In *Gills v. Harris*, No. 11-15-00018-CV, 2017 WL 469407 (Tex. App.—Eastland Feb. 2, 2017, no pet.) (mem. op.), the appellant claimed that the provision ordering him to use "his best efforts to refinance the house solely in his name" was too indefinite to be enforced and was therefore not subject to clarification. When he had failed to refinance the house after five years, the trial court ordered him to refinance it within ninety days. The appellate court held that the imposition of a specific time and manner for refinancing the house did not amend, modify, alter, or change the underlying property division. *See also Friend v. Friend*, No. 02-15-00166-CV, 2016 WL 7240596 (Tex. App.—Fort Worth Dec. 15, 2016, no pet.) (mem. op.) (judgment finding husband liable for increased debt on line of credit previously divided in divorce was not modification of property division).

§ 31.7 No Effect on Finality of Decree

An order of enforcement does not alter or affect the finality of the underlying decree of divorce or annulment. Tex. Fam. Code § 9.006(c); *see In re Marriage of Zvara*, 131

S.W.3d 566, 571 (Tex. App.—Texarkana 2004, no pet.). The trial court may not enter orders to aid or clarify the property division in the decree before the thirtieth day after the final judgment is signed or the thirtieth day after a timely filed motion for new trial or to vacate, modify, correct, or reform the judgment is overruled by court order or operation of law. Tex. Fam. Code § 9.007(c).

§ 31.8 Joinder of Claims

Any enforcement proceeding may be joined, either independently or alternatively, with multiple remedies or claims. *See* Tex. Fam. Code § 9.001(b) (suit to enforce governed by Texas Rules of Civil Procedure).

§ 31.9 Partition of Property Not Divided in Decree

The procedures for enforcement of a decree of divorce or annulment do not apply to actions to partition property not divided on dissolution of the marriage, which are governed by subchapter C of the Family Code and the Texas Rules of Civil Procedure applicable to original lawsuits. Tex. Fam. Code § 9.004. For a discussion of division of property after divorce, see section 61.6 in this manual.

§ 31.10 Qualified Domestic Relations Orders

If the court that rendered a final decree of divorce or annulment dividing retirement did not provide a qualified domestic relations order (QDRO) for the payment of retirement benefits, a party may petition the court to render a QDRO or similar order. Tex. Fam. Code § 9.103. However, a trial court may not enter a postdivorce QDRO that changes the substantive division of property made in the original decree. *Dalton v. Dalton*, 551 S.W.3d 126, 140–42 (Tex. 2018).

The court that rendered the final order has continuing, exclusive jurisdiction to render an enforceable QDRO. Tex. Fam. Code § 9.101(a).

The court that rendered a QDRO retains continuing, exclusive jurisdiction to amend the order to correct the order or clarify its terms to effectuate the property division ordered by the court. Such an amended QDRO must be submitted to the plan administrator to determine whether it satisfies the requirements of a QDRO. Tex. Fam. Code § 9.1045. If the plan administrator determines that the amended QDRO does not satisfy the requirements of a QDRO, the court retains continuing, exclusive jurisdiction to render a QDRO. Tex. Fam. Code §§ 9.104, 9.1045(b).

In a proceeding for a postdecree QDRO, the court may award reasonable attorney's fees incurred by a party to a divorce or annulment against the other party to the divorce or annulment. The fees may be ordered paid directly to the attorney, who may enforce the order for fees by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 9.106.

§ 31.11 Right to Jury

The parties to an enforcement action are ordinarily not entitled to a jury. Tex. Fam. Code § 9.005. Concerning the availability of a jury when contempt charges are in issue, see section 35.5:2 in this manual.

§ 31.12 Right to Counsel

Concerning the right to counsel when a party is seeking to hold the other party in contempt and incarceration is a possible result of the proceedings, see sections 35.5:3 and 35.5:4 in this manual.

§ 31.13 Fifth Amendment Rights

For a discussion of the Fifth Amendment privilege in a contempt proceeding, see section 35.5:5 in this manual.

§ 31.14 Costs and Attorney's Fees

In any proceeding to enforce a property division, the court may award costs as in other civil cases. Tex. Fam. Code § 9.013. Reasonable attorney's fees may be awarded and may be ordered paid directly to the attorney, who may enforce the order for fees by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 9.014. A court may not place an equitable lien on a former spouse's real and personal property to ensure payment of attorney's fees incurred in a postdivorce enforcement action. *Higgins v. Higgins*, 514 S.W.3d 382, 391 (Tex. App.—San Antonio 2017, pet. denied).

[Sections 31.15 through 31.20 are reserved for expansion.]

II. Enforcement Remedies

The Texas Family Code provides several significant remedies to secure compliance with an order for the division of property.

§ 31.21 Clarification Order

If the terms of the original order are not clear or specific enough to be enforceable by contempt, the court may render a clarifying order setting forth specific terms to enforce compliance with the original division of property. Tex. Fam. Code § 9.008(b); *Hollingsworth v. Hollingsworth*, 274 S.W.3d 811, 818 (Tex. App.—Dallas 2008, no pet.) (clarification of method, time, and place of payment of tax liability upheld); *Karigan v. Karigan*, 239 S.W.3d 436, 438–39 (Tex. App.—Dallas 2007, no pet.); *In re Marriage of Jones*, 154 S.W.3d 225, 228 (Tex. App.—Texarkana 2005, no pet.); *Pearcy v. Pearcy*, 884 S.W.2d 512, 514 (Tex. App.—San Antonio 1994, no writ).

On the request of a party or on the court's own motion, the court may render a clarifying order before a motion for contempt is made or heard, in conjunction with a motion for contempt, or on denial of a motion for contempt. Tex. Fam. Code § 9.008(a). The order can be issued without a hearing. *See In re Marriage of Alford*, 40 S.W.3d 187, 190 (Tex. App.—Texarkana 2001, no pet.).

A clarifying order applies only prospectively. Tex. Fam. Code § 9.008(c). The court shall provide a reasonable time for compliance before enforcing a clarifying order by contempt or in another manner. Tex. Fam. Code § 9.008(d). In clarifying its order the court may order the respondent to pay monies already accrued. *Zeolla v. Zeolla*, 15 S.W.3d 239, 243 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

The trial court may not enter orders to clarify the property division in the decree before the thirtieth day after the final judgment is signed or the thirtieth day after a timely filed motion for new trial or to vacate, modify, correct, or reform the judgment is overruled by court order or operation of law. Tex. Fam. Code § 9.007(c).

§ 31.22 Order for Delivery of Property

A court may make an order for the delivery of specific existing property regardless of its value, including an award of an existing sum of money or its equivalent. Tex. Fam. Code § 9.009.

§ 31.23 Contempt

The court may enforce by contempt an order requiring the delivery of specific property or the award of a right to future property. However, the court may not enforce by contempt an award of money, payable either in a lump sum or in future installments in the nature of debt, except for a sum of money in existence at the time of the decree or a matured right to future payments as provided by Family Code section 9.011. Tex. Fam. Code § 9.012(a), (b); *see also Woolam v. Tussing*, 54 S.W.3d 442, 449 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.) (provision in divorce decree rendered before September 1, 1995, ordering payment of support to former spouse not enforceable by contempt unless authorized by statute or constitutional provision; before September 1, 1995, Texas statutes and public policy did not sanction court-ordered alimony). *But cf. In re Marriage of Zvara*, 131 S.W.3d 566, 568 (Tex. App.—Texarkana 2004, no pet.) (husband sold stock in account and was ordered to restore account with cash equivalent). A party may combine contempt and other appropriate remedies in an enforcement action. *See* Tex. Fam. Code § 9.012(c).

An obligation to pay a debt imposed under a divorce decree is not enforceable by contempt. *Shumate v. Shumate*, 310 S.W.3d 149 (Tex. App.—Amarillo 2010, no pet.); *see also In re C.F.*, 576 S.W.3d 761, 769 (Tex. App.—Fort Worth 2019, orig. proceeding). The respondent in a petition to enforce a property division may not be held in contempt in absentia, regardless of whether the sanction imposed is coercive or punitive. *In re Loeppky*, No. 11-16-00322-CV, 2017 WL 1497383 (Tex. App.—Eastland Apr. 20, 2017, orig. proceeding) (mem. op.) (citing *Ex parte Alloju*, 907 S.W.2d 486, 487 (Tex. 1995)).

For a comprehensive discussion of contempt proceedings, see chapter 35.

§ 31.24 Money Judgment

If a party fails to comply with a decree of divorce or annulment and delivery of property ordered in the decree is no longer an adequate remedy, the court may render a money judgment for the damages caused by the failure to comply. Tex. Fam. Code § 9.010(a). If a party did not receive payments of money awarded, the court may render a money judgment against a defaulting party for the amount of unpaid payments to which the party is entitled. Tex. Fam. Code § 9.010(b); *In re Marriage of Malacara*, 223 S.W.3d 600, 603 (Tex. App.—Amarillo 2007, no pet.) (per curiam).

A party is entitled to a share of a retirement account awarded to the party in a decree in the form of a money judgment when the funds have been removed from the retirement account contrary to the provisions of the decree. *Degroot v. Degroot*, 369 S.W.3d 918, 923 (Tex. App.—Dallas 2012, no pet.). An agreed divorce provision requiring a parent to pay a child's college expenses, not specifically included in the property division terms in the divorce decree, was enforceable only as a contract and not by a money judgment under Texas Family Code, chapter 9. *In re B.M.Y.*, 2017 WL 3275505 (Tex. App.—Dallas 2017, no pet.) (mem. op.).

A money judgment is enforceable by any means available for the enforcement of judgments for debts and is in addition to any other remedy provided by law. Tex. Fam. Code § 9.010(c), (d).

For additional information on and forms for the preparation of a money judgment, see 2 *Texas Collections Manual*, State Bar of Texas, ch. 20 (5th ed. 2018). For information on and forms for postjudgment discovery, see 3 *Texas Collections Manual*, State Bar of Texas, ch. 26 (5th ed. 2018).

COMMENT: An attorney collecting a money judgment may be subject to federal and state laws affecting debt collection. For a detailed discussion of the federal Fair Debt Collection Practices Act and Texas Debt Collection Practices Act, see 1 *Texas Collections Manual*, State Bar of Texas, ch. 2 (5th ed. 2018).

§ 31.25 Abstracting Judgment

A judgment creditor may abstract a money judgment and record the abstract in the deed records of counties where the judgment debtor owns real property as soon as the judgment is signed. On application of a person in whose favor a judgment is rendered or of that person's agent, attorney, or assignee, the judge or justice of the peace who rendered the judgment, or the court clerk, shall prepare, certify, and deliver an abstract to the applicant for a fee. The attorney for a person in whose favor a judgment is rendered in a small claims court or a justice court or a person in whose favor a judgment is rendered in a court other than a small claims court or justice court, or the person's agent, attorney, or assignee, may prepare the abstract, and the preparer must verify it. Tex. Prop. Code § 52.002. The Property Code does not provide for a waiting period for filing an abstract. There are strict rules, however, for the form and content of the abstract. *See* Tex. Prop. Code § 52.003.

An abstract of judgment, properly recorded and indexed, generally creates a judgment lien on and attaches to any nonexempt real property of the judgment debtor located in that county, including nonexempt property acquired after the abstract is recorded and indexed. Tex. Prop. Code §§ 52.001, 52.0011, 52.0012.

If an abstracted judgment is either paid, settled, or reversed by the appellate courts, the party filing the abstract should record a release of judgment in the counties where the abstract was filed. *See* Tex. Prop. Code § 52.005(2).

For additional information on and forms for a judgment lien and abstract of judgment, see 3 *Texas Collections Manual*, State Bar of Texas, ch. 27 (5th ed. 2018).

§ 31.26 Foreclosure of Lien

The court may impose a lien on property as part of the property division. However, a lien granted on a separate property homestead is invalid if the lien does not fit in any category allowed by Texas Constitution. *See Hinton v. Burns*, 433 S.W.3d 189, 200 (Tex. App.—Dallas 2014, no pet.). A money judgment to one spouse may also be secured by perfecting a lien on property of the other spouse. The lien operates as a security interest and creates a debtor-creditor relationship between the parties. The failure of the debtor to make timely payments in satisfaction of the money judgment allows the creditor to foreclose on and enforce the sale of the property subject to the lien. *See McGoodwin v. McGoodwin*, 671 S.W.2d 880, 883 (Tex. 1984); *Magallanez v. Magallanez*, 911 S.W.2d 91, 95 (Tex. App.—El Paso 1995, no writ).

§ 31.27 Garnishment

A judgment is final for the purpose of garnishment from the date it is signed unless a supersedeas bond is approved and filed in accordance with rule 47 (now rules 24.1 and 24.2) of the Texas Rules of Appellate Procedure. Tex. R. Civ. P. 657. The requirements of garnishment actions are set forth in rules 657–679 of the Texas Rules of Civil Procedure and in sections 63.001–.005 of the Civil Practice and Remedies Code.

For additional information on and forms for a postjudgment garnishment, see 3 *Texas Collections Manual*, State Bar of Texas, ch. 27 (5th ed. 2018).

§ 31.28 Turnover Statute

The turnover statute provides remedies by way of injunction and attachment to reach property of a judgment debtor. A court may order the judgment debtor to turn over nonexempt property together with related records to a designated sheriff or constable for execution; otherwise apply the property to satisfy the judgment; or appoint a receiver to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor. Tex. Civ. Prac. & Rem. Code § 31.002(b). *But see In re C.H.C.*, 290 S.W.3d 929, 932–33 (Tex. App.—Dallas 2009, no pet.) (nonrefundable retainer paid to judgment debtor's attorney not in judgment debtor's possession or control).

A judgment creditor may seek relief under the turnover statute as soon as a judgment is signed. *See Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 287 (Tex. App.—Dallas 1985, no writ). A judgment creditor need not exhaust other legal remedies before seeking relief under the turnover statute if the statutory requirements are met. *Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). A judgment debtor is not entitled to notice and a hearing before the entry of a turnover order. *In re Marriage of Tyeskie*, 558 S.W.3d 719, 725 (Tex. App.—Texarkana 2018, pet. denied) (citing Tex. Civ. Prac. & Rem. Code § 31.002).

A trial court may not confer the exercise of nondelegable judicial discretion to a receiver. A receiver has no constitutional authority to adjudicate parties' rights. Under Tex. Civ. Prac. & Rem. Code § 31.002, an order must specifically identify the nonexempt property that is susceptible to turnover relief. Further, the order must specify the actions to be taken with respect to that property. *Congleton v. Shoemaker*, Nos. 09-11-00453-CV, 09-11-00654-CV, 2012 WL 1249406, at *2–4 (Tex. App.—Beaumont Apr. 12, 2012, orig. proceeding) (mem. op.).

A trial court's order authorizing and requesting a foreign court to appoint a receiver to help dispose of property as stated in the divorce decree is not an unauthorized modification of the decree. *Vats v. Vats*, No. 01-12-00255-CV, 2012 WL 2108672, at *4 (Tex. App.—Houston [1st Dist.] June 7, 2012, no pet.) (mem. op.).

For additional information on and forms for turnover, see 3 *Texas Collections Manual*, State Bar of Texas, ch. 27 (5th ed. 2018).

§ 31.29 Execution

Generally a writ of execution may not issue until thirty days after the judgment is signed or the motion for new trial is overruled. Tex. R. Civ. P. 627. An exception exists for earlier execution if the judgment debtor is about to remove, transfer, or hide property for the purpose of defrauding creditors and the creditor or attorney files an affidavit to this effect; with such evidence, the judgment creditor may have assets seized as soon as the judgment is signed. Tex. R. Civ. P. 628. Execution proceedings are governed by rules 621–656 and by chapter 34 of the Civil Practice and Remedies Code.

For additional information on and forms for execution and property subject to and exempt from execution, see 3 *Texas Collections Manual*, State Bar of Texas, ch. 27 (5th ed. 2018).

§ 31.30 Constructive Trust

The receipt by one spouse of property awarded to the other spouse creates a fiduciary obligation and imposes a constructive trust on the property for the benefit of the owner spouse. Tex. Fam. Code § 9.011(b). *See Ishee v. Ishee*, No. 09-15-00197-CV, 2017 WL 2293150 (Tex. App.—Beaumont May 4, 2017, no pet.) (mem. op.) (former husband had fiduciary duty to remit to former wife her assigned percentage of income he received from business identified in divorce decree). *See also Lancashire v. Lancashire*, No. 05-16-00890-CV, 2017 WL 2952995 (Tex. App.—Dallas July 11, 2017, no pet.) (mem. op.) (provision naming former husband as constructive trustee to extent of payment obligations on sale or transfer of stock shares did not impose further obligations to provide tax returns, financial statements, or other information showing status of shares).

§ 31.31 Uniform Fraudulent Transfer Act

If a spouse is awarded a money judgment in a divorce and after the divorce his or her former spouse makes a transfer of property, the transfer is fraudulent under the Texas Uniform Fraudulent Transfer Act and may be set aside if (1) the former spouse made the transfer with actual intent to hinder, delay, or defraud a creditor or (2) the former spouse made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the former spouse intended to incur, or reasonably believed he or she would incur, debts beyond his or her ability to pay. *See* Tex. Bus. & Com. Code § 24.005(a); *Mladenka v. Mladenka*, 130 S.W.3d 397, 404 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

For a discussion of the Uniform Fraudulent Transfer Act, see section 3.74 in this manual.

[Sections 31.32 through 31.40 are reserved for expansion.]

III. Uniform Enforcement of Foreign Judgments Act

§ 31.41 Foreign Judgments

A judgment of another state may be enforced in accordance with the terms of the Uniform Enforcement of Foreign Judgments Act, chapter 35 of the Texas Civil Practice and Remedies Code.

A properly authenticated foreign judgment may be filed for enforcement with any Texas court of competent jurisdiction, whereupon it is treated like any other judgment of that court. *See* Tex. Civ. Prac. & Rem. Code §§ 35.003–.007. *See Dalton v. Dalton*, 551 S.W.3d 126, 135–36 (Tex. 2018) (while full faith and credit clause requires Texas courts to recognize orders of other states, Texas law governs methods by which Texas courts may enforce rights and obligations under foreign judgment); *see also Gesswein v. Gesswein*, 566 S.W.3d 34, 39 (Tex. App.—Corpus Christi–Edinburg 2018, pet. denied).

Alternatively, a judgment creditor retains the right to bring an action to enforce a judgment instead of filing it under those provisions. Tex. Civ. Prac. & Rem. Code § 35.008.

Rule 308b of the Texas Rules of Civil Procedure governs the enforceability of judgments and arbitration awards based on foreign law in suits involving a marriage relationship or a parent-child relationship. The primary purpose for the adoption of this rule was to counteract the possible unfair effects of judgments and awards granted under Sharia law. When dealing with a foreign judgment related to family law, the practitioner must follow the specific notice provisions set forth in rule 308b. *See* Tex. R. Civ. P. 308b.

Chapter 32

Enforcement—Spousal Maintenance and Alimony

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Chapter 32

Enforcement—Spousal Maintenance and Alimony

I. Enforcement Procedures—Spousal Maintenance

§ 32.1 Filing Suit to Enforce

A court order for spousal maintenance or an agreement for periodic payments of spousal maintenance approved by the court may be enforced by a suit to enforce filed in the court that rendered the order or approved the agreement. The court may render judgment against a defaulting party for the amount of arrearages after notice by service of citation, answer, if any, and a hearing finding that the defaulting party has failed or refused to pay the spousal maintenance as ordered. That judgment may be enforced by any means available for the enforcement of judgment for debts. Tex. Fam. Code § 8.059(a), (b).

§ 32.2 Limitations

No statute of limitations specifically applies to the enforcement of spousal maintenance. If the spousal maintenance is paid in accordance with an agreement, the four-year statutes governing contracts and debts may apply. *See* Tex. Civ. Prac. & Rem. Code §§ 16.004, 16.051.

However, if the maintenance is paid in accordance with a decree or under an agreement incorporated into a decree, it may be governed by the ten-year statute applicable to the enforcement and revival of judgments. *See* Tex. Civ. Prac. & Rem. Code §§ 31.006, 34.001; *see also O'Carolan v. Hopper*, 414 S.W.3d 288, 298 (Tex. App.—Austin 2013, no pet.) (ten-year limitation period applies to enforcement of spousal maintenance); *In re Marriage of Ward*, 806 S.W.2d 276 (Tex. App.—Amarillo 1991, writ denied) (only those payments due and unpaid more than ten years before filing of motion to reduce

claims to judgment are barred by limitations; case decided under prior version of section 31.006 of the Civil Practice and Remedies Code).

Further, the court may issue an order or writ for withholding at any time before all spousal maintenance and arrearages are paid. *See* Tex. Fam. Code § 8.151.

§ 32.3 Pleadings

A suit for enforcement should, in ordinary and concise language, identify the provision of the order allegedly violated and sought to be enforced, state the manner of the obligor's alleged noncompliance, state the relief requested, and contain the signature of the obligee or the obligee's attorney. *See* Tex. Fam. Code § 157.002(a).

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

§ 32.4 Clear and Specific Language

The order to be enforced must spell out the details of compliance in clear, specific, and unambiguous terms so that the person subject to the order will readily know exactly what duties or obligations are imposed on him. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding). Each obligation for which enforcement by contempt is requested must be set forth in clear, specific, and unambiguous terms. The order must clearly specify the act to be performed, together with the time and place of performance. The fact that a respondent has defeated the intent of an order is not sufficient to support contempt. The relator must have violated a command to do or not do a specific act.

§ 32.5 Written Order

The order to be enforced must be written and signed. *Ex parte Wilkins*, 665 S.W.2d 760, 760–61 (Tex. 1984) (orig. proceeding); *Ex parte Padron*, 565 S.W.2d 921, 924 (Tex. 1978) (orig. proceeding).

§ 32.6 Contempt

A court order for spousal maintenance or an *agreement* for periodic payments of spousal maintenance under the terms of Family Code chapter 8 voluntarily entered into between the parties and approved by the court is enforceable by contempt.

The court may not enforce by contempt any provision of an agreed order for maintenance that exceeds the amount of periodic support the court could have ordered under chapter 8 or for any period beyond the period of maintenance the court could have ordered under chapter 8. Tex. Fam. Code § 8.059(a–1). Such a maintenance obligation is punishable by contempt only if it meets the other requirements of chapter 8 of the Family Code. The Texas Supreme Court held, in *In re Green*, that a former husband could not be incarcerated under a contempt order for his failure to make spousal support payments based on a contractual obligation to pay "spousal maintenance" incorporated into a divorce decree, under the provision of the Texas Constitution prohibiting imprisonment for debt; alimony debt arising from a contract between the parties was a private debt, even though it was referenced in a court order. The support the former husband agreed to pay fell outside the requirements of chapter 8 of the Family Code. Although a legal obligation of support is enforceable by contempt, the promise to pay contractual alimony creates nothing more than a debt. *In re Green*, 221 S.W.3d 645, 648 (Tex. 2007) (orig. proceeding) (per curiam).

The case of *In re L.R.P.* follows the rationale in *Green*, stating in part, "[t]he mere fact a trial court approves a contractual spousal support agreement and incorporates it into the divorce decree does not transform the support obligation into court-ordered maintenance" subject to chapter 8 of the Family Code. *In re L.R.P.*, No. 05-14-01590-CV, 2016 WL 514174, at *3 (Tex. App.—Dallas Feb. 5, 2016, no pet.) (mem. op.); *see also Thompson v. Thompson*, No. 05-16-0026-CV, 2017 WL 2871423 (Tex. App.—Dallas June 30, 2017, no pet.).

A proceeding for enforcement by contempt of a spousal maintenance award may be brought in the trial court pending the appeal of such an order. *In re Sheshtawy*, 154 S.W.3d 114, 124–25 (Tex. 2004) (orig. proceeding).

For a comprehensive discussion of contempt proceedings, see chapter 35 in this manual.

§ 32.7 Affirmative Defenses

The following affirmative defenses apply to an action to enforce spousal maintenance by contempt or the violation of a condition of probation requiring payment of court-ordered maintenance: (1) the obligor's lack of ability to provide maintenance in the amount ordered; (2) the obligor's lack of property that could be sold, mortgaged, or otherwise pledged to raise the funds needed; (3) the obligor's unsuccessful attempts to borrow the amount ordered; and (4) the obligor's lack of knowledge of a source from

which to borrow or otherwise legally obtain the amount ordered. Tex. Fam. Code § 8.059(c).

The issue of the existence of an affirmative defense does not arise until pleaded. An obligor must prove the affirmative defense by a preponderance of the evidence. Tex. Fam. Code § 8.059(d).

COMMENT: There are no reported cases on the application of affirmative defenses in contractual alimony situations. Such defenses may not apply to voluntary cases, especially if the reason for the maintenance was to equalize the property settlement.

§ 32.8 Right to Jury

The provisions regarding the enforcement of spousal maintenance are silent with regard to the issue of a jury trial. However, the parties to an enforcement action are ordinarily not entitled to a jury. *See* Tex. Fam. Code § 9.005.

Concerning the availability of a jury when contempt charges are in issue, see section 35.5:2 in this manual.

§ 32.9 Costs and Attorney's Fees

There is no Family Code provision directly authorizing an award of attorney's fees for the enforcement of spousal maintenance in a suit brought by an obligee against an obligor. However, in any proceeding to enforce a property division, the court may award costs as in other civil cases. Tex. Fam. Code § 9.013. In such a case, reasonable attorney's fees may be awarded and may be ordered paid directly to the attorney, who may enforce the order for fees by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 9.014. Furthermore, the Texas Civil Practice and Remedies Code provides that a party may recover reasonable attorney's fees if the claim is for a written contract. Tex. Civ. Prac. & Rem. Code § 38.001.

In a suit brought by an obligor against the obligee to recoup an overpayment of maintenance, the obligor may be awarded fees. Tex. Fam. Code § 8.0591(b). Likewise, an obligor's employer may be liable for attorney's fees in an action against the employer for failure to withhold maintenance pursuant to a withholding order. Tex. Fam. Code § 8.206(b)(3).

There is no statutory authority to award fees in contempt cases generally. *See In re Daugherty*, No. 05-18-00290-CV, 2018 WL 3031658, at *5 (Tex. App.—Dallas June 19, 2018, orig. proceeding) (mem. op.) (absent contractual or statutory basis, trial court lacks authority to award attorneys' fees based on finding of contempt).

§ 32.10 Overpayment

If a maintenance order has terminated and the obligor is not in arrears, the obligee must return any payment made by the obligor that exceeds the amount of maintenance ordered or approved by the court, regardless of whether the payment was made before, on, or after the termination date. An obligor may file suit to recover overpaid maintenance. If the court finds that the obligee failed to return overpaid maintenance, the court must order the obligee to pay the obligor's attorney's fees and all court costs in addition to the overpaid maintenance unless the court waives the requirement to pay attorney's fees and court costs for good cause and states the supporting reasons in its order. *See* Tex. Fam. Code § 8.0591.

§ 32.11 Right to Counsel

Concerning the right to counsel when a party is seeking to hold the other party in contempt and incarceration is a possible result of the proceedings, see sections 35.5:3 and 35.5:4 in this manual.

§ 32.12 Fifth Amendment Rights

For a discussion of the Fifth Amendment privilege in a contempt proceeding, see section 35.5:5 in this manual.

[Sections 32.13 through 32.20 are reserved for expansion.]

II. Income Withholding for Payment of Spousal Maintenance

§ 32.21 Generally

In any proceeding in which spousal maintenance has been ordered, modified, or enforced, the court may order that income be withheld from the disposable earnings of the obligor. Tex. Fam. Code § 8.101(a). Withholding may be ordered in a proceeding in

which there is an agreement for periodic payments of spousal maintenance under the terms of chapter 8 of the Family Code voluntarily entered into between the parties and approved by the court. Tex. Fam. Code § 8.101(a–1).

Withholding may not be ordered to the extent that any provision of an agreed order exceeds the amount of periodic support the court could have ordered under chapter 8 or for any period of maintenance beyond the period the court could have ordered under chapter 8. Tex. Fam. Code § 8.101(a–2). Contractual alimony or spousal maintenance is not subject to withholding unless the contract or agreement specifically permits income withholding or the payments are not timely made under the terms of the agreement. Tex. Fam. Code § 8.101(b); *see Heller v. Heller*, 359 S.W.3d 902, 903 (Tex. App.—Beaumont 2012, no pet.).

An order or writ of withholding for spousal maintenance has priority over any other garnishment, attachment, execution, or other order affecting disposable earnings except for an order or writ of withholding for child support. Tex. Fam. Code § 8.105.

§ 32.22 Withholding for Spousal Maintenance and Child Support

An order or writ of withholding for spousal maintenance may be combined with an order or writ of withholding for child support but only if the obligee has also been appointed managing conservator of the child for whom support has been ordered and is the conservator with whom the child primarily resides. Tex. Fam. Code § 8.101(c).

If the order or writ of withholding is for both spousal maintenance and child support, it must require that the withheld amounts be paid to the appropriate place of payment, be in the form prescribed by the attorney general's office, and clearly indicate the amount to be applied to current spousal maintenance and the maintenance arrearages. Tex. Fam. Code § 8.101(d)(1)–(3). Subject to the maximum amounts of withholding, amounts withheld must be applied, in order of priority, to (1) current child support, (2) current spousal support, (3) child support arrearages, and (4) spousal maintenance arrearages. Tex. Fam. Code § 8.101(d)(4).

§ 32.23 Withholding for Arrearages

In addition to income withheld for current spousal maintenance, the court may order that income be withheld from the disposable earnings of the obligor to be applied toward the liquidation of any arrearages. Any additional amount to be withheld for arrearages must be in an amount sufficient to discharge the arrearages in not more than

two years or an additional 20 percent of the amount withheld by the current maintenance order, whichever amount will result in discharging the arrearages in the least amount of time. Tex. Fam. Code § 8.102.

Once current spousal maintenance is no longer due and owing, the court may order income withholding to be applied toward arrearages in an amount sufficient to discharge those arrearages in not more than two years. Tex. Fam. Code § 8.103.

In rendering a cumulative judgment for arrearages, the court may order that a reasonable amount of income be withheld from the disposable earnings of the obligor to be applied toward the satisfaction of the judgment. Tex. Fam. Code § 8.104.

An out-of-state spousal support order can be enforced in Texas by use of a qualified domestic relations order. Even though the initial spousal support was an agreement between the parties, it became an enforceable order when given full faith and credit by Texas. The ERISA "antiassignment" provision does not apply to domestic relations orders. In *Dalton v. Dalton*, 551 S.W.3d 126 (Tex. 2018), the supreme court held that a wage withholding order could not be used to satisfy the former husband's spousal-support obligations, which originated in an Oklahoma order that incorporated a separation agreement and was later filed in Texas divorce proceedings. Although Oklahoma allows wage withholding to enforce all agreed spousal-support orders, the prior agreement and court orders did not require payment of "spousal maintenance" under Texas law, because the former wife's eligibility was never determined; rather, they required "support alimony" that falls outside Texas statutes allowing wage withholding, and the parties did not agree in the separation agreement to allow wage withholding.

§ 32.24 Maximum Amount to Be Withheld

An order or writ of withholding must direct that an obligor's employer withhold from the obligor's disposable earnings the lesser of either the amount specified in the order or writ as spousal maintenance or an amount that, when added to the amount of income being withheld by the employer as child support, is equal to 50 percent of the obligor's disposable earnings. Tex. Fam. Code § 8.106.

§ 32.25 Limitations

The court may issue an order or writ of withholding for spousal maintenance at any time until all spousal maintenance and any arrearages are paid. Tex. Fam. Code § 8.151. An order or writ of withholding issued in accordance with Family Code chapter 8 and

delivered to an employer doing business in Texas is binding on the employer without regard to whether the obligor resides or works outside Texas. Tex. Fam. Code § 8.107. However, a writ of withholding is improper if the spousal support provision in the divorce decree falls outside Family Code chapter 8 and does not create a legal duty of support under chapter 8. *Kee v. Kee*, 307 S.W.3d 812, 814–15 (Tex. App.—Dallas 2010, pet. denied) (no specific reference to chapter 8 in alimony agreement, no chapter 8 criteria in decree, and no provision in agreement for enforcement by withholding). An agreement to pay postdivorce support merely restates a private debt rather than creating a legal duty imposed by Texas law.

§ 32.26 Contents of Order of Withholding

An order of withholding for spousal maintenance must include—

1. the style, cause number, and court with jurisdiction to enforce the order;
2. the name, address, and, if available, the Social Security number of the obligor;
3. the amount and duration of the spousal maintenance payments, including the amount and duration of withholding for any arrearages; and
4. the name, address, and, if available, the Social Security number of the obligee.

Tex. Fam. Code § 8.152(a).

However, if the obligee or a member of the obligee's family or household is a victim of family violence and the subject of a protective order to which the obligor is also subject, the court may exclude the obligee's address and Social Security number from the order of withholding. The court shall order the clerk of the court to strike the address and Social Security number of the obligee from the order and maintain a confidential record of the obligee's address and Social Security number to be used only by the court. Tex. Fam. Code § 8.152(c).

The order must also require the obligor to notify the court of any material change affecting the order, including a change of employer. Tex. Fam. Code § 8.152(b).

§ 32.27 Request for Issuance of Order or Writ of Withholding

Either an obligor or an obligee may file a request for the issuance of an order or writ of withholding with the clerk of the court. Tex. Fam. Code § 8.153.

Once the request for issuance of the order or writ is received, the clerk of the court shall deliver a certified copy of the order or writ, along with a copy of Family Code subchapter E of chapter 8, to the obligor's current employer or to any subsequent employer. The order or writ must be delivered not later than the fourth working day after the date the order is signed or request filed, whichever is later, by either certified or registered mail, return receipt requested, to the employer, or by service of citation to either the person authorized to receive service of process for the employer or a person designated by the employer by written notice to the clerk to receive orders or notices of income withholding. Tex. Fam. Code § 8.154.

§ 32.28 Duties of Employer

Not later than the first pay period after the date the order or writ is delivered to an employer, the employer shall begin to withhold income from the obligor's earnings in accordance with the order. The employer must continue to withhold income as required by the order or writ as long as the obligor is employed by the employer. Tex. Fam. Code § 8.202.

The employer shall remit the amount of income withheld from the obligor to the person or office named in the order or writ of withholding on each pay date and include the date on which the income withholding occurred. Each remittance shall include the cause number of the suit under which the withholding is required, the payor's name, and the payee's name, unless the remittance is to be made by electronic funds transfer. Tex. Fam. Code § 8.203.

An employer may deduct an administrative fee of not more than $5 each month from the obligor's disposable earnings in addition to the amount withheld as spousal maintenance. Tex. Fam. Code § 8.204.

An employer complying with an order or writ of withholding for spousal maintenance is not liable to the obligor for the amount of income withheld and remitted as required by the order or writ. However, an employer who receives but does not comply with an order or writ of withholding is liable to the obligee for any amount of spousal maintenance not paid in compliance with the order or writ, to the obligor for any amount withheld but not remitted to the obligee, and to the obligor or obligee for reasonable attorney's fees and court costs incurred in recovering such an amount. Tex. Fam. Code § 8.206(a), (b).

§ 32.29 Employer's Request for Hearing

An employer receiving an order or writ of withholding may file a motion for hearing on the applicability of the order or writ to the employer. The motion must be filed with the court issuing the order or writ not later than the twentieth day after the date the order or writ is delivered to the employer. The hearing must then be held on or before the fifteenth day after the date the motion is filed. The order or writ of withholding is binding, and the employer must continue to withhold the obligor's income and remit all amounts withheld pending further order of the court. Tex. Fam. Code § 8.205.

§ 32.30 Notice of Application for Writ of Withholding

If income withholding was not ordered at the time spousal maintenance was ordered, an obligor or obligee may file a notice of application for a writ of withholding in the court that ordered the spousal maintenance. Tex. Fam. Code § 8.251.

The notice of application for a writ of withholding must be verified and (1) state the amount of monthly maintenance due, including the amount of any arrearages or anticipated arrearages, and the amount of disposable earnings to be withheld; (2) state that the withholding applies to any current or subsequent employer or period of employment of the obligor; (3) state that the obligor's employer will be notified to begin the withholding if the obligor does not contest the withholding on or before the tenth day after the obligor receives the notice; (4) describe the procedures for contesting the issuance and delivery of a writ of withholding; (5) state that the obligor will be provided an opportunity for a hearing not later than the thirtieth day after the date of receipt of the notice of contest if the obligor contests the withholding; (6) state that the sole ground for successfully contesting the issuance of the writ of withholding is a dispute concerning the identity of the obligor or the existence or amount of the arrearages; (7) describe the actions that may be taken if the obligor contests the notice of application for a writ of withholding; and (8) include with the notice a suggested form for the motion to stay issuance and delivery of writ of withholding that the obligor may file with the clerk of the appropriate court. Tex. Fam. Code § 8.252.

Registration of an out-of-state order that provides for spousal maintenance or alimony under the Uniform Interstate Family Support Act is sufficient for filing a notice of application for a writ of withholding. Tex. Fam. Code § 8.253(a).

§ 32.31 Delivery of Notice

The party filing the notice of application for a writ of withholding shall deliver the notice to the obligor either by first-class or certified mail, return receipt requested, addressed to the obligor's last known address or place of employment or by service of citation as in civil cases generally. If the notice is delivered by mail, the party who filed the notice shall file with the court a certificate stating the name, address, and date the party mailed the notice. The notice is considered to have been received by the obligor on the date of receipt if the notice was mailed by certified mail, on the tenth day after the notice was mailed if the notice was mailed by first-class mail, or on the date of service if the notice was delivered by service of citation. Tex. Fam. Code § 8.255.

§ 32.32 Motion to Stay Issuance of Writ

The obligor may stay issuance of a writ of withholding by filing a motion to stay with the clerk of the court not later than the tenth day after the date the notice of the application for a writ of withholding was received. The grounds for filing a motion to stay issuance are limited to a dispute concerning the identity of the obligor or the existence or the amount of the arrearages. The obligor must verify that the statements of fact within the motion to stay are correct. Tex. Fam. Code § 8.256.

Once the obligor properly files a motion to stay, the clerk of the court may not deliver the writ of withholding to the obligor's employer before a hearing is held. Tex. Fam. Code § 8.257.

The court shall set a hearing on the motion, and the clerk of the court shall notify the obligor and the obligee of the date, time, and place of the hearing, which must be held not later than the thirtieth day after the date the motion was filed unless the obligor and obligee agree and waive the right to have the hearing within thirty days. After the hearing, the court shall render an order for income withholding that includes a determination of any amount of arrearages or grant the motion to stay. Tex. Fam. Code § 8.258.

[Sections 32.33 through 32.50 are reserved for expansion.]

III. Uniform Enforcement of Foreign Judgments Act

§ 32.51 Alimony Orders from Other States

A judgment of another state for the payment of alimony may be enforced in accordance with the terms of the Uniform Enforcement of Foreign Judgments Act, chapter 35 of the Texas Civil Practice and Remedies Code. A properly authenticated foreign judgment may be filed for enforcement with any Texas court of competent jurisdiction, whereupon it is treated like any other judgment of that court. *See* Tex. Civ. Prac. & Rem. Code §§ 35.003–.007; *Dalton v. Dalton*, No. 12-15-00203-CV, 2017 WL 104639 (Tex. App.—Tyler Jan. 11, 2017, pet. granted) (mem. op.).

Alternatively, a judgment creditor retains the right to bring an action to enforce the judgment instead of filing it under those provisions. Tex. Civ. Prac. & Rem. Code § 35.008.

Rule 308b of the Texas Rules of Civil Procedure governs the enforceability of judgments and arbitration awards based on foreign law in suits involving a marriage relationship or a parent-child relationship. The primary purpose for the adoption of this rule was to counteract the possible unfair effects of judgments and awards granted under Sharia law. When dealing with a foreign judgment related to family law, the practitioner must follow the specific notice provisions set forth in rule 308b. *See* Tex. R. Civ. P. 308b.

In *Owens v. Owens*, 228 S.W.3d 721 (Tex. App.—Houston [14th Dist.] 2006, pet. dism'd), the husband filed a motion to modify his alimony obligation under a domesticated New York divorce judgment, and the wife countered with an enforcement proceeding seeking to recover unpaid alimony due under the parties' New York separation agreement. The trial court granted the wife summary judgment for money due under the agreement up to that date and severed the husband's petition to modify and other issues. In reversing, the court of appeals held that, under applicable New York law, the husband's liability would be measured by the difference between the amount provided under the agreement and the lower amount, if any, he would owe after the court ruled on his petition to modify the divorce judgment. Therefore, a ruling on the petition to modify was necessary in order to determine the actual amount owed under the agreement.

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Chapter 33

Enforcement—Child Support

I. Enforcement Procedures

§ 33.1 Filing Motion to Enforce

A court order, including a temporary order, or decree of divorce providing for the payment of child support may be enforced by a motion to enforce filed in the court of continuing, exclusive jurisdiction. Tex. Fam. Code § 157.001(a), (d). The term *temporary order*, for this purpose, includes a temporary restraining order, standing order, injunction, and any other temporary order rendered by a court. Tex. Fam. Code § 157.001(e).

A child support obligee may litigate a claim for delinquent child support payments when responding to a motion to modify custody or future child support payments but is not required to do so. Because the subject matter of the claim for delinquent payments is different and does not arise from the same transaction, the obligee is not barred from subsequently enforcing delinquent payments. *In re P.D.D.*, 256 S.W.3d 834, 844 (Tex. App.—Texarkana 2008, no pet.).

§ 33.2 Venue

A motion to enforce child support must be filed in the court of continuing, exclusive jurisdiction. Tex. Fam. Code § 157.001(d). The enforcement action is subject to transfer as provided by Family Code sections 155.201 through 155.301.

§ 33.3 Transferred Order

On proper transfer, the court to which a transfer is made becomes the court of continuing, exclusive jurisdiction, and all proceedings, including contempt, are continued as if originally brought in that court. A transferred order has the same effect as an original order and is enforced by any means by which the transferring court could have enforced the order, including contempt. The transferee court has the power to hear and punish

disobedience of the transferring court's order, regardless of whether all or some of the alleged contemptuous acts were committed before or after the transfer, and the transferring court has no further jurisdiction. Tex. Fam. Code § 155.206.

The transferee court, which becomes the court of continuing jurisdiction, may hear and decide a motion for contempt pending at the time of the transfer or a motion for contempt filed after the transfer, for child support due both before and after the transfer of jurisdiction. *See* Tex. Fam. Code § 155.206(c), (d).

§ 33.4 Transfer of Registry

On rendition of an order transferring continuing, exclusive jurisdiction to another court, the transferring court must also order that all future payments of child support be made to the local registry of the transferee court or the state disbursement unit. The transferring court's local registry or the state disbursement unit must continue to receive, record, and forward child support payments to the payee until it receives notice that the transferred case has been docketed in the other court. The transferring court's registry must then send a certified copy of the child support payment record to the clerk of the transferee court and forward any payments it has received to the transferee court's local registry or to the state disbursement unit, as appropriate. Tex. Fam. Code § 155.205.

§ 33.5 Joinder of Claims

Any enforcement proceeding may be joined, either independently or alternatively, with multiple remedies or claims. Tex. Fam. Code § 157.003(a).

For a discussion of the effect of a joinder of claims with a motion to enforce, see section 33.10 below.

§ 33.6 Clear and Specific Language

The order to be enforced must spell out the details of compliance in clear, specific, and unambiguous terms so that the person subject to the order will readily know exactly what duties or obligations are imposed on him. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding). Each obligation for which enforcement by contempt is requested must be set forth in clear, specific, and unambiguous terms. The order must clearly specify the act to be performed, together with the time and place of performance. The fact that a respondent has defeated the intent of an order is not sufficient to

support contempt. The relator must have violated a command to do or not do a specific act.

If the terms of the original order are not clear or specific enough to be enforceable by contempt, the court may render a clarifying order specific enough to be enforced by contempt. See section 33.41 below.

§ 33.7 Written Order

The order to be enforced must be written and signed. *Ex parte Wilkins*, 665 S.W.2d 760, 760–61 (Tex. 1984) (orig. proceeding); *Ex parte Padron*, 565 S.W.2d 921, 924 (Tex. 1978) (orig. proceeding).

§ 33.8 Contents of Motion

A motion for enforcement of child support must, in ordinary and concise language, identify the provision of the order allegedly violated and sought to be enforced, state the manner of the respondent's alleged noncompliance, state the relief requested by the movant, and contain the signature of the movant or the movant's attorney. Tex. Fam. Code § 157.002(a). *See In re Aslam*, 348 S.W.3d 299, 302 (Tex. App.—Fort Worth 2011, orig. proceeding).

The motion must further allege the amount owed, the amount paid, and the amount of arrearages. Tex. Fam. Code § 157.002(b)(1).

If contempt is requested, the motion must also include the portion of the order allegedly violated and, for each date of alleged contempt, the amount due and the amount paid, if any. Tex. Fam. Code § 157.002(b)(2).

The movant may allege repeated past violations of the order and that future violations of a similar nature may occur before the date of the hearing. Tex. Fam. Code § 157.002(e).

Criminal contempt must be specifically pleaded in order to be imposed. *See In re Smith*, 981 S.W.2d 909, 911 (Tex. App.—Houston [1st Dist.] 1998, orig. proceeding).

In initiating the action, the movant must allege, in the first numbered paragraph of the motion, the intended discovery level. *See* Tex. R. Civ. P. 190.1. In an enforcement action, level 1 is not available. Tex. R. Civ. P. 190.2.

§ 33.9 Registry Records

The movant may attach to the motion for enforcement a copy of the record of child support payments maintained by the title IV-D registry (for payments to the state disbursement unit). Tex. Fam. Code § 157.002(b)(3). The movant may update that payment record at the hearing. If a payment record was attached to the motion, the record, as updated if applicable, is admissible to prove the dates and amounts of payments, the amount of any accrued interest, the cumulative arrearage over time, and the cumulative arrearage as of the final date of the record. Tex. Fam. Code § 157.162(c). The respondent may offer evidence controverting the contents of the payment record. Tex. Fam. Code § 157.162(c–1).

A clerical error in the payment record cannot serve as a legal basis for modifying the child support obligation or determining the amount of arrearages. *Granado v. Meza*, 398 S.W.3d 193, 195 (Tex. 2013) (per curiam).

Obtaining Certified Payment Record: For payments made to the state disbursement unit, a certified payment record may be downloaded and printed from the Office of the Attorney General (OAG) website: **https://childsupport.oag.state.tx.us/wps/portal/csi/PayRecordOnline**. This function will require that the attorney enter his State Bar number and a contact identification number that will be provided. If the attorney has not already appeared as attorney of record in the case, it may be necessary to first obtain the client's authorization for release of information. For this purpose, the attorney will need to submit Form 1A004 (TAC Forms) ("Authorization for Release of Information"), available at **https://www.texasattorneygeneral.gov/cs/cs-forms#tac forms**. Custodial and noncustodial parents are also assigned a customer or member identification number to access payment records and may provide the identification numbers to their attorneys for their use in accessing payment and case information. This information is available at the following site: **https://www.texasattorneygeneral.gov/cs/**.

An attorney may also call the OAG's main number at (800) 252-8014 to request a certified payment record.

In some counties, the attorney will need to obtain payment records from both the local registry and the OAG if the county continues to maintain a local registry. In some counties, the local registry may accept a record of payment furnished by the state disbursement unit and may add the payments to the record maintained by the local registry so

that a single, complete payment record is available for the court. Tex. Fam. Code § 234.009.

Investigating a Discrepancy in the Payment Record: An obligor or obligee may request that the title IV-D agency investigate a discrepancy between the child support payment record provided by the state disbursement unit and the payment records maintained by the party. Tex. Fam. Code § 234.0091(b). The person making the request must provide to the title IV-D agency documentation of the alleged discrepancy, including canceled checks or other evidence of a payment or disbursement at issue. The title IV-D agency has twenty days to respond to the request for an investigation. If the agency determines that the payment record maintained by the state disbursement unit is incorrect, the state disbursement unit must immediately make the amendment to its record. Tex. Fam. Code § 234.0091(c).

An attorney may call the OAG's main number at (800) 252-8014 to request a copy of OAG Form 1770 (Payment Discrepancy Investigation Request) to submit the request for an investigation.

§ 33.10 Notice of Hearing

A respondent to a motion to enforce child support must be given a copy of the motion and notice of hearing by personal service not later than the tenth day before the hearing. Tex. Fam. Code § 157.062(c). The notice of hearing must include the date, time, and place of the hearing. Tex. Fam. Code § 157.062(a).

If the motion to enforce child support is joined with other claims, the hearing may not be held before 10:00 A.M. on the first Monday after the twentieth day after the date of service. Its filing is governed by the Texas Rules of Civil Procedure applicable to original lawsuits. Tex. Fam. Code § 157.062(d); *In re Hathcox*, 981 S.W.2d 422, 425 (Tex. App.—Texarkana 1998, no pet.) (section 157.062(d) applies to an amended pleading, and its purpose is to allow a respondent extra time to answer and prepare for a hearing when a new claim has been joined with a motion for enforcement).

If the respondent has been ordered under Family Code section 105.006 to provide the court and the state case registry with the party's current mailing address, notice of a hearing on a motion for enforcement of a final order or on a request for a court order implementing a postjudgment remedy for the collection of child support may be served by sending the notice of hearing with a copy of the motion by first-class mail to that address. The clerk or the attorney for the movant or the party requesting a court order

may send the notice. The person who sends the notice must file with the clerk a certificate of service showing the date of mailing and the name of the person who sent the notice. Tex. Fam. Code § 157.065.

A party who appears at the hearing or is present when the case is called and who does not object to the court's jurisdiction or the form or manner of the notice of hearing makes a general appearance for all purposes in the enforcement proceeding. Tex. Fam. Code § 157.063.

§ 33.11 Special Exceptions

The court must rule on any special exception or motion to strike before hearing the motion to enforce. If an exception is sustained, the court must give the movant an opportunity to replead and continue the hearing to a designated date and time without requiring additional service. Tex. Fam. Code § 157.064.

§ 33.12 Limitations

Contempt: The court retains jurisdiction to enforce a child support order by contempt if the motion to enforce is filed not later than the second anniversary of the date the child becomes an adult or on which the child support obligation terminates under the order or by operation of law. Tex. Fam. Code § 157.005(a).

Confirmation of Arrearages: The court retains jurisdiction to confirm arrearages and render a cumulative money judgment for past-due child support, as provided by Family Code section 157.263, if a motion for enforcement requesting a cumulative money judgment is filed not later than the tenth anniversary after the date the child becomes an adult or the child support obligation terminates under the child support order or by operation of law. Tex. Fam. Code § 157.005(b). This Code section applies only to cumulative money judgments for past-due support and not to other child support enforcement remedies, including income withholding and child support liens. *In re D.W.G.*, 391 S.W.3d 154, 160 (Tex. App.—San Antonio 2012, no pet.).

Although section 157.005(b) provides an extended limitations period for confirming child support arrearages, nothing in the statute permits multiple enforcement actions and repeated litigation covering the same time period of missed payments. As with other final, unappealed judgments that are regular on their faces, res judicata applies to arrearage judgments. *In re M.K.R.*, 216 S.W.3d 58, 65–66 (Tex. App.—Fort Worth 2007, no pet.).

Before amendment in 1999, section 157.005(b) required that the enforcement action be filed within four years after the child became an adult or the child support obligation terminated. Statutes providing time limits within which enforcement of an existing child support liability may be effected concern the court's continuing enforcement jurisdiction and do not affect substantive rights. *In re A.D.*, 73 S.W.3d 244, 247–48 (Tex. 2002); *In re S.C.S.*, 48 S.W.3d 831, 834–35 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (prior statute involving four-year period within which court retains jurisdiction to render cumulative judgment "not a statute of limitation; rather it addresses how long a court has jurisdiction to enforce its orders. . . . Because it is a jurisdictional provision, it does not confer any vested right, unlike a statute of limitation.").

§ 33.13 Setting Hearing

If the motion for enforcement requests contempt, the court shall set the date, time, and place of the hearing and order the respondent to personally appear and respond to the motion. If the motion does not request contempt, the court shall set the motion on the request of a party. In setting the date for the hearing on the motion to enforce a child support order, the court must give preference to the pending motion and may not delay the hearing because of a suit for modification. Tex. Fam. Code § 157.061.

§ 33.14 Record

A record of the hearing shall be made by the court reporter or, if the proceeding is before an associate judge, as provided by chapter 201 of the Family Code, unless (1) the motion does not request incarceration, the parties waive the requirement of a record at the time of the hearing, either in writing or in open court, and the court approves the waiver or (2) the parties agree to an order. Tex. Fam. Code § 157.161.

COMMENT: It is a better practice not to waive a record of the proceeding if there is any possibility of an appeal.

§ 33.15 Failure to Appear

If a respondent who has been personally served or who has filed an answer or made an appearance fails to appear at the hearing, the court may, on proper proof, grant a default judgment for any relief sought except contempt, regardless of whether other claims or remedies have been joined with the enforcement action. The court may not hold the respondent in contempt but may issue a capias for the respondent's arrest. *See* Tex.

Fam. Code §§ 157.066, 157.114, 157.115; *In re Daniels*, No. 05-17-01260-CV, 2017 WL 6503107 (Tex. App.—Dallas Dec. 19, 2017, orig. proceeding) (mem. op.).

For discussion of consequences of a respondent's failure to appear, including possible issuance of a capias and setting of bond, see sections 35.51 through 35.53 in this manual.

§ 33.16 Contents of Enforcement Order

An enforcement order must include in ordinary and concise language the provisions of the final order for which enforcement was requested, the acts or omissions that are the subject of the order, the manner of noncompliance, and the relief granted by the court. Tex. Fam. Code § 157.166(a); *see In re Aslam*, 348 S.W.3d 299, 302 (Tex. App.—Fort Worth 2011, orig. proceeding).

The basic requirements for the contents of a contempt order are discussed in section 35.61 in this manual.

A statement of child support payments made (by attaching a child support payment history) is insufficient to identify child support payments the respondent failed to make and will not withstand challenge. *In re Nesevitch*, 93 S.W.3d 510, 512–13 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding).

If the court imposes incarceration for civil (coercive) contempt and orders the relator to pay a sum of child support to purge the contempt, the sum payable must be a sum for which the relator has been held in contempt. *In re O'Keeffe*, No. 05-18-00371-CV, 2018 WL 2296495 (Tex. App.—Dallas May 21, 2018, orig. proceeding) (mem. op.) (striking portions of contempt order requiring relator to remain incarcerated until he pays costs that he was not actually held in contempt for failing to pay); *In re Patillo*, 32 S.W.3d 907, 910 (Tex. App.—Corpus Christi–Edinburg 2000, orig. proceeding).

An obligor cannot be held in contempt for failing to pay child support before the date the judgment giving rise to the obligation was signed. *Ex parte Huitrado-Soto*, No. 05-16-00545-CV, 2016 WL 3185357, at *2 (Tex. App.—Dallas June 8, 2016, orig. proceeding) (mem. op.).

§ 33.17 Attorney's Fees

The court may render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to an attorney. A judgment

for attorney's fees and expenses may be enforced in the attorney's name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 106.002.

The court may award reasonable attorney's fees and court costs to the obligee even if the respondent is not found in contempt. *See* Tex. Fam. Code § 157.162(a). A trial court does not have discretion to characterize attorney's fees awarded in a nonenforcement modification suit as necessaries or additional child support. *See Tucker v. Thomas*, 419 S.W.3d 292, 300–01 (Tex. 2013); *see also Guillory v. Boykins*, 442 S.W.3d 682, 692–93 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (where motion for enforcement was previously denied and subsequent trial was for modification only, trial court lacked authority to award attorney's fees as necessaries or as additional child support).

If the court finds that the respondent has failed to make child support payments, the court must order the payment of the movant's reasonable attorney's fees and all costs, in addition to the amount of arrearages. These fees and costs may be enforced by any means available for the enforcement of child support, including contempt. Tex. Fam. Code § 157.167(a); *see Taylor v. Speck*, 308 S.W.3d 81 (Tex. App.—San Antonio 2010, no pet.). The award to movant of conditional attorney's fees in the event obligor files bankruptcy is authorized. It is akin to the conditional award of attorney's fees in the event of success on appeal. *Taylor*, 308 S.W.3d at 88.

For good cause shown, the court may waive the requirement that the respondent pay attorney's fees and costs if the court states the reasons for the finding. Tex. Fam. Code § 157.167(c). However, if the court finds that the respondent is in contempt of court for failure or refusal to pay child support and that the respondent owes $20,000 or more in child support arrearages, the court may not waive the requirement that the respondent pay attorney's fees and costs unless the court also finds that the respondent is involuntarily unemployed or is disabled and that he lacks the financial resources to pay the attorney's fees and costs. Tex. Fam. Code § 157.167(d). In addition, income withholding from the disposable earnings of the obligor for attorney's fees and costs may be ordered in an action to enforce child support. Tex. Fam. Code § 158.0051(a).

COMMENT: An order for withholding of attorney's fees should not be combined with the order for child support. It should be on a separate form and should direct that payment be sent to the attorney rather than to the state disbursement unit. The requirements for the form and contents of the order for income withholding are discussed in chapter 9 of this manual.

Attorney's fees incurred in a suit to modify child support or conservatorship may not be characterized as "in the nature of accrued child support" and enforced through income withholding unless the case also involves the enforcement of a delinquent child support obligation. *In re A.M.W.*, 313 S.W.3d 887 (Tex. App.—Dallas 2010, no pet.); *In re K.J.D.*, 299 S.W.3d 517 (Tex. App.— Dallas 2009, no pet.); *In re K.A.R.*, 171 S.W.3d 705, 712 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Finley v. May*, 154 S.W.3d 196, 199 (Tex. App.—Austin 2004, no pet.). The trial court may not classify attorney's fees as additional child support when the motion to enforce is filed after the child's eighteenth birthday. *In re Corbett*, No. 02-11-00430-CV, 2012 WL 386744, at *2 (Tex. App.—Fort Worth Feb. 8, 2012, orig. proceeding) (mem. op.).

When a party fails to segregate attorney's fees incurred with an enforcement proceeding—fees that can be enforced through contempt—from attorney's fees incurred for work performed in connection with a modification proceeding—fees that cannot be enforced through contempt—the award of attorney's fees is enforceable only as a debt. *See In re C.A.C.*, No. 05-17-00602-CV, 2018 WL 2126811, at *3 (Tex. App.—Dallas May 9, 2018, no pet.) (mem. op.); *In re Braden*, 483 S.W.3d 659, 666 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (per curiam).

An attorney appointed to represent an indigent respondent facing possible incarceration is entitled to a reasonable fee in the amount set by the court. The fee is paid from the general funds of the county according to the schedule for compensation of counsel appointed for criminal defendants provided in the Texas Code of Criminal Procedure. Tex. Fam. Code § 157.164(a), (b).

An employer who receives an order or writ of withholding and does not comply is liable for reasonable attorney's fees and court costs. Tex. Fam. Code § 158.206(b)(3).

§ 33.18 Right to Counsel

Concerning the right to counsel when a party is seeking to hold the other party in contempt and incarceration is a possible result of the proceedings, see sections 35.5:3 and 35.5:4 in this manual.

§ 33.19 Affirmative Defenses

The issue of the existence of an affirmative defense does not arise unless evidence is admitted supporting the defense. The respondent must prove the affirmative defense by a preponderance of the evidence. Tex. Fam. Code § 157.006.

Estoppel is not an affirmative defense to a child support enforcement action. In *Office of Attorney General v. Scholer*, 403 S.W.3d 859, 860 (Tex. 2013), the parents agreed that father's child support obligation would cease if he relinquished his parental rights. Although the termination was never finalized, the father relied on the attorney's promises, stopped paying support, and claimed that the mother and the OAG should be estopped from enforcing the child support obligation. The supreme court held that court-ordered child support reflects a parent's duty to his child, not a debt to his former spouse. Except as provided by statute, the other parent's conduct cannot eliminate that duty. A claim of accord and satisfaction made under a similar fact situation has been held not to be a proper affirmative defense to a motion for enforcement of child support. *In re R.K.S.*, No. 10-11-00403-CV, 2014 WL 1681891 (Tex. App.—Waco Apr. 24, 2014, no pet.) (mem. op.).

Inability to Pay Child Support: It is an affirmative defense to an allegation of contempt of court or of the violation of a condition of community supervision requiring payment of support that the obligor lacked the ability to provide support in the amount ordered; lacked property that could be sold, mortgaged, or otherwise pledged to raise the funds needed; attempted unsuccessfully to borrow the needed funds; and knew of no source from which the money could have been borrowed or otherwise legally obtained. Tex. Fam. Code § 157.008(c). All four elements must be conclusively established in the trial court to avoid a contempt finding. *In re Hammond*, 155 S.W.3d 222, 228 (Tex. App.—El Paso 2004, orig. proceeding); *see Ex parte Rojo*, 925 S.W.2d 654, 655–56 (Tex. 1996) (orig. proceeding) (per curiam); *In re Smith*, 354 S.W.3d 929 (Tex. App.—Dallas 2011, orig. proceeding).

Current inability to pay is no defense to criminal contempt. *Ex parte Robertson*, 880 S.W.2d 803, 803 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding) (per curiam). It is a valid defense to civil (coercive) contempt. *See Ex parte Rojo*, 925 S.W.2d at 655; *In re Gibbs*, No. 01-15-00218-CV, 2015 WL 1778358 (Tex. App.—Houston [1st Dist.] Apr. 15, 2015, orig. proceeding) (mem. op.).

Voluntary Relinquishment of Child: An obligor may plead as an affirmative defense in whole or in part that the obligee voluntarily relinquished to the obligor the actual possession and control of a child. The relinquishment must have been for a period in excess of any court-ordered periods of possession and access, and actual support must have been supplied to the child by the obligor. Tex. Fam. Code § 157.008(a), (b); *Curtis v. Curtis*, 11 S.W.3d 466, 472 (Tex. App.—Tyler 2000, no pet.); *Buzbee v. Buzbee*, 870 S.W.2d 335, 339 (Tex. App.—Waco 1994, no writ). The obligor may also request reimbursement for the support, up to the amount previously ordered by the

court, as a counterclaim or offset against the obligee's claim. Tex. Fam. Code § 157.008(d), (e).

§ 33.20 Right to Jury

The parties to an enforcement action are ordinarily not entitled to a jury. Tex. Fam. Code § 9.005. Concerning the availability of a jury when contempt charges are in issue, see section 35.5:2 in this manual.

§ 33.21 Fifth Amendment Rights

For a discussion of the Fifth Amendment privilege in a contempt proceeding, see section 35.5:5 in this manual.

[Sections 33.22 through 33.30 are reserved for expansion.]

II. Contempt

§ 33.31 Enforcement by Contempt

Any provision of a temporary or final order for child support is enforceable by contempt. Tex. Fam. Code § 157.001(b). The term *temporary order*, for this purpose, includes a temporary restraining order, standing order, injunction, and any other temporary order rendered by a court. Tex. Fam. Code § 157.001(e). The obligation that the law imposes on parents to support their children is not considered a debt, and imprisonment for violation of a court order is not imprisonment for debt in violation of the Texas Constitution. *Williams v. State*, 71 S.W.3d 862, 863–64 (Tex. App.—Texarkana 2002), *rev'd on other grounds*, 114 S.W.3d 920 (Tex. Crim. App. 2003).

For a comprehensive discussion of proceedings for enforcement by contempt, see chapter 35 of this manual.

An obligor's ability to become current on child support payments by the time of the enforcement hearing has no impact on the trial court's discretion to hold the obligor in contempt for past violations of the order. *In re C.F.*, 576 S.W.3d 761, 771–72 (Tex. App.—Fort Worth 2019, orig. proceeding).

§ 33.32 Burden of Proof

The movant has the burden to establish a prima facie case of child support arrearages. The ability to pay support is not an element of the offense of contempt. *Ex parte Roosth*, 881 S.W.2d 300, 301 (Tex. 1994) (orig. proceeding) (per curiam). Rather, it is an affirmative defense to an allegation of contempt or of violation of community supervision that the obligor lacked the ability to pay, borrow, or raise the support payments. Tex. Fam. Code § 157.008(c). The respondent must prove an affirmative defense by a preponderance of the evidence. Tex. Fam. Code § 157.006(b). Specific affirmative defenses are discussed in section 33.19 above.

[Sections 33.33 through 33.40 are reserved for expansion.]

III. Clarification

§ 33.41 Clarification Order

If an order is not specific enough to be enforceable by contempt, a court, on the motion of either party or on its own motion, may render a clarifying order specific enough to be enforced by contempt. Tex. Fam. Code § 157.421(a), (b). The court may not change the substantive provisions of the order being clarified. Tex. Fam. Code § 157.423(a). The court may render a clarifying order before a motion for contempt is made or heard, in conjunction with a motion for contempt, or after denial of a motion for contempt. Tex. Fam. Code § 157.424. A clarifying order applies only prospectively for the purpose of contempt enforcement. Tex. Fam. Code § 157.425. A reasonable time for compliance must be provided, after which the clarifying order may be enforced by contempt. Tex. Fam. Code § 157.426.

[Sections 33.42 through 33.50 are reserved for expansion.]

IV. Money Judgments

§ 33.51 Unpaid Child Support as Judgment

A judgment for child support arrearage or a judgment for retroactive child support rendered under chapter 154 of the Family Code may be enforced by any means available

for the enforcement of a judgment for debts or the collection of child support. The court shall render an order requiring that the obligor make periodic payments on the judgment, including by income withholding if the obligor is subject to income withholding. Such an order does not preclude or limit the use of any other means of enforcing the judgment. Tex. Fam. Code § 157.264.

A child support payment not timely made constitutes a final judgment for the amount due and owing, including interest. Interest begins to accrue on the date the judge signs the order for the judgment unless the order states that it is rendered on another specific date. Tex. Fam. Code § 157.261.

§ 33.52 Counterclaim or Offset

A money judgment may be subject to a counterclaim or offset for actual support provided to the child during a time when the obligee voluntarily relinquished the child to the obligor, and that amount is limited to the periodic payment previously ordered. Tex. Fam. Code § 157.008(d), (e). These reimbursement remedies of offset or counterclaim are alternative, not cumulative. Whether the obligor is entitled to an offset or reimbursement will depend on whether the obligor continued to pay the court-ordered support obligation during all or part of the period of excess possession. If support was paid during this period, the obligor must seek reimbursement; if it was not, the obligor must ask for an offset. *In re A.M.*, 192 S.W.3d 570, 574 (Tex. 2006).

In addition to any other credit or offset available to an obligor, if a child for whom the obligor owes child support receives a lump-sum payment as a result of the obligor's disability and that payment is made to the obligee as the child's representative payee, the obligor is entitled to a credit. This credit is equal to the amount of the lump-sum payment and is to be applied to any child support arrearage and interest owed by the obligor on behalf of that child at the time the payment is made. Tex. Fam. Code § 157.009.

§ 33.53 Confirmation of Arrearages

The court shall confirm the amount of arrearages and render one cumulative judgment for all unpaid child support not previously confirmed unpaid, the balance owed on previously confirmed arrearages or lump-sum or retroactive support judgments, and interest on the arrearages. The order must state that it is a cumulative judgment. In rendering a money judgment, the court may not reduce or modify the amount of arrearages. *In re W.M.*, 587 S.W.3d 828, 831 (Tex. App.—El Paso 2019, no pet. h.). However, in con-

firming that amount, the court may allow a counterclaim or offset as provided by Family Code title 5. Tex. Fam. Code § 157.263(b–1). (See section 33.52 above.) There must be evidence to support the court's specific finding of arrearages. *Granado v. Meza*, 398 S.W.3d 193 (Tex. 2013) (per curiam).

If the amount of arrearages confirmed by the court reflects a credit to the obligor for support arrearages collected from a federal tax refund under title 42, section 664, of the United States Code and the amount of that credit is later reduced because the refund was adjusted, the court shall render a new cumulative judgment to include as arrearages an amount equal to the amount by which the credit was reduced. Tex. Fam. Code § 157.263.

The cumulative judgment may be enforced by any means available for the enforcement of a judgment for debts or the collection of child support. The court must render an order requiring the obligor to make periodic payments on the judgment, including by income withholding if the obligor is subject to income withholding. Such an order does not preclude or limit the use of any other means of enforcing the judgment. Tex. Fam. Code § 157.264. An order enforcing the judgment through withholding must comply with the requirements of Family Code chapter 158. In rendering a cumulative judgment for arrearages, the court must order that a reasonable amount of income be withheld from the obligor's disposable earnings to be applied toward satisfaction of the judgment. Tex. Fam. Code § 158.005.

The Texas Estates Code provides class-four priority for claims against an estate of a decedent for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment under subchapter F, chapter 157, of the Family Code, as well as for claims for unpaid child support obligations under section 154.015 of the Family Code. Tex. Est. Code § 355.102.

The use of a QDRO to collect a child support arrearage confirmed five years earlier is an authorized enforcement remedy. A writ of execution or garnishment is not necessary, and collateral estoppel principles do not apply. *In re M.S.*, No. 05-18-00536-CV, 2019 WL 2912235, at *2 (Tex. App.—Dallas 2019, no pet. h.) (mem. op.).

§ 33.54 Retention of Jurisdiction

A court that renders an order providing for the payment of child support retains continuing jurisdiction to enforce the order, including by adjusting the amount of the peri-

odic payments to be made by the obligor or the amount to be withheld from the obligor's disposable earnings, until all current support, medical support, dental support, and child support arrearages, including interest and any applicable fees and costs, have been paid. Tex. Fam. Code § 157.269.

The ten-year dormancy statute does not apply to a judgment for child support under the Family Code, regardless of when the judgment was rendered. Tex. Civ. Prac. & Rem. Code § 34.001(c); *see In re S.H.*, No. 05-17-00336-CV, 2018 WL 3751297, at *5 (Tex. App.—Dallas Aug. 8, 2018, no pet.) (mem. op.); *Taylor v. Speck*, 308 S.W.3d 81 (Tex. App.—San Antonio 2010, no pet.).

§ 33.55 Enforcement of Medical or Dental Support Order

An amount that an obligor is ordered to pay as medical support or dental support for a child is a child support obligation and may be enforced by any means available for the enforcement of child support. Tex. Fam. Code § 154.183(a); *see Morales v. Rice*, 388 S.W.3d 376, 384 (Tex. App.—El Paso 2012, no pet.). Expenses related to inpatient therapeutic programs and residential treatment facilities may qualify as health-care expenses. *Loras v. Mitchell*, No. 03-11-00028-CV, 2012 WL 2979057, at *6 (Tex. App.—Austin July 12, 2012, no pet.) (mem. op.).

[Sections 33.56 through 33.60 are reserved for expansion.]

V. Withholding from Earnings for Child Support

§ 33.61 Income Withholding

In a proceeding in which child support is enforced, the court or the title IV-D agency must order that income be withheld from the obligor's disposable earnings as provided by subchapter A of chapter 158 of the Family Code. Tex. Fam. Code § 158.001.

Except in a title IV-D case, the court may provide, for good cause shown or on agreement of the parties, that the withholding order need not be issued or delivered to an employer until the obligor has been in arrears for an amount due for more than thirty days, the amount of the arrearages is an amount equal to or greater than the amount due for a one-month period, or any other violation of the child support order has occurred. Tex. Fam. Code § 158.002.

If current support is no longer owed, the court or title IV-D agency shall order that income be withheld for arrearages, including accrued interest, in an amount sufficient to discharge those arrearages in not more than two years. Tex. Fam. Code § 158.004. However, the court or agency may extend the payment period for a reasonable length of time if it finds that the two-year repayment schedule would cause the obligor, the obligor's family, or children for whom support is due from the obligor to suffer unreasonable hardship. Tex. Fam. Code § 158.007. If the record does not provide an adequate factual basis to support a court's finding of "unreasonable hardship," the court will abuse its discretion by permitting an obligor to pay off arrearages over a period of more than two years. *In re D.C.*, 180 S.W.3d 647, 653 (Tex. App.—Waco 2005, no pet.).

§ 33.62 Priority

An order of withholding has priority over any garnishment, attachment, execution, or other assignment or order affecting disposable earnings. Tex. Fam. Code § 158.008.

In addition to withholdings for current support, an additional amount must be withheld to liquidate child support arrearages. The additional amount must be an amount sufficient to discharge the arrearages in not more than two years or an additional 20 percent, whichever would discharge the arrearages sooner. Tex. Fam. Code § 158.003. The maximum amount that may be withheld is 50 percent of the obligor's disposable earnings. Tex. Fam. Code § 158.009. The court or the title IV-D agency may extend the repayment time to avoid unreasonable hardship to the obligor, the obligor's family, or children for whom support is due from the obligor. Tex. Fam. Code § 158.007.

§ 33.63 Limitations

An order or writ for income withholding under chapter 158 may be issued until all current support and child support arrearages, interest, and any applicable fees and costs, including ordered attorney's fees and court costs, have been paid. Tex. Fam. Code § 158.102.

An administrative writ of withholding may be issued by the title IV-D agency at any time until all child support arrears are paid and may be based on obligations in more than one support order. Tex. Fam. Code § 158.502(a). The statute does not limit the issuance to cases of uncontested child support arrears. *See Isaacs v. Isaacs*, 338 S.W.3d 184, 190 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Issuance of a writ is not frivolous or unreasonable simply because the arrearages are disputed and not yet adju-

dicated by a court. *In re T.L.*, 316 S.W.3d 78, 88 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Neither section 157.005(b) of the Family Code nor the dormancy statute (Tex. Civ. Prac. & Rem. Code § 34.001) is a defense to the determination of child support arrearages and the issuance of a judicial writ of withholding. The defense of laches is likewise not available as a defense to a judicial writ of withholding. *In re D.W.G.*, 391 S.W.3d 154, 160–61, 166 (Tex. App.—San Antonio 2012, no pet.).

§ 33.64 Form and Contents of Order

The requirements for the form and contents of the order for income withholding are discussed in chapter 9 of this manual.

§ 33.65 Notice and Writ of Withholding

If a delinquency occurs in child support payments in an amount equal to or greater than the total support due for one month or if income withholding was not ordered at the time child support was ordered, a notice of application for judicial writ of withholding may be filed in the court of continuing jurisdiction and delivered to the obligor. Tex. Fam. Code §§ 158.301, 158.306. Procedures related to the notice of withholding and the writ of withholding that may be issued thereafter are discussed in chapter 9 of this manual.

[Sections 33.66 through 33.70 are reserved for expansion.]

VI. Security

§ 33.71 Bond or Other Security

The court may order the respondent to execute a bond or post security if the respondent is employed by an employer not subject to the jurisdiction of the court or for whom income withholding is unworkable or inappropriate. The amount of the bond or security is set by the court and conditioned on the payment of past-due and future child support. The bond or security deposit is to be payable through the registry of the court to the obligee or other person or entity entitled to support payments. Tex. Fam. Code § 157.109.

§ 33.72 Forfeiture

On motion of a person or entity for whose benefit the bond or security was ordered, the court may forfeit all or part of the bond or security deposit on a finding that the person who furnished the bond or security has failed to make child support payments. The court must order the registry to pay the funds from a forfeited bond or security deposit to the obligee or person entitled to receive child support payments in an amount that does not exceed the child support arrearages. All or part of the forfeited amount may be ordered applied to pay attorney's fees and costs incurred in bringing the motion for contempt or motion for forfeiture. Tex. Fam. Code § 157.110.

A motion for contempt may be joined with a forfeiture proceeding. Tex. Fam. Code § 157.112. The forfeiture of bond or security is not a defense in a contempt proceeding. Tex. Fam. Code § 157.111.

[Sections 33.73 through 33.80 are reserved for expansion.]

VII. Child Support Lien

§ 33.81 Filing Lien

A child support lien arises by operation of law against real and personal property of an obligor for all amounts of child support due and owing. Tex. Fam. Code § 157.312(d). The amount "due and owing" includes retroactive child support ordered to be paid, regardless of whether the obligor is current on the court-ordered payout schedule. *In re R.C.T.*, 294 S.W.3d 238 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

Generally, a party may enforce a child support order by lien for all amounts of child support due and owing, including interest, regardless of whether the amounts have been adjudicated or otherwise determined. *See In re C.A.T.*, 316 S.W.3d 202 (Tex. App.—Dallas 2010, no pet.). The fact that an obligor is complying with a court-ordered payment schedule does not preclude the use of a child support lien to enforce the arrearage. *In re C.A.T.*, 316 S.W.3d at 210–11.

A child support lien notice or an abstract of judgment for past-due child support may be filed with the county clerk of (1) any county in which the obligor is believed to own nonexempt real or personal property, (2) the county in which the obligor resides, or (3)

the county in which the court having continuing jurisdiction has venue of the suit affecting the parent-child relationship. Tex. Fam. Code § 157.314(a).

The protections afforded debtors by section 42.005 of the Texas Property Code do not apply to child support obligors because the obligation to support one's child is not a debt. This is true even if the arrearages have been reduced to a judgment that is enforceable in the same way as a judgment for debt. *Dryden v. Dryden*, 97 S.W.3d 863, 865–66 (Tex. App.—Corpus Christi–Edinburg 2003, pet. denied).

A lien arises without action by a court, but the lien notice must contain the date and manner in which the arrearages were determined. Tex. Fam. Code § 157.313(a)(5). *See Herzfeld v. Herzfeld*, 285 S.W.3d 122 (Tex. App.—Dallas 2009, no pet.).

A child support lien notice may be filed with or delivered to (1) the clerk of the court in which a claim, counterclaim, or suit by or on behalf of the obligor, including a claim or potential right to proceeds from an estate as an heir, beneficiary, or creditor, is pending (provided a copy is mailed to the obligor's attorney of record, if any); (2) an attorney who represents the obligor in a claim or counterclaim that has not been filed; (3) any other individual or organization believed to be in possession of real or personal property of the obligor; or (4) any governmental unit or agency that issues or records indicia of property ownership. Tex. Fam. Code § 157.314(b).

Service of a child support lien notice on a financial institution is governed by section 59.008 of the Finance Code, if appropriate, or may be delivered to the registered agent, the institution's main business office in Texas, or another address provided by the financial institution under Family Code section 231.307. Tex. Fam. Code § 157.3145(a). If a child support lien notice is sent to a financial institution with respect to an account of the obligor, the institution shall immediately (1) provide the claimant with the last known address of the obligor and (2) notify any other person having an ownership interest in the account that the account has been frozen in an amount not to exceed the amount of the child support arrearages identified in the notice. Tex. Fam. Code § 157.314(d).

Within twenty-one days after filing or delivering the child support lien notice, the claimant shall send a copy of the lien notice to the obligor at the obligor's last known address and to any other person known to have an ownership interest in the property subject to the lien. Tex. Fam. Code § 157.314(c).

§ 33.82 Perfection of Child Support Lien and Property to Which Lien Attaches

Usually, a child support lien is perfected when an abstract of judgment for past-due child support or child support lien notice is filed or delivered as provided in Family Code section 157.314. Tex. Fam. Code § 157.316(a). Special requirements for perfection of a lien on a motor vehicle are provided in Family Code section 157.316(b).

A child support lien attaches to all real and personal property not exempt under the Texas Constitution or other law, including (1) an account in a financial institution; (2) a retirement plan, including an individual retirement account; (3) the proceeds of an insurance policy, including the proceeds from a life insurance policy or annuity contract and the proceeds from the sale or assignment of life insurance or annuity benefits, a claim for compensation, or a settlement or award for the claim for compensation, due to or owned by the obligor; (4) property seized and subject to forfeiture under chapter 59 of the Texas Code of Criminal Procedure; and (5) the proceeds derived from the sale of oil or gas production from an oil or gas well located in Texas. A lien attaches to all property owned or acquired on or after the date the lien notice or abstract of judgment is filed with the county clerk of the county in which the property is located, with the court clerk as to property or claims in litigation, or, as to property of the obligor in the possession or control of a third party, from the date the lien notice is delivered to that party. Tex. Fam. Code § 157.317(a), (a–1).

A child support lien may not be directed to an employer to attach to the disposable earnings of an obligor paid by the employer. Tex. Fam. Code § 157.312(g). However, this provision does not prevent filing of a child support lien on a self-employed obligor's bank account containing the obligor's disposable earnings. *In re C.A.T.*, 316 S.W.3d 202, 208–09 (Tex. App.—Dallas 2010, no pet.).

COMMENT: There is no distinction between an obligor using his own name in a sole proprietorship and one doing business as some other named business.

Homestead: An obligor who believes that a child support lien has attached to real property that is the obligor's homestead may file an affidavit to release the lien, and the claimant under the lien may dispute the obligor's affidavit by filing a contradicting affidavit. The requirements of Property Code section 52.0012 generally apply. If the obligor follows the required procedures and no contradicting affidavit is filed, the obligor's affidavit serves as a release of record of the lien. If the claimant files a contradicting

affidavit, the issue of whether the property is subject to the lien must be resolved in an action in district court. Tex. Fam. Code § 157.3171; *see* Tex. Prop. Code § 52.0012.

§ 33.83 Effect of Lien Notice; Duration and Effect of Lien

A person with actual notice of a properly filed lien who possesses nonexempt personal property of the obligor that may be subject to the lien may not pay over, release, sell, transfer, encumber, or convey the property unless a release of lien signed by the claimant is delivered to the person or unless the court, after notice and hearing, orders the release of the lien because arrearages do not exist. A person having notice of a child support lien who violates this provision may be joined as a party to a foreclosure action and is subject to the remedies of subchapter G of Family Code chapter 157. A child support lien does not affect the validity or priority of a lien of a health-care provider, a lien for attorney's fees, a lien of a holder of a security interest, or the assignment of rights or subrogation of a claim under title XIX of the federal Social Security Act. Tex. Fam. Code § 157.319.

A lien is generally effective until all current child support and child support arrearages, including interest, any costs and reasonable attorney's fees, and any title IV-D service fees for which the obligor is responsible have been paid or the lien has been released. The lien secures payment of all child support arrearages owed under the underlying child support order, including arrearages that accrue after the lien notice was filed or delivered as provided by Family Code section 157.314. Tex. Fam. Code § 157.318(a), (b).

A lien on real property is effective for only ten years from the date it was filed but can be renewed for subsequent ten-year periods. Tex. Fam. Code § 157.318(d).

§ 33.84 Priority of Lien as to Real Property

A lien created for child support arrearages does not have priority over a lien or conveyance recorded before the child support lien notice is recorded, but it has priority over any lien or conveyance recorded *after* the lien notice is recorded. An obligor's conveyance of real property after proper recording of the notice does not impair enforceability of the lien against the property. A lien created for child support is subordinate to a vendor's lien retained in a conveyance to the obligor. Tex. Fam. Code § 157.320.

A lien that is renewed by notice filed before the tenth anniversary of the original filing of the lien retains priority from the date the original lien notice was filed. A renewed

lien notice filed on or after the ten-year anniversary date has priority only on the basis of the date the renewed lien notice is filed. Tex. Fam. Code § 157.318(d).

§ 33.85 Contents of Lien Notice

Unless the notice of a child support lien is in a form authorized by federal law or regulation, a child support lien notice must contain (1) the name and address of the person to whom the notice is being sent; (2) the style, docket or cause number, and identity of the court having continuing jurisdiction of the child support action and, if the case is a title IV-D case, the case number; (3) the full name, address, and, if known, the birth date, driver's license number, Social Security number, and any aliases of the obligor; (4) the full name and, if known, Social Security number of the obligee; (5) the amount of the current or prospective child support obligation, the frequency with which current or prospective child support is ordered to be paid, and the amount of child support arrearages owed by the obligor and the date of the signing of the court order, administrative order, or writ that determined the arrearages or the date and manner in which the arrearages were determined; (6) the rate of interest specified in the court order, administrative order, or writ or, in the absence of a specified interest rate, the rate provided for by law; (7) the name and address of the person or agency asserting the lien; (8) the motor vehicle identification number as shown on the obligor's title if the property is a motor vehicle; (9) a statement that the lien attaches to all nonexempt real and personal property of the obligor that is located or recorded in Texas, including any property specifically identified in the notice and any property acquired after the date of filing or delivery of the notice; (10) a statement that any ordered child support not timely paid in the future constitutes a final judgment for the amount due and owing, including interest, and accrues up to an amount that may not exceed the lien amount; and (11) a statement that the obligor is being provided a copy of the lien notice and that the obligor may dispute the arrearage amount by filing suit under Family Code section 157.323. Tex. Fam. Code § 157.313(a), (e). If the lien is on real property, the requirements in items (3) and (4) above to provide a Social Security number do not apply. Tex. Fam. Code § 157.313(f).

The notice must generally be verified and may include any other information the claimant considers necessary. Tex. Fam. Code § 157.313(b), (c). The notice may be in a form authorized by federal law. When used by the title IV-D agency, the form need not be verified. Tex. Fam. Code § 157.313(e).

A claimant must file a notice for each after-acquired motor vehicle. Tex. Fam. Code § 157.313(d).

§ 33.86 Release of Lien; Release of Excess Funds

When the full amount of child support due, plus costs and reasonable attorney's fees, is paid, the lien must be released. The release of the child support lien is effective when filed with the county clerk with whom the lien notice or abstract of judgment was filed or when delivered to any other individual or organization that may have been served with a lien notice. Tex. Fam. Code § 157.322. The Family Code also provides for release of a lien on all or part of the obligor's property at the claimant's discretion. *See* Tex. Fam. Code § 157.321. Procedures for the release of excess funds are contained in section 157.325 of the Family Code. *See* Tex. Fam. Code § 157.325.

Release of Lien on Homestead: An obligor who believes that the lien has attached to real property that is the obligor's homestead may file an affidavit to release the lien and send a letter and a copy of the affidavit to the claimant's last known address. The claimant may file a controverting affidavit. The requirements of Property Code section 52.0012 apply, with certain qualifications. If those requirements are met, the obligor's affidavit serves as a release of record of the lien unless a controverting affidavit is filed. In the latter event, the issue of whether the real property is subject to the lien must be resolved in a district court action. Tex. Fam. Code § 157.3171; *see* Tex. Prop. Code § 52.0012.

§ 33.87 Foreclosure or Suit to Determine Arrearages

An action to foreclose a lien for child support, to dispute the amount of the arrearages stated in the lien, or to resolve issues of ownership interest with respect to property subject to a child support lien may be brought in (1) the court in which the lien notice was filed, (2) the district court of the county where the property is or was located and where the lien was filed, or (3) the court of continuing jurisdiction. The procedures in Family Code chapter 157, subchapter B, apply, but a person or organization in possession of property of the obligor or known to have an ownership interest in property that is subject to the lien may be joined as an additional respondent. If the obligor owes an arrearage, the court shall render judgment against the obligor for the amount due, plus costs and reasonable attorney's fees, order levy of execution, or order an individual or organization in possession of nonexempt personal property or cash of the obligor to dispose of the property as the court directs. Requirements for publication of notice are described in section 157.323(d). *See* Tex. Fam. Code § 157.323.

§ 33.88 Liability for Failure to Comply with Lien

A person who knowingly disposes of property subject to a child support lien or who, after a foreclosure hearing, fails to surrender on demand nonexempt personal property as directed by a court under Family Code chapter 157, subchapter G, is liable to the claimant in an amount equal to the value of the property disposed of or not surrendered, not to exceed the amount of the child support arrearages for which the lien or foreclosure judgment was issued. Tex. Fam. Code § 157.324.

§ 33.89 Interest of Obligor's Spouse or Another Person Having Ownership Interest

An obligor's spouse or another person having an ownership interest in property that is subject to a child support lien may file suit under Family Code section 157.323 to determine the extent, if any, of the spouse's or other person's interest in real or personal property subject to a lien or foreclosure. Tex. Fam. Code § 157.326(a).

If the court finds after notice and hearing that the property is the separate property of the obligor's spouse or the other person, the court shall order that the lien against the property be released and that any action to foreclose on it be dismissed. If the court finds that the property is jointly owned by the obligor and obligor's spouse, the court shall determine whether the sale of the obligor's interest would cause unreasonable hardship on the obligor's spouse or family. If so, the court is to render an order that the obligor's interest in the property not be sold and that the lien against the property be released. If the court finds that the sale would not cause hardship, the court shall partition the property and order that the property be sold and the proceeds applied to the child support arrearage. If the court finds that the property is owned in part by another person, other than the obligor's spouse, the court shall render an order partitioning the property and directing that the obligor's share of the property be applied to the child support arrearages. Tex. Fam. Code § 157.326(b).

The treatment of the same piece of real property as a homestead with respect to the obligor's spouse but as nonhomestead property with respect to the obligor is legally impossible, and a child support lien filed against such property is void. *Salomon v. Lesay*, 369 S.W.3d. 540, 556 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

The spouse or other person claiming an ownership interest in the property subject to the lien has the burden to prove the extent of that ownership interest. Tex. Fam. Code § 157.326(c).

§ 33.90 Levy on Financial Assets of Obligor

If a judgment or administrative determination of arrearages has been rendered, a claimant may deliver a notice of levy to any financial institution possessing or controlling assets or funds owned by, or owed to, an obligor and subject to a child support lien, including a lien for child support arising in another state. Tex. Fam. Code § 157.327(a).

The notice of levy must (1) identify the amount of child support arrearages owing at the time the amount of arrearages was determined or, if the amount is less, the amount of arrearages owing at the time the notice is prepared and delivered to the financial institution and (2) direct the financial institution to pay to the claimant, not earlier than the fifteenth day or later than the twenty-first day after the date of delivery of the notice, an amount from the assets of the obligor or from funds due to the obligor that are held or controlled by the institution, not to exceed the amount of the child support arrearages identified in the notice, unless (a) the financial institution is notified by the claimant that the obligor has paid or made satisfactory arrangements for the payment of the arrearages, (b) the obligor or another person files a suit under Family Code section 157.323 requesting a hearing by the court, or (c) if the claimant is the title IV-D agency, the obligor has requested an agency review under Family Code section 157.328. Tex. Fam. Code § 157.327(b).

The notice of levy may be delivered to a financial institution as provided by section 59.008 of the Finance Code if applicable or may be delivered to the registered agent, the financial institution's main business office in Texas, or another address provided by the institution under Family Code section 231.107. Tex. Fam. Code § 157.327(e).

A financial institution receiving a notice of levy may not close an account or permit a withdrawal from any account owned by the obligor or pay funds to the obligor so that the amount remaining in the account is less than the amount of the arrearages identified in the notice, plus fees due the institution and any costs of the levy identified by the claimant. Tex. Fam. Code § 157.327(c). The financial institution may deduct those fees and costs from the obligor's assets before paying the appropriate amount to the claimant. Tex. Fam. Code § 157.327(f).

On receipt of the notice of levy, the financial institution shall notify any other person having an ownership interest in an account in which the obligor has an ownership interest that the account has been levied on. Tex. Fam. Code § 157.327(d).

Unless probate proceedings relating to the estate of a deceased obligor in a title IV-D case have commenced, the title IV-D agency may, not earlier than the ninetieth day after

the date of death, deliver a notice of levy to a financial institution in which the obligor was the sole owner of an account, regardless of whether the title IV-D agency has issued a child support lien notice regarding the account. Tex. Fam. Code § 157.3271(a), (b). The notice of levy must identify the amount of child support arrearages determined by the agency to be owing and unpaid by the obligor on the date of the obligor's death and direct the financial institution to pay to the agency, not earlier than the forty-fifth day or later than the sixtieth day after the date of delivery of the notice, an amount from the assets of the obligor or from funds due to the obligor that are held or controlled by the institution, not to exceed the amount of the child support arrearages identified in the notice. Tex. Fam. Code § 157.3271(c).

Not later than the thirty-fifth day after the date of delivery of the notice, the financial institution must notify any other person asserting a claim against the account that the account has been levied on for child support arrearages in the amount shown on the notice of levy and that the person may contest the levy by filing suit and requesting a court hearing in the same manner that a person may challenge a child support lien under Code section 157.323. Tex. Fam. Code § 157.3271(d). A person who contests a levy may bring the suit in the district court of the county in which the property is located or in which the obligor resided or in the court of continuing jurisdiction. Tex. Fam. Code § 157.3271(e). The notice of levy may be delivered to a financial institution as provided by section 59.008 of the Texas Finance Code if the institution is subject to that law, or it may be delivered to the registered agent, the institution's main business office in Texas, or another address provided by the institution under Family Code section 231.307. Tex. Fam. Code § 157.3271(f). A financial institution may deduct its fees and costs from the deceased obligor's assets before paying the appropriate amount to the agency. Tex. Fam. Code § 157.3271(g).

At the time the notice of levy under Code section 157.327 is delivered to a financial institution, the claimant shall serve the obligor with a copy of the notice. The notice to the obligor must inform the obligor that (1) the claimant will not proceed with levy if, not later than the tenth day after the date of receipt of the notice, the obligor either pays the arrearages in full or makes acceptable arrangements with the claimant for payment of the same and (2) the obligor may contest the levy by filing suit under Family Code section 157.323 not later than the tenth day after the date of receipt of the notice. The notice to the obligor may be delivered to the last known address of the obligor by first-class mail, certified mail, or registered mail. Tex. Fam. Code § 157.328(a), (b), (d).

A financial institution has no liability to the obligor or any other person for compliance with a notice of levy. However, a person who refuses to surrender the property or right

to property to the claimant on demand is liable to the claimant in an amount equal to the value of the property or right to property not surrendered in an amount that does not exceed the amount of the child support arrearages, as well as costs and reasonable attorney's fees. *See* Tex. Fam. Code §§ 157.329, 157.330.

If the property or right to property on which a notice of levy has been filed does not produce enough money to satisfy the child support arrearages identified in the notice of levy, the claimant may levy on other property of the obligor until the total amount of child support due is paid. Tex. Fam. Code § 157.331.

§ 33.91 Claim against Abandoned Property

A claim under a child support lien may be made against property that has been presumed abandoned and has been delivered to the state comptroller under section 74.301 of the Texas Property Code.

The comptroller may approve a claim for child support arrearages owed by the reported owner of the property and reflected in a child support lien notice that complies with Family Code section 157.313. Such a claim may be submitted by the lienholder or by the attorney general on the lienholder's behalf. Tex. Prop. Code § 74.501(f); *see* Tex. Fam. Code § 157.313.

If a claim is filed in the prescribed manner, found valid, and approved, the comptroller must pay a claim for money; if the claim is for personal property other than money, the comptroller must deliver the property or, if the property has been sold, pay the proceeds from its sale. *See* Tex. Prop. Code § 74.501.

[Sections 33.92 through 33.94 are reserved for expansion.]

VIII. Accrual of Interest on Child Support

§ 33.95 Generally

Interest accrues on the portion of delinquent child support that is greater than the amount of the monthly periodic support obligation at the rate of 6 percent simple interest per year from the date the support is delinquent until the date the support is paid or the arrearages are confirmed and reduced to money judgment. The 6 percent rate applies to a child support payment that becomes due on or after January 1, 2002. Child

support arrearages in existence before January 1, 2002, that were not confirmed and reduced to a money judgment on or before that date accrue interest under a different formula: (1) before January 1, 2002, the arrearages are subject to the interest rate that applied to them before that date; (2) on and after January 1, 2002, the cumulative total of arrearages and interest accumulated on those arrearages described in (1) is subject to the 6 percent rate. Tex. Fam. Code § 157.265(a), (d), (e).

Interest accrues on child support arrearages that have been confirmed and reduced to money judgment and on a money judgment for retroactive or lump-sum child support at the rate of 6 percent simple interest per year from the date the order is rendered until the judgment is paid. Interest accrues on a money judgment for retroactive or lump-sum child support at the annual rate of 6 percent simple interest from the date the order is rendered until the judgment is paid. These provisions apply only to a money judgment for child support rendered on or after January 1, 2002; such a judgment rendered before that date is governed by the law in effect when the judgment was rendered. Tex. Fam. Code § 157.265(b), (c), (f).

However, unpaid child support obligations that accrued before January 1, 2002, and were not confirmed and reduced to judgment as of January 1, 2002, are subject to a 12 percent interest rate until January 1, 2002. After that date, interest begins accruing on those unpaid obligations at the new 6 percent rate. *In re M.C.C.*, 187 S.W.3d 383 (Tex. 2006) (per curiam).

A child support payment is delinquent for the purpose of accrual of interest if the payment is not received before the thirty-first day after the payment date stated in the order by the local registry, the title IV-D agency, or the state disbursement unit or, if payments are not made through a registry, by the obligee or entity specified in the order. If a payment date is not stated in the order, a payment is delinquent if payment is not received by the registry or the obligee or entity specified in the order on the date that an amount equal to the support payable for one month becomes past due. Tex. Fam. Code § 157.266.

A court that confirms the amount of child support in arrears shall include in one cumulative money judgment all prior arrearages, whether or not previously confirmed, and interest on the arrearages. It is error for a court to fail to award interest when confirming an arrearage. *Herzfeld v. Herzfeld*, 285 S.W.3d 122 (Tex. App.—Dallas 2009, no pet.). If the amount of arrearages confirmed by the court reflects a credit to the obligor for support arrearages collected from a federal tax refund under title 42, section 664, of the United States Code and the amount of that credit is later reduced because the refund

was adjusted, the court shall render a new cumulative judgment to include as arrearages an amount equal to the amount by which the credit was reduced. Tex. Fam. Code § 157.263(c).

Accrued interest is part of the child support obligation and may be enforced by any means provided for the collection of child support. Tex. Fam. Code § 157.267. An amount collected in excess of current child support and nondelinquent child support owed shall be applied, first, to the principal amount of child support that has not been confirmed and reduced to money judgment; second, to the principal amount of child support that has been confirmed and reduced to money judgment; third, to interest on delinquent child support that has not been confirmed and reduced to judgment and on delinquent child support that has been so confirmed and reduced to judgment; and, finally, to any ordered attorney's fees or costs or title IV-D service fees for which the obligor is responsible. Tex. Fam. Code § 157.268.

[Sections 33.96 through 33.100 are reserved for expansion.]

IX. Ineligibility for State Grants, Loans, and Bids

§ 33.101 Generally

A child support obligor who is thirty or more days delinquent in paying child support is not eligible to receive payments from state funds under a contract to provide property, materials, or services or to receive a state-funded grant or loan. If such a delinquent obligor is a sole proprietor, partner, shareholder, or owner with an ownership interest of at least 25 percent of a business entity, that entity is similarly ineligible. Tex. Fam. Code § 231.006(a).

A delinquent obligor (or related business entity) remains ineligible to receive payments until all arrearages have been paid, the obligor is in compliance with a written repayment agreement or court order concerning any existing delinquency, or the court of continuing jurisdiction over the child support order has granted the obligor an exemption as part of a court-supervised effort to improve earnings and child support payments. Tex. Fam. Code § 231.006(b).

A bid or application for a contract, grant, or loan must contain the name and Social Security number of the individual or sole proprietor and each partner, shareholder, or owner with an ownership interest of at least 25 percent of the business entity submitting

the bid or application. Tex. Fam. Code § 231.006(c). Section 231.006 further requires a specified statement that the person or entity is not ineligible and provides for termination of the contract and liability if the bidder or applicant is ineligible. *See* Tex. Fam. Code § 231.006(d). A state agency may accept a bid that does not include the information required under section 231.006(c) if the state agency collects the information before the contract, grant, or loan is executed. Tex. Fam. Code § 231.006(j).

[Sections 33.102 through 33.110 are reserved for expansion.]

X. Suspension of License for Failure to Pay Child Support

§ 33.111 Suspension of License

A court or the title IV-D agency may issue an order suspending a license if an individual who is an obligor owes overdue child support in an amount equal to or greater than the total support due for three months under a support order, has been provided an opportunity to make payments toward the overdue child support under court-ordered or agreed repayment schedule, and has failed to comply with the repayment schedule. Tex. Fam. Code § 232.003(a); *In re C.G.*, 261 S.W.3d 842 (Tex. App.—Dallas 2008, no pet.). A court or the title IV-D agency may issue an order suspending a license if a parent or alleged parent has failed to comply with a subpoena after receiving appropriate notice. Tex. Fam. Code § 232.003(b).

An "order suspending license" is an order issued by the title IV-D agency or a court directing a licensing authority to suspend or refuse to renew a license. Tex. Fam. Code § 232.001(3).

"License" means a license, certificate, registration, permit, or other authorization that (1) is issued by a licensing authority; (2) is subject before expiration to renewal, suspension, revocation, forfeiture, or termination by a licensing authority; and (3) a person must obtain to (a) practice or engage in a particular business, occupation, or profession; (b) operate a motor vehicle on a public highway in Texas; or (c) engage in any other regulated activity, including hunting, fishing, or other recreational activity for which a license or permit is required. Tex. Fam. Code § 232.001(1).

Unless otherwise restricted or exempted, all licensing authorities are subject to the Family Code provisions regarding license suspension. Tex. Fam. Code § 232.002. A "licensing authority" is an agency of the state or a political subdivision of the state that

issues or renews a license or that otherwise has authority to suspend or refuse to renew a license. Tex. Fam. Code § 232.001(2).

"Renewal" of a license means any instance when a licensing authority renews, extends, recertifies, or reissues a license or periodically certifies a licensee to be in good standing based on the required payment of fees or dues or the performance of some other mandated action or activity. Tex. Fam. Code § 232.001(3–a).

§ 33.112 Petition for Suspension of License

A child support agency or obligee may file a petition to suspend a license of an obligor who has an arrearage equal to or greater than the total support due for three months under a support order. In proceedings other than a title IV-D case, the petition shall be filed in the court of continuing jurisdiction or the court in which a child support order has been registered under the terms of the Uniform Interstate Family Support Act, which is codified as chapter 159 of the Family Code. Tex. Fam. Code § 232.004(a), (c).

§ 33.113 Contents of Petition

A petition to suspend a license for failure to pay child support must state that the license suspension is required under Family Code section 232.003 and allege (1) the name and, if known, Social Security number of the individual; (2) the name of the licensing authority that issued a license the individual is believed to hold; and (3) the amount of arrearages owed under the child support order or the facts associated with the individual's failure to comply with a subpoena. The petition may include a copy of the record of child support payments maintained by the title IV-D agency or local registry or the subpoena with which the individual has failed to comply and proof of its service. Tex. Fam. Code § 232.005.

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

§ 33.114 Notice

When a petition to suspend a license is filed, the clerk of the court or the title IV-D agency must deliver to the obligor notice of the obligor's right to a hearing before the court or agency, notice of the deadline for requesting a hearing, and a hearing request form if the proceeding is a title IV-D case. The notice must contain the statement prescribed in section 232.006(c). Notice may be served as in civil cases generally or, if the

party has been ordered under chapter 105 of the Family Code to provide the court and registry with the party's current mailing address, by mailing a copy of the notice and of the petition to the respondent by first-class mail to the last mailing address on file with the court and registry. Tex. Fam. Code § 232.006.

§ 33.115 Hearing on Petition to Suspend License

A request for a hearing and a motion to stay suspension must be filed with the court or title IV-D agency by the individual not later than the twentieth day after the date of service of the notice. If a request for a hearing is filed, the court or agency must promptly schedule a hearing; notify each party of the date, time, and location of the hearing; and stay suspension pending the hearing. Tex. Fam. Code § 232.007(a), (b).

§ 33.116 Order Suspending License

On making the findings required by Family Code section 232.003 (see section 33.111 above), the court or title IV-D agency is required to enter an order suspending the license unless the individual proves that all arrearages and the current month's support have been paid, shows good cause for failure to comply with the subpoena, or establishes an affirmative defense as provided by Family Code section 157.008(c). Tex. Fam. Code § 232.008(a).

The court or title IV-D agency may stay an order suspending a license if the individual agrees to a reasonable repayment schedule that is incorporated in the order or the requirements of a reissued and delivered subpoena. Such a stay may be granted only if the individual makes an immediate partial payment in an amount—at least $200—specified by the court or title IV-D agency. Tex. Fam. Code § 232.008(b)(1), (b)(2), (b–1). An order suspending a license with a stay of the suspension may not be served on the licensing authority unless the stay is revoked. Tex. Fam. Code § 232.008(c).

A final order suspending a license must be forwarded to the appropriate licensing authority by the clerk of the court or the title IV-D agency, and the obligor may be ordered not to engage in the licensed activity. Tex. Fam. Code § 232.008(d), (e).

§ 33.117 Default Order

The court or title IV-D agency may enter a default order if the court or agency determines that the individual failed to respond to the proper notice by requesting a hearing or appearing at a scheduled hearing. Tex. Fam. Code § 232.009.

§ 33.118 Review of Final Administrative Order

An order issued by a title IV-D agency is a final agency decision and is subject to review under the substantial evidence rule as provided by chapter 2001 of the Texas Government Code. Tex. Fam. Code § 232.010.

§ 33.119 Action by Licensing Authority

A licensing authority shall implement the terms of a final order suspending a license without additional review or hearing. A licensing authority may not modify, remand, reverse, vacate, or stay an order suspending a license and may not review, vacate, or reconsider the terms of a final order suspending a license. The licensing authority may not issue or renew any other license for the obligor until the court or title IV-D agency renders an order vacating or staying an order suspending a license. Tex. Fam. Code § 232.011(b), (c), (i).

§ 33.120 Revocation of Stay

The obligee, support enforcement agency, court, or title IV-D agency may file a motion to revoke the stay of an order suspending a license if the individual the subject of an order does not comply with the terms of reasonable repayment plan entered into by the individual or the requirements of a reissued subpoena. Notice may be given by personal service or by mail to the address provided by the individual in the order suspending a license. The notice must include a notice of hearing and must be provided to the individual not less than ten days before the date of the hearing. Tex. Fam. Code § 232.012(a), (b).

The motion to revoke stay must allege the manner in which the individual failed to comply with the repayment plan or the reissued subpoena. If the court or title IV-D agency finds that the individual is not in compliance with the terms of the repayment plan or reissued subpoena, the court or agency shall revoke the stay of the order suspending license and render a final order suspending license. Tex. Fam. Code § 232.012(c), (d).

§ 33.121 Vacating or Staying Order

The court or title IV-D agency may render an order vacating or staying an order suspending an individual's license if the individual has paid all delinquent support or established a satisfactory payment record or has complied with the requirements of a

reissued subpoena, or if the court or title IV-D agency determines that good cause exists for vacating or staying the order. Tex. Fam. Code § 232.013(a)(1)(A), (a)(1)(B), (a)(2).

§ 33.122 Denial of License Issuance or Renewal

A child support agency may give notice to a licensing authority about an obligor who has failed to pay child support under a support order for six months or more that requests the authority to refuse to approve an application for issuance of a license to the obligor or renewal of an existing license of the obligor. Tex. Fam. Code § 232.0135(a).

When the licensing authority receives that information, it must refuse to approve an application for such issuance or renewal until further notice from the child support agency. Tex. Fam. Code § 232.0135(b).

The child support agency must send a copy of the notice to the obligor and inform the obligor of the steps to take to permit the authority to approve the application. Tex. Fam. Code § 232.0135(c).

An obligor receiving the notice may request a review by the child support agency to resolve any dispute regarding the obligor's identity or the existence or amount of the arrearages. If the dispute is not resolved, the obligor may, within thirty days from receiving notice of the agency's review determination, file a motion with the court to direct the agency to withdraw the notice to the licensing authority and request a hearing on the motion. The licensing authority may not accept the application until the court rules on the motion. If the agency withdraws the notice after agency review or the court hearing, the agency must reimburse the obligor for any fee charged by the licensing agency. Tex. Fam. Code § 232.015(d).

If the obligor enters into a repayment agreement with the child support agency through this procedure, the agency may incorporate the agreement in an order to be filed with and confirmed by the court. Tex. Fam. Code § 232.015(e).

[Sections 33.123 through 33.130 are reserved for expansion.]

XI. Enforcement of Child Support Orders of Other States

§ 33.131 Generally

Child support orders issued in another state or a foreign country may be enforced under the provisions of the Uniform Interstate Family Support Act (UIFSA), which is contained in Texas Family Code chapter 159. For a detailed discussion of UIFSA, see chapter 43 of this manual.

[Sections 33.132 through 33.140 are reserved for expansion.]

XII. Uniform Enforcement of Foreign Judgments Act

§ 33.141 Foreign Judgments

A judgment of another state may be enforced in accordance with the terms of the Uniform Enforcement of Foreign Judgments Act, chapter 35 of the Texas Civil Practice and Remedies Code.

A properly authenticated foreign judgment may be filed for enforcement with any Texas court of competent jurisdiction, whereupon it is treated like any other judgment of that court. *See* Tex. Civ. Prac. & Rem. Code §§ 35.003–.007.

Alternatively, a judgment creditor retains the right to bring an action to enforce a judgment instead of filing it under those provisions. Tex. Civ. Prac. & Rem. Code § 35.008.

Rule 308b of the Texas Rules of Civil Procedure governs the enforceability of judgments and arbitration awards based on foreign law in suits involving a marriage relationship or a parent-child relationship. The primary purpose for the adoption of this rule was to counteract the possible unfair effects of judgments and awards granted under Sharia law. When dealing with a foreign judgment related to family law, the practitioner must follow the specific notice provisions set forth in rule 308b. *See* Tex. R. Civ. P. 308b.

[Sections 33.142 through 33.145 are reserved for expansion.]

XIII. Federal Supervision of Child Support Enforcement

§ 33.146 Office of Child Support Enforcement

The secretary of the Department of Health and Human Services operates the Office of Child Support Enforcement. This agency was created by Congress to supervise state title IV-D programs for determining paternity, locating absent parents, and establishing and enforcing child support obligations.

§ 33.147 Federal Parent Locator Service

The Federal Parent Locator Service (FPLS) is designed to aid in the location of any individual who owes a duty of support or an individual to whom such duty is owed. *See* 42 U.S.C. § 653. The FPLS coordinates information from the Social Security Administration, the Internal Revenue Service, the Department of Veterans Affairs, the Department of Defense, the National Directory of New Hires, and other state and federal sources. This service is available to "authorized" nonpublic assistance recipients, for a reasonable fee, as well as to state agencies providing child support services. "Authorized persons" include a court with jurisdiction over a child support issue; an agent or attorney of the title IV-D agency; and the custodial parent, legal guardian, attorney, or agent of a child. *See* 42 U.S.C. § 653(c).

For the purposes of establishing or enforcing child support obligations, information including the following may be obtained: an individual's Social Security number; most recent address; employer's name, address, and identification number; and wage and asset information. 42 U.S.C. § 653(a)(2).

A request can be transmitted to the FPLS by title IV-D agencies, which also operate state parent locator services. 42 U.S.C. § 653(f). To make an application in Texas, contact: Office of the Attorney General, Child Support Division, State Parent Locator Service, P.O. Box 12017, Austin, TX 78711-2017.

§ 33.148 Information

For additional information about the federal Office of Child Support Enforcement (OCSE) and Federal Parent Locator Service, see the OCSE Web page at **www.acf.hhs.gov/programs/cse**. In addition, OCSE has established the National Electronic Child Support Resource System (NECSRS). NECSRS provides child support enforcement information available from the federal government, states, tribes, and localities.

The primary emphasis of NECSRS is on the transmission of electronic information. Many documents will be available online for viewing and immediate downloading.

[Sections 33.149 and 33.150 are reserved for expansion.]

XIV. Useful Websites

§ 33.151 Useful Websites

The following websites contain information relating to the topic of this chapter:

Office of Child Support Enforcement/Federal Parent Locator Service (§ 33.148)
www.acf.hhs.gov/programs/cse

Office of Attorney General of Texas (§ 33.9)
www.texasattorneygeneral.gov
https://www.texasattorneygeneral.gov/cs/
https://www.texasattorneygeneral.gov/cs/cs-forms#tacforms
https://childsupport.oag.state.tx.us/wps/portal/csi/PayRecordOnline

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Chapter 34

Enforcement—Possession and Access

I. Enforcement Procedures

§ 34.1 Filing Motion to Enforce

A temporary or final court order for possession and access is enforced by a motion to enforce filed in the court of continuing jurisdiction. Tex. Fam. Code § 157.001. The term *temporary order*, for this purpose, includes a temporary restraining order, standing order, injunction, and any other temporary order rendered by a court. Tex. Fam. Code § 157.001(e).

§ 34.2 Venue

Proceedings for enforcement of court orders for possession of and access to a child are filed in the court of continuing, exclusive jurisdiction of the suit affecting the parent-child relationship. Tex. Fam. Code § 157.001(d). The enforcement action is subject to transfer. *See* Tex. Fam. Code §§ 155.201, 155.202.

§ 34.3 Transferred Order

If a suit is transferred, the court to which a transfer is made becomes the court of continuing, exclusive jurisdiction, and all proceedings, including contempt, are continued as if originally brought in that court. A transferred order has the same effect as an original order and may be enforced by any means by which the original court could have enforced the order, including contempt. The new court has the power to hear and punish disobedience of the original court's order by contempt, regardless of whether all or a part of the alleged disobedience was committed before or after the case was transferred, and the original court has no further jurisdiction. Tex. Fam. Code § 155.206.

§ 34.4 Limitations

The court may enforce an order for possession and access, including by contempt, if the motion is filed within six months after the date the child becomes an adult or the date on which the right to possession and access terminates by the terms of the order or by operation of law. Tex. Fam. Code § 157.004.

§ 34.5 Joinder of Claims

An enforcement proceeding may be joined with other remedies or claims. An enforcement action does not limit or preclude other civil or criminal remedies, including a suit for damages for interference with a possessory interest in a child. Tex. Fam. Code § 157.003.

If a motion to enforce is joined with other claims, its filing is governed by the Texas Rules of Civil Procedure applicable to original lawsuits. The deadline and rules for answering apply as in other civil cases. Tex. Fam. Code § 157.062(d).

§ 34.6 Written Order

The order to be enforced must be written and signed. *Ex parte Wilkins*, 665 S.W.2d 760, 761 (Tex. 1984) (orig. proceeding).

§ 34.7 Clear and Specific Order

The order to be enforced must spell out the details of compliance in clear, specific, and unambiguous terms so that the person subject to the order will readily know the duties or obligations imposed. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding). The judgment must clearly order the parties to perform the required acts and not empower one former spouse to impose a duty on the other. *Ex parte Brister*, 801 S.W.2d 833, 834 (Tex. 1990) (orig. proceeding). *But see In re J.S.P.*, 278 S.W.3d 414, 423 (Tex. App.—San Antonio 2008, no pet.) (approving appointment of third party therapist to supervise periods of possession but holding terms of order were not specific enough to enforce by contempt). "The judgment must state, in clear and unambiguous language, what is required for the conservator to comply, and the terms must be specific enough to permit the conservator to enforce the judgment by contempt." *In re A.L.E.*, 279 S.W.3d 424, 432 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (approving terms of drug testing as condition of possession and access).

All the terms necessary to inform the respondent what he must do must be in the order. *See Ex parte MacCallum*, 807 S.W.2d 729, 730 (Tex. 1991) (orig. proceeding) (per curiam) (place to return child not set out in order); *In re Martin*, 523 S.W.3d 165, 170 (Tex. App.—Dallas 2017, orig. proceeding) (judgment awarding grandparents thirty-five hours of visitation each month not adequately specific); *In re Campbell*, 01-17-00251-CV, 2017 WL 3598251, at *6 (Tex. App.—Houston [1st Dist.] Aug. 22, 2017, orig. proceeding) (mem. op.) ("timely" is inherently ambiguous term when unqualified). *But see Ex parte Linder*, 783 S.W.2d 754, 757–58 (Tex. App.—Dallas 1990, orig. proceeding) (relator who knows with certainty of requirement to perform one of two alternate court-ordered obligations can be punished for contempt for doing neither).

If the terms of the original order are not clear or specific enough to be enforceable by contempt, the court may render a clarifying order specific enough to be enforced by contempt. See section 34.51 below.

§ 34.8 Contents of Motion

The motion for enforcement must, in ordinary and concise language, identify the provision of the order allegedly violated and sought to be enforced, state the manner of the respondent's alleged noncompliance, state the relief requested by the movant, and contain the signature of the movant or the movant's attorney. Tex. Fam. Code § 157.002(a); *see also Ex parte Arnold*, 926 S.W.2d 622, 624 (Tex. App.—Beaumont 1996, orig. proceeding).

The motion must also include the date, place, and, if applicable, the time of each alleged violation. Tex. Fam. Code § 157.002(c); *see also Ex parte Arnold*, 926 S.W.2d at 624. An allegation that "[o]n each occasion since May 2015 [mother] either was not home . . . or refused to open the door to allow [father] access" was not sufficiently specific. *In re A.G.*, 531 S.W.3d 329, 336 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

A movant may plead repeated past violations of the order and that future violations of a similar nature may occur before the date of the hearing. Tex. Fam. Code § 157.002(e).

"Civil contempt" provides for remedial punishment in which the person held in contempt is committed until he or she performs some required act. "Criminal contempt" is punitive in nature and is used to punish the person violating the court's order. *Ex parte Johns*, 807 S.W.2d 768, 770–71 (Tex. App.—Dallas 1991, orig. proceeding). If criminal contempt is sought, it must be specifically pleaded. *See In re Smith*, 981 S.W.2d 909, 911 (Tex. App.—Houston [1st Dist.] 1998, orig. proceeding).

In initiating the action, the movant must allege, in the first numbered paragraph of the motion, the intended discovery level. *See* Tex. R. Civ. P. 190.1.

§ 34.9 Notice of Hearing

The notice of hearing on the motion must be personally served on the respondent not later than the tenth day before the date of the hearing. Tex. Fam. Code § 157.062(c).

Except in a contempt proceeding, if the respondent has been ordered under Family Code section 105.006 to provide the court and the state case registry with the party's current mailing address, notice of hearing on a motion for enforcement of a final order may be served by mailing copies of the notice and the motion by first-class mail to the address of record. The clerk, the movant, or the movant's attorney may send the notice. The person who sends the notice must file with the clerk a certificate of service showing the date of mailing and the name of the person who sent the notice. Tex. Fam. Code § 157.065. If seeking contempt, see section 35.32 in this manual.

A party who appears at the hearing or is present when the case is called and who does not object to the court's jurisdiction or the form or manner of the notice of hearing makes a general appearance for all purposes in the enforcement proceeding. Tex. Fam. Code § 157.063; *Ex parte Linder*, 783 S.W.2d 754, 759 (Tex. App.—Dallas 1990, orig. proceeding).

§ 34.10 Setting Hearing

If the motion for enforcement requests contempt, the court must set the date, time, and place of the hearing and order the respondent to personally appear and respond to the motion. Tex. Fam. Code § 157.061(a). A motion for enforcement that requests contempt must be personally served and may be set for hearing with ten days' notice to the respondent. Tex. Fam. Code § 157.062(c).

If the motion does not request contempt, the court shall set the motion on the request of a party. Tex. Fam. Code § 157.061(b).

If the motion for enforcement is joined with other claims, the hearing may not be held before 10:00 a.m. on the first Monday after the twentieth day after the date of service. The filing of the motion is governed by the Texas Rules of Civil Procedure applicable to original lawsuits. Tex. Fam. Code § 157.062(d); *In re Hathcox*, 981 S.W.2d 422, 425 (Tex. App.—Texarkana 1998, no pet.).

The notice of hearing need not repeat the allegations contained in the motion for enforcement. Tex. Fam. Code § 157.062(b).

§ 34.11 Record

A record of the hearing should be made by the court reporter or, if the proceeding is before an associate judge, as provided by chapter 201 of the Family Code, unless (1) the motion does not request incarceration *and* the parties waive the requirement of a record at the time of the hearing, either in writing or in open court, *and* the court approves the waiver or (2) the parties agree to an order. Tex. Fam. Code § 157.161.

COMMENT: It is a better practice not to waive a record of the proceeding if there is any possibility of an appeal.

§ 34.12 Failure to Appear

If a respondent who has been personally served or who has filed an answer or made an appearance fails to appear at the hearing, the court may, on proper proof, grant a default judgment for any relief sought except contempt, regardless of whether other claims or remedies have been joined with the enforcement action. The court may not hold the respondent in contempt but may issue a capias for the respondent's arrest. *See* Tex. Fam. Code §§ 157.066, 157.114, 157.115.

For discussion of consequences of a respondent's failure to appear, including possible issuance of a capias and setting of bond, see sections 35.51 through 35.53 in this manual.

§ 34.13 Contents of Enforcement Order

An enforcement order must set forth in ordinary and concise language the provisions of the order for which enforcement was requested, the acts or omissions that are the subject of the order, the manner of the respondent's noncompliance, and the relief granted by the court. Tex. Fam. Code § 157.166(a).

The basic requirements for the contents of a contempt order are discussed in section 35.61 in this manual.

§ 34.14 Make-Up Visitation

The court may order additional periods of possession or access to compensate for the denial of court-ordered possession or access. The additional periods must be of the same type and duration as those of the possession or access that was denied, and they may include weekend, holiday, and summer possession or access. Tex. Fam. Code § 157.168(a)(1), (a)(2). The "same type and duration" means "the same amount of time." A trial court abuses its discretion by awarding make-up time that is greater than the periods for which possession or access was denied. *In re Braden*, 483 S.W.3d 659, 666 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding). The court may not grant possession of the child "until further order of the court." *In re Parks*, 264 S.W.3d 59, 61 n.1 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding).

The additional periods must occur on or before the second anniversary of the date the court finds that court-ordered possession or access has been denied. Tex. Fam. Code § 157.168(a)(3). The person denied possession or access is entitled to decide the time of the additional periods, provided they are of the same type and duration as those of the possession or access denied. Tex. Fam. Code § 157.168(b).

§ 34.15 Attorney's Fees

If the court finds that the respondent has failed to comply with the terms of an order providing for the possession of or access to a child, the court must order the respondent to pay the movant's reasonable attorney's fees and all court costs in addition to any other remedy. If the court finds that the enforcement of the order with which the respondent failed to comply was necessary to ensure the child's physical or emotional health or welfare, these fees and costs may be enforced by any means available for the enforcement of child support, including contempt, but not including income withholding. Tex. Fam. Code § 157.167(b). If attorney's fees are incurred for both enforcement and modification proceedings, the attorney must segregate the fees attributable to the enforcement action or all the fees are enforceable only as a debt. *See In re C.A.C.*, No. 05-17-00602-CV, 2018 WL 2126811, at *3 (Tex. App.—Dallas May 9, 2018, no pet.) (mem. op.); *In re Braden*, 483 S.W.3d 659, 666 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding). For good cause shown, the court may waive the payment of fees and costs if the court states the reasons supporting that finding. Tex. Fam. Code § 157.167(c).

The court may render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to an attorney. A judgment

for attorney's fees and expenses may be enforced in the attorney's name by any means available for enforcement of a judgment on a debt. Tex. Fam. Code § 106.002.

An attorney appointed to represent an indigent respondent facing possible incarceration is entitled to a reasonable fee in an amount set by the court. The fee is paid from the general funds of the county according to the schedule for compensation of counsel appointed for criminal defendants provided in the Texas Code of Criminal Procedure. Tex. Fam. Code § 157.164(a), (b).

§ 34.16 Affirmative Defenses

The respondent may plead as an affirmative defense to contempt for failure to comply with an order for possession of or access to a child that the movant voluntarily relinquished actual possession and control of the child. The voluntary relinquishment must have been for the time encompassed by the court-ordered periods during which the respondent is alleged to have interfered. Tex. Fam. Code § 157.007.

The issue of the existence of an affirmative defense does not arise unless evidence is admitted supporting the defense. The respondent must prove the affirmative defense by a preponderance of the evidence. Tex. Fam. Code § 157.006.

§ 34.17 Special Exceptions

The court must rule on any special exception or motion to strike before hearing the motion to enforce. If an exception is sustained, the court must give the movant an opportunity to replead and continue the hearing to a designated date and time without requiring additional service. Tex. Fam. Code § 157.064.

§ 34.18 Right to Counsel

Concerning the right to counsel when a party is seeking to hold the other party in contempt and incarceration is a possible result of the proceedings, see sections 35.5:3 and 35.5:4 in this manual.

§ 34.19 Right to Jury

Concerning the availability of a jury when contempt charges are in issue, see section 35.5:2 in this manual.

§ 34.20 Fifth Amendment Rights

For a discussion of the Fifth Amendment privilege in a contempt proceeding, see section 35.5:5 of this manual.

[Sections 34.21 through 34.30 are reserved for expansion.]

II. Contempt

§ 34.31 Enforcement by Contempt

Any provision of a temporary or final order for possession and access may be enforced by contempt. Tex. Fam. Code § 157.001(b); *see Ex parte Morgan*, 886 S.W.2d 829, 832 (Tex. App.—Amarillo 1994, orig. proceeding) (parent's conduct of encouraging children to resist court-ordered visitation with other parent punishable by contempt); *In re White*, No. 01-18-00073-CV, 2018 WL 2305524 (Tex. App.—Houston [1st Dist.] May 23, 2018, orig. proceeding) (mem. op.) (burden on relator to prove inability to comply with order to transport child to counseling); *Ex parte Rosser*, 899 S.W.2d 382, 385 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding) (burden on relator to show inability to comply with court-ordered visitation). The term *temporary order*, for this purpose, includes a temporary restraining order, standing order, injunction, and any other temporary order rendered by a court. Tex. Fam. Code § 157.001(e).

Contempt proceedings are discussed in chapter 35 of this manual.

[Sections 34.32 through 34.50 are reserved for expansion.]

III. Clarification

§ 34.51 Clarification Order

If an order is not specific enough to be enforceable by contempt, a court, on the motion of either party or on its own motion, may render a clarifying order specific enough to be enforced by contempt. Tex. Fam. Code § 157.421. The court may not change the substantive provisions of the order being clarified. Tex. Fam. Code § 157.423(a). The court may render a clarifying order before a motion for contempt is made or heard, in con-

junction with a motion for contempt, or after denial of a motion for contempt. Tex. Fam. Code § 157.424. A clarifying order applies only prospectively for the purposes of contempt enforcement. Tex. Fam. Code § 157.425. A reasonable time for compliance must be provided, after which the clarifying order may be enforced by contempt. Tex. Fam. Code § 157.426.

[Sections 34.52 through 34.60 are reserved for expansion.]

IV. Security

§ 34.61 Bond or Other Security

The court may order the respondent to execute a bond or post security if the respondent has on two or more occasions denied possession of or access to a child who is the subject of the order. Tex. Fam. Code § 157.109(a)(1).

The amount of the bond or security is set by the court and conditioned on compliance with the court order permitting possession or access. Tex. Fam. Code § 157.109(b). The bond or security deposit is to be payable through the registry of the court to the person entitled to possession or access. Tex. Fam. Code § 157.109(c)(2).

§ 34.62 Forfeiture

On the motion of a person or entity for whose benefit the bond or security was ordered, the court may forfeit all or part of the bond or security deposit on a finding that the person who furnished the bond or security has violated the order for possession or access. Tex. Fam. Code § 157.110(a)(1).

The court must order the registry to pay the funds from a forfeited bond or security deposit to the person entitled to possession or access. All or a part of the forfeited amount may be applied to attorney's fees and costs incurred in bringing the motion for contempt or motion for forfeiture. Tex. Fam. Code § 157.110(b), (c).

Contempt proceedings may be joined with a forfeiture proceeding. Tex. Fam. Code § 157.112. The forfeiture of bond or security is not a defense to contempt. Tex. Fam. Code § 157.111.

[Sections 34.63 through 34.70 are reserved for expansion.]

V. Suspension of License for Failure to Comply with Court Order Providing for Possession of or Access to Child

§ 34.71 Suspension of License

A court may issue an order suspending a license for an individual for whom a court has rendered an enforcement order under Family Code chapter 157 finding that the individual has failed to comply with the terms of a court order providing for the possession of or access to a child. Tex. Fam. Code § 232.003(c). An "order suspending license" is an order issued by the title IV-D agency or a court directing a licensing authority to suspend or refuse to renew a license. Tex. Fam. Code § 232.001(3).

"License" means a license, certificate, registration, permit, or other authorization that (1) is issued by a licensing authority; (2) is subject before expiration to renewal, suspension, revocation, forfeiture, or termination by the issuing licensing authority; and (3) a person must obtain to (a) practice or engage in a particular business, occupation, or profession; (b) operate a motor vehicle on a public highway in Texas; or (c) engage in any other regulated activity, including hunting, fishing, or other recreational activity for which a license or permit is required. Tex. Fam. Code § 232.001(1).

Unless otherwise restricted or exempted, all licensing authorities are subject to the Family Code provisions regarding license suspension. Tex. Fam. Code § 232.002. A "licensing authority" is an agency of the state or a political subdivision of the state that issues or renews a license or that otherwise has authority to suspend or refuse to renew a license. Tex. Fam. Code § 232.001(2).

"Renewal" of a license means any instance when a licensing authority renews, extends, recertifies, or reissues a license or periodically certifies a licensee to be in good standing based on the required payment of fees or dues or the performance of some other mandated action or activity. Tex. Fam. Code § 232.001(3–a).

§ 34.72 Contents of Petition

A petition to suspend a license must state that the license suspension is required under Family Code section 232.003 and allege (1) the name and, if known, Social Security number of the individual; (2) the name of the licensing authority that issued a license the individual is believed to hold; and (3) the facts associated with the individual's failure to comply with the terms of a court order providing for the possession of or access to a child. The petition may include a copy of the enforcement order rendered under

Family Code chapter 157 describing the manner in which the individual was found to have not complied with the terms of the court order and a copy of the court order containing the provisions that the individual was found to have violated. Tex. Fam. Code § 232.005.

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

§ 34.73 Notice

When a petition to suspend a license is filed, the clerk of the court must deliver to the individual notice of the individual's right to a hearing before the court and notice of the deadline for requesting a hearing. The notice must contain the statement prescribed in Family Code section 232.006(c). Notice may be served as in civil cases generally or, if the party has been ordered under chapter 105 of the Family Code to provide the court and registry with the party's current mailing address, by mailing a copy of the notice and of the petition to the respondent by first-class mail to the last mailing address on file with the court and registry. Tex. Fam. Code § 232.006.

§ 34.74 Hearing on Petition to Suspend License

A request for a hearing and a motion to stay suspension must be filed with the court by the individual not later than the twentieth day after the date of service of the notice. If a request for a hearing is filed, the court must promptly schedule a hearing; notify each party of the date, time, and location of the hearing; and stay suspension pending the hearing. Tex. Fam. Code § 232.007(a), (b).

§ 34.75 Order Suspending License

On making the findings required by Family Code section 232.003 (see section 34.71 above), the court is required to enter an order suspending the license unless the individual shows good cause for failure to comply with the terms of the court order providing for the possession of or access to a child. Tex. Fam. Code § 232.008(a)(2).

The court may stay an order suspending a license conditioned on the individual's compliance with the requirements of any court order pertaining to the possession of or access to a child. Tex. Fam. Code § 232.008(b)(3). An order suspending a license with a stay of the suspension may not be served on the licensing authority unless the stay is revoked. Tex. Fam. Code § 232.008(c).

A final order suspending a license must be forwarded to the appropriate licensing authority by the clerk of the court, and the individual may be ordered not to engage in the licensed activity. Tex. Fam. Code § 232.008(d), (e).

§ 34.76 Default Order

The court may enter a default order if the court determines that the individual failed to respond to the proper notice by requesting a hearing or appearing at a scheduled hearing. Tex. Fam. Code § 232.009.

§ 34.77 Action by Licensing Authority

A licensing authority shall implement the terms of a final order suspending a license without additional review or hearing. A licensing authority may not modify, remand, reverse, vacate, or stay an order suspending a license and may not review, vacate, or reconsider the terms of a final order suspending a license. The licensing authority may not issue or renew any other license for the individual until the court renders an order vacating or staying an order suspending a license. Tex. Fam. Code § 232.011(b), (c), (i).

§ 34.78 Revocation of Stay

A motion to revoke the stay of an order suspending a license may be filed if the individual the subject of an order does not comply with the terms of any court order pertaining to the possession of or access to a child. Notice may be given by personal service or by mail to the address provided by the individual in the order suspending a license. The notice must include a notice of hearing and must be provided to the individual not less than ten days before the date of the hearing. Tex. Fam. Code § 232.012(a), (b).

The motion to revoke stay must allege the manner in which the individual failed to comply with the court order pertaining to the possession of or access to a child. If the court finds that the individual is not in compliance with the terms of the court order pertaining to possession of or access to a child, the court shall revoke the stay of the order suspending license and render a final order suspending license. Tex. Fam. Code § 232.012(c), (d).

§ 34.79 Vacating or Staying Order

The court may render an order vacating or staying an order suspending an individual's license if the individual has complied with the terms of any court order providing for

the possession of or access to a child or if the court determines that good cause exists for vacating or staying the order. Tex. Fam. Code § 232.013(a)(1)(C), (a)(2).

[Sections 34.80 through 34.90 are reserved for expansion.]

VI. Uniform Child Custody Jurisdiction and Enforcement Act

§ 34.91 Generally

Child custody determinations of other states may be enforced under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is contained in chapter 152 of the Family Code. For a detailed discussion of the UCCJEA, see chapter 43 of this manual.

[Sections 34.92 through 34.100 are reserved for expansion.]

VII. Federal Parent Locator Service

§ 34.101 Federal Parent Locator Service

The Federal Parent Locator Service (FPLS) (42 U.S.C. § 653) may be used to a limited extent to locate a parent or child for the purpose of enforcing any state or federal law with respect to the unlawful taking or restraint of a child or making or enforcing a child custody or visitation determination. *See* 42 U.S.C. § 663.

Only information on the most recent address and place of employment will be provided for this purpose. 42 U.S.C. § 663(c). The following "persons" are authorized to request assistance from the FPLS for this purpose: an agent or attorney of the state who has the duty or authority to enforce a child custody or visitation determination; a court with jurisdiction to make or enforce such a determination; and an agent or attorney of the United States or a state who has the duty or authority to investigate, enforce, or prosecute with regard to an unlawful restraint or taking of a child. 42 U.S.C. § 663(d)(2). Parents and private attorneys do not have direct access to the FPLS for this purpose, although they may in situations involving child support.

The FPLS coordinates information from the Social Security Administration, the Internal Revenue Service, the Department of Veterans Affairs, the Department of Defense, the National Directory of New Hires, and other state and federal sources. A request can be transmitted to the FPLS by title IV-D agencies, which also operate state parent locator services. 42 U.S.C. § 653(f). To make an application in Texas, contact: Office of the Attorney General, Child Support Division, State Parent Locator Service, P.O. Box 12017, Austin, TX 78711-2017.

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Contempt

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Chapter 35

Contempt

I. Contempt Generally

§ 35.1 Purpose of Contempt

The supreme court has defined contempt as disobedience to or disrespect of a court by acting in opposition to its authority. *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding). The court has further observed that contempt is a broad and inherent power of a court. *See Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976) (orig. proceeding). The purpose of contempt is twofold: (1) to compel decorum and respect in the presence of the court and (2) to compel due obedience to the court's judgments, orders, and process. *See In re Reece*, 341 S.W.3d 360, 365 n.7 (Tex. 2011) (citing *Ex parte Gonzalez*, 238 S.W. 635, 636 (Tex. 1922)).

§ 35.2 Direct Contempt vs. Constructive Contempt

Contempt may occur in the presence of a court (direct contempt) or outside the court's presence (constructive contempt). As a result of this distinction, the trial court in a direct contempt proceeding is allowed, in some instances, to conduct a summary proceeding in which the alleged contemner is not entitled to notice and a hearing, while a constructive contemner is always entitled to notice and a hearing in order to defend the charges. *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979) (orig. proceeding); *see Ex parte Werblud*, 536 S.W.2d 542, 546 (Tex. 1976) (orig. proceeding) (observing that constructive contempt entitles the contemner to more procedural safeguards than those afforded to direct contemners).

In direct contempt cases, the court must have direct knowledge of the behavior constituting contempt. To exercise its authority to compel decorum, the court can use its contempt power to instantly suppress disturbances or disrespect to the court, when occurring in open court. *In re Bell*, 894 S.W.2d 119, 127, 128 (Tex. Spec. Ct. Rev. 1995).

Constructive contempt involves behavior that occurs outside the presence of the court and relates to acts that require testimony to establish their existence. *Ex parte Cooper*, 657 S.W.2d 435, 437 (Tex. Crim. App. 1983). With constructive contempt proceedings, due process demands are heightened, and the accused is entitled to be given notice, a hearing, and the opportunity to obtain an attorney. *Ex parte Hodge*, 389 S.W.2d 463 (Tex. 1965) (orig. proceeding). These due process requirements are necessary because all of the elements of the offense are not personally observed by the court. *In re Oliver*, 333 U.S. 257 (1948); *Ex parte Pyle*, 133 S.W.2d 565 (Tex. 1939).

COMMENT: An officer of a court who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence. Tex. Gov't Code § 21.002(d); *see In re Cisneros*, 487 S.W.3d 237 (Tex. App.—El Paso 2015) (orig. proceeding).

§ 35.3 Criminal Contempt vs. Civil Contempt

Contempt is further classified into either civil or criminal contempt. The classifications of civil and criminal contempt have nothing to do with the characterization of the underlying case or the burden of the contempt order. Rather, the distinction lies in the nature and purpose of the penalty imposed. *See Ex parte Chambers*, 898 S.W.2d 257, 266 (Tex. 1995) (orig. proceeding) (Gonzalez, J., dissenting) (citing *Ex parte Werblud*, 536 S.W.2d 542, 545–46 (Tex. 1976)).

Civil contempt is remedial and coercive in nature. In a civil contempt order, the court exerts its contempt power to persuade the contemner to obey a previous order, usually through a conditional penalty. Because the contemner can avoid punishment by obeying the court's order, the contemner is said to carry the keys to the jail cell in his own pocket. *Ex parte Werblud*, 536 S.W.2d at 545.

Criminal contempt is punitive in nature. A criminal contempt order is an exertion of the court's inherent power to punish a contemner for some completed act that affronted the court's dignity and authority. The contemner's punishment is fixed, so that no subsequent voluntary compliance on the part of the defendant can enable him or her to avoid punishment for past acts. *Ex parte Werblud*, 536 S.W.2d at 545–46.

§ 35.4 Court's Authority to Hold Parties in Contempt

A court's contempt power does not depend on statutory authority; it is an inherent power of a court and essential to a court's ability to exercise its authority. *Ex parte*

Gorena, 595 S.W.2d 841, 845 (Tex. 1979) (orig. proceeding); *Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976) (orig. proceeding). This inherent power has been codified in the Texas Government Code. *See* Tex. Gov't Code §§ 21.001, 21.002.

Nevertheless, the Texas Family Code contains numerous statutes that provide authority to enforce certain types of orders by contempt. For example, title 4 contains provisions for enforcement of protective orders by contempt. *See* Tex. Fam. Code §§ 81.004, 81.010, 85.024, 85.026. Protective orders are the subject of chapter 17 of this manual.

Statutory authority also exists that permits courts to enforce property divisions and awards of spousal maintenance by contempt. *See* Tex. Fam. Code §§ 8.059, 9.012. See section 31.23 of this manual for a discussion of enforcement by contempt of orders for property division and section 32.6 concerning enforcement by contempt of orders for spousal maintenance.

The most comprehensive and perhaps most commonly encountered statutory scheme for enforcement by contempt is that laid out in Texas Family Code chapter 157, which addresses contempt in suits affecting the parent-child relationship. While substantive contempt law and procedures related to contempt, generally, are largely uncodified, chapter 157 specifically addresses practices and procedures related to contempt in these cases.

§ 35.5 Constitutional Protections

§ 35.5:1 Due Process Requirements

Because contempt proceedings entail possible penal sanctions, the proceedings are quasi-criminal and should conform as nearly as practicable to those in criminal proceedings. Texas courts have consistently held that alleged constructive contemners are entitled to procedural due process protections before they may be held in contempt. *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983) (orig. proceeding).

§ 35.5:2 Right to Jury

The parties to an enforcement action are ordinarily not entitled to a jury. *See, e.g.*, Tex. Fam. Code § 9.005. However, an alleged contemner has a constitutional right to a jury trial on a "serious" charge of criminal contempt. A charge for which confinement may exceed six months is serious. *Ex parte Sproull*, 815 S.W.2d 250, 250 (Tex. 1991) (orig. proceeding) (per curiam); *Ex parte Werblud*, 536 S.W.2d 542, 546 (Tex. 1976) (orig.

proceeding). The alleged contemner must be informed of the right to a jury trial, and, because a waiver of the right to a jury shall not be presumed from a silent record, the record must clearly reflect the waiver of this right. *Ex parte Sproull*, 815 S.W.2d at 250; *Ex parte Griffin*, 682 S.W.2d 261, 262 (Tex. 1984) (orig. proceeding).

The Supreme Court has held that a defendant who is prosecuted in a single proceeding for multiple petty offenses does not have a Sixth Amendment right to a jury trial when the aggregate prison term authorized for the offenses exceeds six months. The right to a jury trial does not extend to petty offenses. An offense carrying a maximum term of six months or less is assumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that it considered the offense serious. *Lewis v. United States*, 518 U.S. 322 (1996).

Texas is in accord with these distinctions between petty and serious offenses. The statute that authorizes punishment for contempt allows punishment by a fine of not more than $500 or confinement in the county jail for not more than six months or both. *See* Tex. Gov't Code § 21.002(b). The total period of confinement arising out of the same matter is limited cumulatively to eighteen months. Tex. Gov't Code § 21.002(h). However, the limitations of section 21.002(h) do not apply for offenders found in contempt for failure to make child support payments. Tex. Gov't Code § 21.002(f). Whether the offense is serious or petty is determined by the pleadings. *Ex parte York*, 899 S.W.2d 47, 48 (Tex. App.—Waco 1995, orig. proceeding). However, it has been held that if the court announces prior to the contempt hearing that punishment will not exceed six months, an alleged contemnor no longer has a right to a jury trial, notwithstanding the pleadings. *See In re C.F.*, 576 S.W.3d 761, 768–69 (Tex. App.—Fort Worth 2019, orig. proceeding).

§ 35.5:3 Right to Counsel

If incarceration is a possible result of the proceedings, the court must inform an unrepresented respondent of the right to be represented by an attorney and, if he is indigent, of his right to the appointment of an attorney. *Ex parte Strickland*, 724 S.W.2d 132, 134 (Tex. App.—Eastland 1987, orig. proceeding); *see also In re Luebe*, 983 S.W.2d 889, 890 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding). The fact that the respondent was admonished as to his right to counsel must appear on the record. *Ex parte Keene*, 909 S.W.2d 507, 508 (Tex. 1995) (orig. proceeding) (per curiam); *In re Chambers*, No. 05-18-00031-CV, 2018 WL 833382 (Tex. App.—Dallas Feb. 12, 2018, orig. proceeding) (mem. op.).

Absent a knowing and intelligent waiver of right to counsel, a trial court has no authority to hold an unrepresented party in contempt. *In re Dooley*, 129 S.W.3d 277 (Tex. App.—Corpus Christi–Edinburg 2004, orig. proceeding) (citing *Ex parte Keene*, 909 S.W.2d 507); *In re Chambers*, 2018 WL 833382.

§ 35.5:4 Indigency

If the respondent claims indigency and requests appointment of an attorney, the court shall require an affidavit and may hear evidence to determine the issue of indigency. The hearing on indigency may be conducted by teleconference, videoconference, or other remote electronic means if the court determines that conducting the hearing in that manner will facilitate the hearing. If the court determines that the respondent is indigent, the court must appoint an attorney to represent the respondent. Tex. Fam. Code § 157.163(d)–(e).

Indigency for the appointment of counsel is determined on a case-by-case basis. *Redman v. State*, 860 S.W.2d 491, 493 (Tex. App.—El Paso 1993, no pet.). In criminal cases, the courts may consider the person's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income available to the person. Tex. Code Crim. Proc. art. 26.04(m). The only guidance given on the civil side is rule 145 of the Texas Rules of Civil Procedure, which describes evidence of an inability to afford payment of costs, including receipt of government benefits based on means, representation by an attorney providing free legal services, and application for free legal services. *See* Tex. R. Civ. P. 145(e). See section 8.71 in this manual for a discussion of the procedure for claiming indigency under rule 145.

The fact that the respondent may have a relative financially able to assist is not to be considered in determining indigency. *In re Luebe*, 983 S.W.2d 889, 890 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

If the court determines that the respondent will not be incarcerated as a result of the proceeding, the court may require an indigent respondent to proceed without an attorney. Tex. Fam. Code § 157.163(c).

§ 35.5:5 Fifth Amendment

A respondent in a contempt proceeding may assert a Fifth Amendment privilege and refuse to testify. *Ex parte York*, 899 S.W.2d 47, 48 (Tex. App.—Waco 1995, orig. pro-

ceeding). However, a respondent's invocation of the privilege may result in his failure to prove any affirmative defense. *See Ex parte Johns*, 807 S.W.2d 768, 773 (Tex. App.—Dallas 1991, orig. proceeding).

A fact finder may also draw an adverse inference against a party who pleads the Fifth Amendment in a civil proceeding. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Texas Capital Securities, Inc. v. Sandefer*, 58 S.W.3d 760, 779 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *see also* Tex. R. Evid. 513(c). The trial judge is entitled to determine whether the refusal to answer appears to be based on the good faith of the witness and is justifiable under all the circumstances. *Ex parte Butler*, 522 S.W.2d 196, 198 (Tex. 1975) (orig. proceeding).

COMMENT: While a respondent may ordinarily be entitled to admonishments regarding his Fifth Amendment rights, if the respondent is represented by counsel and voluntarily testifies, some courts have held that the Fifth Amendment right to be free from compelled self-incrimination is not implicated. *See In re Brown*, 114 S.W.3d 7, 12 (Tex. App.—Amarillo 2003, orig. proceeding).

§ 35.5:6 Double Jeopardy

Although contempt of court proceedings may be criminal or civil, double jeopardy generally applies only to criminal contempt. Tex. Const. art. I, § 14; *see also Ex parte Hudson*, 917 S.W.2d 24, 26 (Tex. 1996) (orig. proceeding) (per curiam); *Ex parte Jones*, 36 S.W.3d 139, 142 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). The distinction between criminal and civil contempt derives from the nature and purpose of the penalty imposed. *See Ex parte Johns*, 807 S.W.2d 768, 770–71 (Tex. App.—Dallas 1991, orig. proceeding).

As a means to persuade the contemner to obey a previous court order, civil contempt is conditional, albeit coercive, in that it can impose a fine, confinement, or both, unless and until the contemner performs the affirmative act required by the court's order. *See In re Johnson*, 150 S.W.3d 267, 271 (Tex. App.—Beaumont 2004, orig. proceeding); *Ex parte Johns*, 807 S.W.3d at 770. A determinate sentence containing a "purge clause" can also be imposed by the court in a civil contempt order. *See In re Johnson*, 150 S.W.3d at 271; *Ex parte Johns*, 807 S.W.3d at 770. Double jeopardy principles, however, are inapposite to a civil contempt order assessing confinement conditioned on the contemner's obtaining his release by purging the contempt. *Tramel v. Tramel*, No. 01-10-00713-CV, 2012 WL 3775971 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no

pet.) (mem. op.) (citing *Ex parte Hudson*, 917 S.W.2d at 26 (Tex. 1996)); *Ex parte Jones*, 36 S.W.3d at 142.

[Sections 35.6 through 35.10 are reserved for expansion.]

II. Orders Enforceable by Contempt

§ 35.11 Enforceability by Contempt—Generally

Whether a decree is enforceable by contempt depends, not on statutory authority, but on the nature of the decree itself. For example, a decree that orders a party to perform an act that he is incapable of performing is not subject to enforcement by contempt. *Ex parte Gonzales*, 414 S.W.2d 656 (Tex. 1967) (orig. proceeding). Similarly, a decree that is so indefinite that it does not clearly indicate what a party is to do may not be enforced by contempt. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967); *Ex parte Gorena*, 595 S.W.2d 841, 846 (Tex. 1979).

§ 35.12 Written and Signed Order

A contemner cannot be held in constructive contempt of court for actions taken before the court's order is reduced to writing. *Ex parte Chambers*, 898 S.W.2d 257, 262 (Tex. 1995); *see also Ex parte Price*, 741 S.W.2d 366 (Tex. 1987). For a party to be held in contempt for disobeying a court decree, a party should be able to find somewhere in the record a written order that spells out the terms of compliance in clear, specific, and unambiguous terms. *Ex parte Price*, 741 S.W.2d at 367; *see also Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967). It is this written order, signed by the court and entered on the minutes, that evidences a party's rights and duties. *Ex parte Price*, 741 S.W.2d at 367.

§ 35.13 Clear and Specific Terms

The focus is on the wording of the judgment itself. A proper judgment must spell out the details of compliance in clear and unambiguous terms so that the person will know exactly what he is expected to do. *Ex parte Reese*, 701 S.W.2d 840, 841–42 (Tex. 1986) (orig. proceeding) (citing *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967)); *see also Ex parte Glover*, 701 S.W.2d 639 (Tex. 1986) (orig. proceeding); *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981) (orig. proceeding); *Ex parte Choate*, 582 S.W.2d 625, 627

(Tex. App.—Beaumont 1979, orig. proceeding). However, an order "need not be full of superfluous terms and specifications adequate to counter any flight of fancy a contemner may imagine in order to declare it vague." *Ex parte McManus*, 589 S.W.2d 790, 793 (Tex. App.—Dallas 1979, orig. proceeding).

COMMENT: When drafting an order, avoid using such terms as "bi-monthly," which can be interpreted to mean twice per month or every other month and thus is inherently ambiguous and will not support a finding of contempt. *See J.A.S. v. A.R.D.*, No. 02-17-00403-CV, 2019 WL 238118, at *6 (Tex. App.—Fort Worth Jan.17, 2019, no pet. h.) (mem. op.).

Clarification: If the terms of the original order are not clear or specific enough to be enforceable by contempt, the court may render a clarifying order specific enough to be enforced by contempt. Such an order may be rendered before a motion for contempt is made or heard, in conjunction with a motion for contempt, or after denial of a motion for contempt. *See* Tex. Fam. Code §§ 9.008, 157.421, 157.424. Clarification orders are discussed in sections 31.21 (property division), 33.41 (child support), and 34.51 (possession and access) in this manual.

§ 35.14 Decretal Language

To be enforceable by contempt, an order must contain decretal language that commands a party to perform an act or refrain from performing an act. *See In re Coppock*, 277 S.W.3d 417 (Tex. 2009) (orig. proceeding). A party cannot be held in contempt of court for failing to take an action the court never ordered the party to take. *Ex parte Padron*, 565 S.W.2d 921, 924 (Tex. 1978) (orig. proceeding).

Without decretal language making clear that a party is under an order of the court, agreements incorporated into divorce decrees are enforced only as contractual obligations (*McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984)), and obligations that are merely contractual cannot be enforced by contempt. *See* Tex. Const. art. I, § 18 ("No person shall ever be imprisoned for debt."); *In re Green*, 221 S.W.3d 645, 648–49 (Tex. 2007) (orig. proceeding).

§ 35.15 Within Court's Jurisdiction

There can be no finding of contempt unless it is proved that there is a valid order that an alleged contemner has violated. *Ex parte Shaffer*, 649 S.W.2d 300, 301–02 (Tex. 1983) (orig. proceeding). A court cannot enforce a void order. *Ex parte Tanner*, 904 S.W.2d

202, 203 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding); *see Padfield v. McIntosh*, 267 S.W.2d 224 (Tex. App.—Fort Worth 1954, writ dism'd).

There are occasions in which a party will attempt to enforce an order that is void, such as an order that has been signed after the court lost plenary power. This can occur after a dismissal for want of prosecution and a subsequent, untimely reinstatement. *See In re General Motors Corp.*, 296 S.W.3d 813, 823, 827, 828 (Tex. App.—Austin 2009, orig. proceeding). Judgments nunc pro tunc should be carefully scrutinized to see whether the changes were truly corrections of mere clerical errors. *See* Tex. R. Civ. P. 329b(f); *Universal Underwriters Insurance Co. v. Ferguson*, 471 S.W.2d 28, 30 (Tex. 1971) (orig. proceeding).

COMMENT: The practitioner should always review the court's file to determine the validity of the order to be enforced.

§ 35.16 Debt Not Enforceable by Contempt

An obligation to pay a debt imposed under a divorce decree is not enforceable by contempt. *Shumate v. Shumate*, 310 S.W.3d 149, 152–53 (Tex. App.—Amarillo 2010, no pet.). While the constitution clearly prohibits imprisonment for debt, Texas courts have consistently recognized that obligations incurred for the support of children and spouses do not constitute a debt. *Ex parte Kimsey*, 915 S.W.2d 523, 525 (Tex. App.—El Paso 1995, orig. proceeding); *see also Ex parte Davis*, 111 S.W. 394, 396 (Tex. 1908) (orig. proceeding); *In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005) (orig. proceeding) (confinement may be proper under court's contempt powers for failure to pay child support); *Ex parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993) (orig. proceeding) (obligation law imposes on spouses to support one another and on parents to support children is not considered "debt" within constitution's prohibitions). Additionally, when a spouse holds money as a constructive trustee for the other spouse, the obligation to deliver that money to the former spouse is not a debt. *Ex parte Gorena*, 595 S.W.2d 841, 846–47 (Tex. 1979) (orig. proceeding) (former husband held constructive trustee for portion of monthly retirement pay awarded to former wife in divorce decree; therefore obligation to deliver money to former wife not "debt"); *In re C.F.*, 576 S.W.3d 761 (Tex. App.—Fort Worth 2019, orig. proceeding).

The Texas Constitution provides that "[n]o person shall ever be imprisoned for debt." Tex. Const. art. I, § 18. Thus, although an order requiring payment of debt may be enforced through legal processes like execution or attachment, a confinement order premised on failure to pay a debt violates the Texas Constitution and is therefore void.

Accordingly, a party's failure to comply with an order to pay a "debt" is not punishable by imprisonment. *Ex parte Hall*, 854 S.W.2d at 658.

Further, when a trial court orders a party to a divorce to pay an obligation owed to a third party, that obligation is not transformed into one enforceable by coercive contempt. *In re Henry*, 154 S.W.3d at 597 (husband's obligation to pay past-due property taxes, imposed as part of division of community property, was order to pay debt owed to third party and therefore not enforceable by confinement for contempt). It is well settled in Texas that the obligation for one spouse to make payments to a third party on behalf of the other spouse is not enforceable by contempt, for such enforcement would amount to imprisonment for nonpayment of a debt in violation of article I, section 18, of the Texas Constitution. *See Ex parte Yates*, 387 S.W.2d 377, 380 (Tex. 1965) (orig. proceeding).

§ 35.17 Enforcement of Award of Attorney's Fees

Generally, an award of attorney's fees is not enforceable by contempt. However, the exception of child and spousal support obligations from the constitutional prohibition against imprisonment for debt has been extended to assessments of attorney's fees incurred to enforce orders for temporary spousal or child support. *See In re Bielefeld*, 143 S.W.3d 924, 928–29 (Tex. App.—Fort Worth 2004, no pet.).

Attorney's fees awarded in proceedings to enforce child support payments may be enforced through a contempt judgment; so may attorney's fees awarded in proceedings to enforce the terms of possession and access if the court finds that enforcement of the order was necessary to ensure the child's physical or emotional health or welfare. Tex. Fam. Code § 157.167(a), (b); *see Gulley v. Gulley*, No. 01-18-00234-CV, 2019 WL 3121854 (Tex. App.—Houston [1st Dist.] July 16, 2019, no pet. h.) (mem. op.). Additionally, at least one court has found that the obligation to pay fees awarded in a family violence protective order is a legal duty like the duty to pay fees awarded in the enforcement of a child support obligation. *See In re Skero*, 253 S.W.3d 884, 887 (Tex. App.—Beaumont 2008, no pet.) (per curiam).

§ 35.18 Enforcement of Temporary Orders, Temporary Injunctions, Restraining Orders, and Standing Orders

A motion for enforcement by contempt may be filed to enforce any provision of a temporary order, temporary injunction, temporary restraining order, or standing order rendered in a suit. Tex. Fam. Code § 157.001. *See In re Caldwell-Bays*, No. 04-18-00980-

CV, 2019 WL 1370316 (Tex. App.—San Antonio Mar. 27, 2019, orig. proceeding) (mem. op.) (standing orders are enforceable by contempt because court has power to enter such orders pursuant to Tex. Fam. Code §§ 6.501(a), 6.502). However, a temporary injunction or restraining order that does not either set or expressly waive or dispense with the issuance of a bond may be void and therefore unenforceable by contempt. *In re McCray*, No. 05-13-01195, 2013 WL 5969581, at *2 (Tex. App.—Dallas Nov. 7, 2013, orig. proceeding) (per curiam) (mem. op.); *see also Lancaster v. Lancaster*, 291 S.W.2d 303, 308 (Tex. 1956) (bond provisions of rule 684 are mandatory); *In re Lemons*, 47 S.W.3d 202, 203–04 (Tex. App.—Beaumont 2001, orig. proceeding) (temporary restraining order should contain provisions for bond or express waiver of requirement of bond).

[Sections 35.19 and 35.20 are reserved for expansion.]

III. Motions for Contempt

§ 35.21 Pleading Requirements

Due process of law requires that the constructive contemner be given notice of the charges levied against him and a reasonable opportunity to meet the charges by way of defense or explanation. *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979). For conduct outside the presence of the court, due process requires that the alleged contemner receive full and unambiguous notification of the accusation of any contempt. *Ex parte Vetterick*, 744 S.W.2d 598, 599 (Tex. 1988) (orig. proceeding) (per curiam); *see also Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969) (orig. proceeding) (notice should state when, how, and by what means defendant has been guilty of contempt).

The required contents of a motion for enforcement of child support are specified in section 157.002(a) and (b) of the Texas Family Code and are discussed at section 33.8 of this manual. The required contents of a motion for enforcement of orders for possession of and access to children are specified in section 157.002(a) and (c) of the Texas Family Code and are discussed at section 34.8 of this manual.

The Family Code gives little guidance as to the technical requirements of motions for contempt regarding orders other than child support orders and orders for possession of and access to children. However, motions for enforcement of other orders, such as orders for maintenance, orders for property division, protective orders, and other orders

and injunctions, must still provide due process so that the alleged contemner receives full and unambiguous notification of the accusation of any contempt. A verified complaint is not required as a prerequisite to constructive contempt except where specifically required by statute. *In re N.V.R.*, 580 S.W.3d 220, 224 (Tex. App.—Tyler 2019, pet. denied) (mem. op.).

While chapter 157 of the Code may not govern motions for other types of underlying orders, at a minimum it provides the necessary requirements to comport with due process. Therefore, to comport with due process, a motion for contempt should contain the provisions of the order allegedly violated, the specific manner in which the order was violated (that is, the time, date, place, and manner of noncompliance), and the remedies sought by the movant.

COMMENT: The pleadings should *always* state whether the movant seeks a finding of criminal contempt, civil contempt, or both. If criminal contempt is sought, the specific sentence requested should be pleaded with the distinction between petty and serious offenses in mind, as discussed in section 35.5:2 above.

§ 35.22 Jurisdiction and Venue

Because a court has all powers necessary to enforce its lawful orders, it generally is the proper forum in which to file a motion for enforcement. *See* Tex. Gov't Code § 21.001(a). Further, it has long been the general rule in Texas that one court may not find a person in contempt for violating another court's order. *See Ex parte Gonzalez*, 238 S.W. 635, 636 (Tex. 1922) (orig. proceeding). In keeping with this rule, in suits to enforce the property division in a decree, the court that rendered the decree of divorce or annulment retains the power to enforce the property division. Tex. Fam. Code § 9.002.

However, there are certain circumstances in which the legislature has provided that courts may enforce another court's order. *See Ex parte Barnett*, 600 S.W.2d 252, 254–55 (Tex. 1980) (orig. proceeding).

For example, a foreign decree filed in Texas under the Uniform Enforcement of Judgments Act has the same effect and is subject to the same procedures as a judgment of the Texas court where filed. *See* Tex. Civ. Prac. & Rem. Code § 35.003(c).

Similarly, the legislature has provided that a court with jurisdiction of proceedings under title 4 of the Texas Family Code may enforce a protective order rendered by

another court in the same manner as the court that rendered the order could enforce it, including by contempt. A motion for enforcement of a protective order may be filed in any court in the county in which the order was rendered with jurisdiction of proceedings, a county in which either party resides, or a county in which an alleged violation of the order occurs. Tex. Fam. Code § 81.010.

Finally, while proceedings for enforcement of orders related to a child are filed in the court of continuing, exclusive jurisdiction, Tex. Fam. Code § 157.001(d), an enforcement action is subject to transfer. *See* Tex. Fam. Code §§ 155.201, 155.202. If a suit is transferred, the court to which a transfer is made becomes the court of continuing, exclusive jurisdiction and has the power to hear and punish disobedience of the original court's order by contempt, regardless of whether all or a part of the alleged disobedience was committed before or after the case was transferred, and the original court has no further jurisdiction. Tex. Fam. Code § 155.206.

[Sections 35.23 through 35.30 are reserved for expansion.]

IV. Service of Motion and Show Cause Order

§ 35.31 Required Legal Process

The court must issue a valid show cause order or equivalent legal process apprising the contemner of the accusation. *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969) (orig. proceeding). A contempt judgment rendered without such notification is a nullity. *Ex parte Ratliff*, 3 S.W.2d 406, 407 (Tex. 1928) (orig. proceeding).

The show cause notice must be in writing. *See Ex parte Vetterick*, 744 S.W.2d 598, 599 (Tex. 1988) (orig. proceeding) (per curiam) (notice should be by show cause order or other equivalent legal process personally served on alleged contemner).

§ 35.32 Personal Service Required

Notice in the due process context of criminal contempt proceedings requires timely notice by personal service of the show cause hearing and full and unambiguous notice of the contempt accusations. *See, e.g.*, *Ex parte Adell*, 769 S.W.2d 521, 522 (Tex. 1989) (orig. proceeding) (per curiam); *Ex parte Vetterick*, 744 S.W.2d 598, 599 (Tex. 1988) (orig. proceeding) (per curiam); *In re Rowe*, 113 S.W.3d 749, 752 (Tex. App.—Austin

2003, orig. proceeding). The notice must state when, how, and by what means the person has been guilty of contempt. *Ex parte Vetterick*, 744 S.W.2d at 599. A contempt order rendered without such adequate notification is void. *Ex parte Adell*, 769 S.W.2d at 522.

For enforcement proceedings concerning orders related to child support or possession of or access to a child, the Family Code provides that that the notice of hearing shall be given to the respondent by personal service not later than the tenth day before the hearing. Tex. Fam. Code § 157.062. However, chapter 157 further provides that notice of a hearing on a motion for enforcement may be served by first-class mail in some circumstances. Tex. Fam. Code § 157.065. If service is by mail and the respondent fails to appear, there is little remedy other than a resetting of the hearing. Therefore, the notice should be served in person on the respondent, after which if the respondent fails to appear, the court may not hold the respondent in contempt but may render a default judgment in favor of movant and may order a capias to be issued for the arrest of the respondent. Tex. Fam. Code §§ 157.066, 157.114, 157.115; *In re Taylor*, 39 S.W.3d 406, 413 (Tex. App.—Waco 2001, orig. proceeding). Notice given to a contemner's attorney is inadequate; the notice must be served personally on the contemner. *Ex parte Herring*, 438 S.W.2d 801, 803 (Tex. 1969) (orig. proceeding).

[Sections 35.33 through 35.40 are reserved for expansion.]

V. Answer

§ 35.41 Affirmative Defenses

Affirmative defenses should be included in the respondent's answer to a motion for enforcement. The Family Code expressly provides for affirmative defenses in suits for enforcement brought under chapter 8 (spousal maintenance) and chapter 157 (suits affecting the parent-child relationship). Nothing precludes a party from pleading and proving other affirmative defenses, such as impossibility of performance or payment. *See* Tex. R. Civ. P. 94.

Provisions concerning affirmative defenses available in specific enforcement actions are discussed in sections 32.7 (spousal maintenance), 33.19 (child support), and 34.16 (possession and access) in this manual.

§ 35.42 Limitations

Limitations on enforcement by contempt in specific enforcement actions are discussed in sections 31.2 (property division), 33.12 (child support), and 34.4 (possession and access) in this manual.

§ 35.43 Special Exceptions

A respondent may file special exceptions to challenge pleading defects in the motion for enforcement. If a respondent specially excepts to the motion for enforcement or moves to strike, the court shall rule on the exception or the motion to strike before it hears the motion for enforcement. If an exception is sustained, the court shall give the movant an opportunity to replead and continue the hearing without the need of additional service. Tex. Fam. Code § 157.064.

There is a split in authority as to the necessity of special exceptions in the contempt context. Some courts have held that special exceptions are necessary to preserve complaints regarding the motion for contempt, while others have held that a respondent does not waive complaints to the motion for enforcement if the motion fails to give reasonable notice as to each alleged contumacious act. *See generally Ex parte Barlow*, 899 S.W.2d 791, 796 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding).

[Sections 35.44 through 35.50 are reserved for expansion.]

VI. Hearing

§ 35.51 Failure to Appear

If a respondent who has been personally served or who has filed an answer or made an appearance fails to appear at the hearing, the court may, on proper proof, grant a default judgment for the relief sought, regardless of whether other claims or remedies have been joined with the enforcement action. The court may not hold the respondent in contempt but may issue a capias for the respondent's arrest. *See* Tex. Fam. Code §§ 157.066, 157.114, 157.115; *In re Daniels*, No. 05-17-01260-CV, 2017 WL 6503107 (Tex. App.—Dallas Dec. 19, 2017, orig. proceeding) (mem. op.).

§ 35.52 Capias

A capias is a writ that requires law enforcement officials to take a named person into custody. *See Black's Law Dictionary* 249 (10th ed. 2014). Law enforcement officials must treat a capias or arrest warrant ordered under Family Code chapter 157 in the same manner as an arrest warrant for a criminal offense and shall enter the capias or warrant in the computer records for outstanding warrants maintained by the local police, sheriff, and Department of Public Safety. The capias or warrant shall be forwarded to and disseminated by the Texas Crime Information Center and the National Crime Information Center. Tex. Fam. Code § 157.102.

When the court orders issuance of a capias, it shall also set an appearance bond or security, payable to the obligee or a person designated by the court, in a reasonable amount. Although there is a presumption that an appearance bond or security of $1,000 or a cash bond of $250 is reasonable, evidence that the respondent has tried to evade service, has previously been found guilty of contempt, or has accrued arrearages of more than $1,000 under a child support obligation will rebut the presumption. Tex. Fam. Code § 157.101; *see In re Clark*, 977 S.W.2d 152, 156–57 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (court may apply only factors in statute to rebut presumption of reasonableness). If the presumption is rebutted, the court shall set a reasonable bond. Tex. Fam. Code § 157.101.

The fee for issuance of a capias is the same as that for issuance of a writ of attachment. The fee for service of a capias is the same as that for service of a writ in civil cases generally. Tex. Fam. Code § 157.103.

If the respondent is taken into custody and released on bond, the bond shall be conditioned on the respondent's promise to appear for a hearing without the necessity of further personal service of notice. Tex. Fam. Code § 157.104. A respondent released without posting bond or security must be given notice in open court of a hearing on the alleged contempt set at a designated date, time, and place; no further notice is required. *See* Tex. Fam. Code § 157.105(b).

If the respondent is taken into custody and not released on bond, he must be taken before the court issuing the capias on or before the third working day after the arrest for a release hearing. Tex. Fam. Code § 157.105(a). The release hearing may be conducted by teleconference, videoconference, or other remote electronic means if the court determines that the method of appearance will facilitate the hearing. Tex. Fam. Code § 157.105(a–1).

If the respondent is not released, the hearing on the contempt charge must be held as soon as practicable and not later than the seventh day after the respondent is taken into custody, unless the respondent and the respondent's attorney waive the accelerated hearing. Tex. Fam. Code § 157.105(c).

§ 35.53 No Contempt in Absentia

A respondent who is served and fails to appear at the contempt hearing cannot be held in contempt in absentia because the right to be present at trial and confront witnesses is fundamental and essential to a fair trial. *Pointer v. Texas*, 380 U.S. 400, 405 (1965). The right is protected by the Texas Constitution and the Texas Code of Criminal Procedure. *See* Tex. Const. art. I, § 10; Tex. Code Crim. Proc. art. 33.03. The right to be present at trial is also protected under the Sixth Amendment of the U.S. Constitution against state infringement through the due process clause of the Fourteenth Amendment. *Pointer*, 380 U.S. at 403. Accordingly, the Texas Supreme Court has held that a court should not try charges of criminal, constructive contempt in the alleged contemner's absence, but should instead issue a capias or writ of attachment to bring the alleged contemner before the court. *Ex parte Johnson*, 654 S.W.2d 415, 422 (Tex. 1983); *Ex parte Alloju*, 907 S.W.2d 486, 487 (Tex. 1995) (orig. proceeding) (per curiam).

§ 35.54 Required Evidence

The movant must put on evidence of the following: that the court has jurisdiction to hear the matter, that an enforceable order exists, the manner of the respondent's non-compliance, and the relief sought. The jurisdictional and enforceable order elements can be satisfied by offering into evidence a certified copy of the order to be enforced. The specific violations can be proved by testimony and documents offered by the movant. A contempt order is void absent proof that the contemner violated the order of the trial court. *Ex parte Williams*, 690 S.W.2d 243, 244 (Tex. 1985) (orig. proceeding) (citing *Ex parte Green*, 603 S.W.2d 216 (Tex. 1980)). The requirement of willful disobedience is a necessary component for a finding of contempt. *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding). To support a judgment of contempt, one must have knowledge or notice of an order that one is charged with violating before a judgment of contempt will obtain. *See, e.g.*, *Ex parte Conway*, 419 S.W.2d 827, 828 (Tex. 1967) (orig. proceeding).

A criminal contempt conviction for violation of a court order requires proof beyond a reasonable doubt of a reasonably specific order, a violation of the order, and the willful

intent to violate the order. *Ex parte Chambers*, 898 S.W.2d at 259. Failure to comply with an unambiguous order of which one has notice will ordinarily raise an inference that the noncompliance was willful. The involuntary inability to comply with an order is a valid defense to criminal contempt, for noncompliance cannot have been willful if the failure to comply was involuntary. The relator bears the burden of proving inability to comply. A court of appeals has no jurisdiction to weigh the proof; it determines only if the judgment is void because, for example, the relator has been confined without a hearing or with no evidence of contempt to support his confinement. *See In re Daugherty*, No. 05-17-01129-CV, 2018 WL 3031705, at *5 (Tex. App.—Dallas June 19, 2018, orig. proceeding) (mem. op.).

Some courts have held that identification of the defendant on the record is required to find the defendant in contempt. *See Ex parte Harris*, 581 S.W.2d 545, 547 (Tex. App.—Fort Worth 1979, orig. proceeding). However, other courts have not required such a finding. *See Ex parte Snow*, 677 S.W.2d 147, 149–50 (Tex. App.—Houston [1st Dist.] 1984, orig. proceeding); *Ex parte McManus*, 589 S.W.2d 790, 792–93 (Tex. App.—Dallas 1979, orig. proceeding).

[Sections 35.55 through 35.60 are reserved for expansion.]

VII. Contempt and Commitment Orders

§ 35.61 Contents of Contempt Order

The purpose of an enforcement order is to notify the contemner of how he has violated the provisions for which enforcement is sought and how he can purge himself of contempt, to notify the sheriff accordingly so that he may do his duty, and to provide sufficient information for adequate review. *Ex parte Conoly*, 732 S.W.2d 695, 697 (Tex. App.—Dallas 1987, orig. proceeding). A contempt order is insufficient if its interpretation requires inferences or conclusions about which reasonable persons might differ. *In re Turner*, 177 S.W.3d 284, 289 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding) (citing *In re Houston*, 92 S.W.3d 870, 877 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding)).

An enforcement order may identify the provisions of the order violated by (1) copying into the order the provisions for which enforcement was sought, (2) attaching as an exhibit a copy of the order for which enforcement was sought and incorporating it by

reference, or (3) giving the volume and page numbers in the minutes of the court where the order and its pertinent language are located. *See Ex parte Tanner*, 904 S.W.2d 202, 205 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding). If the contempt order does not satisfy these, or any other, methods of compliance, it violates the relator's right to due process. *In re Levingston*, 996 S.W.2d 936, 938–39 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding); *see also In re Edwards*, 01-10-00992-CV, 2011 WL 2089805, at *4 (Tex. App.—Houston [1st Dist.] May 18, 2011, orig. proceeding) (per curiam).

The order should make findings and state a separate punishment for each occasion when the respondent's failure to comply with the order was found to constitute contempt. *Ex parte Stanford*, 557 S.W.2d 346, 349 (Tex. App.—Houston [1st Dist.] 1977, orig. proceeding). If one punishment is assessed for all the acts of contempt, the whole order is invalid if one of those acts is not punishable by contempt. *Ex parte Rogers*, 820 S.W.2d 35, 38 (Tex. App.—Corpus Christi–Edinburg 1991, orig. proceeding); *Ex parte Jordan*, 787 S.W.2d 367, 368 (Tex. 1990) (orig. proceeding) (per curiam); *Ex parte Davila*, 718 S.W.2d 281, 282 (Tex. 1986) (orig. proceeding) (per curiam). However, where the trial court lists each failure separately and assesses a separate punishment for each failure, only the invalid portion is void; the invalid portion may be severed and the valid portion retained. *Ex parte Linder*, 783 S.W.2d 754, 758 (Tex. App.—Dallas 1990, orig. proceeding); *see also In re Hall*, 433 S.W.3d 203, 207 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding); *Ex parte Russell*, 875 S.W.2d 467, 470 n.7 (Tex. App.—Austin 1994, orig. proceeding). A court may not divide a single contemptuous act into two separate acts and assess punishment for each allegedly separate act. *In re L.M.*, No. 02-17-00218-CV, 2017 WL 3381139 (Tex. App.—Fort Worth Aug. 7, 2017, orig. proceeding) (mem. op.) (citing *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding)).

Criminal Contempt: An order imposing incarceration or a fine for criminal contempt must contain findings identifying, setting out, or incorporating by reference the provisions of the order for which enforcement was requested and the date of each occasion when the respondent's failure to comply with the order was found to constitute criminal contempt. Tex. Fam. Code § 157.166(b).

An order for criminal contempt may not exempt a contemner from "good time" credit. *Ex parte Roosth*, 881 S.W.2d 300, 301 (Tex. 1994) (orig. proceeding) (per curiam); *Ex parte Acly*, 711 S.W.2d 627, 628 (Tex. 1986) (orig. proceeding); *see In re Harris*, No. 06-18-00015-CV, 2018 WL 1734294 (Tex. App.—Texarkana Apr. 11, 2018, orig. proceeding) (mem. op.); *In re Mayorga*, 538 S.W.3d 174, 177 (Tex. App.—El Paso 2017,

orig. proceeding); *In re Parks*, 264 S.W.3d 59, 61, n.1 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding).

Civil Contempt: An enforcement order imposing incarceration for civil contempt must state the specific conditions on which the respondent may be released from confinement. Tex. Fam. Code § 157.166(c); *In re Levingston*, 996 S.W.2d at 938–39; *Ex parte Stanley*, 826 S.W.2d 772, 772–73 (Tex. App.—Dallas 1992, orig. proceeding). The language of the order setting out the terms under which the respondent may purge himself must be clear and unambiguous. *Ex parte Garcia*, 831 S.W.2d 1, 2 (Tex. App.—El Paso 1992, orig. proceeding).

An order for civil contempt may exempt a contemner from "good time" credit. *See Ex parte Acly*, 711 S.W.2d at 628; *In re Parks*, 264 S.W.3d at 61, n.1.

§ 35.62 Commitment Order

There is no particular form required for a commitment order. *Ex parte Barnett*, 600 S.W.2d 252, 256 (Tex. 1980) (orig. proceeding); *Ex parte Johns*, 807 S.W.2d 768, 774 (Tex. App.—Dallas 1991, orig. proceeding). Both an order of contempt and an order of commitment are required to incarcerate a respondent. The court may execute a single written order both finding the respondent in contempt and ordering confinement. *See Ex parte Hernandez*, 827 S.W.2d 858, 858 (Tex. 1992) (orig. proceeding) (per curiam). However, the order must contain a specific directive to an officer to take the contemner into custody. An order "for commitment to county jail" including language that "all writs and other process necessary for the enforcement of this order be issued" is inadequate. *In re Ruiz*, No. 02-13-00148-CV, 2013 WL 2338614 (Tex. App.—Fort Worth May 30, 2013, orig. proceeding) (mem. op.).

The commitment order must state the length, time, and conditions of incarceration. *Ex parte Hernandez*, 726 S.W.2d 651, 651–52 (Tex. App.—Eastland 1987, orig. proceeding). The commitment order directs the bailiff or other officer to take a person to jail or prison and to detain him there. *See Ex parte Hernandez*, 726 S.W.2d at 652. An arrest without a written commitment order made for the purpose of enforcing a contempt judgment is considered an illegal restraint. *Ex parte Calvillo Amaya*, 748 S.W.2d 224, 225 (Tex. 1988) (orig. proceeding). A commitment order increasing the punishment imposed by contempt order is void. *Ex parte Swate*, 922 S.W.2d 122, 124–25 (Tex. 1996) (orig. proceeding).

The court may order a person detained by the sheriff or bailiff for a short and reasonable time to allow for the preparation of the judgment of contempt and order of commitment. *Ex parte Barnett*, 600 S.W.2d at 257. *But see Ex parte Jordan*, 865 S.W.2d 459 (Tex. 1993) (orig. proceeding) (per curiam) (three days too long to hold contemner without written contempt order); *In re Linan*, 419 S.W.3d 694 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (four days too long to restrain contemner before any order signed); *Ex parte Calvillo Amaya*, 748 S.W.2d at 225 (detaining respondent Friday to Monday without commitment order was improper); *see also Ex parte Morgan*, 886 S.W.2d 829, 832 (Tex. App.—Amarillo 1994, orig. proceeding) (in visitation contempt case, court may not order confinement without written judgment and written commitment order).

§ 35.63 Suspended Commitment

On finding a respondent in contempt for failure to pay child support or to comply with an order for possession of or access to a child, the court may suspend commitment and place the respondent on community supervision. Tex. Fam. Code § 157.165. The initial period of community supervision may not exceed ten years. The court may continue the community supervision thereafter until the earlier of the second anniversary of the date on which the community supervision first exceeded ten years or the date on which all child support, including arrearages and interest, has been paid. Tex. Fam. Code § 157.212.

The terms and conditions of community supervision may include the requirement that the respondent report to the community supervision officer as directed; permit the community supervision officer to visit the respondent at the respondent's home or elsewhere; obtain counseling on financial planning, budget management, conflict resolution, parenting skills, alcohol or drug abuse, or other matters causing the respondent to fail to obey the order; pay required child support and any child support arrearages; pay court costs and attorney's fees ordered by the court; seek employment assistance services offered by the Texas Workforce Commission; and participate in mediation or other services to alleviate conditions that prevent the respondent from obeying the court's order. Tex. Fam. Code § 157.211. The list of conditions promulgated in section 157.211 may be exclusive. *See In re Pierre*, 50 S.W.3d 554, 559 (Tex. App.—El Paso 2001, orig. proceeding). In the absence of any evidence of drug abuse and any correlation to a respondent's ability to comply with the child support order, it is an abuse of discretion for a trial court to require the respondent to submit to drug and alcohol testing. *In re Pierre*, 50 S.W.3d at 559.

§ 35.64 Attorney's Fees

There is no statutory authority to award fees in contempt cases generally. *See In re Daugherty*, No. 05-18-00290-CV, 2018 WL 3031658, at *5 (Tex. App.—Dallas June 19, 2018, orig. proceeding) (mem. op.) (absent contractual or statutory basis, trial court lacks authority to award attorney's fees based on finding of contempt).

Statutory provisions for the award of attorney's fees in specific enforcement proceedings are discussed in the following sections of this manual: 31.14 (property division), 32.9 (spousal maintenance), 33.17 (child support), and 34.15 (possession and access).

[Sections 35.65 through 35.70 are reserved for expansion.]

VIII. Revocation of Suspended Commitment

§ 35.71 Filing Motion to Revoke

A prosecuting attorney, the title IV-D agency, a domestic relations office, or a party affected by the order may file a verified motion alleging specifically that certain conduct of the respondent violates the terms and conditions of community supervision. Tex. Fam. Code § 157.214.

§ 35.72 Arrest by Warrant

If the verified motion to revoke alleges a prima facie case that the respondent has violated a term or condition of community supervision, the court *may* order the respondent's arrest by warrant. If the court issues a warrant for the respondent's arrest, the respondent shall be brought promptly before the court ordering the arrest. Tex. Fam. Code § 157.215.

A hearing must be held not later than the third working day after the respondent's arrest, if possible, and not later than the seventh working day after the respondent is arrested, after which the court may continue, modify, or revoke the community supervision. Tex. Fam. Code § 157.216.

§ 35.73 Limitations

The motion to revoke must be filed before the period of suspension has terminated. *See Nicklas v. State*, 530 S.W.2d 537, 540–41 (Tex. Crim. App. 1975); *In re Arpe*, No. 11-18-00073-CV, 2018 WL 1750920 (Tex. App.—Eastland Apr. 12, 2018, orig. proceeding) (mem. op.); *Ex parte Spikes*, 909 S.W.2d 245, 247 (Tex. App.—Amarillo 1995, no writ).

§ 35.74 Pleading Requirements

Contempt orders frequently order the respondent to appear at periodic compliance hearings to determine whether the respondent has complied with the terms of a suspended commitment contained therein. However, such orders setting compliance hearings are not sufficient notice to the respondent that allegations of noncompliance will be made or what they will be. In *In re Zandi*, one of the conditions of the obligor's suspension was that he appear in court every six months for a "status hearing." At such a hearing, the obligee moved to revoke the obligor's suspension based on nonpayment of support, even though she had not filed a written motion to revoke. The supreme court granted the obligor's petition for habeas corpus, setting aside the trial court's revocation order. The order setting a status hearing is notice of the hearing but does not provide the respondent the required prior notice that revocation will be sought and what specific complaints will be alleged. *In re Zandi*, 270 S.W.3d 76 (Tex. 2008) (orig. proceeding) (per curiam).

Attaching the prior contempt order specifying punishment to an order revoking suspension is sufficient notice of the relief granted. A revocation order need not satisfy all technical requirements of the original contempt order. *In re Fountain*, 433 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding).

The detailed pleading requirements required in original enforcement proceedings do not apply to revocation proceedings that do not involve additional contemptuous acts, as explained by the court in *Fountain*:

> There is no reason to deprive trial courts of such flexibility in the enforcement of their orders. A heightened procedural standard is justified for contempt proceedings in the first instance, especially when incarceration of the respondent is a potential result. But once there has been a judgment of contempt, there is no requirement that the same heightened measure of process be provided in order to adjudicate an allegation that the conditions of a sus-

> pended judgment have been violated. Instead, like the analogous circumstance of an appeal from the revocation of probation in a criminal proceeding, we review the trial court's ruling for an abuse of discretion.

In re Fountain, 433 S.W.3d at 8.

§ 35.75 Right to Counsel

In a proceeding to revoke community supervision, the court must determine whether incarceration is a possible result of the proceedings. If so, the court must inform an unrepresented respondent of the right to be represented by an attorney and, if the respondent is indigent, of the right to the appointment of an attorney. Tex. Fam. Code § 157.163(a), (b); *Ex parte Acker*, 949 S.W.2d 314, 316 (Tex. 1997) (orig. proceeding). If the court determines that an alleged contemnor is not indigent and, thus, not entitled to appointed counsel, the court must give the accused time to obtain retained counsel. *In re Fox*, No. 01-19-00155-CV, 2019 WL 2292632 (Tex. App.—Houston [1st Dist.] May 30, 2019, orig. proceeding) (mem. op.).

The fact that the respondent was informed about his right to an attorney must appear on the record. *In re Dooley*, 129 S.W.3d 277, 279 (Tex. App.—Corpus Christi–Edinburg 2004, orig. proceeding); *see Ex parte Keene*, 909 S.W.2d 507, 508 (Tex. 1995) (orig. proceeding) (per curiam). In the absence of an admonishment by the court, the respondent's statement that she could not afford an attorney and "would have to do the best she could" did not constitute a waiver of right to counsel. *In re Rivas-Luna*, 528 S.W.3d 167, 171 (Tex. App.—El Paso 2017, orig. proceeding).

If the court determines that the respondent will not be incarcerated as a result of the proceedings, the court may require an indigent respondent to proceed without an attorney. Tex. Fam. Code § 157.163(c).

§ 35.76 Burden of Proof

The burden of proof to justify the revocation of a suspension of commitment is a preponderance of the evidence, meaning the greater weight of the credible evidence that would create a reasonable belief that the respondent violated a condition of the suspension of commitment. *In re Fountain*, 433 S.W.3d 1, 9 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding); *Rickels v. State*, 202 S.W.3d 759, 763–64 (Tex. Crim. App. 2006) (revocation of probation). The trial court is the exclusive judge of the credibility

of the witnesses and must determine whether the allegations in the motion to revoke are sufficiently demonstrated. *In re Fountain*, 433 S.W.3d at 9.

In a revocation proceeding, the court can infer the ultimate facts at issue based on other evidence presented. *See Rickels*, 202 S.W.3d at 763–64. In *Rickels*, the terms of probation prohibited the defendant from going within 300 feet of where children congregate. The front yard and front door of his leased house were within 300 feet of a school, but the rest of the house was over 300 feet away. The court of criminal appeals upheld the revocation of his probation, finding the trial court could have inferred the ultimate fact that he was within 300 feet of the school from the basic fact that his front yard and front door were within 300 feet of this line, even in the absence of direct evidence that he walked through his front door or stood in his front yard.

Proof of any one alleged violation is sufficient to support an order revoking community supervision. *In re B.C.C.*, 187 S.W.3d 721 (Tex. App.—Tyler 2006, no pet.). In *In re B.C.C.*, the petitioner offered evidence that he was indigent and unable to pay child support. The court held that such an argument is an affirmative defense to a contempt allegation and is not relevant in a motion to revoke community supervision. Since the petitioner admittedly did not make child support payments, the court did not abuse its discretion in revoking his community supervision.

[Sections 35.77 through 35.80 are reserved for expansion.]

IX. Review of Contempt Orders

§ 35.81 Mandamus

A contempt judgment is reviewable only by a petition for writ of habeas corpus (if the contemner is confined) or by a petition for writ of mandamus (if no confinement is involved). *See In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding) (per curiam). See section 27.14 of this manual for a discussion regarding review of contempt orders by mandamus.

Decisions in contempt proceedings cannot be reviewed on appeal because contempt orders are not appealable, even when appealed along with a judgment that is appealable. *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 671 (Tex. App.—Fort Worth 2001, pet. denied). However, requests for clarifications of orders are distinct from requests for enforcement by contempt and are reviewable by appeal. *In re A.C.P.*, No. 14-17-00896-

CV, 2018 WL 6053503, at *2 (Tex. App.—Houston [14th Dist.] Nov. 20, 2018, no pet.) (mem. op.).

§ 35.82 Nature of Habeas Corpus Remedy

In family law cases, the writ of habeas corpus for adults is used to test the validity of the order by which a person is found to be in contempt of court and has been subjected to a sufficient restraint of his liberty. The writ is available if, for any reason, the order was void because it was beyond the power of the court to grant the order or if the relator (person seeking the writ) was not afforded due process in the original proceeding resulting in his incarceration and is illegally restrained in his liberty. *In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005) (orig. proceeding) (per curiam). When a jail sentence is probated without any type of tangible restraint of liberty, a contemner is not restrained for purposes of habeas corpus relief. *In re Kuster*, 363 S.W.3d 287, 292 (Tex. App.—Amarillo 2012, orig. proceeding).

The level of restraint required to warrant habeas relief seems to vary among the appellate courts. If the relator has been held in contempt and ordered to be committed to the county jail but has not actually been incarcerated at the time of filing of the petition, the relator should seek mandamus relief in the alternative. *See Ex parte Brister*, 801 S.W.2d 833, 835 (Tex. 1990) (orig. proceeding) (probated thirty-day sentence with conditions of payment of fees, participation in counseling, and sixty days' house arrest sufficient restraint to pursue habeas relief); *see also In re Hightower*, 531 S.W.3d 884, 887 n.3 (Tex. App.—Texarkana 2017, orig. proceeding) (relator sufficiently restrained when court issued commitment order, although relator had not been incarcerated).

Habeas corpus is a collateral, rather than a direct, attack on the contempt judgment, the purpose of which is not to determine the final guilt or innocence of the relator but to ascertain whether the relator has been confined unlawfully. *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979, orig. proceeding); *In re Parks*, 264 S.W.3d 59 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding). The order is presumed valid.

A court of appeals has no jurisdiction to weigh the proof that resulted in a conviction. Rather, it determines only if the judgment is void because, for example, the relator has been confined without a hearing or with no evidence of contempt to support his confinement. *See In re Daugherty*, No. 05-17-01129-CV, 2018 WL 3031705, at *5 (Tex. App.—Dallas June 19, 2018, orig. proceeding) (mem. op.).

The petitioner in a habeas proceeding must conclusively establish his inability to pay each child support payment as it accrued to invalidate a criminal contempt judgment. If the petitioner fails to carry that burden as to even one delinquent payment, the criminal contempt judgment is not void. *Ex parte Ramon*, 821 S.W.2d 711, 713 (Tex. App.—San Antonio 1991, no writ).

COMMENT: When pursuing habeas relief, the practitioner should scour the record for deficiencies in the specificity of the order, the evidence of violations of the order, and evidence of the relator's ability to comply with the order.

§ 35.83 Bases for Habeas Corpus Relief

The commitment order may be held void if any one of the following applies:

1. The relator did not receive ten days' notice of the proceeding. *In re Chambers*, No. 05-18-00031-CV, 2018 WL 833382 (Tex. App.—Dallas Feb. 12, 2018, orig. proceeding) (mem. op.).

2. The relator was not informed of the right to counsel when faced with the possibility of being ordered to jail. *Ex parte Acker*, 949 S.W.2d 314, 316 (Tex. 1997) (orig. proceeding); *Ex parte Gunther*, 758 S.W.2d 226, 227 (Tex. 1988) (orig. proceeding) (per curiam); *In re Aarons*, 10 S.W.3d 833, 833–34 (Tex. App.—Beaumont 2000, orig. proceeding).

3. The relator was not given court-appointed counsel when entitled to the appointment of an attorney because of indigency. The burden of proof of entitlement to court-appointed counsel is on the relator. *In re Pruitt*, 6 S.W.3d 363, 364–65 (Tex. App.—Beaumont 1999, orig. proceeding). If incarceration is a possibility and the alleged contemner requests appointed counsel, the court may hear evidence to determine indigency; the court must appoint counsel if it determines that the alleged contemner is indigent. Failure to attempt to borrow money from relatives cannot be considered a factor in determining indigency. *In re Luebe*, 983 S.W.2d 889, 890–91 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

4. The relator was denied the right to trial by jury, and the possible sentence for alleged contempt is more than six months' incarceration. *Ex parte Sproull*, 815 S.W.2d 250, 250 (Tex. 1991) (orig. proceeding) (per curiam).

5. The relator was committed to jail without both a written judgment of contempt and a written order of commitment. *Ex parte Hernandez*, 827 S.W.2d 858, 858

(Tex. 1992) (orig. proceeding) (per curiam); *see also Ex parte Barnett*, 600 S.W.2d 252, 256 (Tex. 1980) (orig. proceeding). The court has a limited amount of time in which to issue its written commitment order. *Ex parte Whitehead*, 908 S.W.2d 68, 70 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding). Five days is too long to hold the relator without a written order of commitment. *Ex parte Seligman*, 9 S.W.3d 452, 454 (Tex. App.—San Antonio 1999, orig. proceeding). Three days, including over the weekend, is too long to hold the relator without a written order of commitment. *Ex parte Jordan*, 865 S.W.2d 459 (Tex. 1993) (orig. proceeding) (per curiam) (citing *Ex parte Calvillo Amaya*, 748 S.W.2d 224, 225 (Tex. 1988) (orig. proceeding)).

6. The order that the relator is found to have violated is not sufficiently specific. If the relator cannot read the order and readily know what he is ordered to do or not to do, the commitment is void. *Ex parte Slavin*, 412 S.W.2d 43, 44–45 (Tex. 1967) (orig. proceeding); *see Ex parte Brister*, 801 S.W.2d 833, 834 (Tex. 1990) (orig. proceeding); *Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex. 1995) (orig. proceeding).

7. The commitment order states the relator may purge himself of contempt by performing certain acts but is not sufficiently specific as to what those acts are. *Ex parte Carlton*, 443 S.W.2d 61, 63 (Tex. App.—Houston [14th Dist.] 1969, orig. proceeding).

8. The commitment order requires the relator to pay amounts that the relator was not held in contempt for failure to pay. *In re O'Keeffe*, No. 05-18-00371-CV, 2018 WL 2296495 (Tex. App.—Dallas May 21, 2018, orig. proceeding) (mem. op.) (portion of order that included attorney's fees and costs awarded as part of amount required for relator to purge contempt void because relator was not held in contempt for failing to pay those fees and costs; additionally, those fees and costs were not due until approximately thirty days after relator would be released, and party may not be confined for failure to pay judgment that is not yet due).

9. The judgment the relator violated is one that creates a debt. *In re Green*, 221 S.W.3d 645 (Tex. 2007) (orig. proceeding) (per curiam); *Ex parte Prickett*, 320 S.W.2d 1, 3 (Tex. 1958) (orig. proceeding). Incarceration for failure to pay child support or attorney's fees taxed as costs in a proceeding to enforce child support is *not* imprisonment for debt. *Ex parte Helms*, 259 S.W.2d 184, 188–89 (Tex. 1953) (orig. proceeding); *see also Ex parte Binse*, 932 S.W.2d 619, 621 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding).

10. The relator is incarcerated pursuant to a coercive contempt commitment order and is, through no fault of his own, unable to obey the order. *Ex parte Gonzales*, 414 S.W.2d 656, 657 (Tex. 1967) (orig. proceeding); *In re Smith*, 354 S.W.3d 929 (Tex. App.—Dallas 2011, orig. proceeding).

11. The relator is found in contempt of court in absentia. Tex. Fam. Code § 157.066; *In re Daniels*, No. 05-17-01260-CV, 2017 WL 6503107 (Tex. App.—Dallas Dec. 19, 2017, orig. proceeding) (mem. op.).

12. The commitment order incarcerating the relator was not based on relief pleaded for by the petitioner in the enforcement action. *In re Parks*, 264 S.W.3d 59 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding); *In re Smith*, 981 S.W.2d 909, 911 (Tex. App.—Houston [1st Dist.] 1998, orig. proceeding); *Ex parte Barlow*, 899 S.W.2d 791, 795–96 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding); *see also* Tex. Fam. Code § 157.002(a)(3).

13. The court that issued either the original order or the commitment order lacked personal or subject-matter jurisdiction. *Ex parte Helle*, 477 S.W.2d 379, 385 (Tex. App.—Corpus Christi–Edinburg 1972, orig. proceeding).

14. The document with which the relator allegedly failed to comply was, by its own terms, not an order of the court. *In re Hightower*, 531 S.W.3d 884, 887–89 (Tex. App.—Texarkana 2017, orig. proceeding) (document was "draft" that was "subject to revision"; even if document were construed as order of court, it contained no command language setting out terms of compliance).

15. The relator was held in contempt for violating a temporary injunction when the court failed to set bond and did not expressly waive the requirement of a bond. *In re McCray*, 05-13-01195-CV, 2013 WL 5969581, at *2 (Tex. App.—Dallas Nov. 7, 2013, orig. proceeding) (mem. op.); *see In re Lemons*, 47 S.W.3d 202, 206 (Tex. App.—Beaumont 2001, orig. proceeding) (per curiam).

§ 35.84 Jurisdiction for Habeas Corpus

An original habeas corpus proceeding can be filed in any of the following courts:

1. The trial court. Tex. Const. art. V, § 8; Tex. Gov't Code § 24.008.

2. The court of appeals. Tex. Gov't Code § 22.221(d).

3. The supreme court. Tex. Gov't Code § 22.002(e).

The writ is directed to the officer having custody of the relator, and notice to others is not mandatory. *Ex parte Ramzy*, 424 S.W.2d 220, 223 (Tex. 1968) (orig. proceeding). Notice of hearing is customarily given to the other interested parties. If the basis for the writ is the relator's present inability to purge himself, such writs are usually filed in the trial court.

§ 35.85 Habeas Corpus Procedure in Appellate Court

Habeas corpus is an original proceeding in the appellate court. The petition is captioned "*In re* [name of party seeking relief], Relator." Tex. R. App. P. 52.1.

The petition must include a statement describing how and where the relator is being deprived of liberty and an appendix, among other things, as are set out in detail in rule 52.3. The appendix required in rule 52.3 must contain proof that the relator is being restrained. Tex. R. App. P. 52.3(k)(1)(D). If the petition is filed in the supreme court after the same relief was requested in the court of appeals, the petition must give details of the action in the lower court. Tex. R. App. P. 52.3(d)(5). If the petition is filed first in the supreme court, the petition must state the compelling reason that the petition was not first presented to the court of appeals. Tex. R. App. P. 52.3(e). The person filing the petition must certify that he has reviewed it and concluded that every factual statement in it is supported by competent evidence included in the appendix or record. Tex. R. App. P. 52.3(j).

Any party may file a response, but it is not mandatory. Tex. R. App. P. 52.4. The court may deny relief without requesting or receiving a response. However, the court must request a response before granting relief. Tex. R. App. P. 52.8(a), (b).

If temporary relief is requested, the relator must notify or show a diligent effort to notify all parties by expedited means of the motion for the emergency temporary relief; further, the relator must so certify to the court before the temporary relief will be granted. Tex. R. App. P. 52.10.

If the court denies relief to a relator who has been released on bond, the court must remand the relator to custody and issue an order of commitment. If the relator is not returned to custody, the court may declare the bond forfeited and render judgment against the surety. Tex. R. App. P. 52.8(a).

If the court is of the tentative opinion that the relator is entitled to relief or that a serious question concerning the relief requires further consideration, the court must request a response if none has been filed, may request full briefing, may order that the relator be

discharged on execution and filing of a bond in an amount set by the court, and may set the case for oral argument. Tex. R. App. P. 52.8(b).

The court is not required to issue an opinion if relief is denied but must write an opinion if relief is granted. Tex. R. App. P. 52.8(d). Any party may file a motion for rehearing within fifteen days after the final order is rendered. The motion for rehearing must clearly state the points relied on for the rehearing. Tex. R. App. P. 52.9.

Chapter 36
Physical Possession of Child

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Chapter 36

Physical Possession of Child

I. Generally

§ 36.1 Generally

There are a number of ways to enforce a party's right to physical possession of a child. Family Code section 105.001(c) provides for the attachment of a child on the filing of a verified pleading when it is clearly necessary to protect the child. The traditional remedy of habeas corpus is available under chapter 157 of the Family Code. Finally, a petition for the enforcement of a child custody determination under chapter 152 of the Family Code can include a request for the issuance of a warrant to take physical custody of a child. Because the burdens of proof and specific relief available vary, selecting the option to use requires careful consideration.

[Sections 36.2 through 36.10 are reserved for expansion.]

II. Attachment of Child

§ 36.11 Nature of Remedy

On the filing of a verified pleading or affidavit in accordance with the Texas Rules of Civil Procedure, the court may order attachment of a child. Tex. Fam. Code § 105.001(c). The court then issues a writ commanding any sheriff or constable to attach the body of the child and deliver the child to a designated place. The authority of the court to issue a writ of attachment is restricted by the territorial limits of the state in which the court is established. *In re Aubin*, 29 S.W.3d 199, 202 (Tex. App.—Beaumont 2000, orig. proceeding). Attachment is a harsh remedy that should be requested only when clearly necessary to protect the child. Specific facts, and not conclusions, must be alleged and verified or put in affidavit form.

§ 36.12 Use of Forms

Generally, attachment is ancillary to a suit in which the petitioner seeks additional relief providing for the care of a child in the future. For this reason, the attachment forms provided in this manual are designed for insertion within a petition. However, a separate motion to issue a writ of attachment may be filed ancillary to a pending action. A petitioner might file an original suit affecting the parent-child relationship and request attachment within a request for temporary and permanent managing conservatorship. When necessary, attachment may also be an ancillary remedy in habeas corpus, petitions to modify, and other actions.

[Sections 36.13 through 36.20 are reserved for expansion.]

III. Habeas Corpus for Child

§ 36.21 Nature of Remedy

Under chapter 157 of the Family Code, the writ of habeas corpus is used by the person with a legal right to possession of the child in an effort to regain possession from a person who wrongfully restrains the child.

§ 36.22 Who May Bring Suit

Subject to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act (PKPA), if the right to possession of a child is presently governed by a court order, the court in a habeas corpus proceeding shall compel return of the child to the relator only if it finds that the relator is presently entitled to possession under the order. Tex. Fam. Code § 157.372(a).

If the right to possession of a child is not governed by an order, the court in a habeas corpus proceeding shall compel return of the child to the parent if right of possession is between a parent and nonparent and a suit affecting the parent-child relationship has not been filed. If a suit affecting the parent-child relationship is pending and the parties have received notice of a hearing for temporary orders set for the same time as the habeas corpus proceeding, the court may either compel return of the child or issue temporary orders under Family Code chapter 105. Tex. Fam. Code § 157.376(a).

The court may not use a habeas corpus proceeding to adjudicate the right of possession between two parents or between two or more nonparents. Tex. Fam. Code § 157.376(b). In the event of the death of the managing conservator, the surviving parent has a right to possession of the children, and a court may enforce this right by issuance of a writ of habeas corpus. *Greene v. Schuble*, 654 S.W.2d 436, 437–38 (Tex. 1983) (orig. proceeding) (citing *Knollhoff v. Norris*, 256 S.W.2d 79 (Tex. 1953)); *see Walsh v. Walsh*, 562 S.W.2d 501, 502 (Tex. App.—San Antonio 1978, no writ).

§ 36.23 Jurisdiction

A petition for writ of habeas corpus may be filed in either the court of continuing, exclusive jurisdiction or a court with jurisdiction to issue a writ of habeas corpus in the county in which the child is found. Although habeas corpus is technically not a suit affecting the parent-child relationship, the court may refer to the provisions of Family Code title 5 for definitions and other procedures as appropriate. Tex. Fam. Code § 157.371.

§ 36.24 Responses to Request for Writ of Habeas Corpus

If the court finds that the previous order on which the request for issuance of a writ is based was granted by a court that did not give the contestants reasonable notice of the proceeding and an opportunity to be heard, it may not render an order in the habeas corpus proceeding compelling return of the child on the basis of that order. Tex. Fam. Code § 157.372(b).

If the relator has by consent or acquiescence relinquished actual possession and control of the child for at least six months immediately before the filing of the petition for the writ, the court may either compel or refuse to order the return of the child. The court may disregard any brief periods of possession and control by the relator during the six-month period. If the court does not issue an order compelling the return of the child, it may issue temporary orders if a suit affecting the parent-child relationship is pending and the parties have received notice of a hearing on temporary orders set for the same time as the habeas corpus proceeding. Tex. Fam. Code § 157.373.

§ 36.25 Temporary Orders

The court may order any appropriate temporary orders if there is a serious, immediate question concerning the welfare of the child, notwithstanding any other provision of

subchapter H of chapter 157 of the Family Code. Tex. Fam. Code § 157.374. The court may also issue temporary orders if a suit affecting the parent-child relationship is pending and the parties have received notice of a hearing on temporary orders set for the same time as the habeas corpus proceeding. Tex. Fam. Code § 157.373(c). The provisions fail to address the possibility that the suit affecting the parent-child relationship and the habeas corpus proceeding may be pending in different counties or different courts.

§ 36.26 Proof

If the petitioner intends to rely on an order of a Texas court, the attorney should obtain a certified copy of the order. Tex. R. Evid. 901(b)(7), 902, 1005. If a foreign order is being enforced, the attorney should obtain a certified, exemplified copy. *See* 28 U.S.C. § 1738.

§ 36.27 Immunity from Civil Process

A relator coming to Texas for the sole purpose of compelling the return of a child through a habeas corpus proceeding is not amenable to civil process and is not subject to the jurisdiction of any civil court except the court in which the writ is pending. The relator is subject to process and jurisdiction in that court only for the purpose of prosecuting the writ. A relator's request for costs, attorney's fees, and necessary travel and other expenses under Family Code chapter 106 or 152 is not a waiver of this immunity to civil process. Tex. Fam. Code § 157.375.

§ 36.28 Mandamus

A granting of habeas corpus is not appealable. *Gray v. Rankin*, 594 S.W.2d 409, 409 (Tex. 1980) (per curiam). Mandamus is the proper remedy to compel enforcement of a relator's right in habeas corpus proceedings to custody of a child. *See Saucier v. Pena*, 559 S.W.2d 654, 655 (Tex. 1977) (orig. proceeding); *Lamphere v. Chrisman*, 554 S.W.2d 935, 938 (Tex. 1977) (orig. proceeding). See chapter 27 and form 27-1 in this manual.

[Sections 36.29 through 36.40 are reserved for expansion.]

IV. Warrant to Take Possession of Child

§ 36.41 Nature of Remedy

Subchapter D of chapter 152 of the Family Code provides the means for enforcement of interstate child custody determinations, within the context of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). However, many of the remedies under the UCCJEA, including the issuance of a warrant for physical possession of a child, are available in intrastate matters and should therefore be considered as well. The UCCJEA as contained in Family Code chapter 152 is state law, and provisions not clearly limited to interstate cases apply to intrastate cases as well.

COMMENT: Although Texas lawyers may be familiar with the habeas corpus procedure described above, the enforcement provisions in chapter 152 are superior in several ways, such as providing for the issuance of a warrant granting law enforcement officials the immediate right to take the child into their physical custody and to enter private property by way of forcible entry, at any hour, if necessary. *See* Tex. Fam. Code § 152.311. Further, chapter 152 allows for the awarding to the prevailing party of all necessary and reasonable expenses incurred by or on behalf of that party in enforcing the child custody determination, including but not limited to costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care expenses during the course of the proceeding. *See* Tex. Fam. Code § 152.312(a).

§ 36.42 Parties

For purposes of enforcement under the UCCJEA, "petitioner" means a person seeking enforcement of a child custody determination or an order for the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction. "Respondent" means a person against whom such a proceeding is brought. Tex. Fam. Code § 152.301. Therefore, under the UCCJEA, a court may enforce an order for the return of a child made under the Hague Convention as if it were a child custody determination. *In re Lewin*, 149 S.W.3d 727 (Tex. App.—Austin 2004, orig. proceeding).

§ 36.43 Expedited Enforcement

Subchapter D of chapter 152 of the Family Code provides for the production of the child in a summary, remedial process based primarily on habeas corpus as a means of

enforcement of a child custody determination from another state. A child custody determination made in another state or a foreign country under factual circumstances in substantial conformity with the jurisdiction standards of the UCCJEA must be recognized and enforced. *In re Y.M.A.*, 111 S.W.3d 790 (Tex. App.—Fort Worth 2003, no pet.). Although this procedure is included in the UCCJEA, nothing statutorily limits its application to interstate cases. Its primary benefit over the habeas corpus proceeding found in chapter 157 is that the court's inquiry is limited. See section 36.45 below.

A petition for expedited enforcement must be verified, and certified copies, or copies of certified copies, of all orders sought to be enforced, as well as any order confirming a registration under section 152.305, must be attached to the petition. Tex. Fam. Code § 152.308(a). The petition must also state—

1. whether the court that issued the determination to be enforced identified the jurisdictional basis on which it relied in exercising jurisdiction and, if so, what that basis was;

2. whether the determination to be enforced has been vacated, stayed, or modified by a court whose decision must be enforced and, if so, the identity of that court, the case number, and the nature of that proceeding;

3. whether any other proceeding has been commenced that could affect the current proceeding, including any proceeding related to domestic violence, protective orders, termination, or adoption, and, if such a proceeding has been commenced, the identity of the court, the case number, and the nature of that proceeding;

4. the current physical address of the child and the respondent, if known;

5. whether any other relief in addition to the immediate physical custody of the child and attorney's fees is being requested and, if so, what is being requested (if assistance from a law enforcement agency is requested, it should be specifically included); and

6. if the child custody determination has been registered and confirmed under section 152.305, the date and place of registration.

Tex. Fam. Code § 152.308(b).

Unless a warrant for the immediate return of the child is also issued, the petition, along with an order to appear, must be served by any means authorized by Texas law on the

respondent and on any other person who has physical custody of the child. Tex. Fam. Code § 152.309.

§ 36.44 Order to Appear

On the filing of the petition, the court shall issue an order directing the respondent to appear in court, in person, either with or without the child, at a hearing. The court may also enter any other orders necessary to ensure the safety of the parties and the child. Tex. Fam. Code § 152.308(c).

The hearing must be held on the next judicial day after service of the order unless that date is impossible, in which case the court shall hold the hearing on the first judicial day possible. The court may extend the date of the hearing at the petitioner's request. Tex. Fam. Code § 152.308(c). This priority is not found in the habeas corpus remedy.

The order must state the time and place of the hearing and inform the respondent that at the hearing the court will award the petitioner immediate physical custody of the child and order payment of any fees, costs, and expenses incurred by the petitioner and may schedule a hearing to determine if further relief is appropriate, unless the respondent appears as ordered and establishes that—

1. the child custody determination has not been registered and confirmed under Family Code section 152.305, and the issuing court did not have jurisdiction under the UCCJEA;

2. the child custody determination has not been registered and confirmed under section 152.305 and has been vacated, stayed, or modified by a court with appropriate jurisdiction under the UCCJEA;

3. the child custody determination has not been registered and confirmed under section 152.305, and the respondent, although entitled, never received notice in accordance with section 152.108 in the proceeding before the court that issued the order sought to be enforced; or

4. the child custody determination to be enforced has been registered and confirmed under section 152.305 but has been vacated, stayed, or modified by a court of a state with jurisdiction under the UCCJEA.

Tex. Fam. Code § 152.308(d).

§ 36.45 Hearing and Order

Unless the court issues a temporary emergency order under Family Code section 152.204, the court, after finding that the petitioner is entitled to immediate physical custody under the order sought to be enforced, shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that—

1. the child custody determination has not been registered and confirmed under section 152.305, and the issuing court did not have jurisdiction under the UCCJEA;
2. the child custody determination has not been registered and confirmed under section 152.305 and has been vacated, stayed, or modified by a court with appropriate jurisdiction under the UCCJEA;
3. the child custody determination has not been registered and confirmed under section 152.305, and the respondent, although entitled, never received notice in accordance with section 152.108 in the proceeding before the court that issued the order sought to be enforced; or
4. the child custody determination to be enforced has been registered and confirmed under section 152.305 but has been vacated, stayed, or modified by a court of a state with jurisdiction under the UCCJEA.

Tex. Fam. Code § 152.310(a).

The court's order shall also award fees, costs, and expenses. Tex. Fam. Code § 152.310(b). The prevailing party, including a state, shall be awarded necessary and reasonable expenses incurred by the party or on its behalf, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care expenses during the proceeding, unless the party from whom these amounts are sought establishes that such an award would be inappropriate. Tex. Fam. Code § 152.312(a).

The court may also grant additional relief, including a request for law enforcement assistance, and set a further hearing to determine whether additional relief is appropriate. Tex. Fam. Code § 152.310(b).

§ 36.46 Evidence

In these proceedings, if a party called to testify refuses to answer a question on the ground that the testimony may be self-incriminating, the court may draw an adverse

inference from that refusal. Tex. Fam. Code § 152.310(c). The privilege against the disclosure of communications between spouses and the defense of immunity based on a spousal or parent-child relationship may not be invoked in these proceedings. Tex. Fam. Code § 152.310(d).

§ 36.47 Warrant for Physical Custody

On the filing of a petition seeking enforcement of a child custody determination, the petitioner may also file a verified application for the issuance of a warrant to take physical custody of the child. Tex. Fam. Code § 152.311(a). If the court, after hearing the testimony of the petitioner or another witness, finds that the child is imminently likely to suffer serious physical harm or be removed from Texas, it may issue a warrant to take physical custody of the child. The hearing on the underlying petition seeking enforcement must be held the next judicial day following execution of the warrant unless that date is impossible, in which case the court shall hold the hearing on the first judicial day possible. The application for the warrant must contain the statements required for the petition by Family Code section 152.308(b). Tex. Fam. Code § 152.311(b); *see* Tex. Fam. Code § 152.308(b). See section 36.43 above.

The warrant to take physical custody must recite all the facts on which the conclusion of imminent serious physical harm or removal from the jurisdiction is based. It should also direct the appropriate law enforcement officers to take physical custody of the child immediately, state the date for the hearing on the petition, provide for the safe interim placement of the child pending further order of the court, and impose conditions on placement of the child to ensure the appearance of the child and the child's custodian. Tex. Fam. Code § 152.311(c).

Placement with the petitioner or any other appropriate placement authorized by law may be ordered. However, if the petition seeks to enforce a child custody determination made in a foreign country or an order for the return of the child made under the Hague Convention, the court may place a child with a parent or family member only if the parent or family member has significant ties to the jurisdiction of the court. Otherwise, the court shall provide for the delivery of the child to the Department of Family and Protective Services. Tex. Fam. Code § 152.311(c–1).

The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody. Tex. Fam. Code § 152.311(d).

A warrant to take physical custody of a child is enforceable throughout Texas. If the court, after hearing the testimony of the petitioner or another witness, finds that a less intrusive means is not available, the court may authorize law enforcement officers to enter private property to take physical custody of the child and, if necessary under the circumstances, to make a forcible entry at any hour. Tex. Fam. Code § 152.311(e).

§ 36.48 Appeal

An appeal may be taken from a final order under the UCCJEA enforcing a child custody determination in accordance with the rules for expedited appeals as in other civil cases. Tex. Fam. Code § 152.314. The Texas Supreme Court has held that justice demands a speedy resolution of child custody and child support issues. *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (per curiam). The Family Code also recognizes that, in cases involving children, if ordinary scheduling practices will unreasonably affect the best interest of the children, the case should be given a preferential setting. *See* Tex. Fam. Code § 105.004. However, unless the court enters a temporary emergency order, the enforcing court may not stay an order enforcing a child custody determination pending appeal. Tex. Fam. Code § 152.314.

§ 36.49 International Application

A Texas court must treat a foreign country as if it were a state of the United States in applying the general and jurisdictional provisions of the UCCJEA. A child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA must be recognized and enforced under the enforcement provisions of the UCCJEA unless the child custody law of the foreign country violates fundamental principles of human rights. A record of all proceedings under the UCCJEA relating to a child custody determination made in a foreign country or to the enforcement of an order for the return of a child made under the Hague Convention must be made by a court reporter or as provided in Family Code section 201.009. Tex. Fam. Code § 152.105.

In a hearing held under Family Code chapter 152, it is a third-degree felony to knowingly make a false statement relating to a child custody determination made in a foreign country or to knowingly cause such a false statement to be made. Tex. Penal Code § 37.14.

[Chapters 37 through 39 are reserved for expansion.]

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Chapter 40

Original Suit Affecting Parent-Child Relationship

§ 40.1 Nature of Remedy

A suit affecting the parent-child relationship is any suit brought under title 5 of the Texas Family Code in which the relief requested includes (1) appointment of a managing conservator, (2) appointment of a possessory conservator, (3) access to a child, (4) support of a child, (5) establishment of the parent-child relationship, or (6) termination of the parent-child relationship. Tex. Fam. Code § 101.032(a).

The suit may include termination, adoption, possession or access by grandparents or other nonparents, and conservatorship or support incident to a divorce. Forms for these proceedings are found in other chapters of this manual.

§ 40.2 Caption

The suit is to be styled "In the Interest of _____, a Child." Tex. Fam. Code § 102.008(a).

COMMENT: Although the name of a minor is classified as sensitive data (*see* Tex. R. Civ. P. 21c(a), (b)), its inclusion in a pleading in a suit affecting the parent-child relationship is statutorily required. Since the pleading must contain sensitive data, the clerk must be notified of that fact. A document that is not electronically filed must contain, on the upper left-hand side of the first page, the phrase "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d)(2). If the document is electronically filed, it must be designated as containing sensitive data when it is filed. Tex. R. Civ. P. 21c(d)(1).

§ 40.3 Who May Bring Suit

An original suit affecting the parent-child relationship may be brought at any time by—

1. a parent of the child;

2. the child, through a representative authorized by the court;

3. a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;

4. a guardian of the person or of the estate of the child;

5. a governmental entity;

6. the Department of Family and Protective Services;

7. a licensed child-placing agency;

8. a man alleging himself to be the father of the child filing in accordance with Family Code chapter 160 (subject to the limitations of that chapter);

9. a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than ninety days preceding the date of the filing of the petition;

10. a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Family Code chapter 161 or to whom consent to adoption has been given in writing under Family Code chapter 162;

11. a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than ninety days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;

12. a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for a period of at least twelve months ending not more than ninety days preceding the date of the filing of the petition;

13. a person who is a relative of the child within the third degree by consanguinity, as determined by chapter 573 of the Government Code if the child's parents are deceased at the time of the filing of the petition;

14. a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Family Code section 102.0035, regardless of whether the child has been born; or

15. a person who is an intended parent of a child or unborn child under a gestational agreement that complies with the requirements of Code section 160.754,

but only if the person is filing an original suit either jointly with or against the other intended parent under the gestational agreement.

Tex. Fam. Code § 102.003(a), (d).

Standing is a component of subject-matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit under Texas law. The petitioner is required to allege facts sufficiently demonstrating that the trial court has jurisdiction to hear the case. *In re M.K.S.-V.*, 301 S.W.3d 460, 463 (Tex. App.—Dallas 2009, pet. denied). The Texas Family Code defines who has standing to file an original suit affecting the parent-child relationship. *In re E.G.L.*, 378 S.W.3d 542, 547 (Tex. App.—Dallas 2012, pet. denied).

Standing as Parent—Tex. Fam. Code § 102.003(a)(1): In *Berwick v. Wagner*, the parties, both men, married in Canada. In 2005, they registered in California as domestic partners and entered a gestational surrogacy agreement with a married woman there. The surrogate was impregnated with Berwick's sperm and a donated ovum. After the child was born, a California court entered an order adjudicating the parentage of the child, declaring that both Berwick and Wagner were the legal parents of the child and the surrogate and her husband were not the child's legal parents. Berwick and Wagner brought the child to Texas, where they lived together as a family for several years. After their relationship ended, Wagner filed a suit affecting the parent-child relationship and registered the California judgment as a foreign judgment under the Texas Family Code. Berwick counterclaimed, arguing that Wagner lacked standing as a parent to seek custody because Berwick was the only party biologically related to the child; Wagner's parentage had never been adjudicated; and, even if Wagner had been adjudicated to be a parent by the California parentage order, such a designation would be void as against Texas public policy. The appellate court found that the trial court correctly recognized that Wagner and Berwick had each already been adjudicated the child's parents by the California order; that the trial court properly gave full faith and credit to the California judgment; and that Wagner, having been affirmed as a parent, had standing to file the suit. *Berwick v. Wagner*, 509 S.W.3d 411, 418 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

In *In re A.E.*, two women were married in Connecticut in 2011. One of the women, "Mother," was impregnated through assisted reproduction, but the couple separated before the child was born. Subsequently the other spouse, "Wife," filed a petition for divorce and a suit affecting the parent-child relationship with respect to the child, seeking to establish a parent-child relationship. Wife appealed dismissal of suit affecting the parent-child relationship for lack of standing, arguing that after *Obergefell*, the Texas

statutes regarding parentage should be read in a gender-neutral manner because the fundamental right to marry encompasses the unified whole of rights that inherently emanate from the marital relationship. The appellate court held that when construing statutes, the courts must give effect to the legislature's intent and not look to extraneous matters. *Obergefell* does not confer standing on Wife to maintain a parentage claim, nor does it require the court to act as a legislature and rewrite the Texas statutes that define who has standing to bring a suit affecting the parent-child relationship. Wife did not meet any of the statutory definitions of "parent," she had not given birth to the child, and she was not a man. When construing the statutes regarding artificial reproduction, the substitution of the word "spouse" for the words "husband" and "wife" would amount to legislating from the bench. *In re A.E.*, No. 09-16-00019-CV, 2017 WL 1535101, at *8–10 (Tex. App.—Beaumont Apr. 27, 2017, pet. denied) (mem. op.).

Computing Time Necessary for Standing—Tex. Fam. Code § 102.003(a)(9), (a)(11), (a)(12): In computing the time necessary for standing under the provisions in items 9., 11., and 12. above, the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date the suit is begun. Tex. Fam. Code § 102.003(b); *In re H.S.*, 550 S.W.3d 151, 156 (Tex. 2018); *see also In re J.A.T.*, 502 S.W.3d 834, 837 (Tex. App.—Houston [14th Dist.] 2016, no pet.). "Principal residence" means more than "primary residence." A principal residence is (1) a fixed place of abode; (2) occupied consistently over a substantial period of time; and (3) that is permanent rather than temporary. *Doncer v. Dickerson*, 81 S.W.3d 349, 362 (Tex. App.—El Paso 2002, no pet.); *see also In re Brice*, ___ S.W.3d ___, No. 04-19-00334-CV, 2019 WL 3642646, at *2 (Tex. App.—San Antonio Aug. 7, 2019, orig. proceeding).

Actual Care, Control and Possession—Tex. Fam. Code § 102.003(a)(9): Under section 102.003(a)(9) of the Family Code, an original suit affecting the parent-child relationship may be filed by 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 ninety days preceding the date of the filing of the petition. Equitable tolling cannot be applied to confer standing if the ninety-day deadline is not met. *In re N.M.B.*, No. 04-18-00111-CV, 2018 WL 6516120, at *2 (Tex. App.—San Antonio Dec. 12, 2018, pet. denied) (mem. op.).

Resolving a split of authority among the courts of appeals as to whether "actual control" requires legal control, the Texas Supreme Court addressed the issue in *In re H.S.*, 550 S.W.3d 151. The court held that a nonparent has "actual care, control, and possession of the child" under section 102.003(a)(9) if, for the requisite six-month period, the

nonparent served in a parent-like role by (1) sharing a principal residence with the child, (2) providing for the child's daily physical and psychological needs, and (3) exercising guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children. The statute does not require the nonparent to have ultimate legal authority to control the child, nor does it require the parents to have wholly ceded or relinquished their own parental rights and responsibilities. *In re H.S.*, 550 S.W.3d at 160. In finding *Troxel v. Granville*, 530 U.S. 57 (2000), inapplicable to the facts before them, the court noted that in *Troxel* the visitation statute in question permitted "[a]ny person" to petition for rights "at any time." In stark contrast to the Washington statute at issue in *Troxel*, section 102.003(a)(9) does not allow "any" nonparent to file a SAPCR; it allows only nonparents who have exercised "actual care, control, and possession" of a child for at least six months to do so. The nonparent standing threshold in Texas is thus much higher and narrower than the one rejected in *Troxel*. *In re H.S.*, 550 S.W.3d at 161–62.

If possession is maintained in violation of a valid court order, that possession does not confer standing to bring a suit affecting the parent-child relationship. *See Perez v. Williamson*, 726 S.W.2d 634, 636 (Tex. App.—Houston [14th Dist.] 1987, no writ). In *In re S.S.G.*, 208 S.W.3d 1 (Tex. App.—Amarillo 2006, pet. denied), however, the court found no authority for an exception to the standing rule based on consent to actual care, control, and possession of the child for the requisite period.

Standing in Same-Sex Relationships—Tex. Fam. Code § 102.003(a)(9): In *In re N.I.V.S.*, a female who self-identified as a male and had been raised as a boy ("Villarreal") began a relationship with a female ("Sandoval") who later adopted two children. At separation, Sandoval refused to allow any contact between Villarreal and the children. Villarreal then obtained an order legally changing his female birth name to the masculine name he had gone by since he was a child. Subsequently he filed a suit affecting the parent-child relationship and a voluntary statement of paternity. He then obtained an order changing his identity from female to male. The trial court dismissed the suit for lack of standing, and Villarreal appealed, asserting standing under sections 160.602(a)(3) (man whose paternity of the child is to be adjudicated), 102.003(a)(8) (man alleging himself to be the father of the child), and 102.003(a)(9) (a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months). Finding that Villarreal was a legally a female at the time the suit was filed, the appellate court found that he did not have standing to bring a suit to adjudicate parentage under section 160.602(a)(3). *In re N.I.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913, at * 4 (Tex. App.—San Antonio Mar. 11, 2015, no pet.) (mem. op.). Using the

same rationale, the appellate court found that Villarreal did not have standing to bring suit under section 102.003(a)(8). *In re N.I.V.S.*, 2015 WL 1120913, at *5. Finally, the appellate court found that Villarreal did not have standing under section 102.003(a)(9), as he was not involved in the actual care, control, and possession of the children in the three years between the time of the parties' separation and his filing of the suit, nor did he authorize any medical treatment or make education decisions for the children after separation. *In re N.I.V.S.*, 2015 WL 1120913, at *5.

Five days after losing the above appeal, Villarreal filed a second suit to adjudicate parentage, asserting standing under Family Code section 102.003(a)(8). He asserted he was "a man alleging himself to be the father of the minor children." Sandoval again filed a plea to the jurisdiction, which the trial court denied. The trial court entered temporary orders allowing Villarreal possession of the children, appointing an amicus attorney, and enjoining the parties from initiating any adoption proceedings. Sandoval filed a petition for writ of mandamus, which the court granted. In 2009, Tex. Fam. Code § 2.005(b)(8) was added to allow a court order relating to an individual's sex change to be an acceptable form of identification to establish a person's identity and age for the purpose of obtaining a marriage license. The appellate court refused to extend the applicability of this section to confer standing to maintain a suit to adjudicate parentage under Tex. Fam. Code § 160.602(a)(3), reasoning that even if Villarreal was considered a man from birth for legal purposes, his status as a man is not sufficient to confer statutory standing as "a man whose paternity of the child is to be adjudicated." Tex. Fam. Code § 160.602(a)(3). "If all that was required for standing was to be a man, then any man could maintain a suit to adjudicate parentage to any child. We do not believe that to be what the Texas Legislature intended." *In re Sandoval*, No. 04-15-00244-CV, 2016 WL 353010, at *3 (Tex. App.—San Antonio Jan. 27, 2016, orig. proceeding) (mem. op.). Villarreal did not meet the statutory requirements for standing as a presumed father or as the acknowledged father. Villarreal's suit was not brought within ninety days of the date on which his actual care, control, and possession of the children terminated. Villarreal did not raise any basis on which he would have standing to file a SAPCR. *See In re Sandoval*, 2016 WL 353010, at *3–4.

If the evidence creates a fact question regarding the jurisdictional issue, the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *See Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004); *see also In re R.E.R.*, 534 S.W.3d 1 (Tex. App.—Corpus Christi–Edin-

burg 2016, no pet.) (trial court failed to consider relevant evidence to determine whether nonparent petitioner had standing under section 102.003(a)(9) although petitioner's pleadings and evidence presented raised fact issue regarding standing).

Standing for Other Nonparents: A foster parent may bring a suit to adopt a child the person is fostering at any time after the person has been approved to adopt the child, who must be eligible for adoption. Tex. Fam. Code § 102.003(c).

Standing of a grandparent under Family Code section 102.003(a)(9) is not conditioned on a biological relationship, but on a period of time; thus the affidavit requirement of Code section 153.432(c) (the grandparent access statute) does not apply. *See In re C.D.M.*, No. 11-15-00319-CV, 2016 WL 5853261, at *3–4 (Tex. App.—Eastland Oct. 6, 2016, no pet.) (mem. op.) (grandparents sought to be appointed child's joint managing conservator and alternatively for possession of and access to child under section 153.432).

A former parent whose parent-child relationship with the child has been terminated by court order does not have standing under Family Code section 102.003(a)(9) to file an original suit affecting the parent-child relationship seeking conservatorship, as Code section 102.006(a)(1) prohibits the former parent from filing an original suit. A trial court lacks subject-matter jurisdiction over such a suit. *See In re R.B.*, No. 02-16-00387-CV, 2016 WL 6803200, at *2–6 (Tex. App.—Fort Worth Nov. 17, 2016, orig. proceeding) (mem. op.).

Suits by grandparents and other nonparents are the subject of chapter 44 of this manual.

No provision of section 102.003 of the Family Code gives standing to a child to file an involuntary termination of parental rights through the child's parent as next friend, nor does chapter 161 of the Code contain a provision giving a child standing to file a suit affecting the parent-child relationship. *In re I.C.G.*, No. 05-14-01629-CV, 2015 WL 3454278, at *3 (Tex. App.—Dallas June 1, 2015, no pet.) (mem. op.).

In most cases, if the parent-child relationship between the child and every living parent of the child has been terminated, a suit affecting the parent-child relationship may not be brought by (1) a former parent whose parent-child relationship with the child has been terminated by court order; (2) the child's father; or (3) a family member or relative, by blood, adoption, or marriage, either of a former parent whose parent-child relationship has been terminated or of the child's father. These limitations on standing do not apply to a person who has a continuing right to possession of or access to the child under an existing court order or who has the consent of the child's managing conserva-

tor, guardian, or legal custodian to bring the suit. The limitations also do not apply to an adult sibling of the child, a grandparent of the child, or an aunt or uncle who is a sibling of a parent of the child if the adult sibling, grandparent, aunt, or uncle files an original suit or a suit for modification requesting managing conservatorship of the child not later than the ninetieth day after the date the parent-child relationship between the child and the parent is terminated in a suit filed by the Department of Family and Protective Services requesting termination of the parent-child relationship. Tex. Fam. Code § 102.006.

COMMENT: Tex. Fam. Code § 102.006(c) may have the unintended effect of conferring standing on an adult sibling, grandparent, aunt, or uncle without the requirement of substantial past contact.

An authorization agreement for an adult caregiver executed under Family Code chapter 34 does not confer or affect standing or a right of intervention in any proceeding under title 5 of the Code. *See* Tex. Fam. Code § 34.007(c).

Family Code section 162.602(a)(8) does not confer standing on a girlfriend of the biological mother to seek conservatorship as an intended parent, because that section pertains to a proceeding to adjudicate parentage in which a trial court renders an order adjudicating whether a man alleged or claiming to be the father is the parent of the child. *In re N.M.B.*, 2018 WL 6516120, at *2.

§ 40.4 Citation

Citation is the same as in civil cases generally. *See generally* Tex. R. Civ. P. 99–107.

The persons entitled to citation are—

1. any managing conservator;
2. any possessory conservator;
3. anyone having possession of or access to the child under an order;
4. anyone required by law or order to provide for the support of the child;
5. any guardian of the person of the child;
6. any guardian of the estate of the child;
7. each parent as to whom the parent-child relationship has not been terminated or process has not been waived under chapter 161 of the Family Code;

8. any alleged father unless there is attached to the petition an affidavit of waiver of interest executed by the alleged father under chapter 161 of the Family Code or unless the petitioner has complied with the provisions of section 161.002(b)(2), (b)(3), or (b)(4) of the Family Code;

9. a man who has filed a notice of intent to claim paternity as provided by chapter 160 of the Family Code;

10. the Texas Department of Family and Protective Services, if the petition requests that the department be appointed managing conservator of the child;

11. the title IV-D agency, if the petition requests termination of the parent-child relationship and support rights have been assigned to the title IV-D agency;

12. a prospective adoptive parent to whom standing has been conferred under Family Code section 102.0035; and

13. a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Family Code chapter 161 or to whom consent to adoption has been given in writing under Family Code chapter 162.

Tex. Fam. Code § 102.009(a).

Citation may be served on any other person who has or who may assert an interest in the child. Tex. Fam. Code § 102.009(b); *Texas Department of Protective & Regulatory Services v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001). In an interstate custody case, citation should be served on any person who has physical custody of the child. *See* Tex. Fam. Code § 152.205. If the petition seeks to establish, terminate, modify, or enforce any support right assigned to the title IV-D agency under chapter 231 of the Family Code or the rescission of a voluntary acknowledgment of paternity under chapter 160 of the Family Code, notice shall be given to the title IV-D agency. Tex. Fam. Code § 102.009(d).

Service of citation is not required on a counterpetition when the opposing party has already made an appearance in the case. *See In re D.P.B.*, No. 05-17-00185-CV, 2018 WL 3014628, at *2 (Tex. App.—Dallas June 15, 2018, no pet.) (mem. op.).

Citation by Publication: Provisions concerning service of citation by publication in a title 5 case are contained in section 102.010 of the Family Code. *See* Tex. Fam. Code § 102.010(a)–(c). If service is by publication, a statement of the evidence of service, approved and signed by the court, must be filed with the papers of the suit as part of the record. Tex. Fam. Code § 102.010(d). If citation by publication is authorized, the court

may, on motion, prescribe a different method of substituted service if the court finds and recites in its order that the method so prescribed would be as likely as publication to give the respondent actual notice. Tex. R. Civ. P. 109a.

A diligent attempt must be made to personally serve a respondent before alternate service can be authorized by the court. A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time. *In re E.R.*, 385 S.W.3d 552, 565–66 (Tex. 2012).

Citation by publication should substantially follow the form promulgated in section 102.010 of the Family Code. To provide notice through publication, the citation must include the correct caption of the case and provide notice of the relief sought. If it does not, citation does not substantially comply with the statute. *See Curley v. Curley*, 511 S.W.3d 131, 133 (Tex. App.—El Paso 2014, no pet.).

Waiver of Service: A party may waive service after the suit is filed by filing a waiver acknowledging receipt of a copy of the citation. The waiver may not be signed using a digitized signature. The waiver must contain the party's mailing address, and it must be sworn before a notary public who is not an attorney in the suit unless the party waiving is incarcerated. The Texas Rules of Civil Procedure do not apply to these waivers. Tex. Fam. Code § 102.0091.

Strict Compliance Required: In a direct attack on a default judgment, the record must show strict compliance with the rules regarding service of citation. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 274 (Tex. 2012); *Primate Construction, Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam). " 'Strict compliance' means literal compliance with the rules governing issuance, service, and citation." *In re J.M.*, 387 S.W.3d 865, 870 (Tex. App.—San Antonio 2012, no pet.) (record showed that Department of Family and Protective Services attempted to serve father by publication using incorrect name although Department later learned father's true name and location, record did not contain return of service on father, and record did not contain statement of evidence required by section 102.010(d) of Family Code). *See In re J.B.*, No. 02-15-00040-CV, 2015 WL 9435961 (Tex. App.—Fort Worth Dec. 23, 2015, no pet.) (mem. op.) (return of service must include, among other things, description of what was served; affidavit of service that does not specify documents served is not sufficient).

A return of service must include the address served. Tex. R. Civ. P. 107(b)(6). The failure to do so renders service defective, deprives the trial court of personal jurisdiction over the defendant, and renders the resulting default judgment void. *See In re L.R.M.*,

No. 04-17-00503-CV, 2018 WL 3129447, at *2 (Tex. App.—San Antonio June 27, 2018, no pet.) (mem. op.).

In *In re S.C.*, No. 02-15-00191-CV, 2015 WL 9435937 (Tex. App.—Fort Worth Dec. 23, 2015, no pet.) (mem. op.), the father filed a petition to modify a prior conservatorship order. The citation and petition were served on the mother in Japan by certified mail, return receipt requested. The mother personally signed the return receipt. The return stated that service of "a true copy of this writ together with a copy of Chapter 158 Texas Family Code" was "by delivery certified mail, return receipt requested, to the employer named within, as herein directed." The return receipt, the first page of the petition, and the citation were attached to the return of service filed with the clerk. After default judgment, the mother filed a notice of restricted appeal and argued that the return of service was defective, rendering the default judgment void. The court of appeals affirmed the trial court, finding that in determining whether service was proper, the court must consider the return of service together with any attached documents, including the petition and citation. The clerk's stamp on the filed return of service was sufficient to satisfy the time requirement of Tex. R. Civ. P. 107(b)(4). Although the return of service incorrectly stated service was "to the employer named within," the certified mail return receipt and citation indicated the mother was served in Japan by certified mail. The first page of the petition was attached to the return of service and included handwritten notations regarding the service on the mother. *In re S.C.*, 2015 WL 9435937 at *3–4.

Service on Incarcerated Persons: The Texas Civil Practice & Remedies Code provides a method of service for inmates incarcerated in a TDCJ facility:

> (a) In this section, "inmate" means a person confined in a facility operated by or under contract with the Texas Department of Criminal Justice.
>
> (b) In a civil action against an inmate, citation or other civil process may be served on the inmate by serving a person designated under Subsection (c) as an agent for service of civil process.
>
> (c) The warden of each facility operated by or under contract with the Texas Department of Criminal Justice shall designate an employee at the facility to serve as an agent for service of civil process on inmates confined in the facility.
>
> (d) An employee designated under Subsection (c) as an agent for service of civil process shall promptly deliver any civil process served on the employee to the appropriate inmate.

Tex. Civ. Prac. & Rem. Code § 17.029.

In the absence of evidence that the person served is an employee designated by the warden of the facility "to serve as an agent for service of civil process on inmates confined in the facility," the trial court lacks in personam jurisdiction to enter a default judgment against the inmate. *See In re J.M.H.*, 414 S.W.3d 860, 863 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

Caveat: When there is uncertainty as to who is the agent for service of process on an incarcerated inmate, a rule 106 motion for alternative service may be appropriate.

Waiver of Defect in Service of Citation: By signing an order in a suit affecting the parent-child relationship as "approved and consented to as to both form and substance," a party consents to the personal jurisdiction of the trial court, enters a general appearance, and waives any defect in the service of citation. *See In re C.R.B.*, 256 S.W.3d 876, 877–78 (Tex. App.—Texarkana 2008, no pet.).

Service of Amended Petition Seeking More Onerous Relief: If a party amends a petition to seek more onerous relief against a defaulting party, service of a new citation on the defaulting party is not required. Service under rule 21a of the Texas Rules of Civil Procedure will suffice. *See In re E.A.*, 287 S.W.3d 1, 8 (Tex. 2009).

In the absence of a waiver that includes language waiving service of an amended petition, a party is obligated to serve the other party under rule 21a with an amended petition requesting more onerous relief. The failure to do so deprives the other party of notice of the more onerous relief sought in the amended petition. *See Garduza v. Castillo*, No. 05-13-00377-CV, 2014 WL 2921650, at *3 (Tex. App.—Dallas June 25, 2014, no pet.) (mem. op.).

§ 40.5 Contents of Petition

The petition must contain a statement that no court has continuing jurisdiction, as well as a number of other items described in section 102.008(b) of the Family Code. *See* Tex. Fam. Code § 102.008.

If the suit involves a child custody proceeding, which includes a proceeding for legal custody, physical custody, or visitation with respect to a child, and not all of the parties reside in Texas, the first pleading by each party must also contain either in the body of the pleading or in an attached affidavit the information set forth in section 152.209 of the Family Code. *See* Tex. Fam. Code §§ 152.102(4), 152.209.

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

The petition must state whether, in regard to a party to the suit or a child of a party to the suit, there is in effect a protective order under Family Code title 4, a protective order under chapter 7A of the Code of Criminal Procedure, or an order for emergency protection under article 17.292 of the Code of Criminal Procedure. The petition also must state whether an application for any of these orders is pending. The petitioner must attach a copy of each such protective order in which a party to the suit or the child of a party to the suit was the applicant or victim of the conduct alleged in the application or order and the other party was the respondent or defendant of an action regarding the conduct alleged in the application or order without regard to the date of the order. If a copy of the order is not available at the time of filing, the petition must state that a copy will be filed with the court before any hearing. Tex. Fam. Code § 102.008(b)(11), (c).

The petition must include the name and date of birth of the child, except that if an adoption is requested, the name of the child may be omitted. Tex. Fam. Code § 102.008(b)(2).

COMMENT: Although the name and birth date of a minor are classified as sensitive data (*see* Tex. R. Civ. P. 21c(a), (b)), their inclusion in a pleading in a suit affecting the parent-child relationship is statutorily required. Since the pleading must contain sensitive data, the clerk must be notified of that fact. A document that is not electronically filed must contain, on the upper left-hand side of the first page, the phrase "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d)(2). If the document is electronically filed, it must be designated as containing sensitive data when it is filed. Tex. R. Civ. P. 21c(d)(1).

The petition must also clearly state the precise relief being requested. Absent a specific request in the pleading, a trial court exceeds its authority if it modifies or reforms previous orders affecting the conservatorship of the child. *In re Parks*, 264 S.W.3d 59, 62 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding). *But see Peck v. Peck*, 172 S.W.3d 26, 35 (Tex. App.—Dallas 2005, pet. denied) (trial court has discretion to place conditions on parents' visitation even if pleadings do not request such conditions).

Before a hearing on temporary orders or a final order, if no hearing on temporary orders is held, the court shall require the parties to the proceedings to disclose in a pleading or other statement (1) if private health insurance is in effect for the child, the identity of the insurance company providing the coverage, the policy number, which parent is

responsible for payment of any insurance premium for the coverage, whether the coverage is provided through a parent's employment, and the cost of the premium or (2) if private health insurance is not in effect for the child, whether (a) the child is receiving medical assistance under chapter 32, Human Resources Code, (b) the child is receiving health benefits coverage under the state child health plan under chapter 62, Health and Safety Code, and the cost of any premium, and (c) either parent has access to private health insurance at reasonable cost to the obligor. Tex. Fam. Code § 154.181(b). "Reasonable cost" means the cost of health insurance coverage for a child that does not exceed 9 percent of the obligor's annual resources, as described by section 154.062(b), if the obligor is responsible under a medical support order for the cost of health insurance coverage for only one child; if the obligor is responsible under a medical support order for the cost of health insurance coverage for more than one child, "reasonable cost" means the total cost of health insurance coverage for all children for whom the obligor is responsible under a medical support order that does not exceed 9 percent of the obligor's annual resources, as described by section 154.062(b). Tex. Fam. Code § 154.181(e).

Before a hearing on temporary orders, or a final order if no hearing on temporary orders is held, the court shall require the parties to the proceedings to disclose in a pleading or other document whether the child is covered by dental insurance. If the child is covered, the parties must disclose the following: the identity of the insurer providing the coverage, the policy number, which parent is responsible for payment of any insurance premium for the coverage, whether the coverage is provided through a parent's employment, and the cost of the premium. If dental insurance is not in effect for the child, the parties must disclose whether either parent has access to dental insurance at reasonable cost to the obligor. Tex. Fam. Code § 154.1815(c). "Reasonable cost" means the cost of a dental insurance premium that does not exceed 1.5 percent of the obligor's annual resources, as described by section 154.062(b), if the obligor is responsible under a dental support order for the cost of dental insurance coverage for only one child; if the obligor is responsible under a dental support order for the cost of dental insurance coverage for more than one child, "reasonable cost" means the total cost of dental insurance coverage for all children for whom the obligor is responsible under a dental support order that does not exceed 1.5 percent of the obligor's annual resources, as described by section 154.062(b). Tex. Fam. Code § 154.1815(a).

§ 40.6 Jurisdiction

General: The possibility that a Texas court will have only partial jurisdiction over the issues in a suit affecting the parent-child relationship (SAPCR) when the parties or the child reside in different states is explicitly recognized in Family Code section 102.012. This provision states that a Texas trial court may exercise jurisdiction over only those portions of the suit for which it has authority. *See* Tex. Fam. Code § 102.012.

A child support order may be rendered against a nonresident obligor only if the court has personal jurisdiction over that party. Tex. Fam. Code § 159.201. *See In re A.B.*, 207 S.W.3d 434 (Tex. App.—Dallas 2006, no pet.). This principle has been ingrained in U.S. jurisprudence for decades. *See Kulko v. Superior Court*, 436 U.S. 84 (1978). In 1980, the principle was confirmed by federal statute to ensure universal understanding of the mandate. *See* 28 U.S.C. § 1738B(c). The impact of this restriction of the trial court's jurisdiction is mitigated by the expansive long-arm statute contained in the Uniform Interstate Family Support Act. *See* Tex. Fam. Code § 159.201. (Identical provisions are in effect in all states.) Long-arm jurisdiction is discussed in section 40.7 below.

Similarly, the court's authority to resolve all custody and visitation issues in controversy between the parties may be restricted because another state is the "home state" of the child, even if the Texas court has the requisite, albeit subordinate, jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (chapter 152 of the Texas Family Code). In *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005) (orig. proceeding), the parents had moved from Texas and lived with their then-only child in another state for more than six months, thereby establishing it as the child's "home state." The mother returned to Texas with that child and gave birth to a second child. She then filed for divorce and for custody of and child support for both children. The Texas Supreme Court reversed the trial and appellate courts' determination that Texas had custody jurisdiction over both children. The court held that the explicit terms of the UCCJEA, in effect in both states, mandate that the home state has jurisdictional priority regarding the father's subsequent custody suit for the first child, which prevails over the "significant-connection" jurisdiction of Texas; Texas has jurisdictional priority regarding custody of the second child.

Section 6.406(b) of the Texas Family Code does not vest the trial court with subject-matter jurisdiction if another state would have jurisdiction under the UCCJEA. The UCCJEA specifically provides that it is the "exclusive jurisdictional basis" for making a child custody determination. Tex. Fam. Code § 152.201(b). Moreover, the UCCJEA

provides that if its provisions conflict with another Texas statute, the UCCJEA controls. Tex. Fam. Code § 152.002. *See Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 586 (Tex. App.—Dallas 2006, no pet.).

In *Villarreal v. Villarreal*, No. 04-15-00551-CV, 2016 WL 4124067 (Tex. App.—San Antonio Aug. 3, 2016, no pet.) (mem. op.), the petitioner filed for a divorce, coupled with a suit affecting the parent-child relationship, in state district court. When the trial court entered an order of conditional dismissal for failure to pay court costs, the petitioner filed a petition for divorce in a tribal court. The state district court case was never dismissed, nor was it stayed. The appellate court held that the Indian Child Welfare Act (ICWA) was not applicable to a custody case within a divorce proceeding. Accordingly, the appellate court held that the Indian tribe within which the tribal court was located should be treated as a state of the United States under the UCCJEA. As Texas was the home state of the children when the petitioner filed the divorce in state district court, the trial court had jurisdiction to make the initial child custody determination. *Villarreal*, 2016 WL 4124067, at *3.

The shorthand terminology for the complexity of the jurisdictional rules governing child custody and visitation and child support is "bifurcated jurisdiction," which in the Texas Family Code is labeled "partial jurisdiction." For a more detailed explanation of these jurisdictional rules, see chapter 43 of this manual. A more comprehensive explanation of these rules is found in Russell J. Weintraub, *Commentary on the Conflict of Laws* (5th ed., Foundation Press 2006).

Original Suit: An original suit is filed only if there has been no prior order affecting the parent-child relationship. For this reason, the petition will always state that no court has continuing jurisdiction. Tex. Fam. Code § 102.008(b)(1). However, the following final orders do not create continuing, exclusive jurisdiction in a court:

1. A voluntary or involuntary dismissal of a suit affecting the parent-child relationship.

2. In a suit to determine parentage, a final order finding that an alleged or presumed father is not the father of the child, except that the jurisdiction of the court is not affected if the child was subject to the jurisdiction of the court or some other court in a suit affecting the parent-child relationship before the commencement of the suit to adjudicate parentage.

3. A final order of adoption, after which a subsequent suit affecting the child must be commenced as though the child had not been the subject of a suit for adoption or any other suit affecting the parent-child relationship before the adoption.

Tex. Fam. Code § 155.001(b).

In the absence of specific provisions to the contrary in an order establishing conservatorship, the death of the managing conservator does not end the conservatorship order, except for purposes of seeking a writ for habeas corpus. *Greene v. Schuble*, 654 S.W.2d 436, 437–38 (Tex. 1983) (orig. proceeding); *In re P.D.M.*, 117 S.W.3d 453, 458 (Tex. App.—Fort Worth 2003, pet. denied).

Jurisdictional issues that may arise in a suit affecting the parent-child relationship in the context of a divorce are discussed in section 3.42 in this manual. Jurisdictional issues that may arise in interstate matters are discussed in chapter 43 of this manual.

§ 40.7 Long-Arm Jurisdiction

In an original suit affecting the parent-child relationship (SAPCR), the court may exercise status or subject-matter jurisdiction over custody and visitation issues in the suit as provided in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in section 152.201 of the Family Code. Further, the court may exercise personal jurisdiction regarding the child support issues under sections 102.011 and 159.201 of the Family Code over a person on whom service of citation is required, although the person is not a resident or domiciliary of Texas, if—

1. the person is personally served with citation in Texas;
2. the person submits to the jurisdiction of Texas by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
3. the child resides in Texas as a result of the acts or directives of the person;
4. the person resided with the child in Texas;
5. the person resided in Texas and provided prenatal expenses or support for the child;
6. the person engaged in sexual intercourse in Texas and the child may have been conceived by that act of intercourse;

7. the person, as provided by chapter 160 of the Family Code, registered with the paternity registry maintained by the bureau of vital statistics or signed an acknowledgment of paternity of a child born in Texas; or

8. there is any basis consistent with the constitutions of Texas and of the United States for the exercise of personal jurisdiction.

Tex. Fam. Code § 102.011.

Note that the fact that a Texas court may have personal jurisdiction over both parents in a SAPCR does not always mean that the court may decide all the issues that may be implicated in typical cases. The possibility that a Texas court will have only partial jurisdiction over all issues in a SAPCR when the parties or the child reside in different states is explicitly recognized in Family Code section 102.012. This provision states that a Texas trial court may exercise jurisdiction over only those portions of the suit for which it has authority. *See* Tex. Fam. Code § 102.012. For example, the court's authority to resolve all custody and visitation issues in controversy between the parties may be restricted because another state is the "home state" of the child, even if the Texas court has the requisite, albeit subordinate, jurisdiction under the UCCJEA. *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005) (orig. proceeding).

As noted above, the existence of federal and state legislation has had a significant effect on this area of the law. See the UCCJEA, Tex. Fam. Code §§ 152.001–.317, and the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A. For a more detailed explanation of these statutes, see chapter 43 of this manual. A more comprehensive explanation of these laws is found in Russell J. Weintraub, *Commentary on the Conflict of Laws* (5th ed., Foundation Press 2006).

§ 40.8 Venue

Venue is in the county of the child's residence unless another court has continuing, exclusive jurisdiction under Family Code chapter 155 or venue is fixed in a suit for dissolution of a marriage under Family Code chapter 6. Tex. Fam. Code § 103.001(a). However, a suit in which an adoption is requested may be filed in the county where the child resides or in the county where the petitioners reside, regardless of whether another court has continuing, exclusive jurisdiction; except as provided by Family Code section 155.201, the court with continuing, exclusive jurisdiction is not required to transfer the suit affecting the parent-child relationship to the court in which the adoption suit is filed. Tex. Fam. Code § 103.001(b).

Generally, a child resides in the county where the child's parents reside or the child's parent resides, if only one parent is living. Tex. Fam. Code § 103.001(c). If the parents of the child do not reside in the same county and if a managing conservator, custodian, or guardian of the person has not been appointed, the child resides in the county where the parent having actual care, control, and possession of the child resides. Tex. Fam. Code § 103.001(c)(2); *see In re Narvaiz*, 193 S.W.3d 695 (Tex. App.—Beaumont 2006, orig. proceeding) (per curiam) (where parents living in different counties shared possession of child, residence of parent having *actual* care, control, and possession of child *at time of filing suit* governed venue).

If venue is improper in the court in which an original suit is filed and no other court has continuing, exclusive jurisdiction, on the timely motion of any party other than the petitioner, the court shall transfer the proceeding to the county where venue is proper. Tex. Fam. Code § 103.002(a).

§ 40.9 Trial before Associate Judge

The judge of a court having jurisdiction of suits under Family Code title 1, 4, or 5 or chapter 45 may appoint a full-time or part-time associate judge to perform specified duties if the commissioners court of a county in which the court has jurisdiction authorizes employment of an associate judge. Tex. Fam. Code § 201.001(a). The provisions of Family Code section 201.001 do not apply to an associate judge appointed under sections 201.101 (title IV-D cases) or 201.201 (child protection cases). Tex. Fam. Code § 201.001(e).

The judge may refer to the associate judge any aspect of a suit under title 1, 4, or 5 or chapter 45, including a trial on the merits, unless a party objects in writing within ten days of receiving notice of the referral to the associate judge. *See* Tex. Fam. Code § 201.005(a)–(c).

A court reporter is not required to be provided during a hearing held by an associate judge except when the associate judge presides over a jury trial or a contested final termination hearing. A party, the associate judge, or the referring court may provide for a reporter during the hearing if one is not otherwise provided. Tex. Fam. Code § 201.009(a), (b).

COMMENT: The local rules in some counties refer all cases for final trial to the associate judge on filing, requiring that the objection to the referral be made in the initial pleading or be waived.

Failure to timely object to referral to an associate judge does not deprive a party of the right to appeal to the referring court. *See In re T.S.*, 191 S.W.3d 736, 740 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

A party's failure to request, or waiver of the right to request, a de novo hearing before the referring court does not deprive the party of the right to appeal to or request other relief from the proper appellate court. Tex. Fam. Code § 201.016(a).

Pending a de novo hearing before the referring court, a proposed order or judgment of the associate judge is in full force and effect and is enforceable as an order or judgment of the referring court, except for an order providing for the appointment of a receiver. Tex. Fam. Code § 201.013(a). Except as provided by Family Code section 201.007(c) (default, agreed, or temporary orders or final order where notice, appearance, or right to de novo hearing is waived), if a request for a de novo hearing before the referring court is not timely filed, the proposed order or judgment of the associate judge becomes the order or judgment of the referring court only on the referring court's signing the proposed order or judgment. Tex. Fam. Code § 201.013(b); *see also* Tex. Fam. Code § 201.007(c).

Judicial review by trial de novo is not a traditional appeal, but a new and independent action characterized by all the attributes of an original civil action, only to the extent of the challenged finding—that is, the effect of the appeal is to begin again only as to the issues appealed. *See In re A.A.T.*, No. 13-16-00269-CV, 2016 WL 8188946, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2016, no pet.) (mem. op.).

Generally, when a matter is heard de novo, the referring court is limited to the evidence presented during the de novo hearing. However, Family Code section 201.015(c) expressly permits the referring court to consider the record from the hearing before the associate judge. *See* Tex. Fam. Code § 201.015(c); *see also In re R.S.-T.*, 522 S.W.3d 92, 108 (Tex. App.—San Antonio, no pet.); *but see In re R.R.*, 537 S.W.3d 621, 624 (Tex. App.—San Antonio 2017, no pet.) (while referring court is permitted to consider record from hearing before associate judge, court is not authorized to bar party from calling witnesses at de novo hearing).

An order by an associate judge for the temporary detention or incarceration of a witness or party shall be presented to the referring court on the day the witness or party is detained or incarcerated. If the referring court is not immediately available, the associate judge may order the release of the party or witness, with or without bond, pending a

de novo hearing or may continue the person's detention or incarceration for not more than seventy-two hours. Tex. Fam. Code § 201.013(c).

Associate judges appointed under Family Code section 201.001 have the judicial immunity of a district judge. Tex. Fam. Code § 201.017.

§ 40.10 Trial before Assigned Judge

The Court Administration Act, chapter 74 of the Texas Government Code, divides the state into eleven administrative judicial regions and empowers the presiding judge of each region to assign visiting judges to the courts in that region. *See* Tex. Gov't Code §§ 74.042(a), 74.056; *In re Canales*, 52 S.W.3d 698, 701 (Tex. 2001) (orig. proceeding). Section 74.053 of the Act allows the parties to a civil case to object to a judge assigned to a trial court and sets out the procedure for doing so. An active judge assigned to hear the case is not subject to an objection. Tex. Gov't Code § 74.053(e).

When a judge is assigned to a trial court under chapter 74 of the Government Code, the order of assignment must state whether the judge is an active, former, retired, or senior judge. If it is reasonable and practicable and if time permits, the presiding judge must give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or in part by the assigned judge. If a party to a civil case files a timely objection to the assignment, the judge may not hear the case. The objection must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier. The presiding judge may extend the time to file an objection on written motion by a party who demonstrates good cause. Tex. Gov't Code § 74.053(a)–(c).

If an objection is timely, the assigned judge's disqualification is automatic. *See* Tex. Gov't Code § 74.053(b). A party is entitled to only one objection, except with regard to an assigned judge who was defeated in the last primary or general election for which the judge was a candidate for reelection. Tex. Gov't Code § 74.053(b), (d). When an assigned judge overrules a timely objection to his assignment, all of the judge's subsequent orders are void and the objecting party is entitled to mandamus relief. *In re Canales*, 52 S.W.3d at 701.

The assigned judge must have a valid assignment. When an assigned judge's action exceeds the scope of the assignment, the judgment is void. *Ex parte Eastland*, 811 S.W.2d 571, 572 (Tex. 1991) (orig. proceeding) (per curiam); *In re B.F.B.*, 241 S.W.3d

643, 647 (Tex. App.—Texarkana 2007, no pet.) (after denying motion to recuse, assigned judge went forward with trial on merits although assignment order limited assignment "for the purpose of the assigned judge hearing a Motion to Recuse").

§ 40.11 Managing Conservatorship

Except as provided by Code section 153.004, the court may appoint a sole managing conservator or joint managing conservators. A managing conservator must be a parent, a competent adult, or the Department of Family and Protective Services. If the parents are or will be separated, the court must appoint at least one managing conservator. Tex. Fam. Code § 153.005(a), (b); *see* Tex. Fam. Code § 153.004.

In making the appointment, the court must consider whether, before the suit was filed or while it is pending, a party engaged in a history or pattern of family violence, as defined by Code section 71.004; a party engaged in a history or pattern of child abuse or child neglect; or a final protective order was rendered against a party. Tex. Fam. Code § 153.005(c).

Parental Presumption: Subject to the provisions of Family Code section 153.004 concerning a history of domestic violence or sexual abuse, one or both parents shall be appointed managing conservator(s) unless the court finds that appointment of the parent or parents would not be in the child's best interest because the appointment would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 153.131(a). It is a rebuttable presumption that the appointment of the parents as joint managing conservators is in the child's best interest, but a finding of a history of family violence involving the parents removes the presumption. Tex. Fam. Code § 153.131(b); *see Burns v. Burns*, 116 S.W.3d 916, 919–20 (Tex. App.—Dallas 2003, no pet.).

Immigration status, standing alone, is not probative of a parent's fitness to be a parent so as to deny that parent joint managing conservatorship. Absent evidence showing that it has had a material, adverse effect on the ability to parent, immigration status should not be used as a basis to deny joint managing conservatorship. *See Turrubiartes v. Olvera*, 539 S.W.3d 524, 529–30 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see also E.T.-M. v. Texas Department of Family & Protective Services*, No. 03-18-000622-CV, 2019 WL 988222, at *3 (Tex. App.—Austin Mar. 1, 2019, no pet. h.) (mem. op.) (although father admitted he was not in country legally, considering other factors, trial court did not abuse its discretion by designating father as conservator with exclusive right to determine child's primary residence).

The strong presumption that the best interest of a child is served by appointing a natural parent as managing conservator is deeply embedded in Texas law. *See Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990). To overcome this presumption, a nonparent must prove by a preponderance of the evidence that appointment of the parent as managing conservator would significantly impair the child's physical health or emotional development. *See Lewelling*, 796 S.W.2d at 167.

The evidence cannot merely raise a suspicion or speculation of possible harm but must instead support the logical inference that some specific, identifiable behavior or conduct of the parent will probably harm the child. *See In re B.B.M.*, 291 S.W.3d 463 (Tex. App.—Dallas 2009, pet. denied); *see also In re De la Pena*, 999 S.W.2d 521, 528 (Tex. App.—El Paso 1999, no pet.). Evidence that a nonparent would be a better custodian of the child is wholly inadequate to meet this burden. *See Lewelling*, 796 S.W.2d at 166. The focus on potential harm caused by the child's removal from the nonparent is misplaced. The proper focus of the court's inquiry is solely on whether the placement of the child with the natural parent would significantly impair the child's physical health or emotional development. *See Lewelling*, 796 S.W.2d at 166; *see In re B.B.M.*, 291 S.W.3d at 467–68. The negative effect on the child caused by his separation from the nonparents may not, standing alone, be sufficient to deny a natural parent managing conservatorship. *See In re B.B.M.*, 291 S.W.3d at 468. When a parent and a nonparent are both seeking managing conservatorship, "close calls" should be decided in favor of the parent. *See Lewelling*, 796 S.W.2d at 168.

The parental presumption, however, is applicable only in original custody determinations, not to modifications. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000); *In re C.A.M.M.*, 243 S.W.3d 211, 215–16 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). The parental presumption is not applicable in an original custody determination where there is a mediated settlement agreement naming a nonparent as a joint managing conservator and the only issue before the court is which joint managing conservator should have the right to designate the child's primary residence. *Gardner v. Gardner*, 229 S.W.3d 747 (Tex. App.—San Antonio 2007, no pet.). There is also a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or abuse or family violence by that parent or any person who resides in that parent's household or who is permitted by that parent to have unsupervised access to the child during that parent's periods of possession of or access to the child. Tex. Fam. Code § 153.004(e).

The presumption that a parent should be appointed managing conservator is also rebutted if the court finds that (1) the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent for a period of one year or more, a portion of which was within ninety days preceding the date of intervention in or filing of the suit, and (2) the appointment of the nonparent as managing conservator is in the child's best interest. Tex. Fam. Code § 153.373. Voluntary relinquishment of a child by one parent to another parent does not rebut the parental presumption. *See In re L.D.L.*, No. 13-15-00099-CV, 2017 WL 371486, at *3–4 (Tex. App.—Corpus Christi–Edinburg Jan. 26, 2017, pet. denied) (mem. op.).

The parental preference creates a strong presumption in favor of parental custody and imposes a heavy burden on a nonparent. *See Lewelling*, 796 S.W.2d at 176. For appointment of a parent *and* a nonparent as joint managing conservators, the best interest test, not the higher standard of Family Code section 153.131(a), applies. *See Brook v. Brook*, 881 S.W.2d 297, 298 (Tex. 1994). *But see Critz v. Critz*, 297 S.W.3d 464, 471 (Tex. App.—Fort Worth 2009, no pet.) ("Unlike current section 153.131, former section 14.01 contained no rebuttable presumption that appointment of both parents as joint managing conservators is in the child's best interest. At the time *Brook* was decided, a trial court was authorized to appoint parents as joint managing conservators only upon finding that the appointment would be in the child's best interest. This is no longer the law."). Where both parents and a nonparent are appointed joint managing conservators, a trial court implicitly finds that appointment of only the parents would result in significant impairment to the child's physical health and emotional development. *In re Marriage of Mitchell*, 585 S.W.3d 38, 49 (Tex. App.—Texarkana 2019, no pet. h.).

Domestic Violence: In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than eighteen years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit. Tex. Fam. Code § 153.004(a).

The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault in violation of Penal Code section 22.011 or 22.021 that results in the other parent's becoming pregnant with the child. Joint managing conservators may not be appointed where a history or pattern of abuse between two parents exists, regardless

whether the abuse is inflicted by one spouse against the other, or inflicted mutually by each spouse against the other. *See Watts v. Watts*, 396 S.W.3d 19, 22 (Tex. App.—San Antonio 2012, no pet.).

A history of sexual abuse includes a sexual assault that results in the other parent's becoming pregnant with the child, regardless of the prior relationship of the parents. It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child. Tex. Fam. Code § 153.004(b); *see Baker v. Baker*, 469 S.W.3d 269, 273 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (section 153.004(b) precludes parent from being joint managing conservator when credible evidence presented that parent has history of family violence).

An act by one spouse that is intended to result in bodily injury to the other spouse, and actually results in bodily injury to the other spouse, qualifies as both family violence and physical abuse. *Baker*, 469 S.W.3d at 274.

Even when the child the subject of the suit affecting the parent-child relationship is a relative of one of the parties, another party to the suit, who is not related to the child but has standing under section 102.003, can be appointed as a sole managing conservator if there is credible evidence of a history of family violence. Nothing in the Family Code gives a biological relative greater rights than another person with standing under section 102.003(a)(9) despite the family violence findings. *In re K.A.K.*, No. 05-14-000628-CV, 2015 WL 4736566, at *4 (Tex. App.—Dallas Aug. 11, 2015, pet. denied) (mem. op.).

If a parent files a petition seeking joint managing conservatorship and evidence is presented at trial of a history or pattern of past or present physical abuse by the other parent against the petitioner, it is not error for the trial court to appoint the parents as joint managing conservators. The invited error doctrine prevents a party from asking for relief from the trial court and later complaining on appeal that the trial court gave it. *Kimbell v. Kimbell*, No. 02-14-00202-CV, 2015 WL 4663396 (Tex. App.—Fort Worth Aug. 6, 2015, no pet.) (mem. op.).

In determining whether there is credible evidence of history or pattern of past or present child neglect or abuse or family violence by a parent or other person, as applicable, the

court shall consider whether a protective order was rendered under Family Code chapter 85 against the parent or other person during the two-year period preceding the filing of the suit or during the pendency of the suit. Tex. Fam. Code § 153.004(f). Although section 153.004(f) requires the fact finder to consider the entry of a protective order within the two-year period before the suit was filed or during its pendency, it does not make the entry of the protective order dispositive on the issue of conservatorship. *Alexander v. Rogers*, 247 S.W.3d 757, 764 (Tex. App.—Dallas 2008, no pet.).

The legislature did not define the terms *history* or *pattern* in enacting section 153.004 of the Family Code. In common usage, the term *history* is defined as "events that form the subject matter of a history" or "events of the past." The word *history* in section 153.004(b) leaves the trial court with the discretion to decide whether a parent's acts rise to the level of a history that disqualifies him or her from being appointed as a joint managing conservator. *See C.C. v. L.C.*, No. 02-18-00425-CV, 2019 WL 2865294, at *17 (Tex. App.—Fort Worth July 3, 2019, no pet. h.) (mem. op.). Although a single act of violence or abuse may not constitute a pattern, it can amount to a history of physical abuse. *Alexander*, 247 S.W.3d at 762–63; *In re Marriage of Stein*, 153 S.W.3d 485, 489 (Tex. App.—Amarillo 2004, no pet.). A single act, even if its occurrence is undisputed, does not necessarily mandate a finding that a history of abuse exists. *See C.C.*, 2019 WL 2865294, at *17. The application of section 153.004 does not require a court to consider whether family violence is likely to occur in the future. *Baker*, 469 S.W.3d at 274–75.

COMMENT: The Family Code does not (1) define credible evidence, (2) address the potential conflict between a finding by the district court in which the child custody determination is made and the district court in which a protective order is entered, or (3) address whether a finding in one of these courts is res judicata as to the second court.

Actions outside Cognitive Presence of Child: Texas case law holds that sexual activity of a parent committed outside the presence of a child is insufficient evidence on which to base conservatorship of the child. *See Wolfe v. Wolfe*, 918 S.W.2d 533, 539–40 (Tex. App.—El Paso 1996, writ denied) (father retained custody because no evidence child exposed to any of father's sex paraphernalia); *In re W.G.W.*, 812 S.W.2d 409, 414–15 (Tex. App.—Houston [1st Dist.] 1991, no writ) (mother retained custody because no evidence mother had overnight visitors or that her visitors behaved improperly in front of child, who was between ages three months and six months); *Schwartz v. Jacob*, 394 S.W.2d 15, 18 (Tex. App.—Houston 1965, writ ref'd n.r.e.) (mother retained custody

because her indiscretions took place outside presence of children and children likely unaware of conduct).

Split Custody: The Texas Family Code contains no requirement that a party show or that trial court find "clear and compelling reasons" for separating children during periods of possession. *See In re K.B.K.*, No. 11-12-00155-CV, 2014 WL 1285784, at *4 (Tex. App.—Eastland Mar. 27, 2014, no pet.) (mem. op.); *Gardner v. Gardner*, 229 S.W.3d 747, 754 (Tex. App.—San Antonio 2007, no pet.). Split custody of two or more children of the same marriage is a factor, among many, to consider in determining the best interest of the child. *See In re M.H.*, 319 S.W.3d 137, 154 (Tex. App.—Waco 2010, no pet.). Although section 153.251(c) of the Texas Family Code espouses a preference for all children in a family to be together during periods of possession, it is simply a factor the trial court considers in deciding what is in the child's best interest. *Gardner*, 229 S.W.3d at 754.

Rights and Duties: The Family Code sets forth the rights and duties for parents appointed as joint managing conservators (sections 153.133–.138), the rights and duties of a parent appointed sole managing conservator (section 153.132), the rights and duties of a managing conservator who is not the parent of the child (section 153.371), guidelines to be followed by courts in determining the terms and conditions for possession of a child (sections 153.251–.258, 153.311–.317), and temporary orders concerning rights, duties, possession, and access during and immediately following a parent conservator's military deployment, military mobilization, or temporary military duty (sections 153.701–.709). *See* Tex. Fam. Code §§ 153.132–.138, 153.251–.258, 153.311–.317, 153.371, 153.701–.709.

It was not an abuse of discretion for a trial court to order that a parent named as possessory conservator have none of the parental rights listed in Code section 153.073 (rights of a parent at all times) and that the parent have supervised possession when there was extensive evidence that was not favorable, specifically the parent's lengthy history of aggressive, violent behavior. *See In re T.N.R.*, No. 05-16-00261-CV, 2016 WL 3660331, at *5 (Tex. App.—Dallas July 7, 2016, no pet.) (mem. op.).

If a written agreed parenting plan is filed with the court, the court shall render an order appointing the parents as joint managing conservators only if the parenting plan designates the conservator who has the exclusive right to designate the primary residence of the child and (1) establishes, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence or (2) specifies that the conservator may designate the child's primary residence without regard to geo-

graphic location. Tex. Fam. Code § 153.133(a)(1). Notwithstanding subsection (a)(1), the court shall render an order adopting the provisions of a written agreed parenting plan appointing the parents as joint managing conservators if the parenting plan meets all the requirements of subsections (a)(2) through (a)(6) and provides that the child's primary residence shall be within a specified geographic area. Tex. Fam. Code § 153.133(c).

If a written agreed parenting plan is not filed with the court, the court shall designate the conservator who has the exclusive right to determine the primary residence of the child and (1) establish, until modified by further order, a geographic area within which the conservator shall maintain the child's primary residence or (2) specify that the conservator may determine the child's primary residence without regard to geographic location. Tex. Fam. Code § 153.134(b)(1).

Where neither party pleads for a geographic restriction but each requests the court to designate that party as the parent with the exclusive right to designate the child's primary residence, the request necessarily invokes the jurisdiction of the trial court over matters of custody and control, instilling the trial court with "decretal powers" over the child's geographic residence. *See In re Marriage of Christensen*, 570 S.W.3d 933, 940 (Tex. App.—Texarkana 2019, no pet.).

A trial court did not abuse its discretion when it declined to impose a geographic restriction on a parent joint managing conservator's right to determine the child's primary residence where there was no bad faith or ill motive for that conservator's desire to leave Texas and that conservator expressed willingness to facilitate a long-distance relationship between the child and the other parent. *See Cruz v. Cruz*, No. 04-17-00594-CV, 2018 WL 6793847, at *2 (Tex. App.—San Antonio Dec. 27, 2018, no pet.) (mem. op.).

Although section 153.134(b)(1)(A) specifies only that the trial court may impose a geographic restriction on the child's residence when it appoints parents as joint managing conservators, there is no authority that expressly denies such authority to a trial judge when a parent is awarded the status of sole managing conservator. While section 151.132(1) grants the sole managing conservator the exclusive right to designate the primary residence of the child, that right is subject to limitation by court order. The state's public policy is to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child. Since the best interest of the child shall be the primary consideration of a court in determining issues of conservatorship and possession of and access to a child, a geographic restric-

tion may be imposed in a sole managing conservatorship if it is in the child's best interest. *See In re A.S.*, 298 S.W.3d 834, 836 (Tex. App.—Amarillo 2009, no pet.).

COMMENT: Relevant orders in suits affecting the parent-child relationship in this manual provide an option for the geographic restriction to be lifted without further order of the court if, at the time the joint managing conservator with the right to designate the child's primary residence wishes to remove the child from the specified geographic area for the purposes of changing the primary residence of the child, the other joint managing conservator no longer resides in the specified geographic area. The Family Code does not provide this automatic remedy. A change of a geographic restriction is governed by the statutory provisions for modification of an order in a suit affecting the parent-child relationship. For a detailed treatment of modification, see chapter 41 of this manual.

Careful consideration is urged before including in an order the provision for an automatic lifting of the geographic restriction, as the inclusion may lead to unintended consequences. As an example, assume that at the time an order is rendered, both parties live in Dallas County. The order provides the child's primary residence is restricted to Dallas County. Subsequently, the parent joint managing conservator who does not have the exclusive right to determine the child's primary residence relocates to Harris County. Under the provisions for an automatic lifting of the geographic restriction, the parent joint managing conservator with the exclusive right to designate the child's primary residence may relocate the child to any place of that parent's choosing, including a foreign country, without further order of the court.

§ 40.12 Possessory Conservatorship or Access to Child

If a managing conservator is appointed, the court may appoint one or more possessory conservators. The court shall specify the rights and duties of the possessory conservator and, unless a party shows good cause why specific orders would not be in the child's best interest, shall specify the times and conditions for possession of or access to the child. Tex. Fam. Code § 153.006.

The court shall appoint as a possessory conservator a parent who is not appointed sole or joint managing conservator unless it finds that the appointment of the parent is not in the child's best interest and that parental possession of or access to the child will endanger the child's physical or emotional welfare. Tex. Fam. Code § 153.191. A parent not appointed as a managing or possessory conservator may be ordered to perform other parental duties, including paying child support. Tex. Fam. Code § 153.075. In the

absence of a nonparent's intervention, the trial court has no authority to award any non-party possession of or access to a child. *See In re Marriage of D.E.L. & J.J.P.*, No. 14-17-00216-CV, 2019 WL 545911, at *3 (Tex. App.—Houston [14th Dist.] Feb. 12, 2019, no pet.) (mem. op.).

While there is a parental presumption when appointing a managing conservator, whether to appoint a possessory conservator should be determined by what is in the child's best interest. *See In re Ryan*, No. 12-16-00284-CV, 2016 WL 6996639, at *2 (Tex. App.—Tyler Nov. 30, 2016, orig. proceeding) (mem. op.).

While the guidelines in the standard possession order are intended to guide courts as to the minimum possession for a joint managing conservator, there is a rebuttable presumption that the standard possession order provides the reasonable minimum possession of a child for a parent named as a joint managing conservator and that the order is in the child's best interest. Tex. Fam. Code §§ 153.251(a), 153.252; *In re N.P.M.*, 509 S.W.3d 560, 564 (Tex. App.—El Paso 2016, no pet.).

A parent is not entitled to longer periods of possession than the other simply because that parent was awarded the exclusive right to designate the child's primary residence. *See In re W.B.B.*, No. 05-17-00384-CV, 2018 WL 3434588, at *3 (Tex. App.—Dallas July 17, 2018, no pet.) (mem. op.) (award of roughly equal periods of possession to joint managing conservators does not pose inherent conflict with child's having primary residence, nor does it render right to designate child's primary residence meaningless).

In determining whether to deny, restrict, or limit the possession of a child by a parent appointed possessory conservator, the court shall consider the commission of family violence or sexual abuse by that parent. Tex. Fam. Code § 153.004(c). *See also In re N.P.M.*, 509 S.W.3d at 565 (father had history of aggression with children, resulting in arrest for assault, and he had been physically, mentally, and sexually abusive toward mother in presence of children); *In re B.N.F.*, 120 S.W.3d 873 (Tex. App.—Fort Worth 2003, no pet.) (under Family Code section 153.004(c), mother's past history of sexual assault of a child does not automatically require supervised visitation; it merely requires court to take that history into consideration).

The court may not allow a parent access to a child if there is a history or pattern of committing family violence within the two years before the suit was filed or during its pendency or if the parent engaged in conduct constituting an offense under section 21.02, 22.011, 22.021, or 25.02 of the Texas Penal Code and as a direct result the victim of the

conduct became pregnant with the child. Tex. Fam. Code § 153.004(d). Notwithstanding that provision, the court may allow the parent access if the court finds that doing so would not endanger the child's physical health or emotional welfare and would be in the child's best interest and also renders a possession order designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent. Tex. Fam. Code § 153.004(d–1).

There is also a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or abuse or family violence by that parent or any person who resides in that parent's household or who is permitted by that parent to have unsupervised access to the child during that parent's periods of possession of or access to the child. Tex. Fam. Code § 153.004(e). There is no requirement that the parent be convicted of family violence to sustain a finding that credible evidence of family violence exists. *See In re A.A.E.*, No. 05-18-00210-CV, 2019 WL 1552450, at *4 (Tex. App.—Dallas Apr. 10, 2019, no pet. h.) (mem. op.).

Persistent alienation of the other parent can be a guiding consideration in making possession and access determinations. *Allen v. Allen*, 475 S.W.3d 453, 458 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

The terms of an order denying possession or imposing restrictions or limitations on a parent's right to possession or access shall not exceed those that are required to protect the child's best interest. Tex. Fam. Code § 153.193; *see In re P.A.C.*, 498 S.W.3d 210 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (trial court may continue supervised possession for parent appointed joint managing conservator if warranted by circumstances); *see also In re K.G.*, No. 05-14-01171-CV, 2016 WL 3265215, at *13–14 (Tex. App.—Dallas June 13, 2016, no pet.) (mem. op.) (trial court abused discretion by imposing right of first refusal to grandmother in absence of evidence that child's best interest requires mother to consult specifically with grandmother about supervision instead of making other suitable arrangements); *Newell v. Newell*, 349 S.W.3d 717 (Tex. App.—Fort Worth 2011, no pet.) (trial court's order requiring alcohol tests exceeded restrictions required to protect child's best interest considering limited facts regarding father's alcohol use in past and at time of trial; considering that in year before trial he tested negative for drug use multiple times; and considering drastic restriction placed on his alcohol use and severe consequences of positive alcohol test—which could be attributable to alcohol he drank while child was not in his possession); *In re Walters*, 39 S.W.3d 280, 286 (Tex. App.—Texarkana 2001, no pet.) (trial court may

deny possession and limit or deny access even though it finds that parent should be appointed as possessory conservator).

Even when restrictions are in the best interest of the child, it remains the court's responsibility to specifically define those terms in its decree. *In re J.S.P.*, 278 S.W.3d 414, 423 (Tex. App.—San Antonio 2008, no pet.); *see In re A.P.S.*, 54 S.W.3d 493, 499 (Tex. App.—Texarkana 2001, no pet.). The judgment must state in clear and unambiguous terms what the parties must do to comply with the possession order in a manner that is specific enough to allow an aggrieved party to obtain enforcement of the judgment by contempt. *In re J.S.P.*, 278 S.W.3d at 423; *see In re A.P.S.*, 54 S.W.3d at 499. An order allowing a parent possession of and access to a child solely at the discretion of the other parent affords the other parent complete discretion over a parent's possession, is a complete denial of possession and access to the child, denies the remedy of enforcement to a parent, and is an abuse of the trial court's discretion. *See In re Marriage of Collier*, 419 S.W.3d 390 (Tex. App.—Amarillo 2011, no pet.). By conditioning access to times agreeable to the child or children, a trial court creates the potential for a denial of all access and gives a parent no ability to enforce the order by contempt. *See In re S.V.*, ___ S.W.3d ___, No. 05-16-00519-CV, 2017 WL 3725981, at *7 (Tex. App.—Dallas Aug. 30, 2017, no pet.).

A court may require a parent to complete a fifty-two-week batterer's intervention program as a precondition to increased possession without a finding that the party has a history of physical abuse if there is evidence supporting a finding that such an order is in the child's best interest. *See Barndt v. Barndt*, No. 03-17-00796-CV, 2019 WL 1746995, at *4–5 (Tex. App.—Austin Apr. 19, 2019, no pet. h.) (mem. op.).

A court may order a party to participate in counseling with a qualified mental health professional if it finds at the time of the hearing that the parties have a history of conflict in resolving an issue of conservatorship or possession of or access to the child. Tex. Fam. Code § 153.010; *see In re Scheller*, 325 S.W.3d 640, 645 (Tex. 2010) (orig. proceeding) (per curiam). There is no requirement in section 153.010 that the ordered counseling be conditioned on or linked to any possession of the children or tied as a condition to lifting restrictions imposed on the party's possession of or access to the party's child. *See* Tex. Fam. Code § 153.010; *In re J.H.C.*, No. 11-17-00187-CV, 2019 WL 2557542, at *9 (Tex. App.—Eastland June 20, 2019, no pet. h.) (mem. op.); *but see In re Marriage of Swim*, 291 S.W.3d 500 (Tex. App.—Amarillo 2009, no pet.) (standalone order of indefinite duration imposing conditions requiring parent to continue taking medication, going to counseling, and attending AA meetings that are not conditions precedent to possession and access, and compliance with which is not a requirement in

order to obtain or enhance parent's rights of possession and access, is abuse of discretion).

A court may deny, restrict, or suspend possession of a child by a parent until the parent has attended therapeutic family counseling. *See Acosta v. Soto*, 394 S.W.3d 665, 667 (Tex. App.—El Paso 2012, no pet.).

Generally, trial courts must exercise their judicial power to decide disputed issues and not delegate the decision of questions within their jurisdiction. However, limited circumstances may require the delegation of some authority to a neutral third party to protect the best interest of a child and to minimize, when possible, the restrictions placed on a parent's right to possession of and access to a child. The trial court's ability to obtain assistance from a third party is not limitless, however. The trial court must maintain the power to enforce its judgment, and the trial court's order appointing a third party to assist in deciding issues related to possession and access must be sufficiently specific as to be enforceable by contempt. *See Waters v. Waters*, No. 04-16-00690-CV, 2017 WL 6345223, at *5 (Tex. App.—San Antonio Dec. 13, 2017, no pet.) (mem. op.).

The court may also condition access on a bond and is empowered to set the amount and conditions. *See* Tex. Fam. Code § 153.011; *In re A.R.*, 236 S.W.3d 460, 470 (Tex. App.—Dallas 2007, no pet.).

The Family Code provides guidelines to be followed by courts in determining the terms and conditions for possession of a child by a parent named as a possessory conservator. *See* Tex. Fam. Code §§ 153.192(b), 153.251–.258, 153.311–.317. There is a rebuttable presumption that a standard possession order is in the best interest of the child. *See* Tex. Fam. Code § 153.252. A court may deviate from the terms of the standard order if those terms would be unworkable or inappropriate. *See* Tex. Fam. Code § 153.253. The Family Code does not require that a trial court make a predicate finding of endangerment before it deviates from the standard possession order. *See* Tex. Fam. Code §§ 153.253, 153.256; *In re S.C.B.*, 581 S.W.3d 434, 439 (Tex. App.—El Paso 2019, no pet. h.). The Family Code also allows the trial court to consider the following when ordering the terms of possession of a child: the age, developmental status, circumstances, needs, and best interest of the child; the circumstances of the managing conservator and of the parent named as a possessory conservator; and any other relevant factor. *See* Tex. Fam. Code § 153.256. The commission of family violence is a relevant factor. *In re M.C.*, No. 06-18-00072-CV, 2019 WL 1983384, at *3 (Tex. App.—Texarkana May 6, 2019, no pet. h.) (mem. op.).

The possessory conservator must make an election for the expanded standard possession order before or at the time of the rendition of a possession order. Tex. Fam. Code § 153.317(b). An election made after rendition comes too late. *See Howe v. Howe*, 551 S.W.3d 236, 260 (Tex. App.—El Paso 2018, no pet.).

When possession of a child by a parent is contested and the possession of the child varies from the standard possession order, on proper request by a party the court shall state in writing the specific reasons for the variance from the standard possession order. *See* Tex. Fam. Code § 153.258. The use of the word *shall* in the statute imposes a duty, and the failure of a trial court to comply with that duty is an abuse of discretion. *See In re Rangel*, No. 04-17-00060-CV, 2017 WL 1161173 (Tex. App.—San Antonio Mar. 29, 2017, orig. proceeding) (mem. op.) (even when temporary order is rendered that deviates from standard possession order, party has right to request findings, and trial court must comply with duty imposed by statute).

Provisions regarding temporary orders that may affect possession during and immediately following the military deployment, military mobilization, or temporary military duty of a parent possessory conservator are contained in Tex. Fam. Code §§ 153.701–.709.

§ 40.13 Alternative Possession and Access for Certain Religious Holidays

In addition to or in lieu of periods of holiday possession or access specified in the standard possession order, some parties of faith wish to include religious holidays or dates of religious observance in an order for possession of and access to a child. The following discussion is an effort to inform of the dates of religious observance by three of the more common faiths and guide the practitioner in an understanding of the meaning of those observances. This manual does not attempt to present a thorough study of any religion or its holidays, just a brief overview of the principal holidays of the more common faiths.

In each case, consultation with the client about how the family celebrates their faith and culture is advised in order to carefully craft appropriate holiday provisions.

§ 40.13:1 Christian Holidays

There are many Christian denominations, each with its own customs, liturgies, and observances. This manual does not advocate one denomination over another, denomi-

national churches over nondenominational churches, or Christianity over other religions. References to "our Lord" come from the names of the holidays. The dates of holidays can differ between Orthodox churches and Western Christian churches due to their use of different calendars.

Christmas: Christmas (the Feast of our Lord's Nativity) remembers the birth of Christ and celebrates the Incarnation—God's becoming human. In the Western churches, Christmas Day occurs on December 25. In some Orthodox churches, Christmas Day may fall on January 6 or 7. Many Christians attend church on Christmas Eve in the evening or late at night, and many do so instead of going to church on Christmas Day. There are many Christmas customs, including displays of evergreen garlands, crèches (also known as Nativity scenes), and Christmas trees. The exchange of presents is common among most Christians and many non-Christians. The Christmas season lasts twelve days.

Epiphany: The Epiphany of our Lord Jesus Christ occurs on January 6 in the Western church calendar. In some Orthodox churches, Epiphany may occur on January 19 or 20. The feast celebrates the day the Christ was revealed to the Gentiles, represented by Wise Men from the East following a star. "Epiphany" comes from the Greek "to show forth" or "reveal."

Lent: The season of Lent begins on Ash Wednesday and lasts forty days, but Sundays are not counted among these forty days. As a result, the last day of Lent, Holy Saturday, occurs forty-six days after Ash Wednesday but is considered the fortieth day of Lent. On Ash Wednesday, ashes are placed on foreheads as a reminder of mortality and the need for repentance. Lent is a season of penitence and fasting to prepare for Easter. The last week of Lent is Holy Week, which begins with Palm Sunday, a commemoration of Jesus's entry into Jerusalem. Many Christians attend church services each day of Holy Week, especially the services at the end of the week. The Maundy Thursday service remembers Jesus's washing the feet of his disciples, the Last Supper with his disciples, and his commandment to his disciples to love one another. (Maundy comes from the Latin word "mandatum," which means "command.") On Good Friday, the church remembers Jesus's arrest, trial, crucifixion, and death. On the night of Holy Saturday, some churches will hold an Easter Vigil, a service beginning in darkness changing to light, at which the resurrection of the Lord is celebrated.

Easter: Easter Day celebrates the resurrection of Jesus Christ and is the most important of all Christian holidays. Church services may begin at dawn. Easter Day is a time of great celebration. Easter Day is always the first Sunday after the full moon that falls

on or after March 21. It cannot occur before March 22 or after April 25. Easter determines the beginning of Lent on Ash Wednesday, the days of Holy Week, Ascension Day, day of Pentecost, and Trinity Sunday.

Other Holidays: Throughout the church year, there are other greater and lesser holidays, not all celebrated by each Christian denomination. For example, forty days after Easter Day is Ascension Day, the day the risen Christ ascended to heaven. Pentecost Sunday occurs seven weeks after Easter Sunday, making it the fiftieth day after Easter inclusive of Easter Sunday. (Pentecost comes from the Greek word meaning "fiftieth.") Also known as Whitsunday, Pentecost remembers the Holy Spirit's descending on the disciples. There are numerous saints' days and All Saints' Day (November 1), which can have particular significance to members of certain parishes and congregations that are named after those saints. The Roman Catholic Church and the Orthodox churches have other days of observation that may be special to a client.

Websites: Some useful websites for identifying Christian holidays and determining their dates are—

https://www.officeholidays.com—Shows public holidays of countries and religions up to two years into the future. Go to the "Calendars" tab for dates. For explanations of some holidays, go to the "Upcoming" tab, then "Religious Holidays."

https://www.bcponline.org—Book of Common Prayer of the Episcopal Church. Go to the tabs marked "The Calendar of the Church Year" and "Tables for Finding Holy Days."

https://www.lectionarypage.net—Liturgical calendar of the Episcopal Church in calendar format.

www.usccb.org/about/divine-worship/liturgical-calendar/index.cfm—United States Conference of Catholic Bishops: liturgical calendar page with PDFs of the current and next two years.

https://www.goarch.org/chapel/calendar—Greek Orthodox Archdiocese of America: Calendar of Saints, Feasts, and Readings in the Orthodox Church.

§ 40.13:2 Jewish Holidays

Jewish holidays and festivals are celebrated according to the lunar calendar. The Jewish year contains twelve months of twenty-nine or thirty days, with an extra month added

seven times every nineteen years in order to align it with the solar calendar approximately every three years, so that the festival of Passover is always celebrated in the spring.

In the United States there are generally three "denominations" of Judaism—Orthodox, Conservative, and Reform. Which Jewish holidays and festivals are celebrated and for how long depends on the branch with which a person affiliates or identifies.

Orthodox Jews celebrate and attend religious services on all holidays and festivals and every Sabbath, which begins at sundown on Friday night and ends after sundown on Saturday. Most Orthodox Jews will refrain from riding in a car, working, and adjusting the electricity in their homes on the Sabbath or holidays. Reform Jews generally celebrate only Rosh Hashanah, Yom Kippur, Passover, and Hanukkah. Rosh Hashanah and Yom Kippur are celebrated by attending synagogue services, and Passover and Hanukkah are celebrated by Reform Jews in their homes. Synagogue attendance is not as central to Reform Judaism. Conservative Jews are closer to Orthodox Jews in their observance, but they will drive and work and utilize electricity in their homes on holidays and the Sabbath.

Rosh Hashanah and Yom Kippur: The most important holidays to all Jews are Rosh Hashanah and Yom Kippur, which occur in the early fall. Rosh Hashanah is the Jewish New Year and is celebrated for two days by Orthodox and Conservative Jews. Many Reform Jews observe it for one day, although some observe it for two days. Yom Kippur is the Day of Atonement and is celebrated by fasting and prayer in the synagogue.

Passover: Passover is celebrated by attendance at a "seder" meal with family and friends and the reading of the story of Moses and the Exodus from Egypt. Orthodox and Conservative Jews have two seder meals, on the first and second days of the eight-day Passover holiday. Most Reform Jews hold only one seder meal.

Hanukkah: Hanukkah commemorates the rededication of the Jewish Temple in 165 B.C.E. by the Maccabees after its destruction by the Syrians. The holiday lasts eight days and is marked by the kindling of candles and the giving of gifts.

Other Holidays: There are many other Jewish holidays and festivals, including—

Purim—Purim is based on the Book of Esther and celebrates the saving of the Jews from genocide at the hands of Haman, an official in the court of King Ahasuerus around the 4th Century B.C.E., by Queen Esther and her adopted father Mordechai. Purim is

sometimes called Jewish Hallowe'en, since Jewish children wear masks and costumes on the holiday and drown out the name of Haman with noisemakers when they listen to the reading of the Purim story.

Sukkot—Sukkot is a harvest festival, celebrated by eating all meals out of doors for the eight days of the festival. Jews build temporary structures (sukkots) outside their homes, with the roofs covered in greenery. The last day of the festival is called Shemini Atzeret.

Simchat Torah—Jews read a portion of the Torah (the five books of Moses—Genesis, Exodus, Leviticus, Numbers, and Deuteronomy) each Sabbath for an entire year. Simchat Torah celebrates the conclusion of the public reading of the Torah and the beginning of a new cycle for the next year.

Shavuot—Shavuot, another harvest festival, commemorates the anniversary of the day that Moses received the Ten Commandments on Mount Sinai.

§ 40.13:3 Muslim Holidays

Muslims around the world typically celebrate Eid Al-Fitr and Eid Al-Adha, two major religious holidays. The exact way that these holidays are celebrated varies by country and by different Sunni and Shia Islam sects. In addition, some Muslims from certain countries celebrate cultural holidays, such as Nowruz, the Persian New Year.

Eid Al-Fitr: Eid Al-Fitr is celebrated for one, two, or three days and marks the end of Ramadan, the holy month of dawn-to-sunset fasting. The date for the start of the holiday varies based on the Islamic lunar calendar, but generally the date shifts approximately eleven days earlier each year. The holiday typically involves prayers, celebratory feasts, and visiting with friends and family.

Eid Al-Adha: Eid Al-Adha, also called the "Festival of the Sacrifice," honors the willingness of Abraham to sacrifice his son as an act of obedience to God's command; in commemoration, an animal is sacrificed. Some families go to a local farm for the sacrifice, while other families have the sacrifice done for them elsewhere; a portion of the meat is distributed to the poor. The date for the start of the holiday varies based on the Islamic lunar calendar, but generally the holiday occurs two months and ten days after Eid Al-Fitr. The holiday also involves prayers and visiting with friends and family.

§ 40.14 Interview with Child

In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the child's attorney ad litem, the court *shall* interview a child twelve years of age or older, and *may* interview a child younger than twelve years of age, in chambers to determine the child's wishes about conservatorship or about the person who will have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for such a purpose. Tex. Fam. Code § 153.009(a).

In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the child's attorney ad litem, or on the court's own motion, the court may interview the child in chambers to determine the child's wishes about possession, access, or any other issue in the suit affecting the parent-child relationship. Tex. Fam. Code § 153.009(b).

In a jury trial, the court may not interview a child in chambers about an issue on which a party is entitled to a jury verdict. Tex. Fam. Code § 153.009(d).

In any trial or hearing, the court may permit the attorney for a party, the amicus attorney, the child's guardian ad litem, or the child's attorney ad litem to be present at the interview. Tex. Fam. Code § 153.009(e). On the motion of a party, the amicus attorney, or the child's attorney ad litem, or on the court's own motion, the court shall cause a record of the interview to be made when the child is twelve years of age or older, and the record of the interview shall be a part of the record in the case. Tex. Fam. Code § 153.009(f). Even if the trial court abuses its discretion by not performing a mandatory in-chamber interview of a child, the party requesting the interview must make an offer of proof demonstrating the expected discussion between the court and the child for an appellate court to be able to determine whether the trial court's error was harmful. *See In re T.A.L.*, No. 07-17-00274-CV, 2018 WL 3862994, at *3 (Tex. App.—Amarillo Aug. 14, 2018, pet. denied) (mem. op.); *see also In re N.W.*, No. 02-12-00057-CV, 2013 WL 5302716, at *10 (Tex. App.—Fort Worth Sept. 19, 2013, no pet.) (mem. op.).

COMMENT: If the trial court refuses to conduct a properly requested mandatory interview of a child twelve years of age or older or refuses to cause a record of the interview to be made after proper request, the party seeking the mandatory interview or record of the interview should consider preserving the error on appeal by making an offer of proof under Tex. R. Evid. 103(a)(2).

Interviewing a child does not diminish the court's discretion in determining the child's best interests. Tex. Fam. Code § 153.009(c).

COMMENT: As a precaution, the practitioner should always ensure that a record of the interview is made. *See Long v. Long*, 144 S.W.3d 64, 69 (Tex. App.—El Paso 2004, no pet.) (court apparently based decision on what children said in interview, but no record of interview was made). If a record is not made, it is presumed that the interview of the minor child supports the trial court's ruling. *Ohendalski v. Ohendalski*, 203 S.W.3d 910 (Tex. App.—Beaumont 2006, no pet.); *Patterson v. Brist*, 236 S.W.3d 238 (Tex. App.—Houston [1st Dist.] 2006, pet. dism'd).

§ 40.15 Child Support

Child support is discussed in chapter 9 of this manual.

§ 40.16 Attorney's Fees and Costs

The court may award costs in a suit or motion under title 5 of the Family Code and in a habeas corpus proceeding. Tex. Fam. Code § 106.001. The court may also render judgment for reasonable attorney's fees and expenses in a suit under title 5 of the Family Code and may order the judgment and postjudgment interest to be paid directly to an attorney. A judgment for attorney's fees and expenses may be enforced in the attorney's name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 106.002.

Tex. Fam. Code § 106.002 does not impose a prevailing-party requirement on an award for attorney's fees. Although success on the merits may be relevant, it is not a compulsory requirement under the statute. *In re R.E.S.*, 482 S.W.3d 584, 586–87 (Tex. App.—San Antonio 2015, no pet.).

Attorney's Fees in Temporary Orders: In a suit affecting the parent-child relationship, the court can make a temporary order for the safety and welfare of a child, including an order for payment of reasonable attorney's fees and expenses. Tex. Fam. Code § 105.001(a)(5). A party seeking a temporary order for interim attorney's fees under this section has the burden of showing that payment of the requested attorney's fees is necessary for the safety and welfare of the children. The trial court may not make a temporary order for payment of attorney's fees under this section for another purpose, including an order for the purpose of leveling the playing field. *See In re Payne*, No.

03-17-00757-CV, 2018 WL 1630933, at *2 (Tex. App.—Austin Apr. 5, 2018, orig. proceeding) (mem. op.).

Attorney's Fees on Appeal: Attorney's fees on appeal are discussed in section 20.16 in this manual.

Fees for Court-Appointed Representatives: In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, in addition to the attorney's fees that may be awarded under Family Code chapter 106, the following persons are entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit: (1) an attorney appointed as an amicus attorney or as an attorney ad litem for the child and (2) a professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate. Tex. Fam. Code § 107.023(a). The court may determine that such fees are necessaries for the benefit of the child. Tex. Fam. Code § 107.023(d). A friend of the court is entitled to compensation for services rendered and for expenses incurred in rendering the services. Tex. Fam. Code § 202.005(a).

Attorney's Fees as Condition Precedent to Filing Suit: Denying a party access to courts absent payment of money has been found to be a denial of access to courts under due course of law. *Byars v. Evans*, No. 07-14-00064-CV, 2016 WL 105671, at *5 (Tex. App.—Amarillo Jan. 8, 2016, no pet.) (mem. op.) (citing *In re Flores*, 135 S.W.3d 863, 865 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding)). In *Byars*, the trial court's order provided that "except upon good cause shown by sworn affidavit, prior to filing any further Motions regarding the children, Father shall demonstrate that he has paid no less than $10,000 of the attorney's fees awarded" to the mother. The court distinguished *Flores* because the father in *Flores* was not permitted to proceed to trial under any circumstances other than payment of interim attorney's fees, resulting in a complete denial of his access to courts. In *Byars*, the court found that the trial court's order—in a family law case where there was a strong level of animosity between the parties—conditioning the filing of further motions on compliance with a reasonable condition to be akin to the denial of access to the courts imposed on a vexatious litigant through the use of a prefiling order. Because the father's access to court was initially conditioned "upon good cause shown by sworn affidavit" before filing a motion regarding his children, the denial of access to the courts was not absolute. *See Byars*, 2016 WL 105671, at *5.

Sanctions in the nature of attorney's fees cannot be awarded for a hypothetical suit that may be filed in the future. *See In re S.V.*, ___ S.W.3d ___, No. 05-16-00519-CV, 2017 WL 3725981, at *11–12 (Tex. App.—Dallas Aug. 30, 2017, pet. denied) (trial court ordered that if father should initiate further litigation other than child support modification or enforcement, he would pay all attorney's fees for both parties and pay mother or her attorney $5,000 on filing of suit).

§ 40.17 Temporary Orders

In a suit affecting the parent-child relationship, the court may make a temporary order, including the modification of a prior temporary order, for the safety and welfare of the child, including an order (1) for the temporary conservatorship of the child, (2) for the temporary support of the child, (3) restraining a party from disturbing the peace of the child or of another party, (4) prohibiting a person from removing the child beyond a geographical area identified by the court, or (5) for payment of reasonable attorney's fees and expenses. Tex. Fam. Code § 105.001(a).

The fact-driven nature of temporary orders does not mean that trial courts may rely completely on their own ad hoc determinations of what best serves the safety and welfare for the child. Rather, a trial court's order must comport with the legislatively pronounced public policy guidelines that apply in all suits affecting the parent-child relationship. *See Lenz v. Lenz*, 79 S.W.3d 10, 14 (Tex. 2002).

A court abuses its discretion in imposing temporary orders without due regard for the current living situations of the parties, especially the stability of the child's current living situation, and without regard for the financial or practical ability of the parties to comply with the court's orders. *In re Casanova*, No. 05-14-01166-CV, 2014 WL 6486127, at *4 (Tex. App.—Dallas Nov. 20, 2014, orig. proceeding) (mem. op.).

In entering temporary orders, a trial court is required to attempt to avoid disrupting the child's education. *See In re Casanova*, 2014 WL 6486127, at *5 (finding trial court's order would have required five-and-a-half year-old child to attend her fourth school in three years).

The trial court must also consider the positive benefit of frequent contact with the child's extended family. The opportunity to strengthen the child's relationship with extended family members who may serve as emotional support during the difficult change in the configuration of the child's immediate family is a further benefit the trial

court is required to take into account in assessing whether altering the child's primary residence is advisable. *See In re Casanova*, 2014 WL 6486127, at *5.

The trial court must give effect to the policy imperative that dictates the enforcement, to the degree possible, of agreements reached without judicial intervention. Public policy particularly favors the nonjudicial resolution of disputes concerning the parent-child relationship. *See In re Casanova*, 2014 WL 6486127, at *5 (citing Tex. Civ. Prac. & Rem. Code § 154.002, which states that it is the public policy of Texas to "encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship").

An order may not be entered for temporary conservatorship of a child (except in an emergency order sought by a governmental entity under Family Code chapter 262), for temporary support of a child, or for payment of reasonable attorney's fees and expenses, except after notice and hearing. *See* Tex. Fam. Code § 105.001(b), (h).

Absent a finding supported by evidence that the safety and welfare of a child will be significantly impaired by the appointment of a parent as the child's managing conservator, the parent's decision regarding whether the child will have any contact with third parties is a fundamental right of a parent, and it is unconstitutional for the trial court to enter temporary orders appointing third parties as temporary possessory conservators. *In re Aubin*, 29 S.W.3d 199, 203–04 (Tex. App.—Beaumont 2000, orig. proceeding).

A temporary order in a suit affecting the parent-child relationship rendered in accordance with Family Code section 105.001 is not required to include a temporary parenting plan. The court may not require the submission of a temporary parenting plan in any case or by local rule or practice. Tex. Fam. Code § 153.602.

A court does not have the authority to issue a temporary order that effects a permanent name change. *See In re Pacharzina*, No. 03-12-00353-CV, 2012 WL 2161005, at *2 (Tex. App.—Austin June 14, 2012, orig. proceeding) (mem. op.).

Chapter 156 of the Family Code (modification) does not apply to modifications of temporary orders. The policy concerns regarding finality of judgments and the cessation of custody litigation are not implicated in the same way by modifications of temporary orders because at the time of their entry or modification the litigation concerning the child is ongoing. For that reason, the Family Code expressly sets forth a different test by which the propriety of temporary orders and any modifications of temporary orders are to be measured, namely whether temporary orders are for the "safety and welfare"

of the child. *In re McPeak*, 525 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding); *In re Casanova*, 2014 WL 6486127, at *3.

Temporary orders for the payment of reasonable attorney's fees and expenses are discussed in section 40.16 above.

Modification of temporary orders is further discussed in section 4.15 in this manual, and temporary orders pending appeal are discussed in section 4.18.

§ 40.18 Jury

A party has a limited right to a jury trial on timely demand and payment of the jury fee. Tex. Fam. Code § 105.002(a); Tex. R. Civ. P. 216. In a jury trial, a party is entitled to a verdict by the jury and the court may not contravene a jury verdict on the issues of (1) the appointment of a sole managing conservator; (2) the appointment of joint managing conservators; (3) the appointment of a possessory conservator; (4) the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child; (5) the determination of whether to impose a restriction on the geographic area in which a joint managing conservator may designate the child's primary residence; and (6) if such a restriction is imposed, the determination of the geographic area within which the joint managing conservator must designate the child's primary residence. Tex. Fam. Code § 105.002(c)(1).

The court may not submit to the jury questions on the issues of (1) support under Family Code chapter 154 or 159; (2) a specific term or condition of possession of or access to the child; or (3) any right or duty of a conservator, other than the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child under Family Code section 105.002(c)(1)(D). Tex. Fam. Code § 105.002(c)(2).

§ 40.19 Child Custody Evaluation

In a suit affecting the parent-child relationship, the court may order the preparation of a child custody evaluation regarding (1) the circumstances and conditions of the child, a party to the suit, and, if appropriate, the residence of any person requesting conservatorship of, possession of, or access to the child and (2) any issue or question relating to the suit at the request of the court before or during the evaluation process. Tex. Fam. Code § 107.103(a). A person who has not conducted a child custody evaluation may not offer an expert opinion or recommendation relating to conservatorship, possession, or access

except in a suit in which the Department of Family and Protective Services is a party. Tex. Fam. Code § 104.008(a), (c).

Child Custody Evaluator: A "child custody evaluator" means an individual who conducts a child custody evaluation. The term includes a private child custody evaluator. Tex. Fam. Code § 107.101(2).

Specific minimum educational, licensure, and experience qualifications are required of most child custody evaluators. Tex. Fam. Code § 107.104(b)(1), (b)(2), (c), (d). An individual who is employed by or under contract with a domestic relations office may conduct a child custody evaluation, provided that the individual conducts child custody evaluations relating only to families ordered by a court to participate in child custody evaluations conducted by the domestic relations office. Tex. Fam. Code § 107.104(b)(3). Training in family violence dynamics is also required. Tex. Fam. Code § 107.104(e). In certain counties with a population of less than 500,000, if an individual meeting the requirements is not available in the county to conduct a child custody evaluation in a timely manner, the court may appoint an individual the court determines to be otherwise qualified to conduct the evaluation. Tex. Fam. Code § 107.106(a), (a–1). Provisions concerning conflicts of interest or bias on the part of the child custody evaluator are set out at Tex. Fam. Code § 107.107.

General Provisions for Evaluation and Report: The child custody evaluator must conform to professional standards and any local or court-imposed rules, using evidence-based practice methods and using the current best evidence in making assessments and recommendations. The evaluator must disclose communications with an attorney of record in the case (except an attorney ad litem or amicus attorney), verify pertinent facts and information in the report, and state the basis for conclusions or recommendations. If only one side of a disputed case has been evaluated, no recommendation may be made, but the evaluator may state whether the party evaluated appears suitable for conservatorship. The report must include the identification and basis for qualification of each evaluator who conducted any part of the evaluation. Tex. Fam. Code § 107.108.

Elements of Child Custody Evaluation: Elements required in a child custody evaluation, including interviews, observation, evaluation of home environments, contact with collateral sources, and assessment of the child's relationship with each party seeking possession or access, are set out in detail in Tex. Fam. Code § 107.109(c) and (d). The evaluator must complete the basic elements identified in section 107.109(c) and any additional element ordered by the court, unless the failure to complete an element is

satisfactorily explained, before offering an opinion about conservatorship. The evaluator must identify any basic element identified in subsection (c) or additional element identified in subsection (d) that was not completed, explain why the element was not completed, and explain the likely effect of the missing element on the evaluator's confidence in his expert opinion. Tex. Fam. Code § 107.109(a), (b).

Testing: A child custody evaluator may conduct psychometric testing as part of a child custody evaluation if it is ordered by the court or determined necessary by the child custody evaluator and the child custody evaluator is appropriately licensed and trained to administer and interpret the specific psychometric and tests selected and is trained in the specialized forensic application of psychometric testing. Tex. Fam. Code § 107.110(a). If a child custody evaluator considers psychometric testing necessary but lacks specialized training or expertise to use the specific tests, the evaluator may designate a licensed psychologist to conduct the testing and may request additional orders from the court. Tex. Fam. Code § 107.110(d).

Communications and Recordkeeping: Notwithstanding any rule, standard of care, or privilege applicable to the professional license held by a child custody evaluator, a communication made by a participant in a child custody evaluation is subject to disclosure and may be offered in any judicial or administrative proceeding if otherwise admissible under the rules of evidence. Tex. Fam. Code § 107.112(a). Provisions for the making and retention of records by the child custody evaluator are set out in Tex. Fam. Code § 107.112(b)–(h).

COMMENT: A child custody evaluation report will likely contain private information about a party or child, such as information about the health care and mental health of such an individual, including any results of psychometric testing conducted by the child custody evaluator, and other information of a personal nature that may not be appropriate for public consumption. Because there is no express statutory provision for sealing of the child custody evaluation report, it may be appropriate to seek an order from the court to seal the report to maintain some measure of privacy for the individual.

Fees: If the court orders a child custody evaluation to be conducted, the court must award the person appointed as the child custody evaluator a reasonable fee for the preparation of the evaluation to be imposed in the form of a money judgment and paid directly to the agency or other person. The person may enforce the judgment for the fee by any means available under law for civil judgments. Tex. Fam. Code § 107.115.

Expert Testimony: In measuring the reliability of an expert's testimony regarding parenting and psychological assessments, the "soft" science factors provided in *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), apply—that is, whether (1) the field of expertise is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of that field, and (3) the expert's testimony properly relies on the principles involved in that field of study. *See In re J.R.*, 501 S.W.3d 738, 747 (Tex. App.—Waco 2016, pet. denied).

§ 40.20 Preferential Setting

In any suit affecting the parent-child relationship, after a hearing the court may grant a motion for a preferential setting for a trial on the merits filed by a party, the amicus attorney, or the attorney ad litem for the child and may give precedence to that hearing over other civil cases if the court finds that the delay created by ordinary scheduling practices will unreasonably affect the best interest of the child. Tex. Fam. Code § 105.004.

§ 40.21 Best Interest of Child

The best interest of the child shall always be the primary consideration of the court in determining questions of conservatorship or possession of and access to a child. Tex. Fam. Code § 153.002. In determining the best interest of a child, a court may consider (1) the desires of the child, (2) the child's emotional and physical needs now and in the future, (3) any emotional and physical danger to the child now and in the future, (4) the parental abilities of the individuals seeking primary possession, (5) the programs available to assist these individuals to promote the child's best interest, (6) the plans for the child by those seeking primary possession, (7) the stability of the home or proposed placement, (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent. *See In re C.A.M.M.*, 243 S.W.3d 211, 221 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976)).

§ 40.22 Mandatory Provisions in Order

Identification: The order must contain the Social Security number and driver's license number of each party to the suit, including the child, except that the child's

Social Security number or driver's license number is not required if such a number has not been assigned to the child. Tex. Fam. Code § 105.006(a)(1).

COMMENT: Although the Social Security and driver's license numbers are classified as sensitive data (*see* Tex. R. Civ. P. 21c(a), (b)), their inclusion in a pleading in a suit affecting the parent-child relationship is statutorily required. Since the pleading must contain sensitive data, the clerk must be notified of that fact. A document that is not electronically filed must contain, on the upper left-hand side of the first page, the phrase "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d)(2). If the document is electronically filed, it must be designated as containing sensitive data when it is filed. Tex. R. Civ. P. 21c(d)(1).

Other Required Information: The order must also contain each party's current residence address, mailing address, home telephone number, employer's name, employment address, and work telephone number. Tex. Fam. Code § 105.006(a)(2). The court may order this information not to be disclosed to another party or may render any other order the court considers necessary if it finds after notice and hearing that requiring a party to provide the information to another party is likely to cause the child or a conservator harassment, abuse, serious harm, or injury or to subject the child or a conservator to family violence. Tex. Fam. Code § 105.006(c).

Requirement of Notice of Change in Required Information: Each party shall be ordered to inform each other party, the court that rendered the order, and the state case registry under Family Code chapter 234 of an intended change in residence address, mailing address, home telephone number, name of employer, address of employment, driver's license number, and work telephone number as long as any person is obligated to pay child support or entitled to possession or access under the order. Tex. Fam. Code § 105.006(b).

The court may order the information not to be disclosed to another party or may render any other order the court considers necessary if the court finds after notice and hearing that requiring a party to provide the information to another party is likely to cause the child or a conservator harassment, abuse, serious harm, or injury or to subject the child or a conservator to family violence. Tex. Fam. Code § 105.006(c).

The order must contain certain language in a prominently displayed statement in boldfaced type, in capital letters, or underlined ordering each party to inform each other party, the court, and the state case registry of any change of residence address, mailing address, home telephone number, name of employer, address of employment, driver's

license number, and work telephone number and warning that a failure to do so may result in further litigation to enforce the order, including contempt of court, which may be punished by confinement in jail for up to six months, a fine of up to $500 for each violation, and a money judgment for payment of attorney's fees and court costs. Tex. Fam. Code § 105.006(e). The address for notice to the state case registry is State Case Registry, Contract Services Section, MC046S, P.O. Box 12017, Austin, TX 78711-2017.

A party shall comply with the order by giving written notice to each other party of an intended change in any of the required information. The party must give written notice by registered or certified mail of an intended change in the required information to each other party on or before the sixtieth day before the change is made. If the party does not know or could not have known of the change soon enough to provide the sixty-day notice, written notice shall be given on or before the fifth day after the date the party knew of the change. This notice may be waived by the court on motion by a party if the giving of the notice is likely to expose the child or the party to harassment, abuse, serious harm, or injury. Tex. Fam. Code § 105.007.

Notice to Peace Officers: An order in a suit that provides for the possession of or access to a child must contain certain language in a prominently displayed statement in bold-faced type, in capital letters, or underlined giving notice that any Texas peace officer may use reasonable efforts to enforce the terms of the child custody order, that the peace officer and the officer's agency are entitled to the applicable immunity regarding the officer's good-faith performance in the scope of the officer's duty in enforcing the terms of the order that relate to child custody, and that any person who knowingly presents for enforcement an order that is invalid or no longer in effect commits an offense punishable by confinement in jail for as long as two years and a fine of as much as $10,000. Tex. Fam. Code § 105.006(e–1).

Notice Regarding Child Support: An order in a suit that orders child support must contain certain language in a prominently displayed statement in bold-faced type, in capital letters, or underlined giving notice that the court may modify the order if the circumstances of the child or a person affected by the order have materially and substantially changed or if it has been three years since the order was rendered or last modified and the monthly amount ordered differs by either 20 percent or $100 from the amount that would be ordered under the child support guidelines. Tex. Fam. Code § 105.006(e–2).

Warning: The order must also contain certain language in a prominently displayed statement in bold-faced type, in capital letters, or underlined regarding the penalty for denial of possession of or access to a child and the possible consequences of failure to make child support payments exactly as ordered and informing the parties that the failure of a party to pay child support does not justify denying that party court-ordered possession of or access to the child, nor does a party's refusal to allow possession of or access to the child justify failure to pay court-ordered child support. Tex. Fam. Code § 105.006(d).

§ 40.23 Parenting Plan

The final order in a suit affecting the parent-child relationship must include a parenting plan. Tex. Fam. Code § 153.603. Parenting plans are discussed in chapter 16 of this manual.

§ 40.24 Parent Education and Family Stabilization Course; Counseling

In a suit affecting the parent-child relationship the court may order the parties to attend a parent education and family stabilization course if the court determines that the order is in the child's best interests. The parties may not be required to attend the course together and may be prohibited from taking the course together if there is a history of family violence. Tex. Fam. Code § 105.009(a), (b).

The course, which must be at least four hours but not more than twelve hours long, must be designed to educate and assist parents about the consequences of divorce on parents and children and must cover certain topics specified in the Family Code. It may not be designed to provide individual mental health therapy or individual legal advice, and it must be available in both English and Spanish. Tex. Fam. Code § 105.009(c), (d), (m).

Information obtained in a course or a statement made by a participant to a suit during a course may not be considered in the adjudication of the suit or in any subsequent legal proceeding, and any report that results from participation may not become a record in the suit unless the parties stipulate to the record in writing. Tex. Fam. Code § 105.009(f).

A party who fails to attend or complete a course ordered by the court may be held in contempt, have his pleadings stricken, or be the subject of sanctions under rule 215 of

the Texas Rules of Civil Procedure. Failure or refusal to attend or complete a course may not delay the court from rendering judgment. Tex. Fam. Code § 105.009(g).

COMMENT: The attorney should check the local rules to determine whether the courts in that jurisdiction require parent education courses and, if so, under what circumstances.

Counseling: If the court finds at the time of a hearing that the parties have a history of conflict in resolving an issue on conservatorship or possession of or access to the child, the court may order a party to participate in counseling with a mental health professional with specialized training and to pay for that counseling. Tex. Fam. Code § 153.010(a).

§ 40.25 Passport Application for Minor

Federal regulations control who may apply for a passport for a minor child. *See* 22 C.F.R. § 51.28.

A minor aged sixteen or above must appear in person and may execute a passport application on his own behalf unless the minor's personal appearance is specifically excused by a senior passport authorizing officer or unless, in the judgment of the person before whom the application is executed, it is not advisable for the minor to execute his own application. In such a case, it must be executed by a parent or guardian of the minor or by a person in loco parentis, unless the personal appearance of the parent, legal guardian, or person in loco parentis is excused. 22 C.F.R. § 51.28(b)(1). The passport authorizing office may at any time require such a minor to submit the notarized consent of a parent, a legal guardian, or a person in loco parentis to the issuance of the passport. 22 C.F.R.§ 51.28(b)(2).

Minors under the age of sixteen years must appear in person, unless the minor's personal appearance is specifically excused by a senior passport authorizing officer. If the minor's personal appearance is thus excused, the person or persons executing the application on the minor's behalf must appear in person and verify the application by oath or affirmation unless these requirements are also excused. 22 C.F.R. § 51.28(a)(1).

Except as specifically provided in the regulation, both parents or each of the minor's legal guardians, if any, whether applying for a passport for the first time or for a renewal, must execute the application on behalf of the minor and provide documentary evidence of parentage or legal guardianship showing the minor's name, the minor's

date and place of birth, and the names of the parent or parents or legal guardian. 22 C.F.R. § 51.28(a)(2).

A passport application may be executed on behalf of a minor under age sixteen by just one parent or legal guardian if that person provides either a notarized written statement or notarized affidavit from the nonapplying parent or guardian, if applicable, consenting to the issuance of the passport or documentary evidence that he or she is the sole parent or has sole custody of the child. 22 C.F.R. § 51.28(a)(3).

An individual may apply in loco parentis on behalf of a minor under age sixteen by submitting a notarized written statement or a notarized affidavit from both parents or each legal guardian, if any, specifically authorizing the application. However, if only one parent or legal guardian provides the notarized written statement or notarized affidavit, documentary evidence that an application may be made by one parent or legal guardian, consistent with section 51.28(a)(3), must be presented. 22 C.F.R. § 51.28(a)(4).

Documentary evidence in support of an application executed on behalf of a minor under age sixteen by one parent or legal guardian or by a person in loco parentis may include, but is not limited to—

1. a birth certificate providing the minor's name, the minor's date and place of birth, and the name of only the applying parent;
2. a Consular Report of Birth Abroad of a Citizen of the United States of America or a Certification of Report of Birth of a United States Citizen providing the minor's name, the minor's date and place of birth, and the name of only the applying parent;
3. a copy of the death certificate for the nonapplying parent or legal guardian;
4. an adoption decree showing the name of only the applying parent;
5. an order of a court of competent jurisdiction (1) granting sole custody to the applying parent or legal guardian and containing no travel restrictions inconsistent with issuance of the passport, (2) specifically authorizing the applying parent or legal guardian to obtain a passport for the minor, regardless of custodial arrangements, or (3) specifically authorizing the travel of the minor with the applying parent or legal guardian;
6. an order of a court of competent jurisdiction terminating the parental rights of the nonapplying parent or declaring the nonapplying parent or legal guardian to be incompetent.

22 C.F.R. § 51.28(a)(3)(ii)(A)–(F).

An order of a court of competent jurisdiction providing for joint legal custody or requiring the permission of both parents or the court for important decisions will be interpreted as requiring the permission of both parents or the court, as appropriate. Even if such an order exists, a passport may be issued when there are compelling humanitarian or emergency reasons relating to the minor's welfare. 22 C.F.R. § 51.28(a)(3)(ii)(G).

Provisions for issuance of a passport when only one parent, legal guardian, or person acting in loco parentis executes the application in cases of exigent or special family circumstances are set out in subsection (a)(5) of the regulation. *See* 22 C.F.R. § 51.28(a)(5).

Any State Department official adjudicating a passport application on behalf of a minor may require an applicant to submit other documentary evidence deemed necessary to establish the applying adult's entitlement to obtain a passport on behalf of a minor under the age of sixteen in accordance with the provisions of 22 C.F.R. section 51.28. *See* 22 C.F.R. § 51.28(a)(6).

An interested party may object to the issuance of a passport to a minor. At any time before the issuance of a passport to a minor, the application may be disapproved, and a passport may be denied on receipt of a written objection from a parent or legal guardian, as long as the objecting party provides sufficient documentation of his custodial rights or other authority to object. An order from a court of competent jurisdiction providing for joint legal custody or requiring the permission of both parents or the court for important decisions will be interpreted a requiring the permission of both parents or the court, as appropriate. The Department of State will consider a court of competent jurisdiction to be a U.S. state court or a foreign court located in the child's home state or place of habitual residence and may require that conflicts regarding custody orders, whether domestic or foreign, be settled by the appropriate court before a passport may be issued. 22 C.F.R. § 51.28(c)(1)–(4).

Either parent or any legal guardian may on written request obtain information regarding the application for and issuance of a passport to a minor unless the inquiring parent's parental rights have been terminated by a court order, a copy of which has been provided to the Department of State. The department may deny that information to a parent or legal guardian if it determines that the minor (1) objects to disclosure and is sixteen years of age or older or (2) is of sufficient age and maturity to invoke his own privacy rights. 22 C.F.R. § 51.28(c)(5).

§ 40.26 Electronic Communication with Child

On request by a conservator, the court may award the conservator reasonable periods of electronic communication with the child to supplement the conservator's periods of possession. In deciding whether to award such communication, the court must consider whether electronic communication is in the child's best interest, whether the necessary equipment is reasonably available to all the affected parties, and any other factor the court considers appropriate. Tex. Fam. Code § 153.015(b). "Electronic communication" includes communication facilitated by the use of a telephone, electronic mail, instant messaging, videoconferencing, or webcam. Tex. Fam. Code § 153.015(a).

If the court awards a conservator electronic communication periods, each conservator must provide the other conservator with the child's e-mail address and other electronic communication access information; notify the other conservator of any change in that information not later than twenty-four hours after the date the change takes effect; and, if necessary equipment is reasonably available, accommodate electronic communication with the child with the same privacy, respect, and dignity accorded all other forms of access, at a reasonable time and for a reasonable duration subject to any limitation in the court's order. Tex. Fam. Code § 153.015(c).

The court may not consider the availability of electronic communication as a factor in determining child support, and it is not intended as a substitute for physical possession or access where otherwise appropriate. Tex. Fam. Code § 153.015(d).

If the court's order contains provisions related to a finding of family violence in the suit, including supervised visitation, the court may award periods of electronic communication only if the award and terms of the award are mutually agreed to by the parties and the terms of the award are printed in the court's order in bold-faced, capitalized type and include any specific restrictions relating to family violence or supervised visitation, as applicable, required by other law to be included in a possession or access order. Tex. Fam. Code § 153.015(e).

§ 40.27 Permanent Injunctive Relief

The Family Code does not expressly address permanent injunctions in suits affecting the parent-child relationship. *See Peck v. Peck*, 172 S.W.3d 26, 35 (Tex. App.—Dallas 2005, pet. denied). Therefore, one must apply the rules applicable to permanent injunctions in civil cases generally. *See In re A.A.N.*, No. 02-13-00151-CV, 2014 WL 3778215 (Tex. App.—Fort Worth July 31, 2014, no pet.) (per curiam) (mem. op.). To be entitled

to a permanent injunction, the party seeking the injunction must plead and prove (1) a wrongful act, (2) imminent harm, (3) irreparable injury, and (4) absence of an adequate remedy at law. *See In re A.A.N.*, 2014 WL 3778215. *But see Peck*, 172 S.W.3d at 36 (where Family Code speaks specifically to injunctive relief (that is, in temporary orders), it specifically dispenses with requirement of establishing such prerequisites).

There are limits to seeking a permanent injunction on speech. While a permanent injunction against adjudicated speech is not a prior restraint, an injunction prohibiting future speech based on that adjudication impermissibly threatens to sweep protected speech into its prohibition and is an unconstitutional infringement on Texans' free speech rights under article I, section 8, of the Texas Constitution. *See Kinney v. Barnes*, 443 S.W.3d 87, 101 (Tex. 2014).

§ 40.28 International Issues in Suits Affecting the Parent-Child Relationship

International issues in suits affecting the parent-child relationship are discussed in chapter 55 of this manual.

§ 40.29 Conditions Precedent to Filing Suit for Modification

A trial judge has no authority to require mediation as a precondition to filing a modification suit. *See In re K.L.D.*, No. 12-10-00386-CV, 2012 WL 2127464, at *8 (Tex. App.—Tyler June 13, 2012, no pet.) (mem. op.).

In an agreed divorce, a contractual condition precedent requiring a parent to pay the other parent a sum of money on the date a suit for modification is filed was found void because it violated section 154.124(c) of the Texas Family Code prohibiting agreements regarding child support to be enforced as a contract. *In re I.R.H.*, No. 04-12-00366-CV, 2013 WL 1850778 (Tex. App.—San Antonio May 1, 2013, pet. denied) (mem. op.).

§ 40.30 Transfer of Permanent Physical Custody of Adopted Child

Court approval is required for the transfer of permanent physical custody of an adopted child by a parent, managing conservator, or guardian to any person who is not a relative or stepparent of the child or an adult who has a significant and long-standing relationship with the child. *See* Tex. Fam. Code § 162.026. It is a felony offense to conduct,

facilitate, or participate in an unregulated custody transfer of an adopted child except as provided in Tex. Penal Code § 25.081(d). *See* Tex. Penal Code § 25.081. This topic is discussed in more depth in section 51.30 in this manual.

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Chapter 41

Modification of Texas Orders

I. Parent-Child Relationship

§ 41.1 Continuing Jurisdiction

Continuing, Exclusive Jurisdiction: The court that rendered the order sought to be modified generally retains continuing, exclusive jurisdiction unless that jurisdiction has been transferred to another court under Family Code chapter 155 or section 262.203. Tex. Fam. Code §§ 155.002, 155.201, 262.203. If the petition fails to allege either (1) that no court has continuing, exclusive jurisdiction of the child and the issue is not disputed by the pleadings or (2) that the court in which the suit or petition to modify has been filed has acquired and retains continuing, exclusive jurisdiction of the child as the result of a prior proceeding and the issue is not disputed by the pleadings, then the petitioner or the court shall request from the vital statistics unit identification of the court that last had continuing, exclusive jurisdiction of the child in a suit. Tex. Fam. Code § 155.101(a).

A voluntary or involuntary dismissal of a suit affecting the parent-child relationship does not create continuing, exclusive jurisdiction in a court. Tex. Fam. Code § 155.001(b)(1); *Ramirez v. LaCombe*, No. 01-17-00977-CV, 2019 WL 922058, at *2 (Tex. App.—Houston [1st Dist.] Feb. 26, 2019, no pet. h.) (mem. op.).

Jurisdiction to Modify Order: The court with continuing, exclusive jurisdiction may modify its order regarding managing conservatorship, possessory conservatorship, possession of and access to a child, and support of a child unless certain circumstances exist. Tex. Fam. Code § 155.003(a).

The Texas court may not exercise its continuing, exclusive jurisdiction to modify managing conservatorship if the child's home state is not Texas or if modification is precluded by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The court may not exercise its continuing, exclusive jurisdiction to modify possessory

conservatorship or possession of or access to a child if the child's home state is not Texas and all parties have established and continue to maintain their principal residence outside Texas or if each individual party has filed written consent with the Texas court for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction of the suit. The court may not exercise its continuing, exclusive jurisdiction to modify its child support order if modification is precluded by the Uniform Interstate Family Support Act (UIFSA). Tex. Fam. Code § 155.003(b)–(d).

COMMENT: If the modification suit involves out-of-state parties or orders, the practitioner should refer to the UCCJEA, chapter 152 of the Family Code, and UIFSA, chapter 159 of the Family Code. See chapter 43 of this manual.

Loss of Continuing, Exclusive Jurisdiction: A Texas court loses its continuing, exclusive jurisdiction to modify its order if (1) an order of adoption is rendered by another court in an original suit filed as described by Family Code section 103.001(b); (2) the parents have remarried each other after the dissolution of a previous marriage between them and file a suit for the dissolution of their subsequent marriage combined with a suit affecting the parent-child relationship as if there had not been a prior court with continuing, exclusive jurisdiction over the child; or (3) another court assumed jurisdiction over a suit and rendered a final order based on incorrect information received from the vital statistics unit that there was no court of continuing, exclusive jurisdiction. Tex. Fam. Code § 155.004(a).

§ 41.2 Standing

There are several routes to standing to modify a previous order under Family Code section 156.002. A party affected by an order may file a suit to modify that order in the court with continuing, exclusive jurisdiction. A person or entity who has standing to sue under Family Code chapter 102 may file a modification suit in the court with continuing, exclusive jurisdiction. The sibling of a child who is separated from the child because of the actions of the Department of Family and Protective Services may file a suit for modification requesting access to the child in the court with continuing, exclusive jurisdiction. Tex. Fam. Code § 156.002.

To have standing under section 156.002(a) to seek a modification, a person must not only be a party to the order sought to be modified but also be affected by the order. *In re Shifflet*, 462 S.W.3d 528 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (intervenor stepgrandparents, who were given telephone access to children and signed agreed order that is subject of modification suit, are parties affected by prior order and

have standing to intervene in suit to modify that order); *In re S.A.M.*, 321 S.W.3d 785 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (intervenor in prior suit affecting parent-child relationship, who was given telephone access to children and signed agreed order that is subject of modification suit, is a "party affected by an order" and has standing to seek modification of order).

Under section 156.002(b), a person who was not a party to the order sought to be modified may have standing to file a modification. *In re B.N.L.-B.*, 523 S.W.3d 254, 262–63 (Tex. App.—Dallas 2017, no pet.) (when parents agreed that nonparent could have court-ordered possession of and access to child in prior order, they necessarily also agreed to nonparent's right to file modification in subsequent suit); *In re Chester*, 398 S.W.3d 795, 800–802 (Tex. App.—San Antonio 2011, orig. proceeding) (aunt with standing to sue under chapter 102 could file for modification of prior grandparent access order to which she was not party).

In addition to the general standing to file suit provided by Family Code section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. Tex. Fam. Code § 102.004(a)(1), (a)(2). However, a party seeking standing under section 102.004(a)(1) is not required to show that he would prevail on the underlying claim for conservatorship. *Rolle v. Hardy*, 527 S.W.3d 405, 421–23 (Tex. App.—Houston [1st Dist.] 2017, no pet.). All of the past actions or omissions of the parties are relevant to a determination of a child's present circumstances at the time the suit is filed. *Rolle*, 527 S.W.3d 405, 423.

The statute also provides standing to file a suit for modification requesting access to a child for a sibling who is separated from a child by the actions of the Department of Family and Protective Services. *See* Tex. Fam. Code § 156.002(c).

The Office of the Attorney General (OAG) is authorized to provide all services that title IV-D of the federal Social Security Act (42 U.S.C. § 651 *et seq.*) requires or authorizes. *See* Tex. Fam. Code § 231.101(a). Additionally, governmental entities have general standing to file a suit to modify a conservatorship order. *See* Tex. Fam. Code §§ 102.003(a)(5), 156.002(b). The Family Code also expressly authorizes the OAG, as the state's title IV-D agency, to review a support order at any time on a showing of a

material and substantial change in circumstances, taking into consideration the best interests of the child; if the agency determines that the primary care and possession of the child has changed, the agency may file a petition for modification under Code chapter 156. Tex. Fam. Code § 231.101(d). Therefore, the OAG is authorized to seek a modification of conservatorship when the modification is related to the establishment, modification, or enforcement of a child support obligation in a title IV-D case. *Office of Attorney General v. C.W.H.*, 531 S.W.3d 178, 186 (Tex. 2017) (finding this authority under former law that did not expressly grant OAG authority to file modification of conservatorship).

§ 41.3 Pleadings

The petition and all other documents in the proceeding should be entitled "In the Interest of _____, a Child." Tex. Fam. Code § 102.008(a). The petition must contain certain very specific information as set forth in Family Code section 102.008(b). *See* Tex. Fam. Code § 102.008(b).

COMMENT: Although the name and birth date of a minor are classified as sensitive data (*see* Tex. R. Civ. P. 21c(a), (b)), their inclusion in a pleading in a suit affecting the parent-child relationship is statutorily required. Since the pleading must contain sensitive data, the clerk must be notified of that fact. A document that is not electronically filed must contain, on the upper left-hand side of the first page, the phrase "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d)(2). If the document is electronically filed, it must be designated as containing sensitive data when it is filed. Tex. R. Civ. P. 21c(d)(1).

If the modification involves a child custody proceeding, which includes a proceeding for legal custody, physical custody, or visitation with respect to a child, and not all parties reside in Texas, the first pleading by each party must contain either in the body of the pleading or in an attached affidavit the information set forth in Family Code section 152.209. *See* Tex. Fam. Code §§ 152.102(4), 152.209(a). If the information required by Family Code section 152.209(a) has not been provided in each of the parties' first pleadings or in an attached affidavit, the court, on motion of a party or on its own motion, may stay the proceeding until the information is furnished. Tex. Fam. Code § 152.209(b).

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

The petition must state whether, in regard to a party to the suit or a child of a party to the suit, there is in effect a protective order under Family Code title 4, a protective order under chapter 7A of the Code of Criminal Procedure, or an order for emergency protection under article 17.292 of the Code of Criminal Procedure. The petition also must state whether an application for any of these orders is pending. The petitioner must attach a copy of each such protective order in which a party to the suit or the child of a party to the suit was the applicant or victim of the conduct alleged in the application or order and the other party was the respondent or defendant of an action regarding the conduct alleged in the application or order without regard to the date of the order. If a copy of the order is not available at the time of filing, the petition must state that a copy will be filed with the court before any hearing. Tex. Fam. Code § 102.008(b)(11), (c).

In a suit in which modification of child support or medical support is sought, before a hearing on temporary orders or a final order, if no hearing on temporary orders is held, the court shall require the parties to the proceedings to disclose in a pleading or other statement (1) if private health insurance is in effect for the child, the identity of the insurance company providing the coverage, the policy number, which parent is responsible for payment of any insurance premium for the coverage, whether the coverage is provided through a parent's employment, and the cost of the premium or (2) if private health insurance is not in effect for the child, whether (a) the child is receiving medical assistance under chapter 32, Human Resources Code; (b) the child is receiving health benefits coverage under the state child health plan under chapter 62, Health and Safety Code, and the cost of any premium; and (c) either parent has access to private health insurance at reasonable cost to the obligor. Tex. Fam. Code § 154.181(a), (b). "Reasonable cost" means the cost of health insurance coverage for a child that does not exceed 9 percent of the responsible parent's annual resources, as described by section 154.062(b), if the obligor is responsible under a medical support order for the cost of health insurance coverage for only one child; if the obligor is responsible under a medical support order for the cost of health insurance coverage for more than one child, "reasonable cost" means the total cost of health insurance coverage for all children for whom the obligor is responsible under a medical support order that does not exceed 9 percent of the obligor's annual resources, as described by section 154.062(b). Tex. Fam. Code § 154.181(e).

Before a hearing on temporary orders, or a final order if no hearing on temporary orders is held, the court shall require the parties to the proceedings to disclose in a pleading or other document whether the child is covered by dental insurance. If the child is covered, the parties must disclose the following: the identity of the insurer providing the cover-

age, the policy number, which parent is responsible for payment of any insurance premium for the coverage, whether the coverage is provided through a parent's employment, and the cost of the premium. If dental insurance is not in effect for the child, the parties must disclose whether either parent has access to dental insurance at reasonable cost to the obligor. Tex. Fam. Code § 154.1815(b), (c). "Reasonable cost" means the cost of a dental insurance premium that does not exceed 1.5 percent of the responsible parent's annual resources, as described by section 154.062(b), if the obligor is responsible under a dental support order for the cost of dental insurance coverage for only one child; if the obligor is responsible under a dental support order for the cost of dental insurance coverage for more than one child, "reasonable cost" means the total cost of dental insurance coverage for all children for whom the obligor is responsible under a dental support order that does not exceed 1.5 percent of the obligor's annual resources, as described by section 154.062(b). Tex. Fam. Code § 154.1815(a).

The court's order for modification must conform to the pleadings unless an issue is tried by consent. *Flowers v. Flowers*, 407 S.W.3d 452, 458 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (court abused its discretion by removing geographic restriction when there were no pleadings to support that request and the issue was not tried by consent). *But see Peck v. Peck*, 172 S.W.3d 26, 35 (Tex. App.—Dallas 2005, pet. denied) (pleadings are of little importance in child custody cases).

§ 41.4 Conditions Precedent to Filing Suit

In the absence of an agreement of the parties, the court has no authority to require mediation as a precondition to filing a modification suit. *In re K.L.D.*, No. 12-10-00386-CV, 2012 WL 2127464, at *8 (Tex. App.—Tyler June 13, 2012, no pet.) (mem. op.).

In an agreed divorce, a contractual condition precedent requiring a parent to pay the other parent a sum of money on the date a suit for modification is filed was found void because it violated section 154.124(c) of the Texas Family Code prohibiting agreements regarding child support to be enforced as a contract. *In re I.R.H.*, No. 04-12-00366-CV, 2013 WL 1850778 (Tex. App.—San Antonio May 1, 2013, pet. denied) (mem. op.).

Denying a party access to courts absent payment of money has been found to be a denial of access to courts under due course of law. *Byars v. Evans*, No. 07-14-00064-CV, 2016 WL 105671, at *5 (Tex. App.—Amarillo Jan. 8, 2016, no pet.) (mem. op.) (citing *In re Flores*, 135 S.W.3d 863, 865 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding). In *Byars*, the trial court's order provided that "except upon good cause shown by sworn affidavit, prior to filing any further Motions regarding the children,

Father shall demonstrate that he has paid no less than $10,000 of the attorney's fees awarded" to the mother. The court distinguished *Flores* because the father in *Flores* was not permitted to proceed to trial under any circumstances other than payment of interim attorney's fees, resulting in a complete denial of his access to courts. In *Byars*, the court found the trial court's order—in a family law case where there was a strong level of animosity between the parties—conditioning the filing of further motions on compliance with a reasonable condition to be akin to the denial of access to the courts imposed on a vexatious litigant through the use of a prefiling order. Because the father's access to court was initially conditioned "upon good cause shown by sworn affidavit" before filing a motion regarding his children, the denial of access to the courts was not absolute. *Byars*, 2016 WL 105671, at *5.

§ 41.5 Notice and Service

The Texas Rules of Civil Procedure applicable to the filing of an original lawsuit apply to a suit for modification under Family Code chapter 156. Tex. Fam. Code § 156.004. A party whose rights and duties may be affected by the suit for modification is entitled to receive notice by service of citation. Tex. Fam. Code § 156.003.

Provisions concerning service of citation by publication in a title 5 case are contained in Family Code section 102.010. *See* Tex. Fam. Code § 102.010. If citation by publication is authorized, the court may, on motion, prescribe a different method of substituted service if the court finds and recites in its order that the method so prescribed would be as likely as publication to give the defendant actual notice. Tex. R. Civ. P. 109a.

A diligent attempt must be made to personally serve a respondent before alternate service can be authorized by the court. A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time. *In re E.R.*, 385 S.W.3d 552, 565–66 (Tex. 2012).

Waiver of Service: A party may waive service after the suit is filed by filing a waiver acknowledging receipt of a copy of the citation. The waiver may not be signed using a digitized signature. The waiver must contain the party's mailing address, and it must be sworn before a notary public who is not an attorney in the suit unless the party waiving is incarcerated. The Texas Rules of Civil Procedure do not apply to these waivers. Tex. Fam. Code § 102.0091.

§ 41.6 Trial before Associate Judge

Trial before an associate judge is discussed in section 40.9 in this manual.

§ 41.7 Trial before Assigned Judge

Trial before an assigned judge is discussed in section 40.10 in this manual.

§ 41.8 Frivolous Suits

Notwithstanding rules 296 through 299 of the Texas Rules of Civil Procedure, if the court finds that a suit to modify is filed frivolously or is designed to harass a party, the court shall state that finding in the order and assess attorney's fees against the offending party. Tex. Fam. Code § 156.005; *see Kelsall v. Haisten*, 564 S.W.3d 157, 165–67 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (father engaged in pattern of harassing behavior that trial court could have reasonably determined was intended to deplete mother's resources and demonstrated that father filed suit as means to get access to child's psychiatric records rather than stated purpose of seeking conservatorship); *see also D.R. v. J.A.R.*, 894 S.W.2d 91, 95–96 (Tex. App.—Fort Worth 1995, writ denied) (respondent awarded attorney's fees where court found that modification suit was "frivolous and designed to harass" and that termination action had "no merit or basis in fact or in law and was filed late in the proceedings for purposes of harassment and leverage"). A family court is not required to state good cause for adjudging costs against the successful party as is required in other civil cases. *Carlson v. Carlson*, 983 S.W.2d 304, 309–10 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *see also Goheen v. Koester*, 794 S.W.2d 830, 836 (Tex. App.—Dallas 1990, writ denied) (not abuse of discretion for trial court to have ordered appellant, who obtained all relief he requested, to pay attorney's fees incurred by appellee, who was only partially successful).

§ 41.9 Grounds for Modification: Conservatorship, Possession and Access, or Right to Designate Residence

§ 41.9:1 Grounds for Modification of Order Establishing Conservatorship or Possession and Access

The court may modify an order that provides for the appointment of a conservator, provides the terms and conditions of conservatorship, or provides for possession or access if the modification would be in the best interest of the child and (1) the circumstances of

the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier of the date of the rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based; (2) the child is at least twelve years of age and has expressed to the court in chambers as provided by section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child; or (3) the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months. The voluntary relinquishment ground does not apply to a conservator who has temporarily relinquished the primary care and possession of the child to another person during the conservator's military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 156.101.

Under the plain meaning of section 156.101(a)(1), a merger clause (providing that, in the event of a conflict between the mediated settlement agreement and the subsequent order, the terms of the order supersede the agreement) does not affect the determination of the start date for the timeframe for evaluating whether changed circumstances justify modification. *See In re C.Z.P.*, No. 14-17-00565-CV, 2019 WL 386048, at *2 (Tex. App.—Houston [14th Dist.] Jan. 31, 2019, no pet.) (mem. op.) (date mediated settlement agreement was signed controls over date of rendition of subsequent order).

Even if a conservator's circumstances have not materially and substantially changed, modification is available if the child's circumstances have materially and substantially changed. *In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

The Family Code establishes possession of or access to an adult disabled child, but the adult disabled child, if mentally competent, may refuse possession or access. Tex. Fam. Code § 154.309(b).

Family Code chapter 153 provides guidelines for possession of and access to a child by a parent. Section 153.317 specifically provides what is frequently referred to as the "election," which allows a conservator to elect certain alternative beginning and ending times for that conservator's periods of possession; most of the alternative times relate to dismissal or resumption of the child's school. *See* Tex. Fam. Code § 153.317. This election, however, is not available unless the possessory conservator is first able to establish at least one of the grounds set forth in Family Code section 156.101. *In re Davis*, 30 S.W.3d 609, 613–14 (Tex. App.—Texarkana 2000, no pet.). Further, section 153.317 does not provide for a separate cause of action for modification of a possession sched-

ule to expanded possession when the election was not made before or at the time of the rendition of the original or prior modification order. *In re C.A.P., Jr.*, 233 S.W.3d 896 (Tex. App.—Fort Worth 2007, no pet.).

§ 41.9:2 Modification of Exclusive Right to Designate Primary Residence of Child within One Year

If a suit seeking to modify the designation of the person having the exclusive right to designate the primary residence of the child is filed within one year after the earlier of the date of the rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based, the person filing the suit must execute and attach an affidavit that contains, along with supporting facts, at least one of the following allegations:

1. That the child's present environment may endanger the child's physical health or significantly impair the child's emotional development.

2. That the person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and that the modification is in the best interest of the child.

3. That the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and that the modification is in the best interest of the child.

Tex. Fam. Code § 156.102(a), (b).

The voluntary relinquishment ground does not apply to a person with the exclusive right to designate the child's primary residence who has temporarily relinquished the primary care and possession of the child to another person during the conservator's military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 156.102(d).

The one-year period referred to in section 156.102(a) begins on the date of rendition of the prior order. Because rendition of an order can occur by oral pronouncement, section 156.102 does not require a written, signed order to trigger the beginning of the one-year period. *In re K.R.Z.*, No. 04-14-00876-CV, 2015 WL 4478123, at *2 (Tex. App.—San Antonio July 22, 2015, no pet.) (mem. op.).

In *In re J.A.*, the parties were named joint managing conservators in an agreed conservatorship order signed more than two years before the father filed a petition to modify conservatorship. Between the date of the prior conservatorship order and the date of filing the petition to modify conservatorship, the Office of the Attorney General filed a suit to confirm a nonagreed child support review order that increased the father's child support and health care obligations but did not address any specifics on conservatorship or incorporate the prior conservatorship order by reference. The father filed his petition to modify conservatorship twenty days later. In determining which order is controlling for purposes of determining the filing of a modification action, the El Paso court of appeals held that the petition to modify conservatorship was not filed within one year of the order sought to be modified and that therefore no affidavit was required. *In re J.A.*, 482 S.W.3d 141, 146 (Tex. App.—El Paso 2015, no pet.); *see also In re K.K.R.*, No. 04-18-00250-CV, 2019 WL 451761, at *3 (Tex. App.—San Antonio Feb. 6, 2019, no pet.) (mem. op.).

If the court determines that the facts stated are adequate to support an allegation, the court shall set a time and place for the hearing. Tex. Fam. Code § 156.102(c); *Burkhart v. Burkhart*, 960 S.W.2d 321, 323–24 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (affidavit statements that child endangered by adults smoking in household, that former wife unemployed, and that former wife relocated to California too nebulous to support modification within one year; facts must specifically relate to effect on child). If the affidavit is not filed or the court finds the affidavit is insufficient, the court must deny the relief sought and refuse to schedule a hearing. Tex. Fam. Code § 156.102(c); *In re J.R.P.*, 526 S.W.3d 770, 778 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (statute does not require dismissal, only that court deny relief sought and refuse to schedule hearing); *In re A.S.M.*, 172 S.W.3d 710, 716 (Tex. App.—Fort Worth 2005, no pet.) (trial court did not err when it refused to hear merits of matter and dismissed case due to absence of affidavit). Any error in holding a hearing is harmless, however, if the testimony admitted during the hearing supports the allegation that the child's environment may significantly impair the child's physical health or emotional development. *In re Charles*, No. 03-17-00731-CV, 2017 WL 5985524, at *3–5 (Tex. App.—Austin Dec. 1, 2017, orig. proceeding) (mem. op.); *In re Eddins*, No. 15-16-01451-CV, 2017 WL 2443138, at *4 (Tex. App.—Dallas June 5, 2017, orig. proceeding [mand. denied]) (mem. op.); *In re C.G.*, No. 04-13-00749-CV, 2014 WL 3928612, at *3 (Tex. App.—San Antonio Aug. 13, 2014, no pet.) (mem. op.).

An affidavit not explicitly based on personal knowledge is legally insufficient. *In re D.W.J.B.*, 362 S.W.3d 777, 781 (Tex. App.—Texarkana 2012, no pet.) (citing *Marks v.*

St. Luke's Episcopal Hospital, 319 S.W.3d 658, 666 (Tex. 2010)); *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam). The affidavit must contain sworn facts showing that the child is presently being harmed. *In re D.W.J.B.*, 362 S.W.3d at 781 (affidavit listing father's past criminal history and car accidents did not show child's present circumstances could endanger his physical health or significantly impair his emotional development). The fact that a hearing was set by the court is proof that the court found the affidavit to be adequate. *In re A.L.W.*, 356 S.W.3d 564, 566–67 (Tex. App.—Texarkana 2011, no pet.). Even if a court holds a hearing in the absence of a supporting affidavit, the error is harmless if the testimony admitted during the hearing supports the allegation that the child's environment may significantly impair the child's emotional development. *In re A.L.W.*, 356 S.W.3d at 567.

Family Code section 156.102 does not apply to a suit seeking an order designating a person with the right to determine the primary residence of the children for the first time, rather than a modification of the person so designated. *See In re A.D.C.*, No. 11-17-00190-CV, 2019 WL 1428630, at *3 (Tex. App.—Eastland Mar. 29, 2019, no pet. h.) (mem. op.); *In re X.L.B.*, No. 04-17-00706-CV, 2018 WL 5808316, at *2 (Tex. App.—San Antonio Nov. 7, 2018, no pet.).

A suit brought within one year seeking to impose a geographic restriction on the custodial parent (*see In re A.C.S.*, 157 S.W.3d 9, 18 (Tex. App.—Waco 2004, no pet.)) or to eliminate or modify the terms of a geographic restriction (*see In re A.S.M.*, 172 S.W.3d 710, 715 (Tex. App.—Fort Worth 2005, no pet.)) is a suit seeking to modify the designation of the person having the exclusive right to designate the primary residence of a child for the purposes of Tex. Fam. Code § 156.102. *But see In re C.R.A.*, 453 S.W.3d 623 (Tex. App.—Fort Worth 2014, no pet.). In *In re C.R.A.*, the father filed for modification of a Georgia decree within one year, but he did not file the affidavit required by Tex. Fam. Code § 156.102. The Georgia decree did not designate a person with the exclusive right to determine the children's residence; the geographic restriction in the decree was not attached to anyone's exclusive right to determine the children's residence; and the geographic restriction expired with time, with no post-expiration provision. Because the Georgia decree did not comply with either subsection (A) or (B) of Code section 153.134(b)(1), section 156.102 did not apply. *In re C.R.A.*, 453 S.W.3d at 632.

In the absence of a request for findings of fact and conclusions of law, the appellate court may assume that the trial court made the finding that the children's present environment endangered their physical health or significantly impaired their emotional

development in support of the judgment. *In re S.A.E.*, No. 06-08-00139-CV, 2009 WL 2060087 (Tex. App.—Texarkana July 17, 2009, no pet.) (mem. op.).

Temporary Orders: In a suit for modification within one year of the prior order, a party requesting a temporary order that has the effect of creating a designation, or changing the designation, of the person having the exclusive right to designate the primary residence of the child, or the effect of creating a geographic area, or changing or eliminating the geographic area, within which a conservator must maintain the child's primary residence, must meet the requirements of section 156.006 of the Texas Family Code. Tex. Fam. Code § 156.006(b), (b)(1); *In re Sanchez*, 228 S.W.3d 214 (Tex. App.—San Antonio 2007, orig. proceeding) (where evidence showed modification was clearly pursued because child was spending more time with grandparents than with custodial parent, trial court abused its discretion by entering temporary order, because evidence did not meet requirements of section 156.006); *In re Payne*, No. 10-11-00402-CV, 2011 WL 6091265, at *2 (Tex. App.—Waco Dec. 2, 2011, orig. proceeding) (mem. op.); *In re Winters*, No. 05-08-01486-CV, 2008 WL 5177835, at *2 (Tex. App.—Dallas Dec. 11, 2008, orig. proceeding) (mem. op.).

COMMENT: Standing orders prohibiting a party from removing a child from a specified geographic area effective on the filing of a suit may have the effect of creating a geographic area, or changing or eliminating the geographic area, within which a conservator must maintain the child's primary residence in violation of Family Code section 156.006(b).

§ 41.9:3 Increased Expenses Because of Change of Residence

If a change of residence results in increased expenses for a party having possession of or access to a child, the court may render appropriate orders to allocate those increased expenses on a fair and equitable basis, taking into account the cause of the increased expenses and the best interest of the child. The payment of increased expenses by the party whose residence is changed is rebuttably presumed to be in the best interest of the child. The court may render an order without regard to whether another change in the terms and conditions for possession of or access to the child is made. Tex. Fam. Code § 156.103.

§ 41.9:4 Presumptions Inapplicable in Modification Suits

Joint Managing Conservatorship Presumption Inapplicable: The rebuttable presumption set forth in section 153.131(b) of the Family Code that the appointment of the

parents as joint managing conservators is in the best interest of the child is inapplicable in modification suits. Once a conservatorship order has been implemented, the concept of res judicata attaches, and the order establishes what was in the best interest of the children at the time of the divorce. *Bates v. Tesar*, 81 S.W.3d 411, 421 (Tex. App.—El Paso 2002, no pet.).

Parental Presumption Inapplicable: In original custody determinations, subject to the prohibition concerning family violence in Family Code section 153.004, a parent shall be appointed sole managing conservator or both parents shall be appointed joint managing conservators unless the court finds that the appointment would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 153.131(a). This parental presumption, however, is applicable only in original custody determinations, not to modifications. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000); *In re B.N.L.-B.*, 523 S.W.3d 254, 262–63 (Tex. App.—Dallas 2017, no pet.); *In re Vogel*, 261 S.W.3d 917 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Family Code chapter 153 and chapter 156 are distinct statutory schemes that involve different issues. Chapter 156 modification suits raise additional policy concerns, such as stability for the child and the need to prevent constant litigation in child custody cases. The legislature has determined that the standard and burden of proof are different in original and modification suits. A biological parent has the benefit of the parental presumption in an original proceeding, and the nonparent seeking conservatorship has a higher burden. The legislature, however, did not impose different burdens on parents and nonparents in modification suits. *In re V.L.K.*, 24 S.W.3d at 343; *In re P.D.M.*, 117 S.W.3d 453, 457–58 (Tex. App.—Fort Worth 2003, pet. denied).

Moreover, by including the parental presumption in original suits affecting the parent-child relationship but not in suits for modification of conservatorship, the legislature balanced the rights of the parent and the best interest of the child. *In re C.A.M.M.*, 243 S.W.3d 211, 216 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). On one hand, the interest of parents in the care, custody, and control of their children has been described as perhaps one of the oldest of the fundamental liberty interests recognized by the United States Supreme Court. *In re C.A.M.M.*, 243 S.W.3d at 216 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). On the other hand, it is the public policy of Texas to resolve conservatorship disputes in a manner that provides a safe, stable, and nonviolent environment for the child. *In re C.A.M.M.*, 243 S.W.3d at 216. When these two interests compete, the child's interest in stability prevails over the parent's right to pri-

mary possession. *In re M.P.B.*, 257 S.W.3d 804, 812 (Tex. App.—Dallas 2008, no pet.); *In re C.A.M.M.*, 243 S.W.3d at 216.

The death of a parent does not terminate prior custody provisions in a divorce decree. *In re P.D.M.*, 117 S.W.3d at 460–61. *But see Dohrn v. Delgado*, 941 S.W.2d 244, 247–48 (Tex. App.—Corpus Christi–Edinburg 1996, orig. proceeding) (death of parent terminates prior custody provisions in divorce decree) (citing *Greene v. Schuble*, 654 S.W.2d 436, 438 (Tex. 1983) (orig. proceeding), which held that the original custody order was terminated solely for the purpose of habeas corpus).

§ 41.9:5 Material Change of Circumstances

A court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier of the date of the rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based. Tex. Fam. Code § 156.101(a)(1).

When considering whether a material change of circumstances has occurred, Texas courts have deemed the remarriage of one or both parents to be a pertinent factor. *In re S.R.O.*, 143 S.W.3d 237, 244–45 (Tex. App.—Waco 2004, no pet.). Additionally, Texas courts uniformly recognize that the parental abilities of the parent seeking custody and the stability of that parent's home are factors to be considered in determining what is in the best interests of the child. Accordingly, evidence regarding the conduct and abilities of a stepparent can be relevant and admissible in a suit seeking modification of conservatorship. *In re C.Q.T.M.*, 25 S.W.3d 730, 734 (Tex. App.—Waco 2000, pet. denied). A trial court may consider the effect of a parent's lifestyle choices on the children when deciding matters of custody. *In re M.S.F.*, 383 S.W.3d 712, 716–17 (Tex. App.—Amarillo 2012, no pet.).

In considering whether a change of circumstances has occurred, the trial court compares the evidence of the conditions that existed at the time of entry of the prior order with evidence of the conditions that exist at the time of the hearing on the petition to modify. *In re T.M.P.*, 417 S.W.3d 557, 563–64 (Tex. App.—El Paso 2013, no pet.); *In re W.C.B.*, 337 S.W.3d 510, 514 (Tex. App.—Dallas 2011, no pet.). In deciding whether circumstances have materially and substantially changed, the trial judge is not confined to rigid or definite guidelines. *In re T.M.P.*, 417 S.W.3d 557 at 564. Rather, the

court's determination is fact-specific and must be made according to the circumstances of the case. *In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Material changes may include (1) remarriage by a party, (2) poisoning of the child's mind by a party, (3) change in the home surroundings, (4) mistreatment of the child by a parent or stepparent, and (5) a parent's becoming an improper person to exercise custody. *In re S.N.Z.*, 421 S.W.3d 899, 909 (Tex. App.—Dallas 2014, pet. denied); *In re A.L.E.*, 279 S.W.3d at 428–29; *In re T.M.P.*, 417 S.W.3d at 564; *see also In re M.V.*, 583 S.W.3d 354, 362 (Tex. App.—El Paso 2019, no pet. h.) (subsequent marriage); *In re K.D.B.*, No. 01-18-00840-CV, 2019 WL 4065276, at *9 (Tex. App.—Houston [1st Dist.] Aug. 29, 2019, no pet. h.) (mem. op.) (parent's becoming improper person to exercise custody). In addition, "a course of conduct pursued by a managing conservator that hampers a child's opportunity to favorably associate with the other parent may suffice as grounds for redesignating managing conservators." *In re S.N.Z.*, 421 S.W.3d at 909–10, quoting *Arredondo v. Betancourt*, 383 S.W.3d 730, 735 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Evidence that a parent's employment is being transferred to another city and that the transfer is expected to provide a significant economic impact on that parent's household can constitute a material and substantial change of circumstances. *See In re H.N.H.*, No. 04-18-00574-CV, 2019 WL 2996972, at *3 (Tex. App.—San Antonio July 10, 2019, no pet. h.) (mem. op.).

Repeated allegations of sexual abuse of the child and subjecting the child to repeated physical and forensic examinations constitute a material and substantial change in circumstances. *In re T.M.P.*, 417 S.W.3d at 564.

A parent's allowing the child's grandmother, who had a history of drug abuse and routinely uttered profanities, to move in with the parent and to care for the child constituted a material and substantial change of circumstances. *See Fleming v. Fleming*, No. 13-16-00373-CV, 2018 WL 3599284, at *4 (Tex. App.—Corpus Christi–Edinburg July 27, 2018, no pet.) (mem. op.).

A parent's drug use can support a trial court's finding of a material and substantial change. *See In re K.D.B.*, 2019 WL 4065276, at *9.

Where the only change of circumstances alleged is an investigation by the Texas Department of Family and Protective Services based on allegations of sexual assault of a child that were ultimately determined by the department to be groundless, evi-

dence of that investigation is legally insufficient to support a modification. *Warren v. Ulatoski*, No. 03-15-00380-CV, 2016 WL 4269999 at *5–6 (Tex. App.—Austin Aug. 11, 2016, pet. denied) (mem. op.).

Wanting to spend more time with a child is not a material change of circumstances. *In re C.H.C.*, 392 S.W.3d 347, 352 (Tex. App.—Dallas 2013, no pet.).

A change in the number of children under the control of the visitation order is by itself a substantial change, as is the natural change that occurs between age one and age six and the concomitant change in the scope of activities and the needs of the children involved. *In re Davis*, 30 S.W.3d 609, 614 (Tex. App.—Texarkana 2000, no pet.).

Evidence that a parent with the exclusive right to designate the child's primary residence had increased work-related travel and the absences increased in duration, that the absences required that the parent leave the child in the care of persons other than the other parent, that there were difficulties with the other parent's being able to communicate with the caretakers, and that law enforcement was called on several occasions to facilitate the exchange of possession with the caretakers was sufficient to show a material and substantial change of circumstances. *See In re Y.C.*, No. 13-17-00419-CV, 2018 WL 3764210, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 9, 2018, no pet.) (mem. op.).

Aging of a child alone, in light of a mediated settlement agreement that established which school the child would attend, does not constitute a material and substantial change of circumstances warranting modification of a conservator's right to make educational decisions. *Zeifman v. Michels*, 212 S.W.3d 582 (Tex. App.—Austin 2006, pet. denied). In *Child v. Leverton*, 210 S.W.3d 694 (Tex. App.—Eastland 2006, no pet.), the court gave no effect to the residency restriction contained in a mediated settlement agreement when the mother filed a petition to modify eight months later. The child's stability in the county from which the mother would be required to move him was sufficient to establish a material and substantial change of circumstances permitting modification. A strong dissent suggests that the trial court abused its discretion in finding a material and substantial change in circumstances under the evidence. A parent's remarriage and change in residence has been held to constitute a material change of circumstances. Further, while an increase in the age of a child alone may not be a change in circumstances sufficient to justify modification of conservatorship, changed needs of the child may constitute a material change of circumstances and a child's need for dependable, secure, and stable environment may be different as the child grows older.

In re E.A.D.P., No. 05-15-01210-CV, 2016 WL 7449369, at *3 (Tex. App.—Dallas Dec. 28, 2016, no pet.) (mem. op.).

Evidence that the children expressed a desire for more stability and privacy can constitute a material and substantial change. *See In re J.J.*, No. 09-18-00068-CV, 2019 WL 1186768, at *3 (Tex. App.—Beaumont Mar. 14, 2019, no pet. h.) (mem. op.).

An anticipated circumstance cannot be evidence of a material or substantial change of circumstances. *See Smith v. Karanja*, 546 S.W.3d 734, 740–41 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (child's international travel issue was not changed circumstance, but rather issue of some contention between parties that they neglected to address in divorce decree); *see also, e.g.*, *In re A.B.R.*, No. 04-17-00220-CV, 2018 WL 3998684, at *5 (Tex. App.—San Antonio Aug. 22, 2018, no pet.) (mem. op.) (father's move to Puerto Rico after divorce was contemplated by MSA and divorce decree); *Warren v. Ulatoski*, 2016 WL 4269999, at *5 (where mother's husband was active-duty military and thus subject to relocation, her move out of state was contemplated by parties at time of prior order); *In re M.A.F.*, No. 12-08-00231-CV, 2010 WL 2178541, at *5 (Tex. App.—Tyler May 28, 2010, no pet.) (mem. op.) (travel schedule not changed circumstance where travel issue existed at time of prior order and mother anticipated that child would get older and be in school). A parent's decision to strictly enforce the standard possession order is not a material and substantial change. The fact that the standard possession order was incorporated into the divorce decree is evidence that the parties anticipated following this schedule. *See In re C.W.J.*, No. 11-17-00085-CV, 2019 WL 1067489, at *7 (Tex. App.—Eastland Mar. 7, 2019, no pet. h.) (mem. op.).

In a modification to lift an international travel restriction, "potential benefit" is not the applicable standard to support modification of a prior order. There must be evidence of a material and substantial change of circumstances since the rendition of the order the subject of the modification. The fact that it may be desirable or even generally beneficial for older children to travel internationally is not evidence that a need has arisen in conjunction with the child's age sufficient to demonstrate that there has been a material and substantial change of circumstances. *Wiese v. AlBakry*, No. 03-14-00799-CV, 2016 WL 3136874, at *5 (Tex. App.—Austin June 1, 2016, no pet.) (mem. op.).

Rights and duties of conservators are also subject to modification based on a material and substantial change of circumstances. Evidence that the child's needs were not being met by the mother's homeschooling the child without an established curriculum and that the mother's choice of homeschooling was isolating the child socially supported

the trial court's modification of the prior order, which awarded the mother the exclusive right to make educational decisions, with an order that awarded that right to both parents and required that the child attend public school rather than being homeschooled by the mother. *See In re M.C.K.*, No. 14-17-00289-CV, 2018 WL 1955065, at *7 (Tex. App.—Houston [14th Dist.] Apr. 26, 2018, no pet.) (mem. op.); *see also Trammell v. Trammell*, 485 S.W.3d 571, 579 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (trial court did not abuse its discretion by modifying parent-child relationship so that both parents shared right to make educational decisions where youngest child was not in school at time of previous order and father's ability to pay for private-school education had since changed).

Evidence that a parent repeatedly violated the court's prior orders prohibiting the parent from initiating direct nonwritten communication with the other parent and questioned the other parent in a hostile manner in front of the children and in direct contravention of the court's prior order, that there were concerns about the parent's mental health and home life, and that the supervised possession center dismissed the parent as a result of altercations between the parent and the center's staff, as well as the parent's admission that she had violated the court's orders regarding communication and expressed the sentiment that she need not follow the court's orders if she disagreed with them, supported a finding that there was a material and substantial change of circumstances warranting restrictions on the parent's exercise of periods of possession and the requirement that periods of possession remain supervised, despite a jury's determination that the joint managing conservatorship should not be replaced by appointing the other parent as sole managing conservator. *In re P.A.C.*, 498 S.W.3d 210, 218–20 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

When both parties plead changed circumstances relating to conservatorship, that constitutes a judicial admission of the common element of changed circumstances for both parties. *In re A.E.A.*, 406 S.W.3d 404, 410 (Tex. App.—Fort Worth 2013, no pet.) (mother was not required to put on proof of changed circumstances, and father was barred from challenging sufficiency of evidence to support that fact since he judicially admitted there was change in circumstances in his pleadings); *In re L.C.L.*, 396 S.W.3d 712, 718 (Tex. App.—Dallas 2013, no pet.). However, if prior to trial a party nonsuits that party's pleading alleging a material and substantial change of circumstances, the pleading is no longer a live pleading and the statements contained within it do not constitute judicial admissions. *See In re H.P.J.*, No. 14-17-00715-CV, 2019 WL 1119612, at *5 (Tex. App.—Houston [14th Dist.] Mar. 12, 2019, no pet. h.) (mem. op.).

Conviction for Child Abuse: Except as provided by Family Code section 156.1045, the conviction of a conservator for an offense under section 21.02 of the Penal Code or the conviction of a conservator or an order deferring adjudication with regard to the conservator for an offense involving the abuse of a child under section 21.11, 22.011, or 22.021 of the Penal Code is a material and substantial change of circumstances sufficient to justify a temporary order and modification of an existing court order or portion of a decree that provides for the appointment of a conservator or that sets the terms and conditions of conservatorship or for the possession of or access to a child. A person commits a class B misdemeanor if the person files a suit to modify an order or portion of a decree based on those grounds and the person knows that the person against whom the motion is filed has not been convicted of an offense, or received deferred adjudication for an offense, under section 21.02, 21.11, 22.011, or 22.021 of the Penal Code. Tex. Fam. Code § 156.104.

Conviction for Family Violence: The conviction or an order deferring adjudication of a person who is a possessory conservator or a sole or joint managing conservator for an offense involving family violence is a material and substantial change of circumstances sufficient to justify a temporary order and modification of an existing court order or portion of a decree that provides for the appointment of a conservator or that sets the terms and conditions of conservatorship or for the possession of or access to a child to conform the order to the requirements of Family Code section 153.004(d). A person commits a class B misdemeanor if the person files a suit to modify an order or portion of a decree based on those grounds and the person knows that the person against whom the motion is filed has not been convicted of an offense, or received deferred adjudication for an offense, involving family violence. Tex. Fam. Code § 156.1045.

COMMENT: The court must take into consideration evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than eighteen years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit when determining whether to appoint a party as a joint or sole managing conservator. Tex. Fam. Code § 153.004(a). Presumably this requirement would apply equally if such evidence is presented in an original suit or in support of a modification of conservatorship or possession and access. However, if the reasoning of *In re V.L.K.* is applied (because chapter 156 does not include a specific reference to a parental presumption, that presumption does not apply in modification actions), then, because there is no provision in chapter 156 similar to Family Code section 153.004, that section applies only to original suits; if so, such evidence of the intentional use of abusive physical force may not serve as a

basis for a material change of circumstances to warrant a modification of conservatorship or possession and access.

Military Duty Alone Not Sufficient: The military duty of a conservator who is ordered to military deployment, military mobilization, or temporary military duty does not by itself constitute a material and substantial change of circumstances sufficient to justify a modification of an existing court order or portion of a decree that sets the terms and conditions for the possession of or access to a child, except that the court may render a temporary order under subchapter L of chapter 153 of the Code. Tex. Fam. Code § 156.105. See chapter 45 of this manual concerning military duty.

§ 41.9:6 Best Interest of Child

In a suit to modify conservatorship or possession and access, the court's focus is on the best interest of the child. *See* Tex. Fam. Code § 156.101. In determining the best interest of a child, a court may consider (1) the desires of the child, (2) the child's emotional and physical needs now and in the future, (3) any emotional and physical danger to the child now and in the future, (4) the parental abilities of the individuals seeking primary possession, (5) the programs available to assist these individuals to promote the child's best interest, (6) the plans for the child by those seeking primary possession, (7) the stability of the home or proposed placement, (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent. *In re C.A.M.M.*, 243 S.W.3d 211, 221 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976)).

In the specific context of modification of conservatorship, courts also consider the child's need for stability and the need to prevent constant litigation regarding conservatorship of the child. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000); *In re C.A.M.M.*, 243 S.W.3d at 221; *Long v. Long*, 144 S.W.3d 64, 68 (Tex. App.—El Paso 2004, no pet.).

Just as a parent's history is relevant in deciding matters of custody, the history of those with whom the parent associates and to whom the child is exposed has relevance. *In re E.J.P.*, No. 07-17-00304-CV, 2018 WL 2325564, at *2 (Tex. App.—Amarillo May 22, 2018, no pet.) (mem. op.) (not abuse of discretion for trial court to admit testimony from ex-girlfriend of mother's new husband regarding new husband's use of physical violence against ex-girlfriend).

Modification of a possession and visitation order must be in the best interest of the child, not the parents. *In re M.M.S.*, 256 S.W.3d 470 (Tex. App.—Dallas 2008, no pet.) (trial court abused its discretion limiting Oklahoma father's periods of possession to Texas and limiting his periods of weekend possession to once per month when there was no evidence children were affected by distance or location and no evidence of any sort that children's best interest would be served by limiting father's rights to weekend possession).

§ 41.9:7 Relocation

The standards for relocation have been reassessed, "moving away from a relatively strict presumption against relocation and toward a more fluid balancing test that permits the trial court to take into account a greater number of relevant factors" in part because of the "[i]ncreasing geographic mobility and the availability of easier, faster, and cheaper communication." *Lenz v. Lenz*, 79 S.W.3d 10, 15 (Tex. 2002).

Although relocation, regardless of distance, will not automatically suffice to establish a material and substantial change in circumstances, if the custodial parent moves a significant distance, a finding of changed circumstances may be appropriate. Such a decision is necessarily fact intensive. *Bates v. Tesar*, 81 S.W.3d 411, 430 (Tex. App.—El Paso 2002, no pet.).

The fact that a divorce decree does not prohibit a parent from relocating is not evidence that the parent seeking relocation anticipated moving at the time of the prior order. *See In re C.F.M.*, No. 05-17-00141-CV, 2018 WL 2276351, at *4 (Tex. App.—Dallas May 18, 2018, no pet.) (mem. op.).

Factors that courts have considered in the relocation context include (1) the parents' good-faith reasons for and against the proposed move; (2) a comparison of economic, educational, health, and leisure opportunities for the custodial parent and the child; (3) whether the child's special needs or talents can be accommodated; (4) the effect on the child's extended family relationships; (5) the effect the move would have on the noncustodial parent's visitation and communication and his ability to maintain a full and continuous relationship with the child; (6) whether the noncustodial parent has the ability to relocate; and (7) whether a visitation schedule could be arranged that would allow the noncustodial parent to continue a meaningful relationship with the child. *Lenz*, 79 S.W.3d at 15–16; *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (setting out nonexhaustive list of factors to be considered in determining best interest).

It was not an abuse of discretion for a court to deny relocation where the evidence established that the child's opportunities would be approximately the same whether or not the child moved. While one parent's financial situation would be improved by removing the geographic restriction, it would also negatively affect the child's relationship with the other parent and the child's extended family. *Romero v. Arguello*, No. 03-14-00674-CV, 2016 WL 3974762, at *3–5 (Tex. App.—Austin July 21, 2016, no pet.) (mem. op.).

§ 41.9:8 Actions outside Cognitive Presence of Child

Actions outside the cognitive presence of the child are discussed in section 40.11 in this manual.

§ 41.10 Grounds: Child Support

Material and Substantial Change: The court may modify an order that provides for the support of a child, including an order for health-care coverage or dental care coverage, if (1) the circumstances of the child or a person affected by the order to be modified have materially and substantially changed since the earlier of the date of the order's rendition or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based or (2) it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or $100 from the amount that would be awarded in accordance with the child support guidelines. Tex. Fam. Code § 156.401(a).

However, if the parties agreed to an order under which the amount of child support differs from the amount that would be awarded under the child support guidelines, the court may modify the order only if the circumstances of the child or a person affected by the order have materially and substantially changed since the order was rendered. Tex. Fam. Code § 156.401(a–1); *Dobyanski v. Breshears*, No. 01-17-00407-CV, 2018 WL 2049345, at *3 (Tex. App.—Houston [1st Dist.] May 3, 2018, no pet.) (mem. op.); *Luckman v. Zamora*, No. 01-13-00001-CV, 2014 WL 554630, at *3 (Tex. App.—Houston [1st Dist.] Feb. 11, 2014, no pet.) (mem. op.) (parties agreed in prior order for lump-sum child support payment at time when they were living together. At modification hearing, on parties' concession that circumstances had materially and substantially changed because they were no longer living together, court had authority to modify prior agreement).

A court or administrative order for child support in a title IV-D case may be modified at any time, and without a showing of material and substantial change of circumstances, to provide for medical support or dental support of the child if the order does not provide health-care coverage as required by Code section 154.182 or dental care coverage as required by Code section 154.1825. Tex. Fam. Code § 156.401(a–2). Further, a child support order may be modified with regard to the amount of support ordered only as to obligations accruing after the earlier of the date of service of citation or an appearance in the suit to modify. Tex. Fam. Code § 156.401(b). The trial court has no power to retroactively modify child support to offset an arrearage incurred before the obligor was served or made an appearance in a suit to modify. *See In re W.M*, 587 S.W.3d 828, 831 (Tex. App.—El Paso 2019, no pet. h.).

COMMENT: The availability of dental support in suits filed on or after September 1, 2018, does not by itself constitute a material and substantial change of circumstances under section 156.401 sufficient to warrant modification of an order for support rendered before September 1, 2018. Acts 2015, 84th Leg., R.S., ch. 1150 (S.B. 550), § 72(b).

A material and substantial change of circumstances is determined by comparing the current circumstances to those that existed on the date of the rendition of the prior support order, rather than the date of denial of a prior motion to modify. *In re J.D.D.*, No. 05-10-01488-CV, 2011 WL 5386370, at *3 (Tex. App.—Dallas Nov. 9, 2011, no pet.) (mem. op.); *In re G.J.S.*, 940 S.W.2d 289, 292–93 (Tex. App.—San Antonio 1997, no writ).

The court must compare the financial circumstances of the child and the affected parties at the time the order was entered with their financial circumstances at the time of the hearing on the modification. *Dobyanski*, 2018 WL 2049345, at *4 (evidence before trial court in default hearing did not show obligor's current net resources or additional financial support necessary to provide child with substantial care and personal supervision because of disability, nor did it show that child will require substantial care and personal supervision indefinitely into future); *In re C.H.C.*, 392 S.W.3d 347, 350 (Tex. App.—Dallas 2013, no pet.) (court was unable to make requisite comparison of financial circumstances to determine whether there was material and substantial change without specific testimony on how much money father was making at time of original order); *In re N.T.P.*, 402 S.W.3d 13, 19 (Tex. App.—San Antonio 2012, no pet.). An anticipated change in circumstance that is contemplated at the time of the entry of the order cannot be used as evidence of a material or substantial change of circumstances. *In re N.T.P.*, 402 S.W.3d at 19 (neither father's retirement four years after divorce nor

his move to England were specifically contemplated by prior decree, so when he retired he was able to prove that his income was reduced by nearly one-third, which constituted a material and substantial change of circumstances); *In re Moore*, 511 S.W.3d 278, 284 (Tex. App.—Dallas 2016, orig. proceeding) (anticipating that bonuses will fluctuate over time is different from anticipating that bonuses will steadily decrease, and evidence of latter will support finding of material and substantial change of circumstances).

An increase in a parent's resources alone may not justify modifying child support. *In re L.R.*, 416 S.W.3d 675, 679–80 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (where father could afford to pay support in excess of guidelines at all times since divorce, yet had been ordered to pay nothing, any increase in his income standing alone would not equate to material and substantial change of circumstances; thus any discovery intended to establish increase in his ability to pay was immaterial).

It is well established that an obligor is a person affected by a child support order, and therefore a setback in the obligor's financial circumstances can be a basis for finding that a material and substantial change has occurred since the rendition of a prior child support order. *See Reagins v. Walker*, 524 S.W.3d 757, 761 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see also In re A.A.T.*, 583 S.W.3d 914, 921 (Tex. App.—El Paso 2019, no pet. h.) (evidence uncontroverted that obligor's income had been reduced to zero because of disability); *In re J.Z.*, No. 02-17-00127-CV, 2018 WL 5289353, at *4 (Tex. App.—Fort Worth Oct. 25, 2018, no pet.) (mem. op.) (finding no abuse of discretion in modifying child support order where obligor presented evidence of decrease in income); *Trammell v. Trammell*, 485 S.W.3d 571, 578 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (obligor established material and substantial change in circumstances by showing significant decrease in income). However, not every change in a party's income will qualify as material and substantial; instead, what is required is "a marked decrease in income or steady decline without offsetting circumstances." *See In re A.A.T.*, 583 S.W.3d at 922.

A change in custody of a child is, in and of itself, a material and substantial change. *In re A.M.W.*, 313 S.W.3d 887, 891 (Tex. App. —Dallas 2010, no pet.); *In re Z.B.P.*, 109 S.W.3d 772, 781 (Tex. App.—Fort Worth 2003, no pet.) (modification order giving father right to establish children's primary residence was material and substantial change requiring reallocation of financial resources); *Labowitz v. Labowitz*, 542 S.W.2d 922, 925 (Tex. App.—Dallas 1976, no writ) (father's appointment as managing conservator of children constituted material and substantial change requiring reallocation of financial obligations).

The release of a child support obligor from incarceration is a material and substantial change in circumstances for purposes of Family Code section 156.401 if the obligor's child support obligation was abated, reduced, or suspended during the period of the obligor's incarceration. Tex. Fam. Code § 156.401(d).

If a material change has occurred in *either* the needs of the child *or* the ability of either parent to support the child, the burden of proof is met. *Baucom v. Crews*, 819 S.W.2d 628, 631 (Tex. App.—Waco 1991, no writ).

An order of joint managing conservatorship, in and of itself, does not constitute grounds for modifying a support order. Tex. Fam. Code § 156.401(c).

Neither a history of support voluntarily provided in excess of the court order nor an increase in the needs, standard of living, or lifestyle of the obligee is grounds for an increase in the amount of a child support order. Tex. Fam. Code §§ 156.403, 156.405; *Scott v. Younts*, 926 S.W.2d 415, 418 (Tex. App.—Corpus Christi–Edinburg 1996, writ denied).

Neither the net resources of a new spouse nor the needs of a new spouse or of a dependent of a new spouse may be considered in calculating the amount of support to be ordered. Tex. Fam. Code § 156.404.

The court may consider the statutory guidelines for the support of children set forth in Family Code sections 154.121 through 154.133 to determine whether there has been a material and substantial change in circumstances under chapter 156; if the amount contained in the order sought to be modified does not substantially conform with the guidelines, the court may modify the order to substantially conform with the guidelines if the modification is in the child's best interests. Tex. Fam. Code § 156.402. In determining whether application of the guidelines would be unjust or inappropriate under the circumstances, the court may consider evidence of all relevant factors. Tex. Fam. Code § 154.123(b); *Scott*, 926 S.W.2d at 418–19. The court requires the filing of a financial statement, the last two years' tax returns, and current pay stubs in all cases setting child support. Tex. Fam. Code § 154.063.

In *In re J.D.D.*, 242 S.W.3d 916 (Tex. App.—Dallas 2008, pet. denied), the obligor parent was ordered to pay child support based on his potential income. The obligor filed a petition to modify the payments, which was denied except for an interlocutory order slightly reducing his child support obligation and finding him to be intentionally unemployed. The obligor then worked temporarily before being fired for abandoning his job. The obligor then filed another petition to modify seeking a reduction of child support

based on his unemployment. The trial court denied the petition, and the court of appeals affirmed. The obligor had closed his business and was unemployed at the time the interlocutory order was entered, and he had abandoned his job and was unemployed at the time he filed his petition to modify. The trial court did not abuse its discretion in finding there had been no material and substantial change in circumstances. *In re J.D.D.*, 242 S.W.3d at 921.

Calculation of Child Support: The Family Code provides a bifurcated analysis in setting child support, depending on whether an obligor has net monthly resources below or above $9,200. Although the court may consider a wide range of factors in setting support obligations for persons who earn less than $9,200 in net monthly resources, the Family Code provides a much narrower method for calculating the support obligation when an obligor's net monthly resources exceed $9,200.

The court must first determine what the proven needs of the child are. If the needs of the child exceed the presumptive award, the court must subtract the presumptive award from those needs. *Scott*, 926 S.W.2d at 419. The presumptive award for a single child is 20 percent of the first $9,200 of the obligor's net monthly resources, or $1,840. Any support ordered in excess of $1,840 may be based only on the unmet needs of the child. Tex. Fam. Code §§ 154.125, 154.126. (This dollar amount is to be adjusted for inflation every six years; the adjustment to $9,200 took effect September 1, 2019. Tex. Fam. Code § 154.125(a–1), (a–2).) The court may consider the circumstances of the parties in allocating the burden of meeting the child's needs in its support order. *Scott*, 926 S.W.2d at 419. However, child support awarded out of an obligor spouse's net monthly resources that exceeds the statutory guideline amount must be based solely on the needs of the child, and the trial court may not consider a parent's ability to pay for the lifestyle of the obligee. *In re K.F.*, No. 02-18-00187-CV, 2018 WL 6816119, at *5 (Tex. App.—San Antonio Dec. 27, 2018, pet. denied) (mem. op.).

"Needs of the child" is not defined by statute, nor has the supreme court provided a comprehensive definition. The term *needs* includes more than bare necessities but is not to be determined based on the lifestyle of the family. *See Rodriguez v. Rodriguez*, 860 S.W.2d 414, 418 n.3 (Tex. 1993); *see also In re K.F.*, 2018 WL 6816119, at *5. Further, the managing conservator is in the best position to explain the child's needs, and expert testimony is generally not required. *In re Gonzalez*, 993 S.W.2d 147, 159–60 (Tex. App.—San Antonio 1999, no pet.). The court is not limited to considering only the needs of the child at the time of the order; estimates and projections of future expenses and needs of the children are as relevant and probative as past and current expenses and

needs. *Zajac v. Penkava*, 924 S.W.2d 405, 408–09 (Tex. App.—San Antonio 1996, no writ).

A notice of assignment filed under Family Code chapter 231 does not constitute a modification of an order to pay child support. Tex. Fam. Code § 156.407.

Change in Physical Possession: On the motion of a party or a person having physical possession of the child, the court shall modify an order providing for the support of the child to provide that the person having physical possession of the child for at least six months shall have the right to receive and give receipt for payments of support for the child and to hold or disburse money for the benefit of the child if the sole managing conservator or the joint managing conservator who has the exclusive right to determine the child's primary residence has voluntarily relinquished the primary care and possession of the child, been incarcerated or sentenced to be incarcerated for at least ninety days, or relinquished the primary care and possession of the child in a proceeding under title 3 or chapter 262 of the Family Code. Tex. Fam. Code § 156.409(a).

If the court modifies a support order under this provision, the court shall order the obligor to pay the person or entity having physical possession of the child any unpaid child support that is not subject to offset or reimbursement under Code section 157.008 and that accrues after the date the conservator relinquishes possession and control of the child or is incarcerated. Tex. Fam. Code § 156.409(a–1).

An order modifying a support order because of a conservator's incarceration must provide that, on the conservator's release, the conservator may file an affidavit with the court that the conservator has been released, that there has not been a modification of conservatorship during the incarceration, and that the conservator has resumed physical possession of the child. A copy of the affidavit is to be delivered to the obligor and any other party, including the title IV-D agency if appropriate. On receipt of the affidavit, the court on its own motion shall order the obligor to make support payments to the conservator. Tex. Fam. Code § 156.409(a–3).

The provisions discussed above do not affect the court's ability to render a temporary order for payment of child support that is in the child's best interest. Tex. Fam. Code § 156.409(a–2).

Intentional Unemployment or Underemployment: If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor. Tex. Fam. Code § 154.066(a); *In re Davis*, 30 S.W.3d

609, 616 (Tex. App.—Texarkana 2000, no pet.). In determining whether an obligor is intentionally unemployed or underemployed, the court may consider evidence that the obligor is a veteran (as defined by 38 U.S.C. § 101(2)) who is seeking or has been awarded VA disability benefits (as defined by 38 U.S.C. § 101(16)) or non–service-connected disability pension benefits (as defined by 38 U.S.C. § 101(17)). Tex. Fam. Code § 154.066(b).

A parent who is qualified to obtain gainful employment cannot evade his or her support obligation by voluntarily remaining unemployed. *Giangrosso v. Crosley*, 840 S.W.2d 765, 770 (Tex. App.—Houston [1st Dist.] 1992, no writ). It is within the discretion of the trial court to determine a reasonable earning potential of an obligor. *Eggemeyer v. Eggemeyer*, 535 S.W.2d 425, 427 (Tex. App.—Austin 1976), *aff'd*, 554 S.W.2d 137 (Tex. 1977).

However, intentional underemployment requires a voluntary choice by the obligor. *Starck v. Nelson*, 878 S.W.2d 302, 307 (Tex. App.—Corpus Christi–Edinburg 1994, no writ). There is no presumption that simply because a parent is no longer as lucratively employed as he was during the marriage, he is intentionally underemployed or unemployed. The requisite intent or lack thereof, however, may be inferred from such circumstances as the parent's education, economic adversities and business reversals, business background, and earning potential. *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App.—El Paso 2003, pet. denied); *In re Davis*, 30 S.W.3d at 616–17.

There must be a finding that the obligor is intentionally unemployed or underemployed, meaning an obligor consciously chooses to remain unemployed or underemployed. But there is nothing in the statute requiring further proof of the motive or purpose behind the unemployment or underemployment. *Iliff v. Iliff*, 339 S.W.3d 74, 80 (Tex. 2011) (there is no requirement of proof that obligor be intentionally unemployed or underemployed for purposes of avoiding child support). At the same time, the court must keep in mind a parent's right to his or her own happiness. *In re E.A.S.*, 123 S.W.3d at 570; *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.).

The duty to support one's child is not limited merely to a parent's ability to pay from current earnings, but the court can take a parent's earning potential into account as well in determining a proper amount of child support. *In re Striegler*, 915 S.W.2d 629, 638 (Tex. App.—Amarillo 1996, writ denied).

In *Pharo v. Trice*, 711 S.W.2d 282 (Tex. App.—Dallas 1986, no writ), the obligor parent contended that her income was limited to somewhere between $150 and $200 per month. The trial court, however, ordered her to pay $500 per month. The trial court found that the obligor had worked for Braniff Airlines but that she took a leave of absence for more than five years. She was in "fine" medical condition and spent her time researching genealogy, working with the library, working with the Dallas County Medical Auxiliary, playing tennis, being involved with the Park Cities Tennis Association, and helping a friend put together a cookbook. On appeal, the court found that the trial court did not abuse its discretion in taking into account the obligor's potential earnings based on her abilities and skills. *Pharo*, 711 S.W.2d at 284.

In another case the court found that the obligor's testimony that he thought self-employment would be "more lucrative" and did not foresee a decrease in his earnings was sufficient to base the award on actual earnings rather than earning potential. *McGuire v. McGuire*, 4 S.W.3d 382, 388 (Tex. App.—Houston [1st Dist.] 1999, no pet.). *But see Terry v. Terry*, 920 S.W.2d 423, 426–27 (Tex. App.—Houston [1st Dist.] 1996, no writ) (obligor intentionally unemployed based on educational background); *In re Striegler*, 915 S.W.2d at 639–40 (to avoid paying child support obligor intentionally engaged in activities that did not produce income when he could have been gainfully employed elsewhere).

Withholding from Earnings: In proceedings in which periodic payments of child support are ordered, modified, or enforced, the court or the title IV-D agency shall order that income be withheld from the disposable earnings of the obligor as provided in Family Code chapter 158. Tex. Fam. Code § 158.001.

Family Code section 158.403 contains provisions relating to the modification of voluntary wage withholding. *See* Tex. Fam. Code § 158.403. Various aspects of the withholding procedures are discussed in chapter 9 of this manual.

§ 41.11 Temporary Orders

The court may generally enter temporary orders in a suit affecting the parent-child relationship. *See* Tex. Fam. Code § 105.001(a). While a suit to modify is pending, however, the court may not render a temporary order that has the effect of creating a designation, or changing the designation, of the person who has the exclusive right to designate the primary residence of the child, or the effect of creating a geographic area, or changing or eliminating the geographic area, within which a conservator must maintain the child's primary residence, under the final order unless the temporary order is in the

child's best interest *and* (1) the order is necessary because the child's present circumstances would impair the child's physical health or emotional development *or* (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months *or* (3) the child is twelve years of age or older and has expressed to the court in chambers as provided by section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child. Tex. Fam. Code § 156.006(b).

The movant in a motion for a temporary order authorized by Tex. Fam. Code § 156.006(b)(1) must execute and attach an affidavit that contains facts that support the allegation that the child's present circumstances would significantly impair the child's physical health or emotional development. The affidavit must be on the movant's personal knowledge or the movant's belief based on representations made to the movant by a person with personal knowledge. Unless the court determines on the basis of the affidavit that facts adequate to support the allegation are stated in the affidavit, the court must deny the relief sought and decline to schedule a hearing. If the court determines that the facts are adequate to support the allegation, the court shall set a time and place for the hearing. Tex. Fam. Code § 156.006(b–1). The insufficiency or absence of the affidavit is irrelevant if the court conducts a hearing and resolves the dispute based on the evidence presented. *In re Eddins*, No. 15-16-01451-CV, 2017 WL 2443138, at *5 (Tex. App.—Dallas June 5, 2017, orig. proceeding [mand. denied]) (mem. op.).

The voluntary relinquishment ground does not apply to a conservator with the exclusive right to designate the child's primary residence who has temporarily relinquished the primary care and possession of the child to another person during the conservator's military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 156.006(c).

It is an abuse of the trial court's discretion under section 156.006(b)(1) to issue a temporary order that modifies the designation of a parent with the exclusive right to designate a child's primary residence on insufficient evidence that the child's present circumstances would significantly impair the child's physical health or emotional development. *In re Eddins*, 2017 WL 2443138, at *6 (evidence showing dysfunctional relationship between parents, violations of divorce decree provisions regarding communications, inappropriate angry and negative exchanges between parents (sometimes in front of children), and conduct viewed by trial court as parental alienation although no witness, not even child's counselor, expressed such opinion insufficient to support wholesale change of custody in temporary order). Because the "significant impairment" standard is a high one, the movant must present evidence of bad acts or omissions com-

mitted against the children. *In re Lee*, No. 04-19-00440-CV, 2019 WL 3642640, at *2 (Tex. App.—San Antonio Aug. 7, 2019, orig. proceeding) (mem. op.); *In re Eddins*, 2017 WL 2443138, at *4.

Texas courts have recognized that the "significant impairment" standard in section 156.006(b)(1) is a high one that requires evidence of bad acts that are more grave than violation of a divorce decree or alienation of a child from a parent. *In re Rusch*, No. 03-18-00163-CV, 2018 WL 2123384, at *6 (Tex. App.—Austin May 9, 2018, orig. proceeding) (mem. op.). Courts have held that the following evidence does not rise to the level of "significant impairment":

1. that the mother had interfered in the father's visitation and communications with the child; that the child frequently wore dirty, ill-fitting, or damaged clothes and shoes; and that the child's hair, body, and underwear were often dirty. *See In re Charles*, No. 03-17-00731-CV, 2017 WL 5985524, at *4 (Tex. App.—Austin Dec. 1, 2017, orig. proceeding) (mem. op.);

2. that CPS had investigated whether the children were dirty and had bugs in their hair, that the father witnessed the children being disheveled and wearing clothes that were too small, and that the mother might be forced to move. *See In re Kyburz*, No. 05-15-01163-CV, 2015 WL 6935912, at *2 (Tex. App.—Dallas Nov. 10, 2015, orig. proceeding) (mem. op.);

3. that the mother had attempted to alienate the children from the father and prevent them from having a relationship with him. *See In re Coker*, No. 03-17-00862-CV, 2018 WL 700033, at *5 (Tex. App.—Austin Jan. 23, 2018, orig. proceeding) (mem. op.); *see also In re Serio*, No. 03-14-00786-CV, 2014 WL 7458735, at *1–2 (Tex. App.—Austin Dec. 23, 2014, orig. proceeding) (mem. op.); and

4. that the father's relationship with the child might be adversely affected by the mother's move, that the mother's home was messy or unsanitary, that the child was not always appropriately dressed for the weather, and that the child was sometimes not properly supervised. *See In re Rather*, No. 14-11-00924-CV, 2011 WL 6141677, at *2 (Tex. App.—Houston [14th Dist.] Dec. 8, 2011, orig. proceeding) (mem. op.).

Further, a bad case of scabies occurring eight months before a parent filed a petition for modification does not amount to evidence that a child's *present circumstances* would significantly impair the child's health and well-being. *See In re Charles*, 2017 WL 5985524, at *4.

Temporary orders that have the effect of creating a geographic area in which a parent must maintain the children's residence when the decree had none must be supported by evidence that the children's present circumstances significantly impaired their physical health or emotional development. *See In re J.W.*, No. 02-18-00419-CV, 2019 WL 2223216, at *3–4 (Tex. App.—Fort Worth May 23, 2019, orig. proceeding) (mem. op.) (temporary orders that dictated that children must attend specific elementary school had effect of creating geographic area in which father must maintain children's residence because they created geographic limitation whereas decree had none).

Because section 156.006(b)(1) precludes a trial court from issuing an order eliminating the geographic area within which a conservator must maintain a child's primary residence without evidence that the child's primary residence would significantly impair the child's physical health or emotional development, a trial court abuses its discretion by lifting the geographical restriction imposed in the final order the subject of the modification without such evidence. *See In re Lee*, 2019 WL 3642640, at *4.

It is an abuse of discretion for a trial court to render a temporary order that provides for a conditional modification of the person with the right to determine the child's primary residence without proof that child's present circumstances would significantly impair the child's physical health or emotional development, as required by Family Code section 156.006(b)(1). *In re Kyburz*, No. 05-15-01163-CV, 2015 WL 6935912, at *2 (Tex. App.—Dallas Aug. 10, 2015, orig. proceeding) (mem. op.).

Evidence of frequent moves by the parent having the exclusive right to designate the child's primary residence, when several of the moves were to the home of that parent's mother or the home of the other parent and his parents, is insufficient proof of a significant impairment to the child's physical health or emotional development necessary to support a temporary order changing the parent having the exclusive right to designate the child's primary residence. *See In re Tindell*, No. 03-18-00274-CV, 2018 WL 3405035, at *6 (Tex. App.—Austin July 12, 2018, orig. proceeding) (mem. op.).

Evidence of the emotional distress resulting from separation and loss caused by a move is not, by itself, evidence of a significant impairment of a child's physical health or emotional development as required by section 156.006(b). *In re Montemayor*, No. 04-16-00222-CV, 2016 WL 3440130, at *2 (Tex. App.—San Antonio June 22, 2016, orig. proceeding) (mem. op.). *But see In re Walton*, No.11-16-00230-CV, 2017 WL 922418 (Tex. App.—Eastland Feb. 28, 2017, orig. proceeding) (mem. op.). In *In re Walton*, the father filed a petition to modify the designation of the parent who had the exclusive right to designate the children's primary residence after the mother became engaged

and was in the process of moving with the children to another city. After a hearing, the trial court granted the father's request, and the mother filed a petition for a writ of mandamus. A majority of the court of appeals denied the mandamus, finding that a counselor's testimony that forcing a child to move would have a debilitating effect constituted some evidence that the children's present circumstances, by virtue of the announced move, would significantly impair their physical health or emotional development. *In re Walton*, 2017 WL 922418, at *1. The dissent noted that five other courts of appeals have found that emotional distress caused by separation from a parent is insufficient to satisfy the heightened burden of Family Code section 156.006(b)(1). The counselor—who was not court-appointed, did not perform a custody evaluation, and treated only one of the children—offered no opinion that the children suffered from any physical condition, ailment, or illness that significantly impaired their physical health. The counselor testified that if the children moved, they would adapt, just as they would adapt to a new stepparent. The counselor described the mother as an excellent parent, and even the father conceded that he did not claim that mother was a bad parent. Without evidence of specific allegations of physical or emotional disease or illness that would result in significant impairment of both children, the counselor's testimony was no evidence. The dissent would have held that the mother was entitled to mandamus relief. *In re Walton*, 2017 WL 922418, at *2–7.

A temporary order that deprives a custodial parent of any discretion inherent in the right to determine the child's primary residence has the effect of changing the designation of the person with the exclusive to determine the child's primary residence. *In re Payne*, No. 10-11-00402-CV, 2011 WL 6091265, at *2 (Tex. App.—Waco Dec. 2, 2011, orig. proceeding) (mem. op.); *In re Winters*, No. 05-08-01486-CV, 2008 WL 5177835, at *2 (Tex. App.—Dallas Dec. 11, 2008, orig. proceeding) (mem. op.).

A temporary order in a suit affecting the parent-child relationship rendered in accordance with Family Code section 105.001 is not required to include a temporary parenting plan. The court may not require the submission of a temporary parenting plan in any case or by local rule or practice. Tex. Fam. Code § 153.602.

A trial court abuses its discretion in entering temporary orders that significantly modify existing orders for conservatorship and access without proper notice to a party and an opportunity for a full adversary hearing. *In re Bustos*, No. 04-14-00755-CV, 2014 WL 7339259, at *3 (Tex. App.—San Antonio Dec. 23, 2014, orig. proceeding) (mem. op.). A temporary order rendered by the trial court awarding conservatorship to a party who has not requested such relief and is before the court only on a petition for enforcement

is not supported by the pleadings, is rendered without the notice required by section 105.001 of the Family Code, and is void. *In re Eddins*, 2017 WL 2443138, at *5.

Chapter 156 of the Family Code (modification) does not apply to modifications of temporary orders. The policy concerns regarding finality of judgments and the cessation of custody litigation are not implicated in the same way by modifications of temporary orders because at the time of their entry or modification the litigation concerning the child is ongoing. For that reason, the Family Code expressly sets forth a different test by which the propriety of temporary orders and any modifications of temporary orders are to be measured, namely whether temporary orders are for the "safety and welfare" of the child. *In re McPeak*, 525 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 2017, orig., proceeding); *In re Casanova*, No. 05-14-01166-CV, 2014 WL 6486127, at *3 (Tex. App.—Dallas Nov. 20, 2014, orig. proceeding) (mem. op.).

Modification of temporary orders is further discussed in section 4.15 in this manual, and temporary orders pending appeal are discussed in section 4.18.

Temporary Restraining Orders and Temporary Injunctions: Temporary restraining orders and temporary injunctions are discussed in section 4.2 in this manual.

§ 41.12 Habeas Corpus

In the absence of specific provisions to the contrary in an order establishing conservatorship, the death of the managing conservator ends the conservatorship order, and it no longer constitutes a valid subsisting court order for purposes of seeking a writ for habeas corpus. *Greene v. Schuble*, 654 S.W.2d 436, 437–38 (Tex. 1983) (orig. proceeding); *Lewis v. McCoy*, 747 S.W.2d 48, 49–50 (Tex. App.—El Paso 1988, orig. proceeding).

Habeas corpus, however, is not an appropriate means to initiate a proceeding to modify prior court orders in a suit affecting the parent-child relationship. *See* Tex. Fam. Code §§ 157.371–.376. Note that when a writ is met by the responsive filing of a suit to modify seeking temporary orders, Family Code section 156.006 alters the burden of proof necessary to effect a temporary change in conservatorship from the more onerous burden found in section 157.374. *See* Tex. Fam. Code § 156.006.

Habeas corpus for possession of a child is discussed in chapter 36 of this manual.

§ 41.13 Jury

A party has a limited right to a jury trial on timely demand and payment of the jury fee. Tex. Fam. Code § 105.002(a); Tex. R. Civ. P. 216. In a jury trial, a party is entitled to a verdict by the jury and the court may not contravene a jury verdict on the issues of (1) the appointment of a sole managing conservator; (2) the appointment of joint managing conservators; (3) the appointment of a possessory conservator; (4) the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child; (5) the determination of whether to impose a restriction on the geographic area in which a joint managing conservator may designate the child's primary residence; and (6) if such a restriction is imposed, the determination of the geographic area within which the joint managing conservator must designate the child's primary residence. Tex. Fam. Code § 105.002(c)(1).

The court may not submit to the jury questions on the issues of (1) support under Family Code chapters 154 or 159; (2) a specific term or condition of possession of or access to the child; or (3) any right or duty of a conservator, other than the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child under Family Code section 105.002(c)(1)(D). Tex. Fam. Code § 105.002(c)(2).

A trial court's order for a "2-2-5-5" possession schedule does not contravene a jury verdict that one parent should have the exclusive right to designate the child's primary residence. The specific terms and conditions of possession of or access to a child are distinct from the determination of which parent has the exclusive right to designate the child's primary residence. Because the trial court is statutorily prohibited by Code section 105.002(c)(2)(B) from submitting the possession and access issue to a jury, the specific terms and conditions of possession and access are for the court alone and are subject to the court's discretion. *See In re S.H.*, 590 S.W.3d 588, 594 (Tex. App.—El Paso 2019, pet. denied).

§ 41.14 Child Custody Evaluation

In a suit affecting the parent-child relationship, the court may order the preparation of a child custody evaluation regarding (1) the circumstances and conditions of the child, a party to the suit, and, if appropriate, the residence of any person requesting conservatorship of, possession of, or access to the child and (2) any issue or question relating to the suit at the request of the court before or during the evaluation process. Tex. Fam. Code § 107.103(a).

Child custody evaluations are discussed in section 40.19 in this manual.

§ 41.15 Preferential Setting

In any suit affecting the parent-child relationship, after a hearing, the court may grant a motion for a preferential setting for a trial on the merits filed by a party, the amicus attorney, or the attorney ad litem for the child and may give precedence to that hearing over other civil cases if the court finds that the delay created by ordinary scheduling practices will unreasonably affect the best interests of the child. Tex. Fam. Code § 105.004.

§ 41.16 Mandatory Provisions in Order

Certain information and provisions must be included in the final order in a suit affecting the parent-child relationship, other than in a proceeding involving the termination of the parent-child relationship or adoption. For detailed discussion of these requirements, see section 40.22 in this manual.

§ 41.17 Attorney's Fees and Costs

Attorney's fees awarded in a modification proceeding may not be characterized as child support. *See In re C.A.C.*, No. 05-17-00602-CV, 2018 WL 2126811, at *3 (Tex. App.—Dallas May 9, 2018, no pet.) (mem. op.).

Attorney's Fees as Necessaries or Child Support: In the absence of express statutory authority, a trial court does not have discretion to characterize attorney's fees awarded in a nonenforcement modification suit as necessaries or additional child support. *See Tucker v. Thomas*, 419 S.W.3d 292, 295 (Tex. 2013); *see also Kerlick v. Kerlick*, No. 03-14-00620-CV, 2016 WL 4506162, at *6 (Tex. App.—Austin Aug. 24, 2016, pet. denied) (mem. op.); *Guillory v. Boykins*, 442 S.W.3d 682, 692–93 (Tex. App.—Houston [1st Dist.] 2014, no pet.). *But see In re D.D.J.*, No. 13-14-00401-CV, 2016 WL 6962007, at *4 (Tex. App.—Corpus Christi–Edinburg Nov. 22, 2016, no pet.) (mem. op.) (stating that *Tucker* concluded that legislature did not intend to provide trial courts with discretion to award attorney's fees to movant who seeks only to modify—not enforce—existing SAPCR order, despite express holding in *Tucker* that attorney's fees in nonenforcement modification suit cannot be ordered *as necessaries or as additional child support*. *See Tucker*, 419 S.W.3d at 300).

When a party fails to segregate attorney's fees incurred with an enforcement proceeding—fees that can be enforced through contempt—from attorney's fees incurred for work performed in connection with a modification proceeding—fees that cannot be enforced through contempt—the award of attorney's fees is enforceable only as a debt. *See In re C.A.C.*, 2018 WL 2126811, at *3; *In re Braden*, 483 S.W.3d 659, 666 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (per curiam).

Attorney's fees and costs are discussed in section 40.16 and in chapter 20 in this manual.

§ 41.18 Parent Education and Family Stabilization Course; Counseling

In a suit affecting the parent-child relationship, including an action to modify an order in a suit affecting the parent-child relationship providing for possession of or access to a child, the court may order the parties to attend a parent education and family stabilization course if the court determines that the order is in the child's best interests. Tex. Fam. Code § 105.009(a). Parent education and family stabilization courses are discussed in section 40.24 in this manual.

Counseling: If the court finds at the time of a hearing that the parties have a history of conflict in resolving an issue on conservatorship or possession of or access to the child, the court may order a party to participate in counseling with a mental health professional with specialized training and to pay for that counseling. Tex. Fam. Code § 153.010(a).

§ 41.19 Clarification vs. Modification

A court may clarify an order rendered by the court if the court finds, on the motion of a party or on the court's own motion, that the order is not specific enough to be enforced by contempt. Tex. Fam. Code § 157.421(a); *Lundy v. Lundy*, 973 S.W.2d 687, 688 (Tex. App.—Tyler 1998, pet. denied). A court, however, may not change the substantive provisions of an order to be clarified, and a substantive change is not enforceable. Tex. Fam. Code § 157.423; *Lundy*, 973 S.W.2d at 688.

The only basis for clarifying a prior decree is when a provision is ambiguous and nonspecific. *Lundy*, 973 S.W.2d at 688; *Bina v. Bina*, 908 S.W.2d 595, 598 (Tex. App.—Fort Worth 1995, no writ). In the absence of an ambiguity, the trial court is without authority to change the judgment. *Lundy*, 973 S.W.2d at 688–89. A court may not modify the original judgment under the guise of clarification. *Dunn v. Dunn*, 708 S.W.2d 20,

23 (Tex. App.—Dallas 1986, no writ) (citing *McGehee v. Epley*, 661 S.W.2d 924, 925 (Tex. 1983) (per curiam)).

§ 41.20 Interview with Child

Section 153.009 of the Family Code regulates the court's interview of a child in chambers. The court's interview with a child is discussed in section 40.14 in this manual.

§ 41.21 Parenting Plan

The final order in a suit affecting the parent-child relationship must include a parenting plan. Tex. Fam. Code § 153.603. Parenting plans are discussed in chapter 16 of this manual.

§ 41.22 Agreement for Modification

The Family Code encourages parents to make an agreed parenting plan regarding conservatorship and possession of the child. *In re Kubankin*, 257 S.W.3d 852, 858 (Tex. App.—Waco 2008, orig. proceeding) (per curiam) (citing Tex. Fam. Code § 153.007 and Tex. Fam. Code § 154.124 (providing for agreement concerning support)). However, a purported agreement to modify remains unenforceable until it has been approved by a court in a modification proceeding. *In re Kubankin*, 257 S.W.3d at 859.

§ 41.23 Modification during Pendency of Appeal

A trial court has continuing, exclusive jurisdiction over a suit for modification pending appellate review of a prior final order in a suit affecting the parent-child relationship. While in theory allowing modification of prior orders during the pendency of an appeal could allow a party or a trial court to evade judicial review, the Family Code contains sufficient safeguards to ensure the unlikelihood and undesirability of such an endeavor. Further, the law provides adequate remedies for those who must face litigation costs in defense of groundless or frivolous claims, but a party should not be barred from asserting a valid claim simply because additional resources must be expended to litigate them. *In re Reardon*, 514 S.W.3d 919, 929–30 (Tex. App.—Fort Worth 2017, orig. proceeding); *see also In re G.E.D.*, No. 05-17-00160-CV, 2018 WL 507673, at *4 (Tex. App.—Dallas Jan. 2, 2018, no pet.); *Blank v. Nuszen*, No. 01-13-01061-CV, 2015 WL 4747022, at *2 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.); *Hudson v. Markum*, 931 S.W.2d 336, 337–38 (Tex. App.—Dallas 1996, no writ). *But*

see In re E.W.N., 482 S.W.3d 150, 154 (Tex. App.—El Paso 2015, no pet.) (Family Code section 109.001 implicitly, if not explicitly, recognizes appellate court's exclusive plenary authority over cause on appeal).

§ 41.24 Transfer of Permanent Physical Custody of Adopted Child

Court approval is required for the transfer of permanent physical custody of an adopted child by a parent, managing conservator, or guardian to any person who is not a relative or stepparent of the child or an adult who has a significant and long-standing relationship with the child. *See* Tex. Fam. Code § 162.026. It is a felony offense to conduct, facilitate, or participate in an unregulated custody transfer of an adopted child except as provided in Tex. Penal Code § 25.081(d). *See* Tex. Penal Code § 25.081. This topic is discussed in more depth in section 51.30 in this manual.

[Sections 41.25 through 41.30 are reserved for expansion.]

II. Spousal Maintenance

§ 41.31 Spousal Maintenance

The amount of maintenance awarded under chapter 8 of the Family Code may be reduced by the filing of a motion in the court that originally entered the order. A party affected by the order or portion of the decree to be modified may file the motion. Tex. Fam. Code § 8.057(a). Spousal maintenance is more fully discussed in chapter 23 of this manual.

Notice and response to a motion to modify maintenance are governed by the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit. Tex. Fam. Code § 8.057(b).

After a hearing, the court may modify an original or modified order or portion of a decree providing for maintenance if there has been a material and substantial change in circumstances, including circumstances reflected in the factors to be considered in determining maintenance that are specified in Family Code section 8.052, relating to either party or to a child of the marriage who requires substantial care and personal supervision because of a physical or mental disability, as specified in Code section

8.051(2)(C), if applicable. The modification may apply only to payments accruing after the filing of the motion. Tex. Fam. Code § 8.057(c).

A party's assertion of a material change of circumstances in a petition to modify possession of and access to a child is not a judicial admission of a material and substantial change of circumstances to support a modification of spousal maintenance. *Rother v. Rother,* No. 04-13-00899-CV, 2014 WL 4922898, at *2 (Tex. App.—San Antonio Oct. 1, 2014, no pet.) (mem. op.).

A loss of employment or circumstances that render a former spouse unable to provide for his or her minimum reasonable needs by reason of incapacitating physical or mental disability that occurs after the divorce or annulment are not grounds for the institution of maintenance. Tex. Fam. Code § 8.057(d). *But see Crane v. Crane*, 188 S.W.3d 276 (Tex. App.—Fort Worth 2006, pet. denied) (continuation of spousal maintenance based on incapacitating physical or mental disability is not modification of spousal maintenance and places no special burden of proof on movant other than to prove by preponderance of evidence that disability is continuing).

In *McCollough v. McCollough*, 212 S.W.3d 638 (Tex. App.—Austin 2006, no pet.), the former husband sought to modify the terms of his alimony obligation on the basis that his former wife had entered into an "informal marriage"; he relied in part on sections 8.056, 8.057, and 8.059 of the Family Code. The court held that the agreement incident to divorce in which the husband agreed to pay the wife $5,000 per month as alimony for a period of ten years, which was incorporated into the divorce decree, was governed by contract law rather than by Family Code chapter 8, the statute governing court-ordered maintenance. Nothing in the agreement indicated the parties' intent that the alimony obligation be governed by chapter 8, the agreement made no reference to chapter 8, and the agreement would have violated the statutory prohibitions in chapter 8 governing the terms and amount of alimony to be paid.

No forms for the modification of a spousal maintenance order are provided in this manual.

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Transfer

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Chapter 42

Transfer

§ 42.1 Transfer of Venue

The transfer procedures can be used to move an original proceeding to a county of proper venue when the case is filed in a county that is improper. The transfer of an original proceeding to a county of proper venue is mandatory if a request is timely filed by a party to the case, other than the petitioner. Tex. Fam. Code § 103.002(a). The transfer of suits affecting the parent-child relationship is controlled exclusively by chapter 155 of the Texas Family Code, which supplants the Texas Rules of Procedure that govern venue challenges in other types of civil cases. *See Leonard v. Paxson*, 654 S.W.2d 440, 441 (Tex. 1983); *In re Leder*, 263 S.W.3d 283, 286 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding [mand. denied]); *Kirby v. Chapman*, 917 S.W.2d 902, 907 (Tex. App.—Fort Worth 1996, no writ); *Martinez v. Flores*, 820 S.W.2d 937, 938 (Tex. App.—Corpus Christi–Edinburg 1991, orig. proceeding).

Discretionary transfers for the convenience of the parties and the witnesses and in the interest of justice under Code section 155.201 do not apply to the transfer of original proceedings. *McManus v. Wilborn*, 932 S.W.2d 662, 664–65 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding).

§ 42.2 Where Venue Is Proper

Generally, an original suit affecting the parent-child relationship shall be filed in the county in which the child resides unless another court has continuing, exclusive jurisdiction under Family Code chapter 155 or venue is fixed in a suit for dissolution of a marriage. Tex. Fam. Code § 103.001(a).

Suits for adoption may be brought in the county in which the child resides or in the county in which the petitioners reside, even if another court has continuing, exclusive jurisdiction. Except as provided by Family Code section 155.201, a court with continuing, exclusive jurisdiction is not required to transfer the suit affecting the parent-child relationship to the court in which the adoption suit is filed. Tex. Fam. Code § 103.001(b).

If a suit affecting the parent-child relationship is pending at the time a suit for divorce, for annulment, or to declare a marriage void is filed, the suit affecting the parent-child relationship shall be transferred to the court in which the suit for dissolution of a marriage is filed. *See* Tex. Fam. Code §§ 6.407(a), 103.002(b). A motion to transfer for this purpose may be filed at any time. Tex. Fam. Code §§ 155.201(a), 155.204(a). The motion must contain a certification that all other parties, including the attorney general, if applicable, have been informed of the filing of the motion. Tex. Fam. Code § 155.204(a). A divorce petition filed in another county alleging an informal marriage will not trigger a mandatory transfer without a factual showing that there was an actual marriage. *In re M.A.S.*, 246 S.W.3d 182, 184 (Tex. App.—San Antonio 2007, no pet.) (suit for divorce alleging informal marriage found to be sham to have venue transferred to another county; therefore mandatory transfer not triggered). The transfer shall be made, within the time required by Family Code section 155.204, on the filing of a motion that complies with Family Code section 155.204(a) showing that the dissolution suit has been filed in another court and requesting a transfer to that court. Tex. Fam. Code § 155.201(a).

§ 42.3 Determining Residence of Child for Proper Venue

General Rule: A child resides in the county in which the child's parents reside (or the parent resides, if only one parent is living). Tex. Fam. Code § 103.001(c). However, certain exceptions, which are discussed below, apply. In computing the time the child has resided in a county, the court may not require that the period of residence be continuous and uninterrupted but shall look to the child's principal residence during the six-month period preceding the commencement of the suit. Tex. Fam. Code § 155.203. The child need not be physically present in the transferee county on the date of the filing; that county just has to be the county of the child's residence. *In re Nabors*, 276 S.W.3d 190, 197–98 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

The six-month residency period for mandatory transfer begins with the date the child's actual residence in the new county begins, not with the signing of the original custody order. *Tippy v. Walker*, 865 S.W.2d 928, 929 (Tex. 1993) (orig. proceeding) (per curiam).

A mandatory transfer is required when a child resides in another county for six months at the time the motion to transfer is filed, even if the child no longer resides in the transferee county at the time of the transfer. *In re Foreman,* No. 05-13-01618-CV, 2014 WL 72483 (Tex. App.—Dallas Jan. 9, 2014, orig. proceeding) (mem. op.). The fact that one party thought the child would be residing only temporarily in the new county does

not give the court discretion to deny a mandatory transfer. The court is to look at the actual amount of time the child has resided in the transferee jurisdiction and not whether the parties thought it was temporary or permanent. *In re Burling*, No. 05-16-00529-CV, 2016 WL 3438075 (Tex. App.—Dallas June 21, 2016, orig. proceeding) (mem. op.).

Guardian of Person: If a guardian of the person has been appointed by order of the county or probate court and no managing conservator has been appointed, the child resides in the county in which the guardian of the person resides. Tex. Fam. Code § 103.001(c)(1).

Parent Having Care and Control: If the parents of the child do not reside in the same county and no managing conservator, custodian, or guardian of the person has been appointed, the child resides in the county in which the parent having care, control, and possession of the child resides. Tex. Fam. Code § 103.001(c)(2); *see In re Narvaiz*, 193 S.W.3d 695 (Tex. App.—Beaumont 2006, orig. proceeding) (per curiam) (where parents living in different counties shared possession of child, residence of parent having *actual* care, control, and possession of child *at time of filing suit* governed venue).

Adult Having Care and Control: If the child is in the care and control of an adult other than a parent and no managing conservator, custodian, or guardian of the person has been appointed, the child resides where the adult having actual care, control, and possession of the child resides. Tex. Fam. Code § 103.001(c)(3). If the child is in the actual care, control, and possession of an adult other than a parent and the whereabouts of the parent and the guardian of the person is unknown, the child resides where the adult having actual possession, care, and control of the child resides. Tex. Fam. Code § 103.001(c)(4).

If the person whose residence would otherwise determine venue has left the child in the care and control of the adult, the child resides where that adult resides. Tex. Fam. Code § 103.001(c)(5).

Guardian or Custodian Appointed by Foreign Court: If a guardian or custodian of the child has been appointed by order of a court of another state or nation, the child resides in the county in which the guardian or custodian resides if that person resides in Texas. Tex. Fam. Code § 103.001(c)(6).

No Adult Having Care or Control: If the child is not under the actual care, control, and possession of an adult, the child resides where the child is found. Tex. Fam. Code § 103.001(c)(7).

§ 42.4 Acquiring and Losing Continuing, Exclusive Jurisdiction

The court in which the original suit affecting the parent-child relationship was filed acquires continuing, exclusive jurisdiction over child-related issues on rendition of a final order. Tex. Fam. Code § 155.001(a). There are three situations in which the rendition of a final order does not create continuing, exclusive jurisdiction in a court: (1) voluntary or involuntary dismissal of a suit affecting the parent-child relationship; (2) a final order finding that an alleged or presumed father is not the father of a child in a suit to adjudicate parentage, unless the child was subject to the jurisdiction of the court or some other court in a suit affecting the parent-child relationship before the commencement of the parentage suit; and (3) a final order of adoption. Tex. Fam. Code § 155.001(b).

Exercise of Continuing, Exclusive Jurisdiction: Once a Texas court acquires continuing, exclusive jurisdiction, that court retains that exclusive jurisdiction over the child, and no other court of Texas has jurisdiction to enter orders regarding that child, except when a suit is filed under Code chapter 262 or a suit for adoption is filed in the county where the child resides or in the county where the petitioners reside. Tex. Fam. Code §§ 155.001(c), 103.001(b). The court's jurisdiction will continue until the case is transferred or until jurisdiction is lost pursuant to section 155.004. *See* Tex. Fam. Code § 155.004. In emergency situations, the Texas Department of Family and Protective Services has the authority to file a suit for protection of the child in the county in which the child is found, regardless of where the court of continuing jurisdiction is located. Tex. Fam. Code § 262.002. See section 42.12 below for further discussion.

Generally, a court with continuing, exclusive jurisdiction may exercise its jurisdiction to modify its order regarding managing conservatorship, possessory conservatorship, possession of and access to the child, and support of the child. Tex. Fam. Code § 155.003(a). If a court in which a suit has been filed determines that another court has continuing, exclusive jurisdiction of the child, the court in which the suit is filed shall dismiss the suit without prejudice. Tex. Fam. Code § 155.102.

There are three situations in which a Texas court with continuing, exclusive jurisdiction may not modify its own orders. The first is in a suit to modify managing conservatorship if the child's home state is a state other than Texas or modification is precluded by chapter 152 of the Family Code (the Uniform Child Custody Jurisdiction and Enforcement Act). Tex. Fam. Code § 155.003(b).

The second situation in which a Texas court may not modify its own orders is if there is a suit to modify possessory conservatorship or possession of or access to a child and (1) the child's home state is a state other than Texas and all parties have established and continue to maintain their principal residence outside Texas or (2) each individual party has filed written consent with the Texas court for a court of another state to modify the order and assume continuing, exclusive jurisdiction of the suit. Tex. Fam. Code § 155.003(c).

The final situation in which a court of continuing, exclusive jurisdiction may not exercise jurisdiction is when a modification of a child support order is precluded by chapter 159 of the Family Code (the Uniform Interstate Family Support Act). Tex. Fam. Code § 155.003(d).

Loss of Continuing, Exclusive Jurisdiction: A Texas court loses its continuing, exclusive jurisdiction to modify its order if (1) an order of adoption is rendered by another court in an original suit filed as described by Family Code section 103.001(b); (2) the parents have remarried each other after the dissolution of a previous marriage between them and file a suit for the dissolution of their subsequent marriage combined with a suit affecting the parent-child relationship as if there had not been a prior court with continuing, exclusive jurisdiction over the child; or (3) another court assumed jurisdiction over a suit and rendered a final order based on incorrect information received from the vital statistics unit that there was no court of continuing, exclusive jurisdiction. Tex. Fam. Code § 155.004(a).

§ 42.5 Transfer of Continuing, Exclusive Jurisdiction

If a suit to modify or a motion to enforce an order is filed in the court having continuing, exclusive jurisdiction, the court, on the timely motion of a party, shall, within the time required by Family Code section 155.204, transfer the proceeding to another county in Texas if the child has resided in the other county for six months or longer. Tex. Fam. Code § 155.201(b). Transfer under these circumstances is mandatory. *In re Lawson*, 357 S.W.3d 134, 136 (Tex. App.—San Antonio 2011, orig. proceeding) (agreement in divorce decree for child to live in certain county at set point in time cannot override mandatory provisions of transfer statute); *In re Kramer*, 9 S.W.3d 449, 451 (Tex. App.—San Antonio 1999, orig. proceeding) (failure to transfer to county of child's residence promptly and without hearing improper when transfer timely and properly requested). *But see Huey v. Huey*, 200 S.W.3d 851, 853 (Tex. App.—Dallas 2006, no pet.) (right to mandatory transfer waived even though child had lived in

another county for more than six months, because mother had moved to new county in violation of residency restriction in divorce decree).

A court must look to the residence of each child when considering a transfer. It is conceivable that a case might involve the mandatory transfer of relief relating to one child, while still leaving issues relating to another child in the court of continuing jurisdiction. *See In re Yancey*, 550 S.W.3d 671, 675 (Tex. App.—Tyler 2017, orig. proceeding) (mem. op.); *In re T.J.L.*, 97 S.W.3d 257, 264–65 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

If a suit to modify or motion to enforce an order is pending at the time a subsequent suit to modify or motion to enforce is filed, the court may transfer the proceeding to the county of the child's residence only if the court could have transferred the proceeding at the time the first motion or suit was filed. Tex. Fam. Code § 155.201(c). See section 42.3 above regarding computation of time for child's residence.

If the child has resided in the new county for less than six months, a transfer by the court with continuing, exclusive jurisdiction is discretionary. Tex. Fam. Code § 155.202(a). The court may also order a discretionary transfer of the proceeding to another county in Texas for the convenience of the parties and witnesses and in the interest of justice. Tex. Fam. Code § 155.202(b).

One Party Resides in Texas; All Other Parties Reside Outside Texas: If one party resides in Texas and all other parties including the child or all the children affected by the proceeding reside outside Texas, the Texas court with continuing, exclusive jurisdiction over a child custody or child support proceeding shall transfer the proceeding to the county of residence of the resident party. Tex. Fam. Code § 155.301(a). If the parties submit to the court an agreed order for transfer, the court shall sign the order without the need for other pleadings. Tex. Fam. Code § 155.301(c).

Party Resides Outside Texas; Other Parties or Child(ren) Reside in Different Texas Counties: If one or more of the parties affected by the proceedings reside outside Texas and if more than one party or one or more children affected by the proceeding reside in Texas in different counties, the court shall transfer the proceeding to—

1. the court of continuing, exclusive jurisdiction, if any;

2. the county of residence of the child, if applicable, if there is no court of continuing, exclusive jurisdiction *or* if the court of continuing, exclusive jurisdic-

tion finds that neither a party nor a child affected by the proceeding resides in the county of the court of continuing jurisdiction; or

3. the county most appropriate to serve the convenience of the resident parties and the witnesses and the interest of justice, if 1. and 2. above are inapplicable.

Tex. Fam. Code § 155.301(b).

If the parties submit to the court an agreed order for transfer based on section 155.301 of the Family Code, the court shall sign the order without the need for other pleadings. Tex. Fam. Code § 155.301(c).

§ 42.6 Motion to Transfer—Filing and Hearing

A motion to transfer may be filed only in conjunction with a pending proceeding. *Botello v. Salazar*, 745 S.W.2d 540, 541 (Tex. App.—Houston [14th Dist.] 1988, no writ). A motion to transfer filed by a petitioner or movant is timely filed if it is made at the time the party's initial pleadings are filed. Tex. Fam. Code § 155.204(b). A motion to transfer filed by any other party is timely if it is filed before the party's answer date or before the commencement of the hearing, whichever is sooner. Tex. Fam. Code § 155.204(b). A motion to transfer based on the filing of a petition for divorce may be filed at any time, as may a motion based on the filing of a suit for adoption in another court located in the county where the child resides and requesting a transfer to that court. Tex. Fam. Code §§ 155.201(a), (a–1), 155.204(a).

Response: A party contesting the motion to transfer must file a controverting affidavit denying that grounds for the transfer exist on or before the first Monday after the twentieth day after the date notice of the motion to transfer is served. Tex. Fam. Code § 155.204(d).

Automatic Transfer: If a timely motion to transfer has been filed and no controverting affidavit is timely filed, the proceeding must be transferred without a hearing to the proper court not later than the twenty-first day after the final date of the period allowed for the filing of a controverting affidavit. Tex. Fam. Code § 155.204(c); *see In re Kramer*, 9 S.W.3d 449, 451 (Tex. App.—San Antonio 1999, orig. proceeding) (failure to transfer to county of child's residence promptly and without hearing improper when transfer timely and properly requested).

Hearing: If a controverting affidavit is filed, each party is entitled to notice of not less than ten days before the date of the hearing on the motion to transfer. Tex. Fam.

Code § 155.204(e). The court may not rule based on the pleadings alone but must conduct a hearing. *In re Claiborne*, No. 10-14-00076-CV, 2014 WL 1886052 (Tex. App.—Waco May 8, 2014, orig. proceeding) (mem. op.).

Only evidence pertaining to the transfer may be taken at the hearing. If the court finds after the hearing that grounds for the transfer exist, the proceeding must be transferred to the proper court not later than the twenty-first day after the date the hearing is concluded. Tex. Fam. Code § 155.204(f), (g).

§ 42.7 No Interlocutory Appeal

An order transferring or refusing to transfer a proceeding is not subject to interlocutory appeal. Tex. Fam. Code § 155.204(h); *Brown v. Brown*, 566 S.W.2d 378, 380 (Tex. App.—Corpus Christi–Edinburg 1978, no writ); *Rogers v. Rogers*, 536 S.W.2d 442, 443 (Tex. App.—Houston [14th Dist.] 1976, no writ).

Mandamus is available to compel a mandatory transfer in suits affecting the parent-child relationship. *Proffer v. Yates*, 734 S.W.2d 671, 672–73 (Tex. 1987) (orig. proceeding) (per curiam); *Arias v. Spector*, 623 S.W.2d 312, 313 (Tex. 1981) (orig. proceeding) (per curiam).

If a court improperly denies a mandatory transfer of venue, the party requesting the transfer must file a motion to stay the proceedings while the writ of mandamus is pending. *Cooper v. Johnston*, No. 11-11-00110-CV, 2011 WL 4137731, at *3 (Tex. App.—Eastland Sept. 15, 2011, no pet.) (mem. op.).

There are remedies available for a court's erroneously granting a motion to transfer. In the transferring court, a motion to vacate the order may be filed and heard within thirty days after the transfer order is signed or, failing that, a writ of mandamus may be sought. If that relief is unavailable, the aggrieved party may file a plea in abatement in the transferee court or, if that is unsuccessful, seek a writ of mandamus. *Ex parte Bowers*, 671 S.W.2d 931, 936 (Tex. App.—Amarillo 1984, orig. proceeding).

§ 42.8 Effect of Transfer

During the transfer of a suit from a court with continuing, exclusive jurisdiction, the transferring court retains jurisdiction to render temporary orders. Tex. Fam. Code § 155.005(a). If a mandatory transfer has been requested, the court has only the author-

ity to transfer and may not dismiss the case. *Silverman v. Johnson*, 317 S.W.3d 846 (Tex. App.—Austin 2010, no pet.).

A court to which a transfer is made becomes the court of continuing, exclusive jurisdiction, and all proceedings in the suit are continued as if it were brought there originally. A judgment or order transferred has the same effect and shall be enforced as if originally entered in the transferee court. The transferee court shall enforce a judgment or order of the transferring court by contempt or by any other means by which the transferring court could have enforced its judgment or order. The transferee court has the power to punish disobedience of the transferring court's order, whether occurring before or after the transfer, by contempt. Tex. Fam. Code § 155.206(a)–(c).

The jurisdiction of the transferring court terminates on the docketing of the case in the transferee court. Tex. Fam. Code § 155.005; *Bigham v. Dempster*, 901 S.W.2d 424, 430 (Tex. 1995) (orig. proceeding) (case determined docketed when transferee court receives transfer order and asserts jurisdiction or when files transferred, whichever occurs first).

After the transfer, the transferring court no longer has any jurisdiction over the child who is the subject of the suit that was transferred, nor does it have jurisdiction to enforce its order for a violation occurring before or after the transfer of jurisdiction. Tex. Fam. Code § 155.206(d). After a case is transferred, the transferring court cannot order the return of the case. *Seay v. Valderas*, 643 S.W.2d 395, 397 (Tex. 1982) (orig. proceeding) (per curiam).

When there are multiple children in a suit, a mandatory transfer may apply to some but not all of the children in the case. *See In re T.J.L.*, 97 S.W.3d 257, 264–65 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (where one child resided with mother in Harris County and another child resided with father in Brazos County, only issues involving child living with mother were subject to mandatory transfer to Harris County).

Not later than the tenth working day after the date an order of transfer is signed, the clerk of the transferring court shall send the following items to the transferee court: (1) the pleadings in the pending proceeding and any other document specifically requested by a party, (2) certified copies of all entries in the minutes, (3) a certified copy of each final order, and (4) a certified copy of the order of transfer signed by the transferring court. The clerk of the transferring court shall keep a copy of the transferred pleadings and other requested documents. If the transferring court retains jurisdiction of another child who was the subject of the suit, the clerk shall send a copy of the pleadings and

other requested documents to the transferee court and shall keep the original pleadings and other requested documents. The clerk of the transferring court shall send a certified copy of the order directing payments to the transferee court, to any party or employer affected by that order, and, if appropriate, to the local registry of the transferee court. Tex. Fam. Code § 155.207(a), (b), (d).

When ordering the transfer of the case to another court, the transferring court shall also order that all future payments of child support be made to the state disbursement unit. The transferring court's local registry or the state disbursement unit shall continue to receive, record, and disburse child support payments to the payee until it receives notice that the transferred case has been docketed by the transferee court. After receiving notice of the docketing from the transferee court, the transferring court's local registry shall send a certified copy of the child support payment record to the clerk of the transferee court and shall forward any payments received to the state disbursement unit. Tex. Fam. Code § 155.205.

On receipt of the pleadings, documents, and orders from the transferring court, the clerk of the transferee court shall docket the suit and notify the judge of the transferee court, all parties, the clerk of the transferring court, and, if appropriate, the transferring court's local registry that the suit has been docketed. Tex. Fam. Code § 155.207(c).

§ 42.9 Cost of Transfer

The copying costs and postal charges should be apportioned by the court in the transfer order, but there is no statutory directive for who is to pay for the copying costs for the transferred file.

The fee for filing a transferred case is $45 payable to the clerk of the transferee court. No other fee, cost, charge, or expense may be charged in connection with the filing of the transferred case. However, this limitation does not affect fees payable to the court transferring the case. Tex. Fam. Code § 110.005.

§ 42.10 Void Orders

If an order is entered by a court without the proper jurisdiction, then the order is void as a matter of law. *Kirby v. Chapman*, 917 S.W.2d 902, 907–08 (Tex. App.—Fort Worth 1996, no writ).

In Texas there is a split of authority as to whether a court of continuing jurisdiction is the only court that has jurisdiction of a matter or if that merely creates a court of dominant jurisdiction. Under the Texas Government Code district courts have the ability to hear cases and sign judgments for other courts within the same county, without the case being formally transferred. *See* Tex. Gov't Code § 74.094(a); *In re U.S. Silica Co.*, 157 S.W.3d 434 (Tex. 2005) (orig. proceeding). However, when a court has continuing and exclusive jurisdiction in a suit affecting the parent-child relationship, the record must be clear that the judge of another court is acting on behalf of the court with continuing, exclusive jurisdiction. *In re Garza*, 981 S.W.2d 438, 441 (Tex. App.—San Antonio 1998, orig. proceeding).

If a court enters an order in a case where there is a court of continuing and exclusive jurisdiction, the issue becomes whether the new order is void or voidable. *See In re C.G.*, 495 S.W.3d 40 (Tex. App.—Corpus Christi–Edinburg 2016, pet. denied); *Celestine v. Department of Family & Protective Services*, 321 S.W.3d 222, 229 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *In re Aguilera*, 37 S.W.3d 43, 48 (Tex. App.—El Paso 2000, orig. proceeding) (new order void for want of jurisdiction because there was court of continuing and exclusive jurisdiction in same county). *But see Ramsey v. Ramsey*, 19 S.W.3d 548, 552 (Tex. App.—Austin 2000, no pet.) (order determined not to be void but distinction made because decree challenged via collateral attack, not direct appeal).

If there is an attempted transfer of a case but the transfer is not properly effectuated by the filing of both a motion and an order, an order entered by the transferee court is without effect. *Alexander v. Russell*, 699 S.W.2d 209, 210 (Tex. 1985) (per curiam).

§ 42.11 Identifying Court of Continuing, Exclusive Jurisdiction

The petitioner or the court shall request from the vital statistics unit (VSU) identification of the court that last had continuing, exclusive jurisdiction of a child in a suit unless (1) the petition alleges that no other court has continuing, exclusive jurisdiction of the child and the issue is not disputed by the pleadings or (2) the petition alleges that the court in which the suit or modification has been filed has acquired and retains continuing, exclusive jurisdiction of the child as the result of a prior proceeding and that issue is not disputed by the pleadings. Tex. Fam. Code § 155.101(a).

On the written request of the court, an attorney, or a party, the VSU shall, within ten days of receiving the request, identify the court that last had continuing, exclusive jurisdiction of the child in a suit and give the docket number of the suit or state that the child

has not been the subject of a suit. The request should identify the child by name, birth date, and place of birth. Tex. Fam. Code § 155.101(b), (c).

Reliance on Vital Statistics Unit Information Error: A court shall have jurisdiction over a suit if it has been informed, either correctly or incorrectly, by the VSU that the child has not been the subject of a suit and the petition states that no other court has continuing, exclusive jurisdiction over the child. Tex. Fam. Code § 155.103(a); *see also* Tex. Fam. Code § 155.004(a)(3). If, however, the VSU notifies the court that the unit furnished incorrect information regarding the existence of another court with continuing, exclusive jurisdiction before the rendition of a final order, the court in which the suit was filed shall dismiss the suit without prejudice. Tex. Fam. Code §§ 155.102, 155.103(b).

Voidable Order: Once a request for information from the VSU relating to the identity of the court having continuing, exclusive jurisdiction of the child has been made, a final order, except an order dismissing the action, may not be rendered until the information is filed with the court. A final order rendered without the filing of the information from the VSU is voidable on a showing that a court other than the court that rendered the order had continuing, exclusive jurisdiction. Tex. Fam. Code § 155.104.

§ 42.12 Emergency Procedures

A suit brought by a governmental entity requesting an order to protect the health and safety of a child may be brought in a court with jurisdiction to hear the suit in the county in which the child is found. Tex. Fam. Code § 262.002. If after a full adversary hearing the court renders a temporary order, the governmental entity shall request identification of the court of continuing, exclusive jurisdiction from the VSU. Tex. Fam. Code § 262.202.

After rendering temporary orders under Family Code chapter 262, on its own motion or that of a party, the court must transfer the suit affecting the parent-child relationship to the court of continuing, exclusive jurisdiction, if any, if the court finds that the transfer is necessary for the convenience of the parties and is in the child's best interest; order transfer of the suit from the court of continuing, exclusive jurisdiction; or transfer the suit to the court having venue of the suit under Family Code chapter 103 if grounds exist for transfer based on improper venue. Tex. Fam. Code § 262.203(a). If the chapter 262 court initiates a transfer to itself, the case can be transferred if a controverting affidavit is not filed. *In re D.W.*, 533 S.W.3d 460 (Tex. App.—Texarkana 2017, pet. denied). Notwithstanding Family Code section 155.204, a motion to transfer relating to

a suit filed under Family Code chapter 262 may be filed separately from the petition and is timely if filed while the case is pending. Tex. Fam. Code § 262.203(b). Notwithstanding Family Code sections 6.407 and 103.002, a court exercising chapter 262 jurisdiction is not required to transfer the suit affecting the parent-child relationship to a court in which a parent has filed a suit for dissolution of marriage before a final order for the protection of the child has been rendered under Family Code chapter 263, subchapter E. Tex. Fam. Code § 262.203(c).

An order of transfer must include the date of any future hearings that have been scheduled by the transferring court, any date the transferring court has scheduled for dismissal under Code section 263.401, and the name and contact information of each attorney ad litem or guardian ad litem who has been appointed. Tex. Fam. Code § 262.203(d).

The transferee court may retain an attorney ad litem or guardian ad litem appointed by the transferring court. Any appointment of a new attorney ad litem or guardian ad litem must be made before the earlier of the tenth day after the order of transfer is received or the date of the first scheduled hearing after the transfer. Tex. Fam. Code § 262.203(e).

Chapter 43

Interstate Proceedings

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Chapter 43

Interstate Proceedings

I. Uniform Child Custody Jurisdiction and Enforcement Act

§ 43.1 Generally

The Texas version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is codified at chapter 152 of the Texas Family Code, does not depart materially from the version adopted by the National Conference of Commissioners on Uniform State Laws.

The UCCJEA has been enacted in forty-nine states, as well as the District of Columbia, Guam, and the U.S. Virgin Islands. Massachusetts, the remaining state, continues to use the UCCJA and has pending legislation to adopt the UCCJEA. The UCCJEA governs courts' jurisdictions to make and modify child custody and visitation (conservatorship and access) determinations. It is not a substantive custody statute, dictating standards for making or modifying custody decisions. Rather, it determines which states' courts have and should exercise jurisdiction to do so. Its overarching purpose is to prevent conflicting jurisdiction and relitigation of child custody issues and to deter child abduction. *See Ruffier v. Ruffier*, 190 S.W.3d 884, 889 (Tex. App.—El Paso 2006, no pet.). The UCCJEA does not apply to child support cases.

If a provision of chapter 152 of the Code conflicts with a provision of title 5 or another Texas statute or rule and the conflict cannot be reconciled, chapter 152—the UCCJEA—prevails. Tex. Fam. Code § 152.002. *See Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 586 (Tex. App.—Dallas 2006, no pet.) (Family Code section 6.406(b), which requires party to divorce to include in suit for divorce a suit affecting parent-child relationship unless children of marriage are under continuing jurisdiction of another court, does not confer jurisdiction on trial court when its provisions conflict with UCCJEA).

There are also provisions in federal law involving interstate child custody. See the federal Parental Kidnapping Prevention Act of 1980 (PKPA) discussion beginning at section 43.21 below.

COMMENT: An up-to-date listing of the states that have adopted the UCCJEA is available on the website of the National Conference of Commissioners on Uniform State Laws at **www.uniformlaws.org/Shared/docs/UCCJEAadoptions.pdf**.

§ 43.2 Key Definitions

Texas Family Code section 152.102 contains several key definitions pertinent to the UCCJEA, including the following:

"Child custody determination" means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child. The term includes permanent, temporary, initial, and modification orders. The term does not include an order relating to child support or other monetary obligations of an individual.

"Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under subchapter D of chapter 152.

"Home state" means the state in which the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence of a parent or person acting as a parent is part of the period.

"Modification" means a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether it is made by the court that made the previous determination or not.

"Legal custody" means the managing conservatorship of a child.

"Visitation" means the possession of or access to a child.

Tex. Fam. Code § 152.102.

§ 43.3 Jurisdiction Prerequisites Generally

The relevant time for determining whether the trial court had subject-matter jurisdiction under the UCCJEA is at the proceeding's commencement in a Texas court. *In re Forlenza*, 140 S.W.3d 373, 376 (Tex. 2004) (orig. proceeding); *In re B.A.B.*, 124 S.W.3d 417 (Tex. App.—Dallas 2004, no pet.). "Commencement" means the filing of the first pleading in a proceeding. Tex. Fam. Code § 152.102(5). This rule applies even if the first pleading was filed in a county where venue was improper. *In re Milton*, 420 S.W.3d 245, 251 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding [mand. denied]).

Family Code section 152.201 establishes a hierarchy of jurisdictional grounds that confer jurisdiction on a Texas court to render an initial child custody determination. This hierarchy in section 152.201(a) is the exclusive jurisdictional basis for making a child custody determination by a Texas court. Tex. Fam. Code § 152.201(b). Home-state jurisdiction is given priority but only in an initial child custody determination. This home-state priority conforms with the PKPA, which gives full faith and credit recognition to orders based on home-state jurisdiction; however, if the court of the state of rendition makes a finding that home-state jurisdiction does not exist, orders based on significant connection/substantial evidence will be given full faith and credit. 28 U.S.C. § 1738A. The four jurisdictional grounds are discussed in sections 43.4 through 43.6 below.

Family Code section 152.203 prescribes conditions for jurisdiction by which a Texas court can modify a child custody determination of another state. Except as otherwise provided by Family Code section 152.204, concerning temporary emergency jurisdiction, a Texas court is prohibited from modifying a custody determination of another state unless a Texas court has jurisdiction to make an original child custody determination under home-state or significant-connection/substantial-evidence grounds *and* (1) the court issuing the initial determination determines that it no longer has exclusive, continuing jurisdiction under Family Code section 152.202 or that a Texas court would be a more convenient forum under Family Code section 152.207 or (2) the Texas court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. Tex. Fam. Code § 152.203. Thus, the Texas court is not authorized to determine that the original-decree state has lost jurisdiction unless it determines that the child and all parties have moved away from the original state.

The UCCJEA does not require that the court consider the child's best interest when deciding whether to exercise jurisdiction. When interstate jurisdictional issues are present, the court must first decide which state is best positioned to ascertain the child's best interest. *Hart v. Kozik*, 242 S.W.3d 102 (Tex. App.—Eastland 2007, no pet.).

A Texas court may exercise "partial" jurisdiction over those portions of a suit for which it has authority. *See* Tex. Fam. Code § 102.012(a). The court's authority to resolve all issues in controversy between the parties may be limited by the provisions of the UCCJEA or the Uniform Interstate Family Support Act (UIFSA). In the event of a conflict between chapter 152 (UCCJEA) and other provisions of title 5 of the Texas Family Code, the provision of chapter 152 prevails. Tex. Fam. Code § 102.012(c); *see In re Bellamy*, 67 S.W.3d 482, 483–84 (Tex. App.—Texarkana 2002, no pet.) (holding that provisions of chapter 152, which allow Texas courts under certain circumstances to retain jurisdiction even if Texas is no longer home state of child, prevail over conflicting provisions in chapter 155). *See also In re D.S.*, 555 S.W.3d 301, 318–19 (Tex. App.—Dallas 2018, pet. granted) (termination order void where trial court lacked jurisdiction under UCCJEA even though trial court had proper jurisdiction in divorce proceeding (no "improper severance")); *Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 586 (Tex. App.—Dallas 2006, no pet.) (section 6.406(b) of Family Code, requiring that suit for divorce include suit affecting parent-child relationship, does not vest trial court with subject-matter jurisdiction if another state would have jurisdiction under UCCJEA).

The UCCJEA does not authorize jurisdiction over a child custody proceeding concerning an unborn child. *Arnold v. Price*, 365 S.W.3d 455, 461 (Tex. App.—Fort Worth 2011, no pet.); *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 316–18 (Tex. App.—Dallas 2008, no pet.). Although the UCCJEA prevented a Texas court from making a custody determination as part of a divorce proceeding before the child was born, it did not violate the separation of powers doctrine, the open courts provision of the Texas Constitution, or the husband's equal protection rights under the Fourteenth Amendment to the U.S. Constitution or the Texas Equal Rights Amendment. *In re Dean*, 393 S.W.3d 741, 748–49 (Tex. 2012) (orig. proceeding).

§ 43.4 Home-State Jurisdiction

A Texas court has home-state jurisdiction for an initial custody determination if Texas is the home state of the child on the date of the commencement of the proceeding or if Texas was the child's home state within six months before the date of the commencement of the proceeding and the child is absent from Texas but a parent or person acting as a parent continues to live in Texas. Tex. Fam. Code § 152.201(a)(1). In determining

the child's home state, the court must focus on the child's physical presence in a state, not the legal residency of his parents. *Powell v. Stover*, 165 S.W.3d 322, 328 (Tex. 2005) (orig. proceeding); *Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 585–86 (Tex. App.—Dallas 2006, no pet.).

In *In re S.A.H.*, an agreed order adjudicating parentage, conservatorship, possession and access, child support, and health-care expenses was entered in Texas. Although the order recited that the trial court had jurisdiction of the case and all parties, the original petition and the accompanying affidavit stated that the child had lived in Mexico since birth (so that Mexico was the child's home state when the petition was filed) and alleged no other grounds on which the court would have subject-matter jurisdiction under Family Code section 152.201(a). Despite the parties' agreement, the order was void because the court lacked subject-matter jurisdiction under the UCCJEA. *In re S.A.H.*, 465 S.W.3d 662 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

In *In re Estes*, 153 S.W.3d 591 (Tex. App.—Amarillo 2004, orig. proceeding), the Texas trial court could not exercise home-state jurisdiction when the mother and the children had been absent from Texas for nine months, despite the father's position that the absence was a temporary absence in the nature of a vacation.

In *Powell*, 165 S.W.3d 322, the supreme court disapproved of *Estes* to the extent that it took into account additional facts and circumstances including the parents' intent. In *Powell*, the parents had moved from Texas and lived with their then-only child in another state for more than six months, thereby establishing it as the child's "home state." The mother returned to Texas with that child and gave birth to a second child. She then filed for divorce and for custody of and child support for both children. The Texas Supreme Court reversed the trial and appellate courts' determination that Texas had custody jurisdiction over both children. The court held that the explicit terms of the UCCJEA, in effect in both states, mandate that the home state has jurisdictional priority regarding the father's subsequent custody suit for the first child, which prevails over the "significant connection" jurisdiction of Texas; Texas has jurisdictional priority regarding custody of the second child.

For Texas to be the children's home state on the commencement date of the proceeding, the children must have lived in Texas for six consecutive months immediately before the commencement date. Although a temporary absence of a parent may be part of the six-month period, there is no provision for the children's temporary absence from the state. Thus the trial court abused its discretion by finding that Texas was the home state when the children had been absent from the state for three to four weeks of the preced-

ing six-month period. *In re Tieri*, 283 S.W.3d 889 (Tex. App.—Tyler 2008, orig. proceeding [mand. denied]). *See also Ruffier v. Ruffier*, 190 S.W.3d 884, 890 (Tex. App.—El Paso 2006, no pet.) (Texas did not have home-state jurisdiction where, although one or both parents lived in Texas when the suit was commenced, the child had been living with his maternal grandmother in Belarus for more than six months, except for a one-month stay in Texas shortly before the suit was commenced). *But see In re Majors*, No. 12-15-00193-CV, 2015 WL 7769555 (Tex. App.—Tyler Dec. 3, 2015, orig. proceeding) (mem. op.) (despite parents' agreement for children to live out of state with father for a one-year period, father could not create jurisdiction under UCCJEA by violating court order and refusing to abide by parties' agreement to return children to Texas after one year).

§ 43.5 Significant-Connection/Substantial-Evidence Jurisdiction

For a Texas court to exercise jurisdiction under the significant-connection/substantial-evidence ground, it must appear that no other state has home-state jurisdiction under Family Code section 152.201(a)(1), or a court of the home state of the child must have declined to exercise jurisdiction on the ground that Texas is a more appropriate forum under Family Code section 152.207 or 152.208. Further, the child and at least one parent or person acting as a parent must have a significant connection with Texas other than mere physical presence in the state, and there must be available in Texas substantial evidence concerning the child's care, protection, training, and personal relationships. Tex. Fam. Code § 152.201(a)(2); *see In re Oates*, 104 S.W.3d 571, 578 (Tex. App.—El Paso 2003, orig. proceeding).

In determining whether one state will decline jurisdiction to another, a court may communicate with a court in another state. Tex. Fam. Code § 152.110(b); *In re Butterfield*, No. 01-18-00903-CV, 2019 WL 2127613, at *7 (Tex. App.—Houston [1st Dist.] May 16, 2019, orig. proceeding).

Further, if a child has no home state, the trial court may exercise jurisdiction if the child and at least one parent have substantial connections to Texas. *In re S.M.A.*, 555 S.W.3d 754, 759–60 (Tex. App.—Texarkana 2018, no pet.).

§ 43.6 No Other State Has Jurisdiction or Other State Declines Jurisdiction

A Texas court may make an initial child custody determination if it appears that no other state would have jurisdiction under prerequisites substantially in accordance with

home-state jurisdiction or significant-connection/substantial-evidence jurisdiction or all other states with such jurisdiction have declined to exercise it on the ground that a Texas court is the more appropriate forum to determine the custody of the child. Tex. Fam. Code § 152.201(a)(3), (a)(4). *See In re Marriage of Flowers*, No. 06-19-00015-CV, 2019 WL 3949965, at *5–6 (Tex. App.—Texarkana Aug. 22, 2019, pet. denied); *In re Marriage of Marsalis*, 338 S.W.3d 131, 138 (Tex. App.—Texarkana 2011, no pet.). A state's declination of jurisdiction may be implicit. *In re T.B.*, 497 S.W.3d 640, 651 (Tex. App.—Fort Worth 2016, pet. denied) (Florida court's failure to communicate with Texas trial court or rule on father's pending motion for over six months constituted an implicit determination by that court to decline to exercise its home-state jurisdiction).

§ 43.7 Temporary Emergency Jurisdiction

A Texas court has temporary emergency jurisdiction if the child is present in Texas and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. Tex. Fam. Code § 152.204(a). Specific provisions pertaining to the effective period of an order issued under section 152.204 and to the mandate for immediate communication between courts of different states with jurisdiction are contained in section 152.204(b)–(d). *See* Tex. Fam. Code § 152.204(b)–(d).

The duty of a Texas court to recognize and enforce a custody determination of another state is secondary to its duty to protect a child. *Saavedra v. Schmidt*, 96 S.W.3d 533, 544 (Tex. App.—Austin 2002, no pet.). However, the court's assumption of temporary emergency jurisdiction does not include jurisdiction to modify another state's child custody determination. *Saavedra*, 96 S.W.3d at 549. The court's assumption of temporary emergency jurisdiction does, however, give the court jurisdiction to terminate parental rights for a child when there has not been any custody determination in the child's home state. Section 152.204 permits a custody determination rendered via the emergency jurisdiction of a trial court to become final if, among other things, the child's home state becomes Texas once the order is entered. *In re J.C.B.*, 209 S.W.3d 821 (Tex. App.—Amarillo 2006, no pet.).

Emergency Finding: An "emergency finding" by the court requires evidence that demonstrates that the child has been neglected or subjected to or threatened with mistreatment or abuse or that a serious and immediate question exists concerning the welfare of the child. *In re Marriage of Lai*, 333 S.W.3d 645 (Tex. App.—Dallas 2009, no pet.). Removal of a child to Texas without the other parent's knowledge or consent is not enough to warrant exercise of emergency jurisdiction under the UCCJEA absent

evidence of abuse or mistreatment. *In re S.J.*, 522 S.W.3d 576 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).

§ 43.8 Exclusive, Continuing Jurisdiction

Once a Texas court renders a final custody order in connection with a child, it acquires exclusive, continuing jurisdiction and may exercise its jurisdiction to modify its order regarding managing conservatorship, possession of and access to the child. Exclusive jurisdiction to modify the custody and visitation issues remains in Texas until (1) the Texas court determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with Texas and that substantial evidence is no longer available in Texas concerning the child's care, protection, training, and personal relationships or (2) the Texas court or a court of another state making a child custody determination determines that the child, the child's parents, and any person acting as a parent no longer reside in Texas. Tex. Fam. Code § 152.202(a).

Exclusive jurisdiction continues in the decree-granting state as long as either a significant connection exists *or* substantial evidence is present. The UCCJEA does not premise the exclusive continuing jurisdiction determination on which state has the most significant connection with the child. *See In re Forlenza*, 140 S.W.3d 373, 377 (Tex. 2004) (orig. proceeding) (visits to Texas and continued close relationship with noncustodial parent and other relatives in Texas established "significant connection" with Texas to support trial court's exclusive continuing jurisdiction to modify order). In determining whether there is a "significant connection," the court may consider an absence of visits by the child to Texas from the new state. *See In re Dixon*, No. 04-19-00162-CV, 2019 WL 2013886, at *2 (Tex. App.—San Antonio May 8, 2019, orig. proceeding); *In re Isquierdo*, 426 S.W.3d 128, 132–34 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding). Other factors a court may consider are the child's relationship with the Texas-based parent or other friends and family who live in Texas. *In re Dixon*, 2019 WL 2013886, at *2.

Exclusive jurisdiction may continue in the original state even if that state's case has been dismissed. The UCCJEA does not require that the original case be ongoing for the court to maintain exclusive jurisdiction. *See In re Tieri*, 283 S.W.3d 889, 895–97 (Tex. App.—Tyler 2008, orig. proceeding).

§ 43.9 Modification of Custody Decree of Another State

A Texas court may not modify a custody decree of another state unless the Texas court has jurisdiction to make an initial custody determination on home-state or significant-connection/substantial-evidence grounds and the court of the issuing state determines it no longer has exclusive, continuing jurisdiction under provisions in its laws similar to Family Code section 152.202 or that the Texas court would be a more convenient forum. *See In re Y.M.A.*, 111 S.W.3d 790, 793–94 (Tex. App.—Fort Worth 2003, no pet.) (Texas court must treat foreign country as if state of United States for purpose of applying UCCJEA; thus child custody determination made in foreign country that continues to be home state of child must be recognized and may not be modified). If the Texas court has jurisdiction to make an initial custody determination, it may modify the order of another state if a court of either state determines that the child, the child's parents, and any person acting as a parent do not reside in the other state. Tex. Fam. Code § 152.203; *see Razo v. Vargas*, 355 S.W.3d 866, 875–77 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Loss of Jurisdiction under PKPA: Under the PKPA, the state of original rendition retains continuing jurisdiction of its custody order as long as the court continues to have jurisdiction under its state law and one contestant (any person who claims a right to custody or visitation of a child) continues to reside in that state. 28 U.S.C. § 1738A(b)(2), (d).

COMMENT: Although section 152.103 provides that the UCCJEA does not govern an adoption proceeding, it *does* apply if the adoption involves a modification of a prior custody determination. If the child being adopted has been the subject of another legal proceeding, such as a child abuse or neglect case, a paternity suit, or a divorce action, the UCCJEA will apply.

§ 43.10 Simultaneous Proceedings in Another State

Except for temporary emergency jurisdiction under Family Code section 152.204, a Texas court may not exercise its jurisdiction under the UCCJEA if, at the time of filing of the petition, a proceeding concerning the custody of the child has been commenced in a court of another state exercising jurisdiction substantially in conformity with the UCCJEA, unless the proceeding has been terminated or is stayed by the court of the other state because a Texas court is a more appropriate forum. Tex. Fam. Code § 152.206(a).

Before hearing a custody proceeding, the court shall examine the court documents and other information supplied by the parties pursuant to Family Code section 152.209. See section 43.13 below for the requirements. If the court determines that a child custody proceeding has been commenced in another state with jurisdiction substantially in accordance with the UCCJEA, the Texas court shall stay its proceeding and communicate with the court of the other state. If the court of the other state does not determine that the Texas court is a more appropriate forum, the Texas court shall dismiss the proceeding. Tex. Fam. Code § 152.206(b).

In a proceeding to modify a child custody determination, a Texas court shall determine whether a proceeding to enforce the determination has been commenced in another state. If so, the court may stay the modification proceeding pending action by the other court, enjoin the parties from continuing the enforcement proceeding, or proceed with the modification under conditions it considers appropriate. Tex. Fam. Code § 152.206(c).

§ 43.11 Inconvenient Forum

A Texas court with jurisdiction to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised on the court's own motion, the motion of a party, or the request of another court. Tex. Fam. Code § 152.207(a). Evidence of inconvenient forum can be presented via affidavits or a bench brief with affidavits attached. An evidentiary hearing is not required by section 152.207. *Lesem v. Mouradian,* 445 S.W.3d 366, 375–76 (Tex. App.—Houston [1st Dist.] 2013, no pet.). A litigant may also pursue a declaratory judgment to raise the issue of inconvenient forum under section 152.207. *Monk v. Pomberg*, 263 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Family Code section 152.207 applies only when Texas has jurisdiction but determines it is not a convenient forum. It is not applicable to address whether another state with jurisdiction may be an inconvenient forum. *In re W.T.H.*, No. 04-16-00055-CV, 2017 WL 603649, at *4 (Tex. App.—San Antonio Feb. 15, 2017, no pet.) (mem. op.).

Determining Factors of Inconvenient Forum: In determining the issue of inconvenient forum, the court shall consider whether it is appropriate for a court of another state to exercise jurisdiction. The trial court may consider any relevant factor when deciding whether to decline jurisdiction for inconvenient forum. *Barabarawi v. Rayyan*, 406

S.W.3d 767, 774 (Tex. App.—Houston [14th Dist.] 2013, no pet.). In making its determination, the court may consider among other factors—

1. whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

2. the length of time the child has resided outside Texas;

3. the distance between the court in Texas and the court in the state that would assume jurisdiction;

4. the relative financial circumstances of the parties;

5. any agreement of the parties about which state should assume jurisdiction;

6. the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

7. the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

8. the familiarity of the court of each state with the facts and issues in the pending litigation.

Tex. Fam. Code § 152.207(b); *see In re Moore*, No. 06-11-00119-CV, 2011 WL 6238760 (Tex. App.—Texarkana Dec. 14, 2011, orig. proceeding) (mem. op.); *Haley v. Haley*, 713 S.W.2d 801 (Tex. App.—Houston [1st Dist.] 1986, no writ). If it is determined that Texas is an inconvenient forum and there is no more appropriate forum, the court should not refuse to exercise its jurisdiction. *See Creavin v. Moloney*, 773 S.W.2d 698, 704–05 (Tex. App.—Corpus Christi–Edinburg 1989, writ denied).

Procedure Once Determined That Texas Is Inconvenient Forum: If a Texas court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, the court shall stay the proceedings on condition that a child custody proceeding be promptly commenced in another named state and may impose any other condition the court considers just and proper. Tex. Fam. Code § 152.207(c).

Incidental Proceedings: If the child custody determination is incidental to an action for divorce or another proceeding, the court may either exercise its jurisdiction under the UCCJEA or decline to do so. Tex. Fam. Code §§ 152.102(4), 152.207(d).

§ 43.12 Texas Declines Jurisdiction by Reason of Conduct

If a Texas court has jurisdiction under the UCCJEA by virtue of the petitioner's engaging in some unjustifiable conduct (such as removing, secreting, or restraining the child), the court shall decline to exercise its jurisdiction unless the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction, or a court of the state otherwise having jurisdiction under the UCCJEA determines that Texas is the more appropriate forum, or no court of any other state would have the appropriate jurisdiction. Tex. Fam. Code § 152.208(a). *See In re S.L.P.*, 123 S.W.3d 685 (Tex. App.—Fort Worth 2003, no pet.) (mother's failure to disclose previous custody proceedings in another state in her initial pleadings and her act of holding children in Texas for two years after running away from their father's home in Washington constituted unjustifiable conduct mandating Texas court's refusal to exercise jurisdiction). Section 152.208 focuses on the conduct of the party seeking to invoke a Texas court's jurisdiction. *In re P.M.K.*, No. 05-15-01181-CV, 2017 WL 462343 (Tex. App.—Dallas Jan. 30, 2017, no pet.) (mem. op.) (UCCJEA did not require Texas court to consider alleged unjustifiable conduct by mother, because it was father who sought to invoke Texas court's jurisdiction.)

A court dismissing a petition or staying a proceeding because of the petitioner's conduct shall assess against the petitioner necessary and reasonable expenses, including costs, communication expenses, attorney's fees, and travel expenses of the party and witnesses unless the party against whom fees are being assessed can establish that the assessment would be clearly inappropriate. Tex. Fam. Code § 152.208(c).

§ 43.13 Sworn Statement

Unless each party resides in Texas, every party in a child custody proceeding must, in that party's first pleading or in an affidavit attached to that pleading, give information under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party has participated as a party, as a witness, or in any other capacity in any other proceeding concerning the custody of or visitation with the same child (and, if so, identify the court, the case number, and the date of any child custody determination), whether the party knows of any proceeding that could affect the current proceeding (and, if so, identify the court, the case number, and the nature of the proceeding), and whether the party knows the names and addresses of any person not a party to the

proceeding who has physical custody of the child or claims rights of legal or physical custody of, or visitation with, the child (and, if so, the names and addresses of those persons). Tex. Fam. Code § 152.209(a).

If a party fails to provide the required information, the court may stay the proceeding until the information is furnished. Tex. Fam. Code § 152.209(b).

If the declarant answers in the affirmative to any of the sworn items, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath about the details of the information furnished and about the other matters pertinent to the court's jurisdiction and the disposition of the case. Tex. Fam. Code § 152.209(c).

Each party has a continuing duty to inform the court of any proceeding in Texas or any other state that could affect the current proceeding. Tex. Fam. Code § 152.209(d).

If a party alleges in an affidavit or a pleading under oath that disclosure of identifying information will jeopardize the health, safety, or liberty of a party or child, the information must be sealed and may not be disclosed to the other party or the public unless, after hearing, the court orders disclosure. Tex. Fam. Code § 152.209(e).

§ 43.14 Notice Requirements

Notice of proceedings under the UCCJEA must be given to all persons entitled to notice in Texas as in a child custody proceeding between Texas residents, any parent whose rights have not been previously terminated, and any person having physical custody of the child. Tex. Fam. Code § 152.205(a).

Notice required for the exercise of jurisdiction over a person outside Texas must be given in a manner reasonably calculated to give actual notice in any manner prescribed by Texas law. Tex. Fam. Code § 152.108(a).

§ 43.15 Recognition of Out-of-State Child Custody Determinations

The Texas court shall recognize and enforce a child custody determination of a court of another state if that court exercised jurisdiction in substantial conformity with the UCCJEA or if the determination was made under factual circumstances meeting the jurisdictional standards of the UCCJEA, as long as the determination has not been modified in accordance with the UCCJEA. Tex. Fam. Code § 152.303(a).

§ 43.16 Registration of Out-of-State Child Custody Determinations

Family Code section 152.305 permits the registration of an out-of-state child custody determination, which will then have the legal effect of a child custody determination issued by a Texas court. Registration is achieved by sending to the Texas court—

1. a letter or other document requesting registration;
2. two copies, including one certified copy, of the determination to be registered, along with a sworn statement that, to the best of the declarant's knowledge and belief, the order has not been modified; and
3. except as otherwise provided in Family Code section 152.209, the name and address of the person seeking registration and any parent or person acting as parent who has been awarded custody or visitation in the determination to be registered.

Tex. Fam. Code § 152.305(a).

The registering court must then file the determination as a foreign judgment, serve notice on all persons identified in the registration, and give those persons an opportunity to contest the registration. The notice must state that the registered determination is enforceable as of the date of the registration, that a hearing to contest the registration must be requested within twenty days after service of the notice, and that failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted. Tex. Fam. Code § 152.305(b), (c).

If no timely request for a hearing is made, the registration is confirmed as a matter of law, and the person requesting registration and all persons served must be notified of the confirmation. Confirmation of the order by operation of law or after a hearing precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. Tex. Fam. Code § 152.305(e), (f).

If a contest is filed, the court shall conduct a hearing and confirm the registered order unless the person contesting registration establishes that the issuing court did not have jurisdiction under the UCCJEA, that the determination being registered has been vacated, modified, or stayed by a court having jurisdiction to do so under the UCCJEA, or that the person contesting the registration did not have adequate notice. Tex. Fam. Code § 152.305(d). While section 152.305 does not specifically require an evidentiary hearing, the trial court abuses its discretion by failing to hold an evidentiary hearing

where there are contested issues of fact regarding the adequacy of notice to the contesting party. *Razo v. Vargas*, 355 S.W.3d 866, 874 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

§ 43.17 Expedited Enforcement

The former UCCJA did not provide for any method of enforcing a child custody determination. Section 152.308 of the UCCJEA provides for a prompt enforcement of a child custody determination regardless of whether the order has been issued by a Texas court or a court of another jurisdiction. The provisions are very similar to the enforcement provisions of Family Code subchapter H, chapter 157 (concerning habeas corpus), but several important differences exist.

An appeal may be taken from a final order in a proceeding under Family Code chapter 152, subchapter D, in accordance with accelerated appellate procedures in other civil cases. Tex. Fam. Code § 152.314. If the appellant chooses to file an appeal, the time lines for an accelerated appeal are mandatory. *See In re K.L.V.*, 109 S.W.3d 61, 67 (Tex. App.—Fort Worth 2003, pet. denied).

See chapter 36 of this manual for more extensive coverage of this topic.

§ 43.18 Other Provisions of UCCJEA

Taking Testimony in Another State: A party to the proceeding may offer testimony of witnesses who are located in another state, including parties and the child, by deposition or other means allowed in Texas for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms on which the testimony is taken. Tex. Fam. Code § 152.111(a).

Temporary Visitation: A Texas court not having jurisdiction to modify a child custody determination may issue a temporary order enforcing a visitation schedule made by a court of another state or the visitation provisions of a child custody determination of another state that fails to provide a specific schedule. A court making an order in the latter situation shall specify a period it considers adequate to allow the petitioner an opportunity to obtain an order from a court having jurisdiction under the UCCJEA, and the order remains in effect until an order is obtained from the other court or the period expires. Tex. Fam. Code § 152.304.

[Sections 43.19 and 43.20 are reserved for expansion.]

II. Parental Kidnapping Prevention Act

§ 43.21 Generally

In 1980 Congress passed the Parental Kidnapping Prevention Act (PKPA), codified at title 28, section 1738A, of the United States Code. *See* 28 U.S.C. § 1738A. The purpose of this act is to deter interstate abductions of children by noncustodial parents and to facilitate the enforcement of custody and visitation decrees rendered by other states by giving full faith and credit to child custody determinations made in conformity with the PKPA. Once a state exercises jurisdiction consistently with the jurisdictional prerequisites of the PKPA, each state must give full faith and credit to the sister-state custody order.

COMMENT: The PKPA varied in several respects from the original Uniform Child Custody Jurisdiction Act. It is hoped the adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) eliminated the inconsistencies between the two.

§ 43.22 Key Definitions

Key definitions pertinent to the PKPA include the following:

"Contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child.

"Custody determination" means a judgment, decree, or other order of a court providing for the custody of a child and includes permanent and temporary orders and initial orders and modifications.

"Home state" means the state in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent for at least six consecutive months and, in the case of a child less than six months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the persons are counted as part of the six-month or other period.

"Modification" and "modify" refer to a custody or visitation determination that modifies, replaces, supersedes, or otherwise is made subsequent to a prior custody or visitation determination concerning the same child, whether made by the same court or not.

"Physical custody" means actual possession and control of a child.

"Visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

28 U.S.C. § 1738A(b).

§ 43.23 Determining If Sister State Had Jurisdiction

The PKPA does not confer jurisdiction on a state but provides for enforcement of custody and visitation determinations rendered under the jurisdictional prerequisites set forth in the PKPA.

A child custody or visitation determination made by a court of a state is consistent with the provisions of the PKPA only if the court had jurisdiction under the law of the state *and* either the court has continuing jurisdiction under the PKPA (see section 43.24 below) or one of the jurisdictional provisions discussed below—home state, significant connection/substantial evidence, abandonment/emergency, and lack of jurisdiction in any other state—is met. 28 U.S.C. § 1738A(c). The PKPA does not create the hierarchy for jurisdiction found in the UCCJEA and discussed in sections 43.4 through 43.7 above.

Home State: The home-state jurisdictional ground is met if the forum state is the home state of the child on the date of the commencement of the suit or the forum state had been the child's home state within six months before the date of the commencement of the proceeding and the child is absent from the state because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in the forum state. 28 U.S.C. § 1738A(c)(2)(A).

Significant Connection/Substantial Evidence: This jurisdictional ground exists if it appears that no other state has home-state jurisdiction and it is in the best interest of the child that a court of the state assume jurisdiction because the child and his parents, or the child and at least one contestant, have a significant connection with the state other than mere physical presence and there is available in the state substantial evidence con-

cerning the child's present or future care, protection, training, and personal relationships. 28 U.S.C. § 1738A(c)(2)(B).

Abandonment/Emergency Jurisdiction: The abandonment/emergency jurisdictional ground exists if the child is physically present in the state and either the child has been abandoned or it is necessary in an emergency to protect the child because the child, a sibling, or a parent of the child has been subjected to or threatened with mistreatment or abuse. 28 U.S.C. § 1738A(c)(2)(C).

No Other State Has Jurisdiction: The remaining alternative jurisdictional ground exists if it appears that no other state has jurisdiction or another state has declined to exercise jurisdiction on the ground that the state whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and it is in the best interest of the child that such court assume jurisdiction. 28 U.S.C. § 1738A(c)(2)(D).

§ 43.24 Continuing Jurisdiction

The jurisdiction of a state court that has made a child custody or visitation determination consistently with the jurisdictional provisions of the PKPA continues as long as it has jurisdiction under that state's laws and the state remains the residence of the child or of any contestant. 28 U.S.C. § 1738A(d).

§ 43.25 Modification of Custody or Visitation Determination

A court of a state may modify a custody determination of a child made by a court of another state if it would have jurisdiction to make an initial child custody determination and the court of the other state no longer has jurisdiction or has declined to exercise such jurisdiction to modify its custody order. 28 U.S.C. § 1738A(f).

A court of a state may not modify a visitation determination made by a court of another state unless the court of the other state no longer has jurisdiction to modify the visitation determination or has declined to exercise jurisdiction to modify it. 28 U.S.C. § 1738A(h). The UCCJEA defines the circumstances under which a state no longer has exclusive jurisdiction to modify. See the discussion in section 43.8 above.

§ 43.26 Simultaneous Proceedings in Another State

A court of a state shall not exercise jurisdiction in a custody or visitation proceeding begun when a proceeding in another state is pending if the court of the other state is exercising jurisdiction consistently with the provisions of the PKPA. 28 U.S.C. § 1738A(g).

[Sections 43.27 through 43.30 are reserved for expansion.]

III. Uniform Interstate Family Support Act

§ 43.31 Generally

The Uniform Interstate Family Support Act (UIFSA), codified at chapter 159 of the Texas Family Code, establishes guidelines for courts in exercising jurisdiction over original family support orders and subsequent modifications. It also provides the procedures for child support orders rendered by courts of another state and of certain foreign countries to be enforced in Texas. While UIFSA is state law, there is also federal law involving interstate child support enforcement. See the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) discussion beginning at section 43.51 below.

In the event of a conflict between chapter 159 and other provisions of title 5 of the Family Code, the provisions of chapter 159 prevail. Tex. Fam. Code §§ 102.012(c), 159.001; *see Attorney General v. Litten*, 999 S.W.2d 74, 77 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

2015 amendments to Code chapter 159 include provisions based on the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance ("Hague Maintenance Convention" or "Convention"), which was ratified by the United States and became effective January 1, 2017. Those amendments provide special rules concerning support proceedings under the Convention, which are discussed in section 43.45 below. For a list of Convention countries, see **https://www.hcch.net/en/instruments/conventions/status-table/?cid=131**.

A Texas court must apply subchapters B through G (sections 159.101–.616) and, as applicable, subchapter H (sections 159.701–.713) of chapter 159 to a support proceeding involving a foreign support order, a foreign tribunal, or an obligee, obligor, or child residing in a foreign country. A Texas court that is requested to recognize and

enforce a support order on the basis of comity may apply the procedural and substantive provisions of subchapters B through G. Subchapter H applies only to a support proceeding under the Convention. In such a proceeding, if a provision of subchapter H is inconsistent with subchapters B through G, subchapter H controls. Tex. Fam. Code § 159.105.

§ 43.32 Key Definitions

Family Code section 159.102 contains several key definitions pertinent to UIFSA, including the following:

"Convention" means the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007.

"Foreign country" means a country, including a political subdivision thereof, other than the United States, that authorizes the issuance of support orders and (1) that has been declared under U.S. law to be a foreign reciprocating country, (2) that has established a reciprocal arrangement for child support with Texas, (3) that has enacted a law or established procedures for the issuance and enforcement of support orders that are substantially similar to the procedures under UIFSA, or (4) in which the Convention is in force with respect to the United States.

"Foreign support order" means a support order of a foreign tribunal.

"Foreign tribunal" means a court, administrative agency, or quasi-judicial entity of a foreign country that is authorized to establish, enforce, or modify support orders or to determine parentage of a child. The term includes a competent authority under the Convention.

"Home state" means the state or foreign country in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or a comparable pleading for support and, if a child is less than six months old, the state or foreign country in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

"Initiating tribunal" means the tribunal of a state or foreign country from which a petition or comparable pleading is forwarded or a petition or comparable pleading is filed for forwarding to another state or foreign country.

"Issuing foreign country" means the foreign country in which a tribunal issues a support order or a judgment determining parentage of a child.

"Issuing state" means the state in which a tribunal issues a support order or a judgment determining parentage of a child.

"Issuing tribunal" means the tribunal of a state or foreign country that issues a support order or a judgment determining parentage of a child.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"Record" means information that is inscribed on a tangible medium or stored in an electronic or other medium and that is retrievable in a perceivable form.

"Register" means to file in a Texas tribunal a support order or judgment determining parentage of a child issued in another state or a foreign country.

"Registering tribunal" means a tribunal in which a support order or a judgment determining parentage of a child is registered.

"Responding state" means a state in which a petition or comparable pleading for support or to determine parentage of a child is filed or to which a petition or comparable pleading is forwarded for filing from another state or a foreign country.

"Responding tribunal" means the authorized tribunal in a responding state or foreign country.

"State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian nation or tribe.

"Support order" means a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or foreign country for the benefit of a child, spouse, or former spouse that provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. The term may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorney's fees, and other relief.

"Tribunal" means a court, administrative agency, or quasijudicial entity authorized to establish, enforce, or modify support orders or to determine parentage of a child.

Tex. Fam. Code § 159.102.

Certain other definitions related to proceedings under the Convention appear in section 43.45 below.

Before the 2015 amendments to chapter 159, the definition of "state" included qualifying foreign countries, defined in terms that have been incorporated into the definition of "foreign country" in section 159.102(5)(A)–(C) of the current Family Code. When the Convention provisions do not apply, evidence must be presented to establish that a comity applies or that a reciprocal agreement exists with another country or the foreign order cannot be recognized. In *In re V.L.C.*, 225 S.W.3d 221 (Tex. App.—El Paso 2006, no pet.), the court found that an order entered by a Mexican court related to child support was not governed by UIFSA and that the Texas court had jurisdiction to enter an initial child support order in a suit affecting the parent-child relationship when no evidence was presented to establish that a federal reciprocal agreement exists, that Texas has a reciprocal agreement with any state in Mexico, or that Mexico has laws or procedures substantially similar to those of UIFSA.

§ 43.33 Bases for Jurisdiction over Nonresident

Under Family Code section 159.201, a Texas court may exercise personal jurisdiction over a nonresident in a proceeding to establish or enforce a support order or determine parentage of a child if—

1. the nonresident is personally served with citation in Texas;
2. the nonresident submits to the jurisdiction of Texas by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
3. the nonresident resided with the child in Texas;
4. the nonresident resided in Texas and provided prenatal expenses or support for the child;
5. the child resides in Texas as a result of the acts or directives of the nonresident;
6. the nonresident engaged in sexual intercourse in Texas and the child may have been conceived by that act of intercourse;

7. the individual asserted parentage of a child in the paternity registry maintained in Texas by the vital statistics unit; or

8. there is any other basis consistent with the constitutions of Texas and the United States for the exercise of personal jurisdiction.

Tex. Fam. Code § 159.201(a).

A Texas court may also exercise personal jurisdiction over a nonresident who signed an acknowledgment of paternity of a child born in Texas. Tex. Fam. Code § 102.011(b)(7)(B). Because section 159.201 is permissive rather than mandatory, it is within the court's discretion to decline to exercise personal jurisdiction. *Frazer v. Hall*, No. 01-11-00505-CV, 2012 WL 2159271, at *3 (Tex. App.—Houston [1st Dist.] June 14, 2012, no pet.) (mem. op.).

These bases of personal jurisdiction, or those in any other Texas law, may not be used to acquire personal jurisdiction for a Texas tribunal to modify a child support order of another state unless the requirements of Family Code section 159.611 are met or, in the case of a foreign support order, the requirements of section 159.615 are met. Tex. Fam. Code § 159.201(b).

§ 43.34 Continuing, Exclusive Jurisdiction to Modify Child Support Order

A party seeking to modify a support order from another state must establish jurisdiction pursuant to UIFSA. Tex. Fam. Code § 156.408; *In re T.L.*, 316 S.W.3d 78, 83 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *Link v. Alvarado*, 929 S.W.2d 674, 676 (Tex. App.—San Antonio 1996, writ dism'd w.o.j.).

A Texas court that has issued a child support order consistent with Texas law has and must exercise continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order and (1) when a request for modification is filed, Texas is the residence of the obligor, the individual obligee, or the child or (2) even if Texas is not the residence of such a person, the parties consent in a record or in open court that the Texas court may continue to exercise jurisdiction to modify its order. Tex. Fam. Code § 159.205(a); *see In re B.O.G.*, 48 S.W.3d 312, 317 (Tex. App.—Waco 2001, pet. denied) (trial court lacked jurisdiction to modify child support order since neither obligor, obligee, nor child resided in Texas when motion was filed). Under UIFSA, once a Texas court that has jurisdiction enters a support order, that court is the only court entitled to modify the decree as long as it retains continuing, exclusive jurisdiction. A

court of another state may enforce the Texas support decree, but that court has no authority to modify the support order as long as one of the parties remains in Texas, the issuing state. UIFSA, unlike the UCCJEA, provides no mechanism for the issuing tribunal of a support order to decline to exercise continuing exclusive jurisdiction and transfer jurisdiction to modify a support order to a court in another state. *In re Meekins*, 550 S.W.3d 729 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding).

A Texas court that has issued a child support order consistent with Texas law may not exercise continuing, exclusive jurisdiction to modify the order if (1) all the parties who are individuals file a consent in a record with the Texas court that a tribunal of another state (with jurisdiction over an individual party or located in the state where the child resides) may modify the order and assume continuing, exclusive jurisdiction or (2) the Texas order is not the controlling order. Tex. Fam. Code § 159.205(b).

If a tribunal of another state modifies a Texas child support order under UIFSA, Texas courts must recognize the continuing, exclusive jurisdiction of the other state's tribunal. Tex. Fam. Code § 159.205(c). Conversely, any purported modification of a Texas order by another state is void if statutory requirements set out above are not satisfied. *In re T.L.*, 316 S.W.3d at 86. In *In re T.L.*, the father claimed that the parties consented to Louisiana's assuming jurisdiction to modify a Texas order because the mother executed a written request to the state IV-D agency to stop collection efforts and close her case. The court held that the request filed with the state's enforcement agency did not comply with UIFSA requirements and did not constitute consent for Louisiana to assume continuing exclusive jurisdiction.

A Texas court that lacks continuing, exclusive jurisdiction to modify a child support order may serve as an initiating tribunal to request a tribunal of another state to modify a support order issued in that state. Tex. Fam. Code § 159.205(d).

§ 43.35 Enforcement of Support Order by Tribunal Having Continuing Jurisdiction

A Texas court that has issued a child support order consistent with Texas law may serve as an initiating tribunal to request a tribunal of another state to enforce the order if the order is the controlling order and has not been modified by a tribunal of another state that assumed jurisdiction under UIFSA. The Texas court may also request a tribunal of another state to enforce a money judgment for arrears of support and interest on the order that accrued before a determination that an order of a tribunal of another state is the controlling order. Tex. Fam. Code § 159.206(a).

COMMENT: This provision authorizes, but does not require, that an initiating state be involved to forward a case to another state. Under UIFSA, a tribunal may serve as a responding tribunal even when there is no initiating tribunal in another state. This accommodates the direct filing of an action in a responding tribunal by a nonresident.

A Texas court having continuing jurisdiction over a support order may act as a responding tribunal to enforce the order. Tex. Fam. Code § 159.206(b).

§ 43.36 Controlling Order

UIFSA recognized that under predecessor enactments, states had been able to create multiple, valid orders. To move to a concept of one tribunal's having continuing, exclusive jurisdiction over the child support obligation, UIFSA contains provisions for a tribunal to determine which one order controls the prospective support obligation. UIFSA also determines which tribunal will have the continuing, exclusive jurisdiction to modify the prospective support obligation.

If only one tribunal has issued a child support order concerning the obligor and child, the order of that tribunal controls and must be so recognized. Tex. Fam. Code § 159.207(a).

If two or more child support orders have been issued by tribunals of Texas, another state, or a foreign country concerning the same obligor and same child, a Texas court having personal jurisdiction over both the obligor and the individual obligee shall apply the rules in Family Code section 159.207(b) and by order determine which order controls and must be recognized. If only one of the tribunals issuing an order would have continuing, exclusive jurisdiction under UIFSA, that tribunal's order controls. If more than one of the tribunals would have continuing, exclusive jurisdiction, an order issued by a tribunal in the child's current home state controls if there is such an order; if not, the order most recently issued controls. *See Ellithorp v. Ellithorp*, 346 S.W.3d 583 (Tex. App.—El Paso 2009, pet. denied). If none of the tribunals would have continuing, exclusive jurisdiction, the Texas court shall issue a child support order that controls. Tex. Fam. Code § 159.207(b).

If two or more child support orders have been issued for the same obligor and same child, on request of a party who is an individual or that is a support enforcement agency, a Texas court having personal jurisdiction over both the obligor and the individual obligee shall determine which order controls under Family Code section 159.207(b). A request to determine which is the controlling order may be filed with a registration or as

a separate proceeding and must be accompanied by a copy of each order in effect and the record of payments. The requestor must give notice to each party whose rights may be affected. Tex. Fam. Code § 159.207(c), (d).

The Texas court that determines by order which is the controlling order or issues a new controlling order shall state in its order the basis on which it made its determination; the amount of prospective support, if any; and the total amount of consolidated arrears and accrued interest, if any, under all of the orders after all payments made are credited as provided by Family Code section 159.209. The party obtaining an order determining which is the controlling order shall, within thirty days of its issuance, file a certified copy of the controlling order with each tribunal that issued or registered an earlier child support order. Failure to file subjects the party or support enforcement agency that obtains the order to sanctions but does not affect the validity or enforceability of the controlling order. Tex. Fam. Code § 159.207(f), (g).

An order that has been determined to be the controlling order, or a judgment for consolidated arrears of support and interest, if any, made under section 159.207, must be recognized in UIFSA proceedings. Tex. Fam. Code § 159.207(h).

§ 43.37 Simultaneous Proceedings in Another State

A Texas court may exercise jurisdiction to establish a support order if the pleading is filed after a pleading is filed in another state or a foreign country only if the Texas pleading is filed before expiration of the time allowed in the other state or the foreign country for filing a responsive pleading challenging the exercise of jurisdiction by the other state or the foreign country, the contesting party timely challenges the exercise of jurisdiction in the other state or the foreign country, and, if relevant, Texas is the child's home state. Tex. Fam. Code § 159.204(a).

A Texas court may not exercise jurisdiction to establish a support order if the pleading is filed before a pleading is filed in another state or a foreign country if the pleading in the other state or foreign country is filed before expiration of the time allowed in Texas for filing a responsive pleading challenging the exercise of jurisdiction by Texas, the contesting party timely challenges the exercise of jurisdiction in Texas, and, if relevant, the other state or foreign country is the child's home state. Tex. Fam. Code § 159.204(b).

§ 43.38 Choice of Law

Unless provided otherwise in UIFSA (see section 43.42 below), a responding tribunal in Texas shall apply the procedural and substantive law generally applicable to similar proceedings originating in Texas and may exercise all powers and provide all remedies available in those proceedings, and the tribunal shall determine the duty of support and the amount payable in accordance with Texas law and support guidelines. Tex. Fam. Code § 159.303.

§ 43.39 Pleadings and Accompanying Documents

In a UIFSA proceeding, a petitioner seeking to establish a support order, determine parentage of a child, or register and modify a support order of a tribunal of another state or a foreign country must file a petition and, unless nondisclosure is otherwise ordered under Family Code section 159.312, provide the name, residential address, and Social Security number of the obligor and of the obligee or the parent and the alleged parent and the name, sex, residential address, Social Security number, and date of birth of each child for whose benefit support is sought or whose parentage is to be determined. Unless filed at the time of registration, the petition must be accompanied with a copy of any support order known to have been issued by another tribunal. Tex. Fam. Code § 159.311(a).

The petition must specify the relief sought, and it and the accompanying documents must conform substantially with requirements imposed by certain federally mandated forms. Tex. Fam. Code § 159.311(b).

If a party alleges in an affidavit or pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of specific identifying information (such as residence address and Social Security number), that information must be sealed and may not be disclosed to the other party or the public. After a hearing in which a court takes into consideration the health, safety, or liberty of the party or child, the court may order disclosure of information that the court determines to be in the interests of justice. Tex. Fam. Code § 159.312.

§ 43.40 Establishment of Support Order or Determination of Parentage

Establishment of Support Order: If a support order entitled to recognition under UIFSA has not been issued, a responding Texas court with personal jurisdiction over the parties may issue a support order if the individual seeking the order resides outside

Texas or the support enforcement agency seeking the order is located outside Texas. Tex. Fam. Code § 159.401(a); *see In re M.I.M.*, 370 S.W.3d 94, 97–98 (Tex. App.—Dallas 2012, pet. denied) (subject-matter jurisdiction proper where UIFSA petition filed and Texas has ability to establish personal jurisdiction over respondent). Tex. Fam. Code § 152.208, which allows court to decline jurisdiction because of the unjustifiable conduct of the person seeking to invoke jurisdiction, does *not* apply to UIFSA cases brought under chapter 159. *In re M.I.M.*, 370 S.W.3d at 99–100.

The responding Texas court may issue a temporary child support order in limited circumstances as set out in Family Code section 159.401(b). *See* Tex. Fam. Code § 159.401(b). *But see In re Sanders*, No. 05-16-00617-CV, 2016 WL 3947093 (Tex. App.—Dallas July 18, 2016, orig. proceeding) (mem. op.) (Colorado order lacking specific provision for child support but requiring parties to split expenses, including medical, health insurance, and extracurricular activities, qualified as a "support order" under UIFSA, which deprived Texas of jurisdiction over mother's request for child support).

On finding, after notice and an opportunity to be heard, that an obligor owes a duty of support, the court shall issue a support order directed to the obligor and may issue other orders under Family Code section 159.305. Tex. Fam. Code § 159.401(c).

Determination of Parentage: A Texas court authorized to determine the parentage of a child may serve as responding tribunal in a proceeding to determine parentage brought under UIFSA or a law substantially similar to UIFSA. Tex. Fam. Code § 159.402.

§ 43.41 Direct Enforcement of Income-Withholding Order of Another State

An income-withholding order issued in another state may be sent by or on behalf of the obligee or by a support enforcement agency to the person defined as the obligor's employer under Family Code chapter 158 without the prior filing of a petition or comparable pleading or registration of the order with a Texas court. Tex. Fam. Code § 159.501. On receipt of an income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor. The employer shall treat an income-withholding order issued in another state that appears regular on its face as if the order had been issued by a Texas court. Tex. Fam. Code § 159.502(a), (b).

The employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order that specify (1) the duration and amount of periodic payments of current child support, stated as a sum certain; (2) the designated payee and the address; (3) medical support and dental support, whether periodic cash payments, stated as a sum certain, or an order for the employer to provide health insurance coverage or dental insurance coverage; (4) the amount of periodic payments of certain fees and costs, stated as sums certain; and (5) the amount of periodic payments of arrearages and interest, stated as sums certain.

The employer shall comply with the law of the state of the obligor's principal place of employment with respect to the employer's processing fee, the maximum amount to be withheld from the obligor's income, and the times within which the payments must be withheld and forwarded. Tex. Fam. Code § 159.502(d).

If an employer receives two or more income-withholding orders with respect to the same obligor, the employer satisfies the terms of the orders if the employer complies with the law of the state of the obligor's principle place of employment to establish the priorities for withholding and allocating income withheld for two or more child support obligees. Tex. Fam. Code § 159.503.

An employer who complies with an income-withholding order issued in another state in accordance with these provisions is not subject to civil liability with regard to the withholding. Tex. Fam. Code § 159.504. An employer who willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with a Texas order. Tex. Fam. Code § 159.505.

The obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in Texas by registering the order in a Texas court and either filing a contest to the order as provided in Family Code chapter 159, subchapter G, or otherwise contesting the order in the same manner as if the order had been issued by a Texas court. The obligor must give notice of the contest to a support enforcement agency providing services to the obligee, to each employer that has directly received an income-withholding order relating to the obligor, and to the person designated to receive payments in the withholding order or, if no person is designated, to the obligee. Tex. Fam. Code § 159.506.

§ 43.42 Enforcement of Support Order after Registration

Registration of Order for Enforcement: A support order or income-withholding order issued in another state or a foreign support order may be registered in Texas for enforcement. Tex. Fam. Code § 159.601.

Procedure to Register Order for Enforcement: Except as otherwise provided by Family Code section 159.706 (see section 43.45 below), a support order or income-withholding order of another state or a foreign support order may be registered in Texas by a party's sending to the appropriate Texas court a letter of transmittal requesting registration and enforcement; two copies, including one certified copy, of the order to be registered, including any modification of the order; a sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage; the name of the obligor and, if known, the obligor's address and Social Security number, the name and address of the obligor's employer and any other source of income of the obligor, and a description of and the location of property of the obligor in Texas not exempt from execution; and, except as otherwise provided by Family Code section 159.312, the name and address of the obligee and, if applicable, of the person to whom support payments are to be remitted. Tex. Fam. Code § 159.602(a).

The procedural requirements of Family Code section 159.602 are mandatory. Failure to include a sworn statement by the party requesting registration or a certified statement by the custodian of records showing the amount of any arrearage will prevent registration of the order. *In re Chapman*, 973 S.W.2d 346, 348 (Tex. App.—Amarillo 1998, no pet.). But see *Kendall v. Kendall*, 340 S.W.3d 483, 500 (Tex. App.—Houston [1st Dist.] 2011, no pet.), in which the court held that specific procedural registration requirements under section 159.602 are not jurisdictional, where the parties had actual notice of the proceedings, expressly invoked the jurisdiction of the Texas court, and stipulated in the initial New York divorce action that further proceedings would take place in Texas. Failure to strictly comply with section 159.602's registration procedures does not deprive the Texas courts of subject-matter jurisdiction over a foreign support order. Any complaint about failure to properly register a foreign support order may be addressed by a direct appeal of the subsequent enforcement order, but not by collateral attack.

On receipt of a request for registration, the court shall cause the order to be filed as an order of a tribunal of another state or a foreign support order, together with one copy of the documents and information, regardless of their form. Tex. Fam. Code § 159.602(b).

A petition or comparable pleading seeking a remedy that must be affirmatively sought under another Texas law may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought. Tex. Fam. Code § 159.602(c).

If two or more orders are in effect, the person requesting registration must furnish the court a copy of each support order asserted to be in effect in addition to the other required documents, specify any order alleged to be controlling, and specify the amount of consolidated arrears, if any. Tex. Fam. Code § 159.602(d).

A request for a determination of which order is the controlling order may be filed separately from or with a request for registration. The person requesting registration must give notice of the request to each party whose rights may be affected. Tex. Fam. Code § 159.602(e).

Effect of Registration for Enforcement: A support order or income-withholding order issued in another state or a foreign support order is registered when the order is filed in the registering court in Texas. A registered support order issued in another state or a foreign country is enforceable in the same manner and is subject to the same procedures as an order issued by a Texas court. Unless specifically authorized in subchapter G of Family Code chapter 159, a Texas court shall recognize and enforce, but may not modify, a registered support order if the issuing tribunal had jurisdiction. Tex. Fam. Code § 159.603.

Notice of Registration of Order: When a support order or income-withholding order issued in another state or a foreign support order is registered, the Texas court registering the order shall notify the nonregistering party. The notice must be accompanied with a copy of the registered order and the documents and relevant information accompanying the order. Tex. Fam. Code § 159.605(a).

The notice must inform the nonregistering party that a registered order is enforceable as of the date of registration in the same manner as an order issued by a Texas court, that a hearing to contest the validity or enforcement of the registered order must be requested within twenty days after notice unless the registered order is under Family Code section 159.707, that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the alleged arrearages, and of the amount of alleged arrearages. Tex. Fam. Code § 159.605(b).

If two or more orders are alleged to be in effect, the notice must also identify the two or more orders and the order alleged to be controlling and the consolidated arrears, if any.

The notice must also notify the nonregistering party of the right to a determination of which is the controlling order, state that the procedures pertaining to contesting the validity or enforcement of the registered order also apply to the determination of which order is controlling, and state that failure to timely contest the validity or enforcement of the order alleged to be the controlling order may result in confirmation that the order is the controlling order. Tex. Fam. Code § 159.605(c).

On registration of an income-withholding order for enforcement, the support enforcement agency or the court shall notify the obligor's employer under Family Code chapter 158. Tex. Fam. Code § 159.605(d).

Procedure to Contest Validity or Enforcement of Registered Support Order: A nonregistering party seeking to contest the validity or enforcement of a registered support order in Texas shall request a hearing within the time required by section 159.605 (twenty days after notice of the registration or as provided by Family Code section 159.707). The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearages under Family Code section 159.607. Tex. Fam. Code § 159.606(a).

If the nonregistering party fails to contest the validity or enforcement of the registered support order in a timely manner, the order is confirmed by operation of law. Tex. Fam. Code § 159.606(b).

If a nonregistering party requests a hearing to contest the validity or enforcement of the registered support order, the registering court shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing. Tex. Fam. Code § 159.606(c).

Contest of Registration or Enforcement: A party contesting the validity or enforcement of a registered support order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

1. The issuing court lacked personal jurisdiction over the contesting party.
2. The order was obtained by fraud.
3. The order has been vacated, suspended, or modified by a later order.
4. The issuing tribunal has stayed the order pending appeal.
5. There is a defense under Texas law to the remedy sought.

6. Full or partial payment has been made.

7. The statute of limitation under Family Code section 159.604 precludes enforcement of some or all of the alleged arrearages.

8. The alleged controlling order is not the controlling order.

Tex. Fam. Code § 159.607(a).

The court must apply the requirements of full faith and credit to the issuing state's determination of personal jurisdiction over the contesting party. *In re T.B.*, No. 07-10-00377-CV, 2012 WL 751950, at *5 (Tex. App.—Amarillo Mar. 8, 2012, pet. denied) (mem. op.).

If a party presents evidence establishing a full or partial defense under section 159.607(a), a court may stay enforcement of the registered support order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered support order may be enforced by all remedies available under Texas law. Tex. Fam. Code § 159.607(b).

If the contesting party does not establish a defense to the validity or enforcement of the registered support order under section 159.607(a), the registering court shall issue an order confirming the order. Tex. Fam. Code § 159.607(c). In *In re G.L.A.*, 195 S.W.3d 787 (Tex. App.—Beaumont 2006, pet. denied), the trial court abused its discretion in declining to enforce a registered order of another state based on the common-law doctrine of forum non conveniens. Unlike the UCCJEA, UIFSA does not contain a forum non conveniens provision. Nevertheless, the appellate court assumed without deciding that the forum non conveniens doctrine may apply in some child support enforcement proceedings.

Choice of Law: The law of the issuing state or foreign country governs the nature, extent, amount, and duration of current payments under a registered support order, the computation and payment of arrearages and accrual of interest on the arrearages under the support order, and the existence and satisfaction of other obligations under the support order. After a tribunal of Texas or another state determines which is the controlling order and issues an order consolidating any arrears, the Texas court must prospectively apply the law of the state or foreign country that issued the controlling order, including that state's or country's law on interest on arrears, on current and future support, and on consolidated arrears. Tex. Fam. Code § 159.604(a), (d).

In a proceeding for arrears under a registered support order, the statute of limitations of Texas or of the issuing state or foreign country, whichever is longer, applies. Tex. Fam. Code § 159.604(b). *See In re B.C.*, 52 S.W.3d 926, 928 (Tex. App.—Beaumont 2001, no pet.); *see also Attorney General v. Litten*, 999 S.W.2d 74, 78 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (trial court abused discretion in refusing to take judicial notice of Missouri's statute of limitations based on certified copy of Missouri statute).

A responding Texas court must apply Texas enforcement procedures and remedies to enforce current support and collect arrears and interest due on a support order of another state or a foreign country registered in Texas. Tex. Fam. Code § 159.604(c).

Confirmed Order: Confirmation of a registered support order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. Tex. Fam. Code § 159.608.

§ 43.43 Modification of Support Order after Registration

The procedures regarding registration and contest of a child support order registered for modification are the same as those for an order registered for enforcement only (see section 43.42 above). An order may also be registered for both enforcement and modification. *See* Tex. Fam. Code § 159.609. Special procedures for modification of foreign support orders are provided in Family Code sections 159.615 and 159.711. *See* Tex. Fam. Code §§ 159.615, 159.711.

Effect of Registration for Modification: A Texas court may enforce a child support order of another state registered for purposes of modification in the same manner as if the order had been issued by a Texas court, but the registered support order may be modified only if the requirements of Family Code section 159.611 or 159.613 have been met. Tex. Fam. Code § 159.610.

Modification of Child Support Order of Another State: If Family Code section 159.613 does not apply, a Texas court may modify a child support order issued in another state that is registered in Texas if, after notice and hearing, the court finds either (1) that the child, the obligee who is an individual, and the obligor do not reside in the issuing state, a petitioner who is a nonresident of Texas seeks modification, and the respondent is subject to the personal jurisdiction of the Texas court *or* (2) that the child resides in Texas, or a party who is an individual is subject to the personal jurisdiction of the Texas court, and all the parties who are individuals have filed consents in a record in

the issuing tribunal for a Texas court to modify the support order and assume continuing, exclusive jurisdiction. Tex. Fam. Code § 159.611(a); *see In re Henderson*, 982 S.W.2d 566, 567 (Tex. App.—Amarillo 1998, no pet.) (Texas court could not modify child support provisions of Oklahoma decree because obligor remained resident of Oklahoma).

There is no particular form in which consent for a Texas court to assume jurisdiction to modify another state's support order must be made. *Kendall v. Kendall*, 340 S.W.3d 483 (Tex. App.—Houston [1st Dist.] 2011, no pet.). The parties effectively consented to the Texas court's exercise of jurisdiction to modify an agreed New York order where that order stated that "except for issues regarding equitable distribution, all future questions concerning child support, maintenance, enforcement, interpretation or modification of this Judgment of Divorce shall be referred to the appropriate Court in the State of Texas where the Defendant and the children of the parties reside." *Kendall*, 340 S.W.3d at 502.

Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a Texas court, and the order may be enforced and satisfied in the same manner. Tex. Fam. Code § 159.611(b).

A Texas court may not modify any aspect of a child support order that may not be modified under the law of the issuing state, including the duration of the support obligation. If multiple tribunals have issued orders for the same obligor and same child, the order that controls and must be so recognized under section 159.207 establishes the aspects of the order that are nonmodifiable. Tex. Fam. Code § 159.611(c).

In a proceeding to modify a child support order, the law of the state issuing the initial controlling order governs the duration of the support obligation. The obligor's fulfillment of the support duty established by that order precludes imposition of a further obligation of support by a Texas court. Tex. Fam. Code § 159.611(d). That is, the initial controlling order may be modified and replaced by a new controlling order, but the duration of the child support obligation is fixed by the initial order.

On issuance of an order by a Texas court modifying a child support order issued in another state, the Texas court becomes the court of continuing, exclusive jurisdiction. Tex. Fam. Code § 159.611(e). Notwithstanding the foregoing provisions of section 159.611 and those of Family Code section 159.201(b), a Texas court retains jurisdiction

to modify an order issued by a Texas court if one party resides in another state and the other party resides outside the United States. Tex. Fam. Code § 159.611(f).

If *all* the individual parties reside in Texas and the child does not reside in the issuing state, a Texas court has jurisdiction to register the issuing state's order for enforcement or modification. In such a case (which is essentially an intrastate matter), Texas procedural and substantive law apply. However, only certain provisions of UIFSA apply. The provisions concerning jurisdiction, general provisions, and enforcement and modification apply (Family Code sections 159.101–.211 and 159.601–.616), but certain procedural provisions do *not* apply, including those dealing with establishment of support orders and determination of parentage (Family Code sections 159.301–.507 and 159.701–.802). Tex. Fam. Code § 159.613.

Within thirty days after issuance of a modified child support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction. Tex. Fam. Code § 159.614.

Modification of Child Support Order of Foreign Country: Except as otherwise provided by Family Code section 159.711 (see section 43.45 below), if a foreign country lacks or refuses to exercise jurisdiction to modify its child support order pursuant to its laws, a Texas court may assume jurisdiction to modify the child support order and bind all individuals subject to the personal jurisdiction of the Texas court regardless of whether the consent to modification otherwise required of the individual under Family Code section 159.611 has been given and regardless of the residence of the movant. An order issued by a Texas court modifying a foreign child support order under these circumstances is the controlling order. Tex. Fam. Code § 159.615.

Registration of Foreign Child Support Order for Modification: A party or support enforcement agency that seeks to modify, or to modify and enforce, a foreign child support order not under the Convention may register the order in Texas under the provisions of Family Code sections 159.601 through 159.608 if the order has not been registered. A petition for modification, which must specify the grounds for modification, may be filed at the same time as a request for registration or at another time. Tex. Fam. Code § 159.616.

§ 43.44 Recognition of Order Modified in Another State

If a child support order of a Texas court is modified by a tribunal of another state that assumed jurisdiction under UIFSA, a Texas court may enforce the order that was modified only as to arrears and interest accruing before the modification, may provide appropriate relief for violations of the order that occurred before the effective date of the modification, and shall recognize the modifying order of the other state, on registration, for the purpose of enforcement. Tex. Fam. Code § 159.612.

§ 43.45 Support Proceeding under Convention

The provisions discussed below, set out in subchapter H of chapter 159 of the Family Code, apply only to a support proceeding under the Hague Maintenance Convention. If a provision in subchapter H is inconsistent with subchapters B through G of chapter 159, subchapter H controls. *See* Tex. Fam. Code § 159.702.

Definitions: Family Code section 159.701 contains several definitions pertinent to subchapter H:

"Application" means a request under the Convention by an obligee or obligor, or on behalf of a child, made through a central authority for assistance from another central authority.

"Central authority" means the entity designated by the United States or a foreign country described in Code section 159.102(5)(D) to perform the functions specified in the Convention.

"Convention support order" means a support order of a tribunal of a foreign country described in Code section 159.102(5)(D).

"Direct request" means a petition filed by an individual in a Texas court in a proceeding involving an obligee, obligor, or child residing outside the United States.

"Foreign central authority" means the entity designated by a foreign country described in Code section 159.102(5)(D) to perform the functions specified in the Convention.

"Foreign support agreement" means an agreement for support in a record that (1) is enforceable as a support order in the country of origin; (2) has been formally drawn up or registered as an authentic instrument by a foreign tribunal or authenticated by, or concluded, registered, or filed with a foreign tribunal; and (3) may be reviewed and

modified by a foreign tribunal. The term includes a maintenance arrangement or authentic instrument under the Convention.

"United States central authority" means the secretary of the United States Department of Health and Human Services.

Tex. Fam. Code § 159.701.

The office of the attorney general of Texas (hereinafter "OAG") is the agency designated by the United States central authority to perform specific functions under the Convention. Tex. Fam. Code § 159.703.

A record filed with a Texas court under subchapter H must be in the original language. If it is not in English, it must be accompanied by an English translation. Tex. Fam. Code § 159.713.

Initiation of Proceeding by OAG: In support proceedings under the Convention, the OAG shall transmit and receive applications and initiate or facilitate the institution of a proceeding regarding an application in a Texas court. Tex. Fam. Code § 159.704(a).

These support proceedings are available to an obligee: (1) recognition or recognition and enforcement of a foreign support order; (2) enforcement of a support order issued or recognized in Texas; (3) establishment of a support order if there is no existing order, including, if necessary, determination of parentage of a child; (4) establishment of a support order if recognition of a foreign support order is refused under Code section 159.708(b)(2), (4), or (9); (5) modification of a support order of a Texas court; and (6) modification of a support order of a tribunal of another state or a foreign country. Tex. Fam. Code § 159.704(b).

These support proceedings are available to an obligor against which there is an existing support order: (1) recognition of an order suspending or limiting enforcement of an existing support order of a Texas court, (2) modification of a support order of a Texas court, and (3) modification of a support order of a tribunal of another state or a foreign country. Tex. Fam. Code § 159.704(c).

A Texas court may not require security, bond, or deposit to guarantee payment of costs and expenses in proceedings under the Convention. Tex. Fam. Code § 159.704(d).

Direct Request: A petitioner may file a direct request seeking establishment or modification of a support order or determination of parentage of a child; Texas law applies to the proceeding. Tex. Fam. Code § 159.705(a).

A petitioner may file a direct request seeking recognition and enforcement of a support order or support agreement. Code sections 159.706 through 159.713 apply to the proceeding. Tex. Fam. Code § 159.705(b). A security, bond, or deposit is not required to guarantee the payment of costs and expenses in such a proceeding, and an obligee or obligor that has benefited from free legal assistance in the issuing country is entitled to benefit, at least to the same extent, from any free legal assistance provided for by Texas law under the same circumstances. Tex. Fam. Code § 159.705(c). Subchapter H does not prevent the application of Texas laws that provide simplified, more expeditious rules regarding a direct request for recognition and enforcement of a foreign support order or foreign support agreement. Tex. Fam. Code § 159.705(e).

A petitioner filing a direct request is not entitled to assistance from the office of the attorney general. Tex. Fam. Code § 159.705(d).

Registration: Except as otherwise provided in subchapter H, orders are to be registered as provided in subchapter G of the Code. *See* Tex. Fam. Code § 159.706(a). A request for registration of a Convention support order may seek recognition and partial enforcement of the order. Tex. Fam. Code § 159.706(c).

Supporting materials required to be submitted differ from those required in sections 159.311 and 159.602(a) of the Code for non-Convention proceedings. Notwithstanding those sections, a request for registration of a Convention support order must be accompanied by (1) the complete text of the support order or an abstract or extract of the support order drawn up by the issuing foreign tribunal, which may be in the form recommended by the Hague Conference on Private International Law; (2) a record stating that the support order is enforceable in the issuing country; (3) if the respondent did not appear and was not represented in the proceedings in the issuing country, a record attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard or that the respondent had proper notice of the support order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal; (4) a record showing the amount of arrears, if any, and the date the amount was calculated; (5) a record showing a requirement for automatic adjustment of the amount of support, if any, and the information necessary to make the appropriate calculations; and (6) if necessary, a record showing the extent to which the applicant received free legal assistance in the issuing country. Tex. Fam. Code § 159.706(b).

A Texas court may vacate the registration of a Convention support order without the filing of a contest under Code section 159.707 only if, acting on its own motion, the court finds that recognition and enforcement of the order would be manifestly incompatible with public policy. Tex. Fam. Code § 159.706(d).

The court shall promptly notify the parties of the registration or the order vacating the registration of a Convention support order. Tex. Fam. Code § 159.706(e).

Contest: Except as otherwise provided in subchapter H, Code sections 159.605 through 159.608 apply to a contest of a registered Convention support order. Tex. Fam. Code § 159.707(a).

A party contesting a registered Convention support order must file a contest not later than thirty days after notice of the registration. If the contesting party does not reside in the United States, the contest must be filed not later than sixty days after notice of the registration. Tex. Fam. Code § 159.707(b). If the nonregistering party fails to contest the registered Convention support order by the specified time, the order is enforceable. Tex. Fam. Code § 159.707(c).

A contest of a registered Convention support order may be based only on grounds set forth in section 159.708. The contesting party bears the burden of proof. Tex. Fam. Code § 159.707(d). The Texas court is bound by the findings of fact on which the foreign tribunal based its jurisdiction and may not review the merits of the order, and it must promptly notify the parties of its decision. Tex. Fam. Code § 159.707(e), (f).

A challenge or appeal, if any, does not stay the enforcement of a Convention support order unless there are exceptional circumstances. Tex. Fam. Code § 159.707(g).

Recognition and Enforcement: A Texas court must recognize and enforce a registered Convention support order except on the following grounds for refusal:

1. Recognition and enforcement of the order is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard.
2. The issuing tribunal lacked personal jurisdiction consistent with Code section 159.201.
3. The order is not enforceable in the issuing country.
4. The order was obtained by fraud in connection with a matter of procedure.

5. A record transmitted in accordance with Code section 159.706 lacks authenticity or integrity.

6. A proceeding between the same parties and having the same purpose is pending before a Texas court, and that proceeding was the first to be filed.

7. The order is incompatible with a more recent support order involving the same parties and having the same purpose if the more recent support order is entitled to recognition and enforcement under Code chapter 159 in Texas.

8. Payment, to the extent alleged arrears have been paid in whole or in part.

9. In a case in which the respondent neither appeared nor was represented in the proceeding in the issuing foreign country (a) if the law of that country provides for prior notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard or (b) if the law of that country does not provide for prior notice of the proceedings, the respondent did not have proper notice of the order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal.

10. The order was made in violation of Code section 159.711.

Tex. Fam. Code § 159.708(a), (b).

If a Texas court does not recognize a Convention support order on grounds listed in item 2, 4, or 9 above, the court may not dismiss the proceeding without allowing a reasonable time for a party to request the establishment of a new Convention support order and, if the application for recognition and enforcement was received under Code section 159.704, the OAG shall take all appropriate measures to request a child support order for the obligee. *See* Tex. Fam. Code § 159.708(c).

If a Texas court does not recognize and enforce a Convention support order in its entirety, it must enforce any severable part of the order. An application or direct request may seek recognition and partial enforcement. Tex. Fam. Code § 159.709.

Foreign Support Agreement: Absent specified grounds, a Texas court must recognize and enforce a foreign support agreement registered Texas. *See* Tex. Fam. Code § 159.710(a). An application or direct request for recognition and enforcement of a foreign support agreement must be accompanied by the complete text of the foreign support agreement and a record stating that the foreign support agreement is enforceable as an order of support in the issuing country. Tex. Fam. Code § 159.710(b).

A Texas court may vacate the registration of a foreign support agreement only if, acting on its own motion, the court finds that recognition and enforcement would be manifestly incompatible with public policy. Tex. Fam. Code § 159.710(c). In a contest of a foreign support agreement, a Texas court may refuse recognition and enforcement of the agreement if it finds (1) recognition and enforcement of the agreement is manifestly incompatible with public policy; (2) the agreement was obtained by fraud or falsification; (3) the agreement is incompatible with a support order involving the same parties and having the same purpose in Texas, another state, or a foreign country if the support order is entitled to recognition and enforcement under Code chapter 159 in Texas; or (4) the record submitted with the application or request stating that the agreement is enforceable as a support order in the issuing country lacks authenticity or integrity. Tex. Fam. Code § 159.710(d).

A proceeding for recognition and enforcement of a foreign support agreement must be suspended while a challenge to or appeal of the agreement is pending before a tribunal of another state or a foreign country. Tex. Fam. Code § 159.710(e).

Modification: A Texas court may not modify a Convention child support order if the obligee remains a resident of the foreign country where the support order was issued unless (1) the obligee submits to the jurisdiction of a Texas court, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity or (2) the foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order. If a Texas court does not modify a Convention child support order because the order is not recognized in Texas, Code section 159.708(c) applies. Tex. Fam. Code § 159.711.

§ 43.46 Continuing, Exclusive Jurisdiction to Modify Spousal Support Order

A Texas court that issues a spousal support order consistent with Texas law has continuing, exclusive jurisdiction to modify the order throughout the existence of the support obligation. A Texas court may not modify the spousal support order of another state or a foreign country having continuing, exclusive jurisdiction over that order under the laws of that state or foreign country. A Texas court with continuing, exclusive jurisdiction over a spousal support order may request a tribunal of another state to enforce the Texas spousal support order and may enforce or modify its own order at the request of another state. Tex. Fam. Code § 159.211.

[Sections 43.47 through 43.50 are reserved for expansion.]

IV. Full Faith and Credit for Child Support Orders Act

§ 43.51 Generally

In 1994 Congress passed the Full Faith and Credit for Child Support Orders Act (FFCCSOA), codified at 28 U.S.C. § 1738B. The purpose of the Act is to facilitate the enforcement of child support orders among the states and avoid jurisdictional competition and conflict among state courts in establishing child support orders. Once a state exercises jurisdiction consistently with the jurisdictional prerequisites of the Act, each state must give full faith and credit to the sister-state child support order. *In re G.L.A.*, 195 S.W.3d 787 (Tex. App.—Beaumont 2006, pet. denied). The FFCCSOA sets out general policy dictates and the Uniform Interstate Family Support Act contains the details to implement the policy. Texas law requires that a court must seek to harmonize the FFCCSOA, the federal Parental Kidnapping Prevention Act of 1980, and the provisions of the Texas Family Code. *See* Tex. Fam. Code § 102.012(d).

§ 43.52 Key Definitions

Several key definitions pertinent to the Act are contained in 28 U.S.C. § 1738B(b), including the following:

"Child" means a person under eighteen years of age or a person eighteen or older with respect to whom a child support order has been issued under a state's law.

"Child's state" means the state in which a child resides.

"Child's home state" means the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time a pleading for support is filed and, if the child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month period.

"Child support" means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

"Child support order" means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum, including a permanent or temporary order and an initial order or modification of an order.

"Contestant" means a person, including a parent, who claims a right to receive child support, is a party to a proceeding that may result in issuance of a child support order, or is under a child support order. It also includes a state or political subdivision to which the right to obtain child support has been assigned.

"Modification" means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

§ 43.53 Determining If Sister State Had Jurisdiction

The Act does not confer jurisdiction on a state but provides for recognition of child support orders rendered under the jurisdictional prerequisites set forth in the Act.

A child support order is made consistently with the Act if the court that makes the order has both subject-matter jurisdiction and personal jurisdiction over the contestants, under the law of the state in which the court is located and under the Act, and the contestants have been given reasonable notice and opportunity to be heard. 28 U.S.C. § 1738B(c).

§ 43.54 Continuing Jurisdiction

Under the Act, a court that renders a child support order consistently with the jurisdictional provisions of the Act has continuing, exclusive jurisdiction over the order if the state in which the court is located is the child's state or the residence of any individual contestant or the parties have consented in a record or open court that the state tribunal may continue to exercise jurisdiction to modify its order, unless the court of another state has modified the order in accordance with the provisions of the Act. 28 U.S.C. § 1738B(d).

§ 43.55 Modification of Order

A court of a state may modify a child support order issued by a court of another state if the court has jurisdiction to make such a child support order under section 1738B(i) of the Act and either the court of the other state no longer has continuing, exclusive jurisdiction of the order because that state is no longer the child's state or any individual contestant's residence and the parties have not consented in a record or open court that the tribunal of the other state may continue to exercise jurisdiction to modify its order *or* each individual contestant has filed written consent with the state of continuing,

exclusive jurisdiction for a court of another state to modify the order and assume continuing, exclusive jurisdiction over the order. 28 U.S.C. § 1738B(e).

§ 43.56 Enforcement of Modified Orders

A court of a state that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the modification of the order. 28 U.S.C. § 1738B(g).

§ 43.57 Recognition of Child Support Orders

The Act provides rules by which a court must determine which order to recognize for purposes of continuing, exclusive jurisdiction. 28 U.S.C. § 1738B(f).

If only one court has issued a child support order, that court's order must be recognized. If two or more courts have issued child support orders for the same obligor and child and only one of the courts would have continuing, exclusive jurisdiction under the Act, that court's order must be recognized. If two or more courts have issued such orders and more than one of the courts would have continuing, exclusive jurisdiction under the Act, an order issued by a court in the child's current home state must be recognized, but if no order has been issued in that state, the order most recently issued must be recognized. If two or more courts have issued such orders and none of the courts would have continuing, exclusive jurisdiction under the Act, a court having jurisdiction over the parties shall issue a child support order, which must be recognized. The court that has issued an order recognized under this provision is the court having continuing, exclusive jurisdiction under section 1738B(d). 28 U.S.C. § 1738B(f).

§ 43.58 Choice of Law

In a proceeding to establish, modify, or enforce a child support order, the forum state's law generally applies. However, the law of the state that issued an order applies to its interpretation. A state cannot deny full faith and credit to another state's judgment or final order solely on the ground that it offends the public policy of the state where it is sought to be enforced. *Knighton v. International Business Machines Corp.*, 856 S.W.2d 206, 209 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Daus v. Daus*, No. 05-13-00060-CV, 2014 WL 2109379, at *3 (Tex. App.—Dallas May 14, 2014, pet. denied) (mem. op.) (confirmation of order from foreign court may result in garnishment of Texas resident's wages even though Texas court could not issue same substan-

tive order against Texas resident. Obligee did not seek enforcement from Texas court, but only that Texas give full faith and credit to the order and allow garnishment under other state's laws). Further, in an action to enforce an arrearage, the statute of limitations of the forum state or the issuing state, whichever provides the longer period of limitation, applies. 28 U.S.C. § 1738B(h).

[Sections 43.59 and 43.60 are reserved for expansion.]

V. Useful Websites

§ 43.61 Useful Websites

The following websites contain information relating to the topic of this chapter:

List of states that have adopted UCCJEA (§ 43.1)
www.uniformlaws.org/Shared/docs/UCCJEAadoptions.pdf

List of countries that have adapted Hague Maintenance Convention (§ 43.31)
https://www.hcch.net/en/instruments/conventions/status-table/?cid=131

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Chapter 44

Grandparents and Other Nonparents

§ 44.1 General Standing to File Original Suit

A grandparent or other nonparent may file an original suit affecting the parent-child relationship at any time if the person falls within one of the following categories of persons:

1. A custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country. Tex. Fam. Code § 102.003(a)(3).

2. A guardian of the person or of the estate of the child. Tex. Fam. Code § 102.003(a)(4).

3. 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 ninety days preceding the date of the filing of the petition. Tex. Fam. Code § 102.003(a)(9).

4. A person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Family Code chapter 161 or to whom consent to adoption has been given in writing under Family Code chapter 162. Tex. Fam. Code § 102.003(a)(10).

5. A person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than ninety days preceding the date of the filing of the petition, if the child's guardian, managing conservator, or parent is deceased at the time the petition is filed. Tex. Fam. Code § 102.003(a)(11).

6. A person who is the foster parent of a child placed by the Texas Department of Family and Protective Services in the person's home for at least twelve months ending not more than ninety days preceding the date of the filing of the petition. Tex. Fam. Code § 102.003(a)(12).

7. A person who is a relative of the child within the third degree by consanguinity if the child's parents are deceased at the time of the filing of the petition. Tex. Fam. Code § 102.003(a)(13).

8. A person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Family Code section 102.0035, regardless of whether the child has been born. Tex. Fam. Code § 102.003(a)(14).

If a grandparent satisfies the general standing requirement of Family Code section 102.003, it is not necessary to address the requirements of section 102.004 (grandparent standing). *In re Foshee*, No. 10-17-00321-CV, 2019 WL 962307, at *2 (Tex. App.—Waco Feb. 27, 2019, orig. proceeding) (mem. op.).

See section 40.3 in this manual for a detailed discussion of the topic of general standing to file suit.

In addition to the general standing to file suit provided by Family Code section 102.003(a), a grandparent, or another relative of the child related within the third degree by consanguinity, may bring an original suit affecting the parent-child relationship that seeks managing conservatorship if there is satisfactory proof to the court that (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. Tex. Fam. Code § 102.004(a). To provide "satisfactory proof" means that the evidence submitted regarding the standing issue, when considered in the light most favorable to the petitioner, must enable reasonable and fair-minded people to find the grounds stated in section 102.004(a)(1) or (2) exist. *See In re K.D.H.*, 426 S.W.3d 879, 888 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Oral consent, given by the proper party and established in the record, is sufficient to grant standing under section 102.004 even if it is given after the petition is filed. *In re A.M.S.*, 277 S.W.3d 92, 98 (Tex. App.—Texarkana 2009, no pet.). When the petitioners in a suit affecting the parent-child relationship lack standing, an agreed order is void. *In re A.M.S.*, 277 S.W.3d at 98–99 (petitioner related to child by affinity rather than consanguinity as required by statute does not have standing, and law does not permit parents to waive standing by agreement). When both parents have been appointed joint managing conservators, each must consent to the suit before the petitioner has standing under section 102.004(a)(2). Without consent from each managing conservator, the petitioner must have consent of both parents or the child's surviving parent. *In re Lewis*,

357 S.W.3d 396, 402 (Tex. App.—Fort Worth 2011, orig. proceeding [mand. denied]). *But see In re J.W.L.*, 291 S.W.3d 79, 85–86 (Tex. App.—Fort Worth 2009, orig. proceeding [mand. denied]) (grandparents had standing to seek appointment as managing conservators under section 102.004(a)(2) when only one of two managing conservators consented to grandparents' suit).

The Texas Supreme Court has resolved a prior split of authority among the courts of appeals over whether "actual control" requires legal control. In *In re H.S.*, 550 S.W.3d 151 (Tex. 2018), the court held that proof of "actual care, control, and possession" was established when nonparents shared a residence with the child, cared for the child, and exercised actual control typically exercised by parents. The court held that the statute does not require the nonparent to have ultimate legal authority to control the child, nor does it require the parents to have totally ceded or relinquished their own parental rights and responsibilities.

The actual care, control, and possession of the child must have occurred before the date of commencement of the suit, and not after the third party's intervention in a suit that was later nonsuited. *In re J.A.T.*, 502 S.W.3d 834 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Further, the actual care, control, and possession of the child must have occurred for a period of six months ending in the ninety days immediately preceding the filing of the petition. The court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time. Tex. Fam. Code § 102.003(b); *In re Brice*, ____ S.W.3d ____, No. 04-19-00334-CV, 2019 WL 3642646 (Tex. App.—San Antonio Aug. 7, 2019, orig. proceeding) (stepmother could not show that her home was child's "fixed place of abode" that was occupied or tended to be occupied consistently over substantial period of time and was "permanent rather than temporary"); *In re L.F.*, No. 02-17-00310-CV, 2017 WL 4684025 (Tex. App.—Fort Worth Oct. 19, 2017, orig. proceeding) (mem. op.) (stepmother did not proffer any computation showing that children resided with her for "periods of time" adding up to six months). A mother's fiancé was found to have standing to intervene for conservatorship even though the six-month period in which the child lived with him was not continuous or uninterrupted. The court found that the fiancé acted as a parent to the child during the ten months prior to the mother's death and he filed his petition less than ninety days after her death. *In re Clay*, No. 02-18-00404-CV, 2019 WL 545722, at *8–9 (Tex. App.—Fort Worth Feb. 12, 2019, orig. proceeding [mand. denied]) (mem. op.).

Once a grandparent seeking conservatorship has proved standing under Family Code section 102.003(a)(9), an affidavit under section 153.432(c) no longer applies to the issue of standing. *In re J.H.*, 538 S.W.3d 121 (Tex. App.—El Paso 2017, no pet.).

The sibling of a child who is separated from the child because of an action taken by the Texas Department of Family and Protective Services may file an original suit requesting access to the child if the sibling is at least eighteen years of age. Tex. Fam. Code §§ 102.0045(a), 153.551. The sibling of a child who is separated from the sibling as a result of an action by the Department of Family and Protective Services may file an original suit requesting access to the child, regardless of the age of the sibling. Tex. Fam. Code §§ 102.0045(a–1), 153.551. These two subsections of section 102.0045 appear to be in conflict.

If the parent-child relationship between the child and every living parent of the child has been terminated, a grandparent or other person related by blood, adoption, or marriage to a former parent whose parent-child relationship has been terminated or to the father of a child may not file an original suit. This limitation does not apply to a person who has a continuing right to possession of or access to the child under an existing court order or has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit. The limitation also does not apply to an adult sibling of the child, a grandparent of the child, or an aunt or uncle who is a sibling of a parent of the child if the adult sibling, grandparent, aunt, or uncle files an original suit or a suit for modification requesting managing conservatorship of the child not later than the ninetieth day after the date the parent-child relationship between the child and the parent is terminated in a suit filed by the Department of Family and Protective Services requesting termination of the parent-child relationship. Tex. Fam. Code § 102.006.

COMMENT: Section 102.006(c) of the Family Code may have the unintended effect of giving grandparents, aunts, uncles, and adult siblings standing without their having to have any prior possession of the child or substantial past contact with the child.

§ 44.2 Constitutional Challenges to Standing

With the 2005 revision of section 153.433, the Texas legislature appears to have addressed the concerns raised by *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, the United States Supreme Court held that a Washington statute permitting nonparent visitation violated a parent's due-process right to make decisions concerning the care, custody, and control of his children. Although the Washington statute was extremely broad,

at least one Texas court has applied *Troxel* on the issue of the standing of an unrelated third party to seek managing conservatorship:

> In *Troxel*, the Court declined to define the precise scope of the parental due process right in the visitation context, but held that, as applied in a petition for court-ordered grandparent visitation at any time unconstitutionally infringed upon the mother's liberty interest in her children. *Troxel v. Granville*, 530 U.S. at ___, 120 S. Ct. at 2064, 147 L. Ed. 2d at 61–62. "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, 530 U.S. at ___, 120 S. Ct. at 2061, 147 L. Ed. 2d at 58.

In re Aubin, 29 S.W.3d 199, 203 (Tex. App.—Beaumont 2000, orig. proceeding).

The same rationale can be applied to Texas grandparents or other third parties seeking possession of or access to or conservatorship of a child based on standing provisions set forth in Family Code section 102.004 (child's present circumstances would significantly impair child's physical health or emotional development). The revised statutes appear to place the burden of proof squarely on the grandparents or other third parties. *See* Tex. Fam. Code §§ 102.004, 153.433; *In re J.M.T.*, 280 S.W.3d 490, 492 (Tex. App.—Eastland 2009, no pet.). A grandparent's conclusory statement is insufficient to support a finding by the court that the children's emotional development would be significantly impaired if the grandparent never got to see them. *In re G.L.A.*, No. 11-14-00351-CV, 2015 WL 9311644, at *2 (Tex. App.—Eastland Dec. 10, 2015, no pet.) (mem. op.).

Courts generally require a nonparent seeking conservatorship to present evidence of specific, identifiable behavior or conduct that will probably result in the child's being emotionally impaired or physically harmed. Such evidence usually includes a showing of physical abuse, severe neglect, abandonment, drug or alcohol abuse, or very immoral behavior on the part of the parent. *In re M.F.M.*, No. 07-16-00117-CV, 2017 WL 5473757 (Tex. App.—Amarillo Nov. 14, 2017, no pet.) (mem. op.) (per curiam); *see* *In re Scheller*, 325 S.W.3d 640, 643–44 (Tex. 2010) (orig. proceeding) (per curiam) (maternal grandfather failed to establish that denial of access to grandchildren would significantly impair grandchildren's physical health or emotional well-being; evidence that grandchildren experienced anger and nightmares following their mother's death did not establish anything more substantial than grandchildren's under-

standable sadness resulting from losing family member and missing grandparents); *see also In re J.M.G.*, 553 S.W.3d 137 (Tex. App.—El Paso 2018, orig. proceeding).

Trial courts may not, however, dismiss a petition for lack of standing if there is conflicting testimony about a petitioner's involvement with the children. *In re Y.B.*, 300 S.W.3d 1, 5 (Tex. App.—San Antonio 2009, pet. denied).

§ 44.3 Managing Conservatorship

In any suit by a grandparent or other nonparent for managing conservatorship of a child in which a parent is an opposing party, the grandparent or other nonparent must overcome two statutory hurdles. The first requirement is very significant. Subject to the prohibition of Family Code section 153.004 concerning a history of domestic violence or sexual abuse, unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed joint managing conservators of the child. Tex. Fam. Code § 153.131(a). The nonparent must show specific, identifiable conduct by the parent that is likely to cause harm to the child's physical health or emotional development, not speculative harm. *Gray v. Shook*, 329 S.W.3d 186, 195–98 (Tex. App.—Corpus Christi–Edinburg 2010), *rev'd on other grounds*, *Shook v. Gray*, 381 S.W.3d 540, 542–43 (Tex. 2012) (per curiam); *see also R.H. v. D.A.*, No. 03-16-00442-CV, 2017 WL 875317 (Tex. App.—Austin Mar. 2, 2017, pet. dism'd) (mem. op.). Evidence of a parent's untreated mental illness that did not identify the illness with any certainty, show its effect on the mother's ability to care for the child, or show probable harm to the child has been found insufficient to meet the burden. *In re M.O.*, No. 05-19-00413-CV, 2019 WL 4071999, at *7 (Tex. App.—Dallas Aug. 29, 2019 (no pet. h.) (mem. op.).

Section 153.131(a) applies only to those situations in which a nonparent seeks custody in lieu of a natural parent, not when a grandparent requests joint managing conservatorship with a parent. *Brook v. Brook*, 881 S.W.2d 297, 299–300 (Tex. 1994); *In re A.D.H.*, 979 S.W.2d 445, 447 (Tex. App.—Beaumont 1998, no pet.). *But see Critz v. Critz*, 297 S.W.3d 464, 471 (Tex. App.—Fort Worth 2009, no pet.). In *Shook*, 381 S.W.3d at 542–43, the Texas Supreme Court held that a grandmother should not have been precluded from being considered for conservatorship or access to a child, even though at trial four years before she had been unable to overcome the parental presumption.

COMMENT: The *Troxel* decision may affect the *Brook* ruling.

The presumption that a parent should be appointed or retained as managing conservator is rebutted if the court finds that the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent, a licensed child-placing agency, or the Department of Family and Protective Services for a period of one year or more, a portion of which was within ninety days preceding the date of intervention in or filing of the suit, and that the appointment of the nonparent, the agency, or the department as managing conservator is in the child's best interest. Tex. Fam. Code § 153.373.

The second statutory obstacle facing a grandparent or other nonparent seeking appointment as managing conservator is a rebuttable presumption that the appointment of the child's parents as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the child's parents removes the presumption. Tex. Fam. Code § 153.131(b). Additionally, there is a rebuttable presumption that the appointment of a parent as a sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child. Tex. Fam. Code § 153.004(b); *In re M.M.*, No. 12-18-00243-CV, 2019 WL 1032736, at *4 (Tex. App.—Tyler Mar. 5, 2019, pet. denied) (mem. op.).

If both parents of the child are deceased, the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator, but that consideration does not alter or diminish the court's discretionary power. Tex. Fam. Code § 153.431.

A parent may designate a grandparent or other nonparent to serve as managing conservator in an unrevoked or irrevocable affidavit of relinquishment of parental rights executed as provided by Family Code chapter 161. The court shall appoint a person so designated to serve as managing conservator unless the court finds that the appointment would not be in the child's best interest. Tex. Fam. Code § 153.374. Termination of the parent-child relationship is discussed in chapter 50 of this manual.

Unless limited by court order or a provision in Family Code chapter 153, a grandparent or other nonparent appointed a sole managing conservator has the rights of a nonparent appointed a sole managing conservator, which are set out in Family Code section 153.371. *See* Tex. Fam. Code § 153.371. If appointed managing conservator, a grandparent, like other nonparents, must file an annual report with the court in compliance with Family Code section 153.375. Tex. Fam. Code § 153.375(a).

Support: A court may order either or both parents to support a child. Tex. Fam. Code § 154.001(a). A court is not authorized to order child support to be paid by the grandparents. *Blalock v. Blalock*, 559 S.W.2d 442, 443 (Tex. App.—Houston [14th Dist.] 1977, no writ). Similarly, because only a parent can be required to make payments under the terms of a support order for a child, a grandparent or other nonparent cannot be an "obligor" ordered to provide medical support. *See* Tex. Fam. Code § 101.022 (definition of "obligor"), § 154.001, ch. 154, subch. D. Child support is the subject of chapter 9 of this manual.

§ 44.4 Joint Managing Conservatorship

There is no specific provision governing standing for a grandparent filing an original suit requesting joint managing conservatorship. Family Code sections 102.003 (general standing to file suit) and 102.004(a) (standing for grandparent or other relative of child within third degree of consanguinity to file suit requesting managing conservatorship) would probably apply to such an original suit. See the discussions in sections 44.1 and 44.2 above.

A grandparent or other nonparent appointed a joint managing conservator may serve in that capacity either with another nonparent or with a parent of the child. *Compton v. Pfannenstiel*, 428 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2014, no. pet.) (father testified he believed grandmother's conservatorship was necessary, and court found appointment of mother could significantly impair children's physical health or emotional development; grandmother appointed joint managing conservator with exclusive right to determine children's residence along with mother and father as nonprimary joint managing conservators). The same procedural and substantive standards regarding an agreed or court-ordered joint managing conservatorship in which a parent is appointed joint managing conservator (Family Code chapter 153, subchapter C) apply to a nonparent joint managing conservator. Tex. Fam. Code § 153.372.

Unless limited by court order or other provisions of Family Code chapter 153, a grandparent or other nonparent appointed a joint managing conservator has the right of access to the child's medical records, without regard to whether the right is specified in the order. Tex. Fam. Code § 153.3721.

There are two presumptions that a grandparent or other nonparent seeking joint managing conservatorship must overcome. *See* Tex. Fam. Code § 153.131; see section 44.3 above. Family Code section 153.131(a) applies only to those situations in which a nonparent seeks custody in lieu of a natural parent, not when the grandparent seeks joint

managing conservatorship with a parent. *Brook v. Brook*, 881 S.W.2d 297, 299–300 (Tex. 1994); *In re A.D.H.*, 979 S.W.2d 445, 447 (Tex. App.—Beaumont 1998, no pet.); *see also In re Marriage of Mitchell*, 585 S.W.3d 38 (Tex. App.—Texarkana 2019, no pet. h.) (mother, her husband, and biological father of child appointed joint managing conservators with husband having right to establish primary residence of child when court found child would be in danger of significant impairment to her emotional development if in custody of only mother and biological father); *In re F.R.N.*, No. 10-18-00233-CV, 2019 WL 3801630 (Tex. App.—Waco Aug. 7, 2019, no pet. h.) (mem. op.); *In re J.R.W.*, No. 05-15-01479-CV, 2017 WL 3083930 (Tex. App.—Dallas July 20, 2017, pet. denied) (mem. op.) (mother and grandmother appointed joint managing conservators when there was satisfactory proof that appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair child's physical health or emotional development). *But see In re Crumbley*, 404 S.W.3d 156, 161–62 (Tex. App.—Texarkana 2013, orig. proceeding) (unless trial court makes finding supported by evidence that appointment of natural parent as temporary sole managing conservator would not be in child's best interest, it may not appoint nonparent as temporary joint managing conservator).

COMMENT: The *Troxel* decision may affect the *Brook* ruling.

Support: Orders for support are discussed in section 44.3 above.

§ 44.5 Possessory Conservatorship

An original suit affecting the parent-child relationship that seeks possessory conservatorship may not be brought by a grandparent or other person, but the court may grant a grandparent or other person, except for certain foster parents, deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit affecting the parent-child relationship filed by a person authorized to do so under Family Code chapter 102 if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or of both parents as joint managing conservators would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 102.004(b). A foster parent may be granted leave to intervene under section 102.004(b) only if the foster parent would have standing to file an original suit as provided by Code section 102.003(a)(12). Tex. Fam. Code § 102.004(b–1). A nonparent does not have a relaxed burden on standing to intervene under this statute. *See In re S.M.D.*, 329 S.W.3d 8, 15 (Tex. App.—San Antonio 2010, pet. dism'd). In *In re S.M.D.*,

the court of appeals provides a summary of the law governing the trial court's determination whether the movant has met this burden:

> In order to show "that appointment of the parent as managing conservator would significantly impair the child, either physically or emotionally," the nonparent must "offer evidence of specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child." *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990) (construing section 153.131 of the Family Code). To meet this burden, the nonparent must present evidence of "specific, identifiable behavior or conduct of the parent," as shown by "specific acts or omissions," and evidence that such acts or omissions "will probably cause that harm." *Critz v. Critz*, 297 S.W.3d 464, 474 (Tex. App.—Fort Worth 2009, no pet.). The evidence must support a logical inference that the specific, identifiable behavior or conduct will probably result in the child being emotionally impaired or physically harmed. *Whitworth*, 222 S.W.3d 623 [*Whitworth v. Whitworth*, 222 S.W.3d 616 (Tex. App.—Houston [1st Dist.] 2007, no pet.)]. The link "may not be based on evidence which merely raises a surmise or speculation of possible harm." *Id; In re M.W.*, 959 S.W.2d 661, 665 (Tex. App.—Tyler 1997, writ denied). The non-parent's burden is not met by evidence that shows she would be a better custodian of the child or that she has a strong and on-going relationship with the child. *See Critz*, 297 S.W.3d at 474–75; *M.J.G.*, 248 S.W.3d at 760 [*In re M.J.G.*, 248 S.W.3d 753 (Tex. App.—Fort Worth 2008, no pet.)]. Further, evidence of past misconduct alone is insufficient. *Critz*, 297 S.W.3d at 475. "If the parent is presently a suitable person to have custody, the fact that there was a time in the past when the parent would not have been a proper person to have such custody is not controlling." *May v. May*, 829 S.W.2d 373, 377 (Tex. App.—Corpus Christi 1992, writ denied).

In re S.M.D., 329 S.W.3d at 16.

Under certain circumstances, a biological or adoptive grandparent may request possession of or access to a grandchild by filing an original suit affecting the parent-child relationship or a suit for modification requesting that relief. *See* Tex. Fam. Code §§ 153.432–.434. See section 44.6 below for a detailed description of this topic.

Unless limited by court order or other provisions of Family Code chapter 153, a grandparent or other nonparent appointed a possessory conservator has the rights of a nonpar-

ent appointed a possessory conservator that are set out in Family Code section 153.376(a) and any other right or duty specified in the court order appointing the person possessory conservator. Tex. Fam. Code § 153.376.

Support: Orders for support are discussed in section 44.3 above.

§ 44.6 Possession of or Access to Grandchild

A biological or adoptive grandparent may request possession of or access to a grandchild by filing an original suit or a suit for modification as provided by Family Code chapter 156. Tex. Fam. Code § 153.432(a). A grandparent may request possession of or access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit. Tex. Fam. Code § 153.432(b).

A biological or adoptive grandparent may not request possession of or access to a grandchild if—

1. each of the biological parents of the grandchild has died, had the person's parental rights terminated, or executed an affidavit of waiver of interest in the child or an affidavit of relinquishment of parental rights under Family Code chapter 161 that designates the Department of Family and Protective Services, a licensed child-placing agency, or a person other than the child's stepparent as the child's managing conservator and
2. the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.

Tex. Fam. Code § 153.434.

Under section 153.434, a grandparent who requests access in the alternative to adopting the grandchildren loses standing to request access once the grandchildren are adopted by a person who is not a stepparent. *Martinez v. Estrada*, 392 S.W.3d 261, 264 (Tex. App.—San Antonio 2013, pet. denied).

The grandparent filing the suit must execute and attach an affidavit that contains, along with supporting facts, an allegation that denial of possession of or access to the child by the petitioner would significantly impair the child's physical health or emotional well-being. The court must deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support the relief authorized by Code section 153.433. Tex. Fam. Code § 153.432(c). Merely show-

ing that the grandparents had a close relationship with a grandchild is not sufficient to support granting of access if grandparents cannot show that the child's health or well-being would suffer if they did not have access. *In re Kelly*, 399 S.W.3d 282, 284 (Tex. App.—San Antonio 2012, orig. proceeding). Unlike Texas Family Code section 102.004(b), Code section 153.433 allows a grandparent to seek possession of or access to a child without consideration of the merits of appointment of a parent as managing conservator; instead, the question is whether denial of the grandparent's possession or access would significantly impair the child's physical health or emotional well-being. *In re Nelke*, 573 S.W.3d 917, 925 (Tex. App.—Dallas 2019, orig. proceeding).

The court may order reasonable possession of or access to a grandchild by a grandparent if—

1. at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;
2. the grandparent requesting possession or access overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession or access would significantly impair the child's physical health or emotional well-being; and
3. the grandparent requesting possession or access is a parent of a parent of the child *and* that parent of the child (a) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition, (b) has been found by a court to be incompetent, (c) is dead, or (d) does not have actual or court-ordered possession of or access to the child.

Tex. Fam. Code § 153.433(a).

An order granting possession or access rendered over a parent's objections must state with specificity that each of the foregoing requirements has been met. Tex. Fam. Code § 153.433(b).

Section 153.433 does not contain the specific requirement that grandparent access be in the child's best interest. However, the Family Code provides that the best interest of the child shall always be the court's primary consideration in determining the issues of possession and access to the child. Tex. Fam. Code § 153.002. The Texas Supreme Court, relying on *Troxel v. Granville*, 530 U.S. 57 (2000), has held that a grandparent must introduce evidence that the child's parent is unfit, the child's health or emotional well-being would suffer if the court deferred to the parent's decisions, or the parent intended to exclude the grandparents from access to the child. *See In re Derzapf*, 219 S.W.3d 327

(Tex. 2007) (orig. proceeding) (per curiam); *In re Mays-Hooper*, 189 S.W.3d 777, 777–78 (Tex. 2006) (orig. proceeding) (per curiam); *In re J.P.C.*, 261 S.W.3d 334, 337 (Tex. App.—Fort Worth 2008, no pet.). Courts have found that there is a "hefty statutory burden" to overcome the presumption that a parent would act in the child's best interest. *See In re Scheller*, 325 S.W.3d 640 (Tex. 2010) (orig. proceeding) (per curiam).

The court cannot grant temporary access to a grandparent unless the parent has had a meaningful opportunity to be heard. *In re Chambless*, 257 S.W.3d 698, 700 (Tex. 2008) (orig. proceeding) (per curiam).

A trial court may appoint an expert to serve both as a guardian ad litem to the children and as an expert psychologist to examine the parties and the children to make recommendations to the court regarding whether depriving a grandparent of access would significantly harm the child's emotional well-being or physical health. *In re Scheller*, 325 S.W.3d 640, 644–46 (Tex. 2010) (orig. proceeding) (per curiam).

Grandparents may be granted possession of a grandchild after the child was removed from abusive parents even though the grandparents have not affirmatively sought possession or access. The trial court was required to "evaluate the [Department's] efforts to identify relatives who could provide the child with a safe environment, if the child is not returned to a parent." *In re Roberts*, No. 07-12-00402-CV, 2012 WL 6013223, at *3 (Tex. App.—Amarillo Dec. 3, 2012, orig. proceeding).

COMMENT: Revised section 153.433 specifically omits a requirement that possession and access be in the best interest of the child. Best interest, however, always takes precedence in cases involving children. Therefore, the best-interest discussion in the following cases may still be useful to the practitioner: *Troxel*, 530 U.S. 57; *see In re C.P.J.*, 129 S.W.3d 573, 578–79 (Tex. App.—Dallas 2003, pet. denied) (father testified that grandparent visitation was in best interest of children); *see also In re N.A.S.*, 100 S.W.3d 670, 673 (Tex. App.—Dallas 2003, no pet.) (grandparent access allowed because mother testified at trial that it would be in children's best interest to have relationship with grandparents and that it would not be in children's best interest to have no contact with grandparents).

COMMENT: Although the relevant Family Code sections have been revised to include possession, rather than merely access, they do not give the practitioner or the courts any guidance about what "possession" means or whether the grandparent would be entitled to any accompanying rights or duties. Given the heavy burden that a grandparent must shoulder in order to obtain these rights and the fact that the grandparent's

child does not want the grandparent to have the rights (otherwise the suit would not have been necessary), it would appear that a parent might not want the grandparent to have a right to authorize medical care and so forth. Additionally, under the Health Insurance Portability and Accountability Act, with whom are medical providers allowed to communicate without a court order? Finally, if a grandparent has possession of a child, should the grandparent not also have the duty to inform the parents that he or she is living with or married to a sex offender? These questions and concerns are not answered or addressed by the Code provisions.

Discovery: Discovery in grandparent access and possession cases must be reasonably tailored to obtain evidence that denial of the grandparents' possession of or access to the child would significantly impair the child's physical health or emotional well-being. *In re Wood*, No. 01-06-00014-CV, 2006 WL 648774, at *4–6 (Tex. App.—Houston [1st Dist.] Mar. 14, 2006, orig. proceeding) (mem. op.).

§ 44.7 Suit to Request Termination and Adoption

If a grandparent or other nonparent does not have general standing to file suit, the person may have standing to file an original suit requesting only an adoption or an original suit for termination of the parent-child relationship joined with a petition for adoption if the person—

1. as the result of a placement for adoption has had actual possession and control of the child at any time during the thirty-day period preceding the filing of the petition;
2. has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition;
3. has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
4. is determined by the court to have had substantial past contact with the child sufficient to warrant standing to do so.

Tex. Fam. Code § 102.005(2)–(5).

Family Code section 153.434 provides that a biological grandparent may not request possession of or access to a grandchild if the child's biological parents have died and the child is the subject of a pending suit for adoption. However, the statute does not prevent a court from considering whether an adoption would result in the child's loss of

access to family and whether that would be in the child's best interest. *In re C.J.T.*, No. 04-14-00621-CV, 2016 WL 413262, at *5 (Tex. App.—San Antonio Feb. 3, 2016, no pet.) (mem. op.).

Termination and adoption are more fully discussed in chapters 50 and 51 of this manual.

§ 44.8 Intervention in Suit Affecting Parent-Child Relationship

A grandparent or other nonparent may wish to intervene in a pending suit—such as a parentage suit, divorce, modification, or termination—to seek managing, joint managing, or possessory conservatorship or to request a modification of the terms of an order affecting the grandparent or other nonparent.

A grandparent or other nonparent has the right to intervene in a suit affecting the parent-child relationship if the grandparent or other nonparent could file an original suit to seek the same relief. *In re Chester*, 398 S.W.3d. 795, 801–02 (Tex. App.—San Antonio 2011, orig. proceeding). In addition to the general standing to file suit provided by Family Code section 102.003(a), a grandparent, or another relative of the child related within the third degree by consanguinity, may bring an original suit affecting the parent-child relationship that seeks managing conservatorship if there is satisfactory proof to the court that (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. Tex. Fam. Code § 102.004(a). However, persons not related to the child within the third degree of consanguinity cannot intervene unless there is some other basis on which they can assert standing under the Family Code. *In re Schick*, No. 04-18-00839-CV, 2018 WL 6624380, at *3 (Tex. App.—San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.).

Although a grandparent or other nonparent may not file an original suit requesting possessory conservatorship, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under Family Code chapter 102 if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 102.004(b). *In re L.D.F.*, 445 S.W.3d 823 (Tex. App.—El Paso 2014, no pet.) (grandparent appointed joint managing conservator with father when court impliedly found that, because of his

mental impairment, father's sole custody would significantly impair child's physical health or emotional development). *But see Whitworth v. Whitworth*, 222 S.W.3d 616 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (grandparent allowed to intervene and appointed sole managing conservator even though there were no specific allegations that child's physical health or emotional development would be impaired or any evidence to that effect). Failure to seek leave of court to intervene and determination of standing of the person requesting possession of a child renders any subsequent orders void. *In re H.R.L.*, 458 S.W.3d 23 (Tex. App.—El Paso 2014, orig. proceeding). In a case of first impression, the Dallas court of appeals has held that grandparents, as contrasted with "other persons," are not required to establish substantial past contact under section 102.004(b). *See In re Nelke*, 573 S.W.3d 917, 922–23 (Tex. App.—Dallas 2019, orig. proceeding).

Consent of only one of two managing conservators under Code section 102.004(a)(2) will not confer standing on grandparents to intervene in a SAPCR. *In re Lewis*, 357 S.W.3d 396, 402 (Tex. App.—Fort Worth 2011, orig. proceeding); *In re S.M.D.*, 329 S.W.3d 8, 14 (Tex. App.—San Antonio 2010, pet. dism'd). *But see In re J.W.L.*, 291 S.W.3d 79, 84–86 (Tex. App.—Fort Worth 2009, orig. proceeding [mand. denied]). Even if both parents consent, such consent is "not relevant" to standing under Code section 102.004(b). *In re A.G.*, No. 05-18-00725-CV, 2018 WL 6521893, at *3 (Tex. App.—Dallas Dec. 12, 2018, no pet.) (mem. op.).

Standing to file an original suit affecting the parent-child relationship is more fully discussed in section 40.3 in this manual.

Tex. Fam. Code § 102.004, which governs which parties have standing to intervene in a pending suit affecting the parent-child relationship, has more relaxed requirements than those governing standing to file an original suit. When a termination suit is already pending, "the overriding concern for the best interest of the child . . . is greater than the concern for the privacy of the parties." *In re Salverson*, No. 01-12-00343-CV, 2012 WL 1454549 (Tex. App.—Houston [1st Dist.] Apr. 23, 2012, orig. proceeding) (mem. op.).

Once a grandparent is allowed to intervene in a suit affecting the parent-child relationship, the trial court does not lose jurisdiction and the grandparent is in the suit for all purposes even if both parents file a notice of nonsuit. *In re Schoelpple*, No. 14-06-01038-CV, 2007 WL 431877 (Tex. App.—Houston [14th Dist.] Feb. 8, 2007, orig. proceeding) (mem. op.). The intervention is subject to being stricken by the court for sufficient cause. Tex. R. Civ. P. 60; *Metromedia Long Distance, Inc. v. Hughes*, 810 S.W.2d 494, 497 (Tex. App.—San Antonio 1991, writ denied).

§ 44.9 Suit for Modification

A grandparent or other nonparent who has standing to sue under Family Code chapter 102 or who is a party affected by the order may file a suit for modification in the court with continuing, exclusive jurisdiction. Tex. Fam. Code § 156.002(a), (b); *In re S.G.C.-G.*, No. 05-18-00223-CV, 2019 WL 1856621 (Tex. App.—Dallas Apr. 25, 2019, no pet. h.) (mem. op.) (nonbiological relative who had been awarded rights to have telephone access to child, to consent to medical care, and to share in educational decisions had standing to file petition to modify seeking managing conservatorship); *In re T.R.H.*, No. 09-17-00001-CV, 2018 WL 2246545 (Tex. App.—Beaumont May 17, 2018, no pet.) (mem. op.) (grandmother had standing to file motion to modify after being served with citation of mother's motion to remove grandmother's previously granted right to visitation and possession); *In re Shifflet*, 462 S.W.3d 528 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (stepgrandparents' adjudicated right to telephone access gave standing to modify conservatorship). A child's sibling who is separated from the child because of the actions of the Department of Family and Protective Services may file a suit for modification requesting access to the child in the court with continuing, exclusive jurisdiction. Tex. Fam. Code § 156.002(c).

The Texas Supreme Court has determined that the parental presumption does not apply in a modification action. *See In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000); *In re P.D.M.*, 117 S.W.3d 453, 461 (Tex. App.—Fort Worth 2003, pet. denied). Therefore, if a grandparent or other nonparent has or can acquire standing to file a suit for modification, it may now be easier to gain custody and possession of a child.

The question then becomes whether the suit filed by the grandparent or other nonparent is an original custody determination or a modification of the original custody determination. *See Greene v. Schuble*, 654 S.W.2d 436, 437 (Tex. 1983) (orig. proceeding); *Dohrn v. Delgado*, 941 S.W.2d 244, 247–48 (Tex. App.—Corpus Christi–Edinburg 1996, orig. proceeding). Both *Greene* and *Dohrn*, however, involve a parent seeking a writ for habeas corpus and are decided within that context, not in the context in which a grandparent has attained standing to file a modification action. *Greene*, 654 S.W.2d 436; *Dohrn*, 941 S.W.2d 244; *see also In re Jones*, 263 S.W.3d 120 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding) (at time father filed writ for habeas corpus, grandparent had not filed suit affecting parent-child relationship, so return of possession to father was mandatory). The Fort Worth court of appeals has held that the death of a parent does not terminate the original custody determination, and any subsequent suit is a modification action. *See In re P.D.M.*, 117 S.W.3d at 458–60. If a nonparent is appointed as a joint managing conservator under these circumstances, the appointment

need not be accompanied by a finding of physical or emotional danger to the child. *In re C.A.M.M.*, 243 S.W.3d 211, 223 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

COMMENT: If a grandparent can meet the standing requirements, the grandparent should file a suit affecting the parent-child relationship as soon as the grandparent's child dies. Likewise, if this situation exists, the surviving parent should immediately file a petition for writ of habeas corpus.

A grandparent or other nonparent seeking to modify a decree must comply with the standards established in Family Code chapter 156. See chapter 41 of this manual.

§ 44.10 Sibling Access

The sibling of a child who is separated from the child because of an action taken by the Department of Family and Protective Services may seek access to the child by filing an original suit or a suit for modification under Family Code chapter 156. The sibling may request access to the child in a suit filed for the sole purpose of seeking that relief, without regard to whether the issue of managing conservatorship is an issue in the suit. The court shall order reasonable access to the child if the court finds that access by the sibling is in the child's best interest. Tex. Fam. Code § 153.551.

§ 44.11 Pleadings

Pleadings in an original suit affecting the parent-child relationship are discussed in section 40.5 in this manual. Pleadings in suits for modification are discussed in section 41.3 in this manual.

§ 44.12 Jurisdiction

Jurisdiction in a case in which a grandparent or other nonparent is seeking managing conservatorship of, possession of, or access to a child is determined by the Uniform Child Custody Jurisdiction and Enforcement Act (Family Code sections 152.001 through 152.317). *See In re Shurtz*, No. 03-11-547-CV, 2011 WL 6938502 (Tex. App.—Austin Dec. 30, 2011, orig. proceeding) (mem. op.). See chapter 43 of this manual.

§ 44.13 Venue

Venue for an original suit is as provided in Family Code section 103.001. *See* Tex. Fam. Code § 103.001(a). The term *suit* in title 5 of the Texas Family Code is defined as a legal action under title 5 of the Family Code. Tex. Fam. Code § 101.031.

An original suit shall be filed in the county in which the child resides unless another court has continuing, exclusive jurisdiction under Family Code chapter 155 or venue is fixed in a suit for dissolution of a marriage under Family Code chapter 6, subchapter D. Tex. Fam. Code § 103.001(a). If a Texas court has acquired continuing, exclusive jurisdiction, no other Texas court has jurisdiction of a suit with regard to that child except as provided by Family Code chapter 155, section 103.001(b), or chapter 262. Tex. Fam. Code § 155.001(c).

A transfer of venue of a suit is governed by the provisions of Family Code sections 103.002 and 103.003 and chapter 155. If venue is improper, it may be transferred on the timely motion of an intervenor. See chapter 42 of this manual. If the court fails to transfer the suit pursuant to the mandatory transfer statute, mandamus is available to compel mandatory transfer in suits affecting the parent-child relationship. *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (per curiam); *Arias v. Spector*, 623 S.W.2d 312, 313 (Tex. 1981) (orig. proceeding) (per curiam). For the purposes of a motion to transfer, the intervenors are characterized as "petitioners" and may request transfer at the time they file their petition in intervention. *Walker v. Miller*, 729 S.W.2d 120, 121–23 (Tex. App.—Dallas 1987, orig. proceeding).

§ 44.14 Best Interest of Child

Suits by grandparents and other nonparents are difficult because of the issues of standing to file suit and because of the presumptions favoring parents over nonparents. *But see In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000) (parental presumption does not apply in suits for modification); *In re P.D.M.*, 117 S.W.3d 453 (Tex. App.—Fort Worth 2003, pet. denied). When representing a grandparent or other nonparent, it is important to remember that the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child. Tex. Fam. Code § 153.002.

§ 44.15 Attorney's Fees and Costs

Attorney's fees and costs are discussed in section 40.16 and in chapter 20 in this manual.

§ 44.16 Parenting Plan

The final order in a suit affecting the parent-child relationship must include a parenting plan. Tex. Fam. Code § 153.603. Parenting plans are discussed in chapter 16 of this manual.

§ 44.17 Transfer of Permanent Physical Custody of Adopted Child

Court approval is required for the transfer of permanent physical custody of an adopted child by a parent, managing conservator, or guardian to any person who is not a relative or stepparent of the child or an adult who has a significant and long-standing relationship with the child. *See* Tex. Fam. Code § 162.026. It is a felony offense to conduct, facilitate, or participate in an unregulated custody transfer of an adopted child except as provided in Tex. Penal Code § 25.081(d). *See* Tex. Penal Code § 25.081. This topic is discussed in more depth in section 51.30 in this manual.

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Military Duty of Conservator

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Chapter 45

Military Duty of Conservator

§ 45.1 Generally

If a conservator is ordered to military deployment, military mobilization, or temporary military duty that involves moving a substantial distance from the conservator's residence so as to materially affect the conservator's ability to exercise the conservator's rights and duties in relation to a child, either conservator may file for an order under subchapter L of chapter 153 of the Family Code ("subchapter L") without the necessity of showing a material and substantial change of circumstances other than the military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 153.702(a). "Military deployment" means the temporary transfer of a service member of the armed forces of Texas or the United States serving in an active-duty status to another location in support of combat or some other military operation. "Military mobilization" means the call-up of a national guard or reserve service member of the armed forces of Texas or the United States to extended active duty status but does not include national guard or reserve annual training. "Temporary military duty" means the transfer of a service member of the armed forces of Texas or the United States from one military base to a different location, usually another base, for a limited time for training or to assist in the performance of a noncombat mission. Tex. Fam. Code § 153.701(2)–(4).

The court may render a temporary order in a proceeding under subchapter L regarding possession of or access to the child or child support. Such a temporary order may grant rights to and impose duties on a designated person regarding the child, except that, if the designated person is a nonparent, the court may not require the designated person to pay child support. Tex. Fam. Code § 153.702(b), (c). "Designated person" means the person ordered by the court to temporarily exercise a conservator's rights, duties, and periods of possession and access with regard to a child during the conservator's military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 153.701(1).

After a conservator's military deployment, military mobilization, or temporary military duty is concluded and the conservator returns to the conservator's usual residence, the

temporary orders terminate and the rights of all affected parties are governed by the terms of any court order applicable when the conservator is not ordered to military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 153.702(d).

§ 45.2 Military Duty of Conservator with Exclusive Right to Designate Primary Residence

If the conservator with the exclusive right to designate the primary residence of the child is ordered to military deployment, military mobilization, or temporary military duty, the court may render a temporary order to appoint a designated person to exercise the exclusive right to designate the primary residence of the child during the military deployment, military mobilization, or temporary military duty, following a prescribed order of preference. The first choice is the conservator who does not have the exclusive right to designate the primary residence of the child. If appointing that conservator is not in the child's best interest, the next choice is a designated person chosen by the conservator with the exclusive right to designate the primary residence of the child. If appointment of neither of these persons is in the child's best interest, the court should appoint another person chosen by the court. Tex. Fam. Code § 153.703(a).

A nonparent appointed as a designated person in the temporary order has the rights and duties of a nonparent appointed as sole managing conservator under section 153.371. The court may limit or expand the rights of a nonparent named as a designated person in such a temporary order as appropriate to the best interest of the child. Tex. Fam. Code § 153.703(b), (c).

Visitation in Certain Circumstances: If, under the provisions described above, the court appoints the conservator without the exclusive right to designate the primary residence of the child, the court may award visitation with the child to a designated person ("designated person for visitation") chosen by the conservator with the exclusive right to designate the primary residence of the child. The periods of visitation must be the same as the visitation to which the conservator without the exclusive right to designate the primary residence of the child was entitled under the court order in effect immediately before the date the temporary order is rendered. Tex. Fam. Code § 153.704(a), (b).

The temporary order for visitation must provide that (1) the designated person for visitation has the right to possession of the child for the periods and in the manner in which the conservator without the exclusive right to designate the primary residence of the child is entitled under the court order in effect immediately before the date the tempo-

rary order is rendered; (2) the child's other conservator and the designated person for visitation are subject to the requirements of Family Code section 153.316, with the designated person considered for purposes of that section to be the possessory conservator; (3) the designated person for visitation has the rights and duties of a nonparent possessory conservator under Family Code section 153.376(a) during the period that the person has possession of the child; and (4) the designated person for visitation is subject to any provision in a court order restricting or prohibiting access to the child by any specified individual. The court may limit or expand the rights of a nonparent designated person for visitation as appropriate to the child's best interest. Tex. Fam. Code § 153.704(c), (d).

§ 45.3 Military Duty of Conservator without Exclusive Right to Designate Primary Residence

If the conservator without the exclusive right to designate the primary residence of the child is ordered to military deployment, military mobilization, or temporary military duty, the court may award visitation with the child to a designated person chosen by the conservator, if the visitation is in the child's best interest. Tex. Fam. Code § 153.705(a).

The temporary order for visitation must provide that (1) the designated person has the right to possession of the child for the periods and in the manner in which the conservator without the exclusive right to designate the primary residence of the child would be entitled if not ordered to military deployment, military mobilization, or temporary military duty; (2) the child's other conservator and the designated person are subject to the requirements of Family Code section 153.316, with the designated person considered for purposes of that section to be the possessory conservator; (3) the designated person has the rights and duties of a nonparent possessory conservator under Family Code section 153.376(a) during the period that the designated person has possession of the child; and (4) the designated person is subject to any provision in a court order restricting or prohibiting access to the child by any specified individual. The court may limit or expand the rights of a nonparent designated person as appropriate to the child's best interest. Tex. Fam. Code § 153.705(b), (c).

§ 45.4 Expedited Hearing

On a motion by the conservator who has been ordered to military deployment, military mobilization, or temporary military duty, the court shall, for good cause shown, hold an expedited hearing if the court finds that the conservator's military duties have a material

effect on the conservator's ability to appear in person at a regularly scheduled hearing. Such a hearing must, if possible, take precedence over other suits affecting the parent-child relationship not involving a conservator who has been ordered to military deployment, military mobilization, or temporary military duty. On a motion by any party, the court must, after reasonable advance notice and for good cause shown, allow a party to present testimony and evidence by electronic means, including by teleconference or through the Internet. Tex. Fam. Code § 153.707.

§ 45.5 Enforcement

Temporary orders rendered under subchapter L may be enforced by or against the designated person to the same extent that an order would be enforceable against the conservator who has been ordered to military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 153.708.

§ 45.6 Additional Periods of Possession or Access

Not later than the ninetieth day after the date a conservator without the exclusive right to designate the primary residence of the child who is a member of the armed services concludes the conservator's military deployment, military mobilization, or temporary military duty, the conservator may petition the court to compute the periods of possession of or access to the child to which the conservator would have otherwise been entitled during the conservator's deployment and award the conservator additional periods of possession of or access to the child to compensate for those periods. Tex. Fam. Code § 153.709(a).

If the conservator thus petitions the court, the court must compute those periods of possession or access to the child and may award to the conservator additional periods of possession of or access to the child for a length of time and under terms the court considers reasonable, if the court determines that the conservator was on military deployment, military mobilization, or temporary military duty in a location where access to the child was not reasonably possible and that the award of additional periods of possession of or access to the child is in the child's best interest. In determining whether to award the additional periods of possession, the court must consider the periods of possession of or access to the child to which the conservator would otherwise have been entitled during the conservator's military deployment, military mobilization, or temporary military duty; whether the court named a designated person under Family Code section 153.705 to exercise limited possession of the child during the conservator's

deployment; and any other factor the court considers appropriate. The court is not required to award additional periods of possession of or access to the child that equal the computed periods of possession or access to which the conservator would have been entitled during the conservator's military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 153.709(b), (c).

After the conservator has exercised all additional periods of possession or access awarded, the rights of all affected parties are governed by the terms of the court order applicable when the conservator is not ordered to military deployment, military mobilization, or temporary military duty. Tex. Fam. Code § 153.709(d).

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Authorizations for Care of Child

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Chapter 46

Authorizations for Care of Child

I. Authorizations Generally

§ 46.1 Family Code Provisions

A number of provisions in the Texas Family Code are available to nonparent caregivers providing care for children when their parents are unable to do so. The scope of authority provided under these provisions and the conditions necessary to invoke them vary considerably, and some of the provisions require court involvement while other do not.

Certain nonparents, including specified close relatives, are authorized by chapter 32 of the Code to consent to medical, dental, psychological, and surgical treatment of a child when the person having the right to consent cannot be contacted and has not given actual notice to the contrary. *See* Tex. Fam. Code § 32.001.

Under chapter 35 of the Code, a person who would be eligible under section 32.001 may seek a court order for temporary authorization to perform certain acts in caring for a child who has resided with the person for at least the preceding thirty days if the person lacks authority otherwise that would enable the person to provide necessary care for the child. Tex. Fam. Code §§ 35.001, 35.002. The authority available under this provision is substantially broader than merely consenting to treatment for the child. This procedure is discussed in part II. below.

Chapter 34 of the Code provides for an authorization agreement entered by the parents and an adult caregiver to provide temporary care for the child. *See* Tex. Fam. Code § 34.002. The scope of authority that may be provided by the agreement exceeds that available under the temporary authorization permitted under Code chapter 35. Court approval for execution of the agreement is necessary only in some circumstances, but the parties must observe strict requirements regarding the agreement. This procedure is discussed in part III. below.

Under chapter 35A of the Code, a child's grandparent, adult sibling, or adult aunt or uncle who has had actual care, custody, and control of a child for the preceding six months may seek a court order for temporary authorization to consent to voluntary inpatient mental health services for the child. *See* Tex. Fam. Code §§ 35A.001, 32.001(a). This procedure is discussed in part IV. below.

[Sections 46.2 through 46.10 are reserved for expansion.]

II. Temporary Authorization for Care of Child

§ 46.11 Generally

Chapter 35 of the Texas Family Code allows a person who meets the consent-by-non-parent requirements of Tex. Fam. Code § 32.001 to seek a court order requesting temporary authorization to consent for the care of a child if the child has resided with the person for at least the thirty days preceding the date the person files a petition with the court and the person doesn't have an authorization agreement pursuant to chapter 34 of the Texas Family Code or other signed, written documentation from a parent, guardian, or conservator that enables the person to provide necessary care for the child. Tex. Fam. Code §§ 35.001, 35.002.

The court may authorize the petitioner to do any or all of the following for the necessary care of the child:

1. Consent to medical, dental, psychological, or surgical treatment and immunizations.
2. Execute authorization for release of information required by law for medical treatment or immunization.
3. Obtain and maintain any public benefit for the child.
4. Enroll the child in daycare or school.
5. Authorize participation in extracurricular and other activities.
6. Authorize or consent to any other care for the child essential to the child's welfare.

Tex. Fam. Code § 35.005(d)(1)–(6).

§ 46.12 Contents of Petition

A petition for temporary authorization for care of a child should be filed in the district court in the county in which the petitioner resides. Tex. Fam. Code § 35.002. The petition must be styled "ex parte" and be in the name of the child, and it must be verified by the petitioner. Tex. Fam. Code § 35.003(a)(1), (a)(2).

The petition must state the name, date of birth, and current physical address of the child and of the petitioner and the name and, if known, the current physical and mailing addresses of the child's parents, conservators, or guardians. Tex. Fam. Code § 35.003(a)(3).

The petition must also describe the status and location of any court proceeding in Texas or another state with respect to the child. Tex. Fam. Code § 35.003(a)(4). If such a proceeding is identified in the petition, the petitioner must submit a copy of any court order that designates a conservator or guardian of the child. Tex. Fam. Code § 35.003(b).

Further, the petition must (1) describe the petitioner's relationship to the child; (2) provide the dates during the preceding twelve months that the child has resided with the petitioner; (3) describe any service or action that the petitioner is unable to obtain or undertake on behalf of the child without authorization from the court; (4) state any reason that the petitioner is unable to obtain signed, written documentation from a parent, conservator, or guardian of the child; (5) contain a statement of the period for which the petitioner is requesting temporary authorization; and (6) contain a statement of any reason supporting the request for the temporary authorization. Tex. Fam. Code § 35.003(a)(5)–(10).

§ 46.13 Notice and Hearing

On receipt of a petition for temporary authorization for care of child, the court shall set a hearing. A copy of the petition and notice of hearing shall be delivered to the parent, conservator, or guardian of the child by personal service or by certified mail, return receipt requested, at the last known address of the parent, conservator, or guardian. Proof of service must be filed with the court at least three days before the hearing date. Tex. Fam. Code § 35.004.

The court may hear evidence relating to the child's need for care by the petitioner, any other matter raised in the petition, and any objection or other testimony of the child's parent, conservator, or guardian. Tex. Fam. Code § 35.005(a).

A temporary authorization order shall be granted if the court finds it is necessary for the child's welfare and no objection is made by the child's parent, conservator, or guardian. However, the court shall dismiss the petition without prejudice if a parent, conservator, or guardian of the child makes an objection. Tex. Fam. Code § 35.005(b).

A temporary authorization order should be granted only if the court finds by a preponderance of the evidence that the child does not have a parent, conservator, guardian, or other legal representative available to give the necessary consent. Tex. Fam. Code § 35.005(c).

§ 46.14 Order for Temporary Authorization

An order granting temporary authorization under chapter 35 must state (1) the name and date of birth of the person with temporary authorization to care for the child; (2) the specific areas of authorization granted to the person; (3) that the order does not supersede any rights of a parent, conservator, or guardian as provided by court order; and (4) the expiration date of the temporary authorization order. Tex. Fam. Code § 35.005(e).

A copy of the order must be filed under the cause number in any court that has rendered a conservatorship or guardian order regarding the child and be sent to the last known address of the child's parent, conservator, or guardian. Tex. Fam. Code § 35.005(f).

A temporary authorization order under chapter 35 does not affect the rights of any parent, conservator, or guardian regarding the care, custody, and control of the child; establish legal custody of the child or confer standing or a right of intervention in a SAPCR proceeding; or create a court of continuing exclusive jurisdiction. Tex. Fam. Code § 35.007(b)–(d).

A person who relies in good faith on a temporary authorization order is not subject to civil or criminal liability or professional disciplinary action. Tex. Fam. Code § 35.007(a).

§ 46.15 Duration of Temporary Authorization

The temporary authorization order may be effective until a date certain, but no longer than one year from the date the order is granted unless the person petitions the court for renewal of the authorization order. Tex. Fam. Code § 35.005(d). A court may renew a temporary authorization order for a period of up to one additional year if the petitioner

shows a continuing need for the order. Tex. Fam. Code § 35.006(a). The statute is silent as to how many times the temporary authorization order may be renewed.

§ 46.16 Termination of Temporary Authorization

The petitioner or the child's parent, conservator, or guardian may request the court to terminate the temporary authorization order at any time, and the court shall terminate the order on a finding that there is no longer a need for the order. Tex. Fam. Code § 35.006(b).

[Sections 46.17 through 46.20 are reserved for expansion.]

III. Authorization Agreements for Adult Caregivers

§ 46.21 Generally

Chapter 34 of the Texas Family Code provides for a child's parent or parents to enter into an agreement with an adult caregiver authorizing the adult caregiver to perform certain acts with regard to the child. The provisions of chapter 34 are intended for situations in which a child is living with others because neither parent is able to care for the child.

For purposes of chapter 34, "parent" means the mother; a man presumed, legally determined, or adjudicated to be the father; a man who has acknowledged paternity; or an adoptive mother or father. Tex. Fam. Code §§ 34.0015(2), 101.024(a).

A parent or both parents of a child may enter into an authorization agreement with an adult caregiver to authorize the adult caregiver to perform the following acts in regard to the child:

1. To authorize medical, dental, psychological, or surgical treatment and immunization of the child, including executing any consents or authorizations for the release of information as required by law relating to the treatment or immunization.
2. To obtain and maintain health insurance coverage for the child and automobile insurance coverage for the child, if appropriate.

3. To enroll the child in a day-care program or preschool or in a public or private primary or secondary school.
4. To authorize the child to participate in age-appropriate extracurricular, civic, social, or recreational activities, including athletic activities.
5. To authorize the child to obtain a learner's permit, driver's license, or state-issued identification card.
6. To authorize employment of the child.
7. To apply for and receive public benefits on behalf of the child.
8. To obtain copies or originals of state-issued personal identification documents for the child, including the child's birth certificate, and, to the extent authorized under federal law, copies or originals of federally issued personal identification documents for the child, including the child's Social Security card.

Tex. Fam. Code § 34.002(a).

A parent may enter into an authorization agreement with an adult caregiver with whom the child is placed under a parental child safety placement agreement approved by the Department of Family and Protective Services to allow the person to perform the foregoing acts with regard to the child during an investigation of abuse or neglect or while the Department is providing services to the parent. Tex. Fam. Code § 34.0021.

To the extent of any conflict or inconsistency between chapter 34 and any other law relating to eligibility requirements other than parental consent to obtain a service listed above, the other law controls. The authorization agreement does not confer on the adult caregiver the right to authorize the performance of an abortion on the child or the administration of emergency contraception to the child. Tex. Fam. Code § 34.002(b), (c).

Only one authorization agreement may be in effect for a child at any time. An authorization agreement executed while a prior authorization agreement remains in effect is void. Tex. Fam. Code § 34.002(d).

An authorization agreement executed under chapter 34 between a child's parent and an adult caregiver does not subject the adult caregiver to any law or rule governing the licensing or regulation of a residential child-care facility under chapter 42 of the Human Resources Code. A child who is the subject of an authorization agreement is not considered to be placed in foster care, and the parties to the authorization agreement are not subject to any law or rule governing foster care providers. Tex. Fam. Code § 34.0022.

§ 46.22 Contents of Agreement

The authorization agreement must contain—

1. the following information from the adult caregiver: the name and signature of the adult caregiver, the adult caregiver's relationship to the child, and the adult caregiver's current physical address and telephone number or the best way to contact the adult caregiver;

2. the following information from the parent: the name and signature of the parent and the parent's current address and telephone number or the best way to contact the parent;

3. the information in item 2. with respect to the other parent, if applicable;

4. a statement that the adult caregiver has been given authorization to perform the functions listed in Family Code section 34.002(a) as a result of a voluntary action of the parent and that the adult caregiver has voluntarily assumed the responsibility of performing those functions;

5. statements that neither the parent nor the adult caregiver has knowledge that a parent, guardian, custodian, licensed child-placing agency, or other authorized agency asserts any claim or authority inconsistent with the authorization agreement with regard to actual physical possession or care, custody, or control of the child;

6. statements that (a) to the best of the parent's and adult caregiver's knowledge there is no court order or pending suit affecting the parent-child relationship concerning the child; there is no pending litigation in any court concerning custody, possession, or placement of the child or access to or visitation with the child; and a court does not have continuing jurisdiction concerning the child; or (b) the court with continuing jurisdiction concerning the child has given written approval for the execution of the authorization agreement accompanied by the following information: the county in which the court is located, the number of the court, and the cause number in which the order was issued or the litigation is pending;

7. a statement that to the best of the parent's and adult caregiver's knowledge there is no current, valid authorization agreement regarding the child;

8. a statement that the authorization is made in conformance with Family Code chapter 34;

9. a statement that the parent and the adult caregiver understand that each party to the authorization agreement is required by law to immediately provide to each other party information regarding any change in the party's address or contact information;

10. a statement by the parent that (a) indicates the authorization agreement is for a term of (i) six months from the date the parties enter into the agreement, which renews automatically for six-month terms unless the agreement is terminated as provided by Family Code section 34.008, or (ii) the time provided in the agreement with a specific expiration date earlier than six months after the date the parties enter into the agreement and (b) identifies the circumstances under which the authorization agreement may be terminated as provided by Family Code section 34.008 before the term of the agreement expires or continued beyond the term of the agreement by a court as provided by Family Code section 34.008(b); and

11. space for the signature and seal of a notary public.

Tex. Fam. Code § 34.003(a).

The authorization agreement must contain the following warnings and disclosures:

1. That the authorization agreement is an important legal document.

2. That the parent and the adult caregiver must read all the warnings and disclosures before signing the authorization agreement.

3. That the persons signing the authorization agreement are not required to consult an attorney but are advised to do so.

4. That the parent's rights as a parent may be adversely affected by placing or leaving the parent's child with another person.

5. That the authorization agreement does not confer on the adult caregiver the rights of a managing or possessory conservator or legal guardian.

6. That a parent who is a party to the authorization agreement may terminate the agreement and resume custody, possession, care, and control of the child on demand and that at any time the parent may request the return of the child.

7. That failure by the adult caregiver to return the child to the parent immediately on request may have criminal and civil consequences.

8. That, under other applicable law, the adult caregiver may be liable for certain expenses relating to the child in the adult caregiver's care but that the parent still retains the parental obligation to support the child.

9. That, in certain circumstances, the authorization agreement may not be entered into without written permission of the court.

10. That the authorization agreement may be terminated by certain court orders affecting the child.

11. That the authorization agreement does not supersede, invalidate, or terminate any prior authorization agreement regarding the child.

12. That the authorization agreement is void if a prior authorization agreement regarding the child is in effect and has not expired or been terminated.

13. That, except as provided by section 34.005(a–2) of the Family Code, the authorization agreement is void unless, not later than the tenth day after the date the agreement is signed, the parties mail to a parent who was not a party to the agreement at the parent's last known address, if the parent is living and the parent's parental rights have not been terminated (a) one copy of the agreement by certified mail, return receipt requested, or international registered mail, return receipt requested, as applicable, and (b) one copy of the agreement by first-class mail or international first-class mail, as applicable.

14. That the authorization agreement does not confer on an adult caregiver of the child the right to authorize the performance of an abortion on the child or the administration of emergency contraception to the child.

Tex. Fam. Code § 34.003(b).

§ 46.23 Execution of Agreement

The authorization agreement must be signed and sworn to before a notary public by the parent or parents and the adult caregiver. Tex. Fam. Code § 34.004(a).

A parent may not execute an authorization agreement without a written order by the appropriate court if there is a court order or pending suit affecting the parent-child relationship concerning the child; if there is pending litigation in any court concerning custody, possession, or placement of the child or access to or visitation with the child; or if a court has continuing, exclusive jurisdiction over the child. An authorization agreement obtained in violation of this provision is void. Tex. Fam. Code § 34.004(b), (c).

§ 46.24 Duties of Parties to Agreement

If both parents did not sign the authorization agreement, not later than the tenth day after the date the authorization agreement is executed the parties must mail to the parent who was not a party to the agreement at the parent's last known address, if that parent is living and that parent's parental rights have not been terminated, (a) one copy of the executed authorization agreement by certified mail, return receipt requested, or international registered mail, return receipt requested, as applicable, and (b) one copy of the executed authorization agreement by first class mail or international first class mail, as applicable. Tex. Fam. Code § 34.005(a). Except as otherwise provided by subsection (a–2), an authorization agreement is void if the parties fail to comply with this requirement. Tex. Fam. Code § 34.005(a–1).

The foregoing provision does not apply to an authorization agreement if the parent who was not a party to the agreement does not have court-ordered possession of or access to the child who is the subject of the agreement and has previously committed an act of family violence, as defined by Family Code section 71.004, or assault against the parent who is a party to the agreement, the child who is the subject of the agreement, or another child of the parent who is a party to the agreement, as documented by one or more of the following: (1) the issuance of a protective order against the parent who was not a party to the agreement as provided under Family Code chapter 85 or under a similar law of another state or (2) the conviction of the parent who was not a party to the agreement of an offense under title 5 of the Texas Penal Code or of another criminal offense in Texas or in another state an element of which involves a violent act or prohibited sexual conduct. Tex. Fam. Code § 34.005(a–2).

A party to the authorization agreement must immediately inform each other party of any change in the party's address or contact information. If a party fails to comply with this requirement, the authorization agreement is voidable by the other party. Tex. Fam. Code § 34.005(b).

§ 46.25 Agreement Voidable

An authorization agreement is voidable by a party if the other party knowingly obtained the agreement by fraud, duress, or misrepresentation or if the other party knowingly made a false statement on the agreement. Tex. Fam. Code § 34.006.

§ 46.26 Effect of Agreement

A person who is not a party to the authorization agreement who relies on it in good faith, without actual knowledge that it is void, revoked, or invalid, is not subject to civil or criminal liability to any person, and is not subject to professional disciplinary action, for that reliance if the agreement is completed as required by Family Code chapter 34. The authorization agreement does not affect the rights of the child's parent or legal guardian regarding the care, custody, and control of the child; does not mean that the adult caregiver has legal custody of the child; and does not confer or affect standing or a right of intervention in any proceeding under Family Code title 5. Tex. Fam. Code § 34.007.

§ 46.27 Term of Agreement

An authorization agreement executed under Family Code chapter 34 is for a term of six months from the date the parties enter into the agreement and renews automatically for six-month terms unless an earlier expiration date is stated in the authorization agreement, the authorization agreement is terminated as provided by section 34.008, or a court authorizes the continuation of the agreement as provided by section 34.008(b). Tex. Fam. Code § 34.0075.

§ 46.28 Termination of Agreement

In general, an authorization agreement terminates if, after the execution of the agreement, a court enters an order affecting the parent-child relationship; an order concerning custody, possession, or placement of the child; an order concerning access to or visitation with the child; or an order regarding the appointment of a guardian for the child under subchapter B, chapter 1104, of the Estates Code. However, an authorization agreement may continue after such a court order is entered if the court entering the order gives written permission. Tex. Fam. Code § 34.008(a), (b).

An authorization agreement terminates on written revocation by a party to the agreement if the party (1) gives each party written notice of the revocation; (2) files the written revocation with the clerk of the county in which the child resides, the child resided at the time the agreement was executed, or the adult caregiver resides; and (3) files the written revocation with the clerk of each court that has continuing, exclusive jurisdiction over the child; in which there is a court order or pending suit affecting the parent-child relationship concerning the child; in which there is pending litigation concerning custody, possession, or placement of the child or access to or visitation with the child;

or that has entered an order regarding the appointment of a guardian for the child under subchapter B, chapter 1104, of the Estates Code. If both parents have signed the authorization agreement, either parent may revoke it without the other parent's consent. Tex. Fam. Code § 34.008(c), (e).

Execution of a subsequent authorization agreement does not by itself supersede, invalidate, or terminate a prior agreement. Tex. Fam. Code § 34.008(f).

Caveat: County clerks and court clerks in another state might not recognize a Texas revocation and might refuse to file it. Consultation with an attorney in the other state might be advisable.

§ 46.29 Penalty

A person commits an offense if the person knowingly presents a document that is not a valid authorization agreement as a valid authorization agreement under Family Code chapter 34; makes a false statement on an authorization agreement; or obtains an authorization agreement by fraud, duress, or misrepresentation. The offense is a class B misdemeanor. Tex. Fam. Code § 34.009.

[Sections 46.30 through 46.40 are reserved for expansion.]

IV. Temporary Authorization for Voluntary Inpatient Mental Health Services for Child

§ 46.41 Generally

Chapter 35A of the Texas Family Code allows a person eligible to consent to treatment under Code section 32.001(a)(1), (2), or (3)—a grandparent, an adult sibling, or an adult aunt or uncle—who has had actual care, custody, and control of a child for the six months preceding the date the person files a petition with the court to seek a court order for temporary authorization to consent to voluntary inpatient mental health services for the child. Tex. Fam. Code §§ 35A.001, 35A.002; *see* Tex. Fam. Code § 32.001(a).

§ 46.42 Contents of Petition

A petition for temporary authorization to consent to voluntary inpatient mental health services for a child should be filed in the district court in the county in which the petitioner resides. Tex. Fam. Code § 35A.002. The petition must be styled "ex parte" and be in the name of the child, and it must be verified by the petitioner. Tex. Fam. Code § 35A.003(1), (2).

The petition must state the name, date of birth, and current physical address of the child and of the petitioner and the name and, if known, the current physical and mailing addresses of the child's parents, conservators, or guardians. Tex. Fam. Code § 35A.003(3).

The petition must also describe the status and location of any court proceeding in Texas or another state with respect to the child. Tex. Fam. Code § 35A.003(4).

Further, the petition must describe the petitioner's relationship to the child and provide the dates during the preceding six months that the child has resided with the petitioner. The petition must contain a certificate of medical examination for mental illness prepared by a physician who has examined the child not earlier than the third day before the petition is filed and be accompanied by a sworn statement containing the physician's opinion, and the detailed reasons for that opinion, that the child is a person (1) with mental illness or who demonstrates symptoms of a serious emotional disorder and (2) who presents a risk of serious harm to self or others if not immediately restrained or hospitalized. The petition must state any reason that the petitioner is unable to obtain signed, written documentation from a parent, conservator, or guardian of the child. Tex. Fam. Code § 35A.003(5)–(8).

§ 46.43 Notice and Hearing

On receipt of a petition for temporary authorization to consent to voluntary inpatient mental health services for a child, the court shall set a hearing. A copy of the petition and notice of hearing shall be delivered to the child's parent, conservator, or guardian by personal service or by certified mail, return receipt requested, at the last known address of the parent, conservator, or guardian. Tex. Fam. Code § 35A.004.

The court may hear evidence relating to the child's need for inpatient mental health services by the petitioner, any other matter raised in the petition, and any objection or other

testimony of the child's parent, conservator, or guardian. If a parent, conservator, or guardian objects, the court must dismiss the petition. Tex. Fam. Code § 35A.005(a), (b).

A temporary authorization order should be granted only if the court finds (1) by a preponderance of the evidence that there is no available parent, conservator, guardian, or other legal representative to give consent for voluntary inpatient mental health services and (2) by clear and convincing evidence that the child is a person with mental illness or who demonstrates symptoms of a serious emotional disorder and who presents a risk of serious harm to self or others if not immediately restrained or hospitalized. Tex. Fam. Code § 35A.005(c).

§ 46.44 Order

A copy of the order must be filed under the cause number in any court that has rendered a conservatorship or guardian order regarding the child and be sent to the last known address of the child's parent, conservator, or guardian. Tex. Fam. Code § 35A.005(f).

§ 46.45 Duration of Authorization

The order granting temporary authorization expires on the earliest of the date the petitioner requests that the child be discharged from the facility; the date a physician determines that the criteria concerning the child's condition listed at Code section 35A.005(c)(2) no longer apply to the child; or the tenth day after the date the order is issued; however, if the petitioner obtains an order for temporary managing conservatorship before the order expires on the tenth day, the order continues in effect until the occurrence of the earlier of the other two events. Tex. Fam. Code § 35A.005(d), (e).

[Chapters 47 through 49 are reserved for expansion.]

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Chapter 50

Termination

I. General Information on Termination and Adoption

§ 50.1 Introduction—Termination and Adoption

Actions to terminate the parent-child relationship and to create the relationship by adoption are often interrelated. These two proceedings may be handled independently or combined into one proceeding.

A termination will always precede an adoption unless the parents are deceased at the time the petition for adoption is filed.

This manual contains four separate chapters that deal with termination and adoption. They are—

Chapter 50—"Termination": The forms found in this chapter of the manual are to be used to terminate the parent-child relationship between a child and one or more of his parents and/or an alleged father.

Chapter 51—"Adoption of Child": The forms found in this chapter of the manual are to be used to create the parent-child relationship by adoption.

Chapter 52—"Combined Termination and Adoption of Stepchild": The forms in this chapter of the manual are to be used to terminate the rights of one parent or alleged father, while the other parent joins his or her new spouse in a petition for stepparent adoption.

Chapter 53—"Ancillary Forms for Termination and Adoption."

§ 50.2 Choice between One Proceeding or Two

A suit for termination and adoption should always be treated as two separate and distinct lawsuits unless a stepparent adoption is involved or the child has already lived in the petitioners' home for six months.

The only benefit of combining a suit for termination with a suit for adoption is to save money. In a combined suit the client will pay only one filing fee. There will also be a savings in legal fees because the attorney will not have to draft two petitions and two decrees and make two court appearances. This financial benefit, however, is far outweighed by the risks involved.

A problem with combining the suit for termination and the adoption arises because the child must live in the petitioners' home for six months before the adoption can be granted, and most judges are reluctant to waive the six-month requirement. If the affidavits signed by the birthparents are revocable after sixty days, the birthparents could revoke their relinquishments long before the child has been in the petitioners' home for the required six months. The affidavits are often the only ground available for termination. Even if the affidavits are irrevocable after ten days, the birthparents will not be in a position to revoke their affidavits, but they could still come forward and try to pre-sent evidence showing that it would not be in the child's best interest to terminate their rights. Proof that termination is in the best interest of the child is a separate element that must be supported by evidence in addition to a Code ground for termination. A statement in the affidavit of relinquishment that termination is in the best interest of the child is not conclusive evidence of that element. *See In re E.J.R.*, 503 S.W.3d 536, 544 (Tex. App.—Corpus Christi–Edinburg 2016, pet. denied).

A combined proceeding also extends the period in which the birthparents can challenge the actual termination of their rights, because their rights to appeal do not begin until the termination has been granted.

COMMENT: The attorney should check with the county clerk's office or the judge before filing a bifurcated action. In some counties the court will not allow a termination action to proceed without the joinder of an adoption suit.

§ 50.3 Indian Child Welfare Act

In any case of termination or adoption involving an American Indian child, federal law preempts state law. 25 U.S.C. §§ 1901–1923 (Indian Child Welfare Act or ICWA). The

Bureau of Indian Affairs has issued new regulations and guidelines that affect all terminations involving an Indian child. These regulations and guidelines, which went into effect December 12, 2016, can be found at **https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf**.

IMPORTANT NOTE: The U.S. District Court for the Northern District of Texas has ruled that ICWA is unconstitutional and that the regulations implementing the Act that went into effect on December 12, 2016, (referred to as the Final Rule) are void. *See Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018). This case is currently on appeal to the U.S. Fifth Circuit Court of Appeals (No. 18-11479), and a stay of the district court's ruling was issued on December 3, 2018. On August 9, 2019, a three-judge panel reversed the district court's ruling. *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019). On November 7, 2019, rehearing en banc was granted. *Brackeen v. Bernhardt*, 942 F.3d 287 (5th Cir. 2019). The district court's ruling stands until the rehearing, for which no date has been set. Practitioners should continue to monitor this case to determine if ICWA is applicable to any cases they have that involve an Indian child.

ICWA was established to address "the consequences . . . of abusive child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). ICWA contains heightened standards in a suit for involuntary termination of parental rights, such as a showing that serious harm is likely to result from the parent's continued custody of the child and that remedial efforts were made to prevent the breakup of the Indian child's family. The standard of proof in a suit under ICWA is beyond a reasonable doubt. The U.S. Supreme Court considered whether the heightened standards of ICWA applied to an involuntary termination of parental rights in cases where the child had never been in the custody of the biological father and had never resided on a reservation. The Court held that the Act was designed to counteract the unwarranted removal of Indian children from Indian families and that goal is not implicated when a child is voluntarily placed by a non-Indian parent with sole custodial rights. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

In every termination case the court must inquire on the record if the child is an Indian child or if there is reason to believe that the child is an Indian child. The term *Indian child* is defined as any unmarried person who is under the age of eighteen and either is a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4). If there is reason to believe that a child might be an Indian child, there must be evidence on the record that due diligence was used to verify if the child is a member of a tribe or eligible for membership. Courts are advised to err on the side of caution and to apply ICWA if they are unable to determine that the child is not an Indian child. A father's testimony that he

had "some Indian blood" is not evidence that the child is an Indian child. *In re R.M.W.*, 188 S.W.3d 831 (Tex. App.—Texarkana 2006, no pet.).

The term *parent* is defined as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9).

The inquiry as to whether a child is an Indian child is necessary because it affects the jurisdiction of the court and the standards and procedures to be used in the termination of parental rights. The Indian tribe has exclusive jurisdiction over an Indian child custody proceeding if the child resides or is domiciled within the reservation of the tribe, except when such jurisdiction is otherwise vested in the state by federal law. When an Indian child is a ward of the tribal court, the tribe retains exclusive jurisdiction of the child regardless of whether the child is living on the reservation. 25 U.S.C. § 1911(a).

If an Indian child does not reside or is not domiciled in a reservation and is not a ward of a tribal court, the child is subject to state court jurisdiction. However, transfer to the tribal court is mandatory in certain defined circumstances. *See* 25 U.S.C. § 1911(b). Notice to the tribe is required in all involuntary terminations. 25 U.S.C. § 1912(a); *Navajo Nation v. Washington*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999); *Catholic Social Services, Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989), *cert. denied*, 495 U.S. 948 (1990); *In re Welfare of L.N.B.-L.*, 237 P.3d 944 (Wash. App. Div. 2, 2010). However, notice to the tribe and ICWA findings are not required in emergency removals by TDFPS. *In re A.M.*, 570 S.W.3d 860 (Tex. App.—El Paso 2018, no pet.). Although a voluntary termination or adoption does not require notice to the tribe to allow the tribe to assert jurisdiction, a letter of inquiry to the tribe may be necessary to determine if the child is an Indian child. *See* 25 U.S.C. § 1913. If the child is an Indian child, the ICWA standards shall be applied by the court. The tribe can intervene at any time, without having to file a written pleading with the court. *In re J.J.T.*, 544 S.W.3d 874, 879 (Tex. App.—El Paso 2017, no pet.).

ICWA requires "evidence beyond a reasonable doubt" that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before the parents' rights may be terminated. Expert testimony is required to support such finding in involuntary termination cases. 25 U.S.C. § 1912(f); *Doty-Jabbaar v. Dallas County Child Protective Services*, 19 S.W.3d 870, 876 (Tex. App.—Dallas 2000, pet. denied). ICWA does not define who qualifies to provide the expert testimony, but the Bureau of Indian Affairs has created guidelines. *See In re D.E.D.I.*,

568 S.W.3d 261, 263 (Tex. App.—Eastland 2019, no pet.); *In re V.L.R.*, 507 S.W.3d 788, 796 (Tex. App.—El Paso 2015, no pet.).

The definition of the term "best interests of Indian Children" is different from the general Anglo-American "best interest of the child" standard used in cases involving non-Indian children. *In re W.D.H.*, 43 S.W.3d 30, 36 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App.—Houston [14th Dist.] 1995, no writ); *In re Welfare of L.N.B.-L.*, 237 P.3d 944.

ICWA provisions for the voluntary termination of parental rights for an Indian child differ in a number of significant ways from those for other Texas termination cases, specifically: (1) the child must be at least ten days old before the signing of documents, (2) the relinquishment must be executed in writing and recorded before a judge, (3) the judge must include a certificate that the terms and consequences of the relinquishment were fully explained in detail and were fully understood by the parent, and (4) the court must also certify that the parent understood the explanation in English or that it was interpreted into a language that the parent understood. 25 U.S.C. § 1913(a). The relinquishment remains revocable until the court enters a final decree of termination or adoption. 25 U.S.C. § 1913(c).

Even though notice to the tribe is not required in a voluntary termination, once it is determined that the child is an Indian child, the attorney *must* comply with all the heightened standards of the Act. Failure to comply with the procedures set forth in ICWA will result in a *void* termination decree. *See* 25 U.S.C. § 1914.

Each tribe determines the eligibility requirements for that tribe. A federal district court in Utah upheld the validity of the Cherokee Nation's membership rule that a newborn child who is a direct descendant of an original enrollee on the Dawes Roll is automatically a member of the tribe for 240 days following the child's birth. This ruling means that the provisions of ICWA would automatically apply to a child, even though neither of the birth parents was a registered member of the tribe. The automatic enrollment provision was challenged in *Nielson v. Ketchum*, 640 F.3d 1117, 1123–24 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 2429 (2012), and the Tenth Circuit held that the tribe could not enroll a newborn without a request being filed on behalf of the enrollee. It is crucial to check with the tribe to determine eligibility requirements. *See In re Adoption of C.D.K.*, 629 F. Supp. 2d 1258 (D. Utah 2009).

Some states have state ICWA statutes with additional, more stringent, requirements for handling cases when the child has parents with American Indian ancestry. These states

are called mini-ICWA states, and the additional requirements must be met before those states will grant interstate compact approval, a termination, or an adoption. Arizona, California, Colorado, Iowa, Nebraska, Oklahoma, Michigan, Minnesota, and Wisconsin are all mini-ICWA states.

Additional information concerning the Indian Child Welfare Act can be found at **https://www.NICWA.org** and **https://www.bia.gov**.

§ 50.4 Ancillary Forms

Ancillary forms needed for termination and adoption actions, such as waivers of citation, affidavits of relinquishment, and affidavits of waiver of interest, are found in chapter 53 of this manual.

§ 50.5 Definition of Parent

Under title 5 of the Family Code, a "parent" is the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, an adoptive mother or father, an unmarried man who provides sperm for assisted reproduction by an unmarried woman and who intends to be the father of a resulting child, or the intended mother or father confirmed by adjudication as a parent under a validated gestational agreement. Tex. Fam. Code §§ 101.024(a), 160.7031, 160.753. The term does not generally include a parent as to whom the parent-child relationship has been terminated. Tex. Fam. Code § 101.024(a). However, for purposes of establishing, determining the terms of, modifying, or enforcing an order, "parent" includes a person ordered to pay child support under Family Code section 154.001(a–1) or to provide medical support or dental support for a child. Tex. Fam. Code § 101.024(b).

A rebuttable presumption that a man is a child's father exists if—

1. he is married to the mother of the child and the child is born during the marriage;

2. he is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;

3. he married the mother of the child before the birth of the child in apparent compliance with the law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;

4. he married the mother of the child after the birth of the child in apparent compliance with the law, regardless of whether the marriage is or could be declared invalid, he voluntarily asserted his paternity of the child, and (1) the assertion is in a record filed with the vital statistics unit (VSU), (2) he is voluntarily named as the child's father on the child's birth certificate, or (3) he promised in a record to support the child as his own; or

5. during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.

Tex. Fam. Code § 160.204(a).

A presumption of paternity under section 160.204 may be rebutted only by an adjudication under chapter 160, subchapter G, or the filing of a valid denial of paternity by a presumed father in conjunction with the filing by another person of a valid acknowledgement of paternity as provided by Family Code section 160.305. Tex. Fam. Code § 160.204(b).

§ 50.6 Establishment of the Parent-Child Relationship

A parent-child relationship as to the mother of a child can be established by (1) the woman's giving birth to the child, (2) an adjudication of the woman's maternity, or (3) the adoption of the child by the woman. Tex. Fam. Code §§ 160.201(a), 160.753(a). A parent-child relationship as to the father of a child can be established by (1) an unrebutted presumption under Family Code section 160.204; (2) an effective acknowledgment of paternity under chapter 160, subchapter D, unless the acknowledgment has been rescinded or successfully challenged; (3) an adjudication of the man's paternity; (4) the adoption of the child by the man; (5) the man's consent to assisted reproduction by his wife under chapter 160, subchapter H, which resulted in the birth of the child; or (6) the unmarried man's consent to assisted reproduction of an unmarried woman using his sperm with the intent to be the father. Tex. Fam. Code §§ 160.201(b), 160.7031, 160.753(b). For further discussion of parentage issues, refer to chapter 54 of this manual.

§ 50.7 Paternity Registry

A man should register with the paternity registry if he wants to be notified of a proceeding for adoption or termination of parental rights regarding a child he may have fathered. This registration is accomplished by filing a "registration for notification" with the VSU before, or within thirty-one days after, the birth of the child. Tex. Fam. Code § 160.402(a). The filing of a registration does not create a presumption of paternity. The mother is not entitled to notice of the registration unless she has provided an address to the VSU. Tex. Fam. Code § 160.412(a).

Registration with the paternity registry entitles the registrant to notice, at the address provided, of a proceeding for termination or adoption with respect to the child, but it does not "commence a proceeding to establish paternity." Tex. Fam. Code § 160.411(3).

If a man has timely registered, the petitioner must attempt service of process as provided by the rules of civil procedure. Tex. Fam. Code § 160.403. If a man has registered but cannot be served at the location listed in the registry or any other address known to the petitioner, it is not necessary to serve the alleged father by publication. Tex. Fam. Code § 161.002(b)(4), (d). Before proceeding without service on an alleged father who registered, the petitioner must show due diligence in attempting to obtain service by filing an affidavit with the court. Tex. Fam. Code § 161.002(f). The termination order must contain specific findings regarding the exercise of due diligence by the petitioner. Tex. Fam. Code § 161.002(f).

The failure of an unmarried birth father to timely register is grounds for termination of his parental rights. Tex. Fam. Code § 161.002(b)(2), (b)(3). A birth father who fails to register is not entitled to personal service, service by publication, or notice of a suit for termination of his parental rights. *See* Tex. Fam. Code §§ 160.404, 161.002(c–1). All other grounds for termination of parental rights require service on the alleged father unless he waives that right. Tex. Fam. Code §§ 161.002(a), 102.009(a)(8).

There is a split of authority as to whether it is constitutional to terminate the rights of an alleged father whose identity is known without service. In *In re Baby Girl S.*, the birth father was known to the birth mother, but his name was not disclosed to the agency. The birth father failed to register, and his rights were terminated for failure to register with the paternity registry, without notice or service of any kind, pursuant to Tex. Fam. Code § 161.002(b)(3). The court held the termination of his parental rights without notice to him was not a violation of his constitutional due process rights because the registry pro-

vides a legal mechanism that he could use to ensure that he received notice. *In re Baby Girl S.*, 407 S.W.3d 904, 915 (Tex. App.—Dallas, 2013, pet. denied); *see In re T.B.D.*, No. 05-17-01137-CV, 2018 WL 947905, at *3 (Tex. App.—Dallas Feb. 20, 2018, orig. proceeding) (mem. op.). But see *In re P. RJ E.*, 499 S.W.3d 571 (Tex. App.—Houston [1st Dist.] 2016, no pet.), where the court held that personal service on an alleged father is required if the birth father's identity and location are known, even though he failed to register with the paternity registry. The court distinguished this case from *In re Baby Girl S.* because in this case the Department of Family and Protective Services attempted to invoke personal jurisdiction over the birth father by naming him in the petition and listing an address, but there was no evidence that he was served or knew or had reason to know that the birth mother was pregnant. In *In re Baby Girl S.* there was evidence that the alleged father knew or should have known that the birth mother might be pregnant.

The information disclosed on the registry form may be used against the registrant to establish paternity. Tex. Fam. Code § 160.411(4). However, the registrant may rescind his registration at any time. Tex. Fam. Code § 160.414. The registration simply identifies a child the man "may have fathered." Tex. Fam. Code § 160.402(a).

The paternity registry may be a source for service information on a self-alleged father and should be searched as a precaution against a subsequent claim of parentage by a nonparty to the parentage action. *See In re K.M.S.*, 68 S.W.3d 61 (Tex. App.—Dallas 2001, pet. denied) (paternity order set aside by bill of review when notice not given to man claiming to be father). A man who registers subjects himself to long-arm jurisdiction. Tex. Fam. Code § 159.201(a)(7).

Registration with the paternity registry is not necessary when a man is a presumed father, has been adjudicated to be the biological father, has filed an acknowledgment of paternity, or has commenced a proceeding to adjudicate paternity before his parental rights are terminated. *See* Tex. Fam. Code § 160.402(b).

In all termination cases where there is no presumed father, a certificate of paternity registry search must be filed before the proceeding may be concluded. Tex. Fam. Code § 160.422(c). The petitioner may request a search of the registry on or after the thirty-second day after the date of the child's birth. Tex. Fam. Code § 160.421(a). The court may not render an order terminating parental rights of an alleged father who has not registered unless the court receives evidence of a certificate of the results of a search of the registry from the VSU indicating that no man has registered the intent to claim paternity. Tex. Fam. Code § 161.002(e). If the petitioner has reason to believe that the

child may have been conceived or born in another state, a search of the paternity registry from the other state must also be obtained. Tex. Fam. Code § 160.421(b).

No fee may be charged for filing a registration or to rescind a registration. However, a fee for processing a search or furnishing a certificate concerning the search may be charged, except to a "support enforcement agency." Tex. Fam. Code § 160.416. A support enforcement agency includes the attorney general, domestic relations offices, and the Texas Department of Family and Protective Services. *See* Tex. Fam. Code § 160.102(17).

§ 50.8 Affidavit of Voluntary Relinquishment of Parental Rights

A person, a licensed child-placing agency, or the Department of Family and Protective Services designated managing conservator in an irrevocable or unrevoked affidavit of voluntary relinquishment *has a superior right to possession* of the child over the parent who signs the affidavit. The designated managing conservator also has the right to consent to medical, surgical, dental, and psychological treatment for the child and the rights and duties given to a possessory conservator under Family Code chapter 153 unless those rights and duties are modified or terminated by court order. Tex. Fam. Code § 161.104.

The relinquishment contained in an affidavit that designates the department or a licensed child-placing agency as managing conservator is irrevocable. Tex. Fam. Code § 161.103(a), (e).

An affidavit of voluntary relinquishment of parental rights in a private placement may be irrevocable for a stated time, not to exceed sixty days. Tex. Fam. Code § 161.103(e). If the affidavit fails to address the matter of revocability, then it becomes revocable for a period of ten days. Tex. Fam. Code § 161.1035. To limit the revocation period to ten days, the affidavit must contain a statement, in bold-faced type, that the affiant may revoke only if the revocation is made before the eleventh day after the date of execution. Tex. Fam. Code § 161.103(b)(10). The name and address of the person to whom the revocation is to be delivered must be included in the affidavit. Tex. Fam. Code § 161.103(b)(11).

To revoke an affidavit of relinquishment, the parent who executed it must sign a verified statement before two witnesses. A copy of the revocation shall be delivered to the person designated in the affidavit. If a parent attempting to revoke a relinquishment knows that a termination suit based on the affidavit of relinquishment has been filed,

the parent shall file a copy of the revocation with the clerk of the court. Tex. Fam. Code § 161.103(g).

In *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App.—Austin 2000), *pet. denied*, 53 S.W.3d 684 (Tex. 2001) (per curiam), the court found that an affidavit of relinquishment was procured by misrepresentation, fraud, and duress and was not voluntarily signed, because the child-placing agency breached its duty owed to the pregnant mother when it failed to notify her that an open adoption agreement was unenforceable. *Vela*, 17 S.W.3d at 760–64. In *Queen v. Goeddertz*, 48 S.W.3d 928 (Tex. App.—Beaumont 2001, no pet.), the court found that an affidavit of relinquishment was not voluntarily signed by a father, because it contained representations that he retained his right to visit with the child and the adoptive parents refused to permit him to do so. *Queen*, 48 S.W.3d at 931–32.

The affidavit of voluntary relinquishment of parental rights must be executed at least forty-eight hours after the birth of the child and must be verified and witnessed by two credible persons. Tex. Fam. Code § 161.103(a). The affidavit must contain the statements and information set forth in Family Code section 161.103(b). *See* Tex. Fam. Code § 161.103(b). The affidavit may contain a waiver of citation in a termination suit. Tex. Fam. Code § 161.103(c)(1). It may also contain a waiver of record and a waiver of notice of the final judgment. Tex. Fam. Code §§ 105.003(c), 161.209. Minor parents are permitted to sign affidavits of relinquishment. Tex. Fam. Code § 161.103(a)(1); *Coleman v. Smallwood*, 800 S.W.2d 353 (Tex. App.—El Paso 1990, no writ). A copy of the affidavit shall be provided to the parent when the parent signs it. Tex. Fam. Code § 161.103(d). The affidavit may not contain terms for limited posttermination contact between the child and the parent whose parental rights are to be relinquished as a condition of the relinquishment of parental rights. Tex. Fam. Code § 161.103(h).

A parent who signs an affidavit of voluntary relinquishment of parental rights regarding a biological child must also prepare a medical history report addressing the medical history of the parent and the parent's ancestors. The department has adopted a form for parents to use to comply with this requirement, designed to permit them to identify any of their medical conditions that could indicate a predisposition for the child to develop the condition. This medical history report is to be used in preparing the health, social, educational, and genetic history report required by Family Code section 162.005 (see section 51.20 in this manual) and made available to persons granted access under Family Code section 162.006. Tex. Fam. Code § 161.1031.

§ 50.9 Affidavit of Waiver of Interest in Child

Before or after the child is born, any man alleged to be the father may execute an affidavit of waiver of interest. The affiant is not required to admit paternity of the child and may disclaim any interest in the child. This affidavit must be signed and verified before a notary and two witnesses. The affidavit may waive notice or the service of citation in any suit filed or to be filed affecting the parent-child relationship with respect to the child. Tex. Fam. Code § 161.106(a)–(d); *Ivy v. Edna Gladney Home*, 783 S.W.2d 829 (Tex. App.—Fort Worth 1990, no writ). Waiver of the making of a record and of the right to receive notice of the judgment may also be included. Tex. Fam. Code §§ 105.003(c), 161.209.

An affidavit of waiver of interest is irrevocable. Tex. Fam. Code § 161.106(f).

§ 50.10 Release of Child from Hospital

The mother of a newborn child may authorize the child's release from the hospital or birthing center to a licensed child-placing agency, the Texas Department of Family and Protective Services, or another designated person. The release must be executed in writing, witnessed by two credible adults, and verified before a person authorized to take oaths. A hospital or birthing center shall comply with the terms of a properly executed release without requiring a court order. Tex. Fam. Code § 161.108.

[Sections 50.11 through 50.20 are reserved for expansion.]

II. Termination

§ 50.21 Nature of Remedy

The purpose of the suit to terminate the parent-child relationship is to divest the parent or alleged father and the child of all legal rights and duties with respect to each other, except that the child retains the right to inherit from and through the child's divested parent unless the court provides otherwise. *See* Tex. Fam. Code § 161.206(b). Estates Code section 201.052 also addresses rights of inheritance by and from certain children with no presumed father. *See* Tex. Est. Code § 201.052. The obligation of support may be continued under certain circumstances, and limited posttermination contact may be available. See the discussion at section 50.34 below.

§ 50.22 Pleadings

The suit is captioned "In the Interest of _____, a Child." Tex. Fam. Code § 102.008(a). If the suit is filed before the birth of the child, it is styled "In the Interest of an Unborn Child," and after the birth the clerk shall change the style to reflect the name of the child unless adoption is sought. Tex. Fam. Code §§ 102.008(a), 161.102(b). The petition must contain the information required by Family Code section 102.008(b). *See* Tex. Fam. Code § 102.008(b).

Unless all parties reside in Texas, the first pleading by each party must also contain either in the body of the pleading or in an attached affidavit the information set forth in section 152.209 of the Family Code. *See* Tex. Fam. Code §§ 152.102(4), 152.209.

The petition must state whether, in regard to a party to the suit or a child of a party to the suit, there is in effect a protective order under Family Code title 4, a protective order under chapter 7A of the Code of Criminal Procedure, or an order for emergency protection under article 17.292 of the Code of Criminal Procedure. The petition also must state whether an application for any of these orders is pending. The petitioner must attach a copy of each such protective order in which a party to the suit or the child of a party to the suit was the applicant or victim of the conduct alleged in the application or order and the other party was the respondent or defendant of an action regarding the conduct alleged in the application or order without regard to the date of the order. If a copy of the order is not available at the time of filing, the petition must state that a copy will be filed with the court before any hearing. Tex. Fam. Code § 102.008(b)(11), (c).

§ 50.23 Jurisdiction

If the child has been the subject of an earlier suit affecting the parent-child relationship, the court in which the prior proceedings occurred retains continuing, exclusive jurisdiction. Tex. Fam. Code § 155.002. The suit must be filed in the court of continuing jurisdiction. Tex. Fam. Code § 155.001. If a final order is rendered by a court other than the court that has continuing, exclusive jurisdiction, such order is voidable under section 155.104, but that court may be requested to transfer, if appropriate. Tex. Fam. Code §§ 103.002, 103.003, 155.104. See chapter 42 of this manual for appropriate transfer procedures.

§ 50.24 Uniform Child Custody Jurisdiction and Enforcement Act

A suit to terminate the parent-child relationship is a "child custody proceeding," as defined under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Tex. Fam. Code § 152.102(4). In personam jurisdiction over the nonresident parent is *not* a prerequisite to obtaining a valid termination order. Tex. Fam. Code §§ 152.106, 152.108, 152.201(c). Suits for termination of parental rights are status determinations and do not require personal jurisdiction. *In re M.S.B.*, 611 S.W.2d 704, 706 (Tex. App.—San Antonio 1980, no writ). The petitioner must satisfy the subject-matter jurisdiction requirement of the UCCJEA under Family Code sections 152.201 and 152.202. *See* Tex. Fam. Code §§ 152.201, 152.202. See the discussion of interstate jurisdictional issues in section 51.3 in this manual.

§ 50.25 Venue

Venue is in the county where the child resides as defined in Family Code section 103.001, unless another court has continuing, exclusive jurisdiction under Family Code chapter 155 or venue is fixed by chapter 6. Tex. Fam. Code § 103.001(a). If a court has continuing jurisdiction but the child's residence has changed, transfer to the county of proper venue may be sought. *See* Tex. Fam. Code §§ 103.002, 103.003. See pleadings in chapter 42 of this manual.

§ 50.26 Who May Bring Suit

A parent may bring a voluntary suit requesting termination of his or her own parental rights. Tex. Fam. Code § 161.005(a).

In involuntary termination proceedings the petitioner may be any person authorized by Family Code section 102.003. In particular, an original suit may be brought by a person designated the managing conservator in a revoked or unrevoked affidavit of relinquishment under Family Code chapter 161 or to whom consent to adoption has been given in writing under chapter 162 or to whom a statement to confer standing has been executed. Tex. Fam. Code § 102.003(a)(10), (a)(14).

An original suit for termination of the parent-child relationship joined with a petition for adoption may be brought by a stepparent of the child; by an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the thirty-day period immediately preceding the filing of the petition; by an adult who has had actual possession and control of the child for at least two months

during the three-month period immediately preceding the filing of the petition; by an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or by another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so. Tex. Fam. Code § 102.005.

§ 50.27 Voluntary Termination

In a suit filed under Family Code section 161.005(a) in which the parent is seeking to have his or her rights terminated, the only evidence needed is that termination will be in the best interest of the child. Tex. Fam. Code § 161.005(a); *Nichols v. Nichols*, 803 S.W.2d 484, 485 (Tex. App.—El Paso 1991, no writ). Courts are reluctant to grant a "voluntary" termination under this section, because the termination of parental rights usually extinguishes the obligation of that parent to provide support for the child. The attorney should confirm with the court in which the suit will be filed that such a proceeding will not be against that court's policy.

In certain cases, however, the obligation to support might not be extinguished. In a suit in which the Texas Department of Family and Protective Services has been appointed managing conservator of the child, the court may order each parent who is financially able to support a child who is in substitute care, even if the parental rights have been terminated. Similarly, the court may order support by a parent whose rights have been terminated with respect to a child who was conceived as a direct result of conduct that constitutes an offense under section 21.02, 22.011, 22.021, or 25.02 of the Texas Penal Code. The court may also order support by a parent whose rights have been terminated with respect to a child for a reason described by Code section 161.001(b)(1)(T)(iv) or (b)(1)(U) (concerning sexual assault of the other parent). *See* Tex. Fam. Code § 154.001(a–1).

Suit for Termination Based on Misrepresentation of Paternity: With certain exceptions, a man may file a suit for termination of the parent-child relationship between the man and a child if the man signed an acknowledgment of paternity without obtaining genetic testing or was adjudicated to be the child's father in a proceeding in which genetic testing did not occur. The petition must be verified and must allege facts showing that the petitioner is not the child's genetic father and that he signed the acknowledgment of paternity or failed to contest parentage in the previous proceeding because of the mistaken belief, at the time the acknowledgment was signed or on the date the court order in the previous proceeding was rendered, that he was the child's

genetic father based on misrepresentations that led him to that conclusion. Tex. Fam. Code § 161.005(c).

A suit under this section may not be filed by a man who is the child's adoptive father, a man who consented to conception by assisted reproduction, or a man who is the intended father of the child under a gestational agreement validated by a court. Tex. Fam. Code § 161.005(d).

The petition must be filed not later than the second anniversary of the date on which the petitioner becomes aware of the facts indicating that he might not be the genetic father. Tex. Fam. Code § 161.005(e). This awareness need not be based on conclusive paternity test results. *In re D.I.P.*, 421 S.W.3d 106 (Tex. App.—San Antonio 2013, pet. denied).

The court must hold a pretrial hearing to determine whether the petitioner has established a meritorious prima facie case for termination. If he has, the court must order genetic testing. Tex. Fam. Code § 161.005(f). A prima facie showing can be established by the filing of a verified petition alleging the misrepresentation coupled with circumstantial evidence of the misrepresentation. *See In re C.E.*, 391 S.W.3d 201, 204 (Tex. App.—Houston [1st Dist.] 2012, no pet.). If the results of that genetic testing identify the petitioner as the child's genetic father and the result of any further testing requested by the petitioner and ordered by the court do not exclude him as the genetic father, the court shall deny the request for termination. Tex. Fam. Code § 161.005(g). If the results of the genetic testing exclude the petitioner as the child's genetic father, the court shall render an order terminating the parent-child relationship without a showing that termination is in the best interest of the child. *See* Tex. Fam. Code § 161.005(h).

A termination order under these provisions ends the petitioner's obligation for future support of the child as of the date the order is rendered, as well as the obligation to pay interest that accrues after that date on the basis of a child support arrearage or money judgment for a child support arrearage existing on that date, but does not affect any support obligations incurred before that date. Support obligations accrued before entry of the termination order are enforceable until satisfied by any means available for the enforcement of child support other than contempt. Tex. Fam. Code § 161.005(i).

The termination order does not preclude initiation of a proceeding under Family Code chapter 160 to adjudicate whether another man is the child's parent or, if the other man is adjudicated as the child's parent, the rendition of an order requiring that man to pay

child support, though not for periods preceding the date of the termination order. Tex. Fam. Code § 161.005(j), (k).

The petitioner in a suit to terminate his rights under these provisions may request periods of possession or access following termination, but the court may order periods of possession or access only if the court determines that denial of possession or access would significantly impair the child's physical health or emotional well-being. Tex. Fam. Code § 161.005(*l*). If possession or access is ordered, the order may include provisions requiring that the child or any party to the proceeding participate in family counseling and that any party pay the costs of that counseling. Tex. Fam. Code § 161.005(m), (n). During periods of possession or access, the petitioner has the rights and duties specified in Family Code section 153.074, subject to any limitations by the court. Tex. Fam. Code § 161.005(o).

§ 50.28 Grounds for Involuntary Termination

There are a number of sections in the Family Code that provide grounds for involuntary termination. *See* Tex. Fam. Code §§ 160.404, 161.001, 161.002, 161.004, 161.006, 161.007. The practitioner should refer to these sections to determine the appropriate grounds before filing a termination suit. The majority of the grounds for termination are set forth in Code section 161.001. It is not necessary to specifically plead the underlying facts in an involuntary termination petition as long as the petition alleges in the statutory language each ground for termination and that the termination is in the child's best interest. Tex. Fam. Code § 161.101. A parent who signs a voluntary affidavit of relinquishment of parental rights remains a party to the lawsuit and is entitled to testify without being designated on a witness list. *In re J.L.J.*, 352 S.W.3d 536, 542 (Tex. App.—El Paso 2011, no pet.).

Pregnancy Result of Criminal Act: There are some special provisions for termination of parental rights if the pregnancy was the result of a criminal act. Code section 161.007 permits termination of parental rights when there has been a violation of Texas Penal Code section 21.02, 22.011, 22.021, or 25.02 resulting in the victim's becoming pregnant with the parent's child. The requirements for termination under Code section 161.007 differ depending on whether the parent was married to or cohabiting with the other parent for the two years after the birth of the child.

If the parents were *not* married or cohabiting during that two-year period, the court shall order termination if it finds by clear and convincing evidence that the parent has engaged in conduct that constitutes an offense under section 21.02, 22.011, 22.021, or

25.02 of the Texas Penal Code; that the victim of the conduct became pregnant with the parent's child as a direct result of that conduct; and that termination is in the child's best interest. Tex. Fam. Code § 161.007(a).

If the parents *were* married or cohabiting for the two-year period, the court may order termination if it finds that the parent has been convicted of an offense under section 21.02, 22.011, 22.021, or 25.02 of the Texas Penal Code; that the other parent became pregnant with the child as a direct result of the commission of the offense; and that termination is in the child's best interest. Tex. Fam. Code § 161.007(b).

§ 50.29 Proceedings Regarding Alleged Father

Except as otherwise provided in Family Code section 161.002, the procedural and substantive standards for termination of parental rights under Family Code title 5 apply to the termination of the rights of an alleged father. Tex. Fam. Code § 161.002(a). An alleged father who has been served with citation in a suit affecting the parent-child relationship may have his rights terminated if he fails to respond by timely filing an admission of paternity or by filing a counterclaim for paternity. Tex. Fam. Code § 161.002(b)(1).

Although the statute states that an alleged father is entitled to the procedural and substantive standards for termination of his parental rights, there are limitations on these procedural rights if the alleged father fails to register with the paternity registry. *See* Tex. Fam. Code § 161.002(b)(2), (b)(3). The petitioner is not required to identify the alleged father or give any type of notice to him of the suit to terminate his parental rights if he fails to register. Tex. Fam. Code § 161.002(c–1).

COMMENT: See section 50.7 above for a discussion of whether a known alleged father is entitled to service if there is no evidence that he knew of the pregnancy.

In termination suits filed by a governmental entity against an alleged father who failed to register and whose identity or location is unknown, the court is required to appoint an attorney ad litem to represent the alleged father's interests. Tex. Fam. Code § 107.013(a)(3). There is no requirement that the petitioner prove termination is in the best interest of the child when the ground for termination is that the alleged father failed to register.

There is a conflict as to whether a certificate from the paternity registry is required in all cases where there is not a presumed father. Section 161.109(a) of the Texas Family

Code states if there is not a presumed father of the child, a certificate from the vital statistics unit must be filed with the court before a trial on the merits in the termination suit. *See* Tex. Fam. Code § 161.109(a). In contrast, section 161.109(b) states that a certificate from the paternity registry is required before termination of the parental rights of an alleged or probable father *if* he has not been personally served or signed an affidavit of relinquishment or an affidavit of waiver of interest. *See* Tex. Fam. Code § 161.109(b).

A named or alleged father may execute an affidavit of waiver of interest in the child either before or after the birth of the child. *See* Tex. Fam. Code § 161.106. He is not required to admit paternity. Tex. Fam. Code § 161.106(d). If the alleged father executes an affidavit of waiver of interest, it is advisable that it contain a waiver of citation as well as a waiver of further notice of the termination suit. Tex. Fam. Code §§ 102.009(a)(8), 161.106(a). If there is more than one alleged father, each one should execute an affidavit of waiver of interest.

Although the affidavit of waiver of interest may be used in any proceeding in which the father claims paternity, it may *not* be used in a proceeding in which another person or an agency attempts to establish his paternity. Tex. Fam. Code § 161.106(e).

For a full discussion on other issues relating to paternity see chapter 54 of this manual.

§ 50.30 Proceedings before Birth of Child

A petition that requests the termination of the parent-child relationship may be filed before the birth of the child. Tex. Fam. Code § 161.102(a). A suit may be filed before the birth of the child by a biological parent, by a licensed child-placing agency, or by the prospective adoptive parents if a biological parent has signed a statement to confer standing. *See* Tex. Fam. Code § 102.003. Filing suit before the birth of the child may be advisable if it will be difficult to serve one of the parties. If the suit is filed before the child's birth, it is styled "In the Interest of an Unborn Child." Tex. Fam. Code § 161.102(b). After the child's birth, the clerk shall change the style of the case to include the child's name, unless adoption is sought. Tex. Fam. Code §§ 102.008(a), 161.102(b).

§ 50.31 Best-Interest Determination

Most, but not all, grounds for termination of parental rights require that there be a specific finding that the termination is in the best interest of the child. However, when

using section 160.404 (failure to register) or section 161.006 (termination of parental rights if child born alive after attempted abortion), there is no requirement that the termination be in the best interest of the child. *See* Tex. Fam. Code §§ 160.404, 161.006.

The fact that termination is in the best interest of the child must be established by clear and convincing evidence, unless the case involves an Indian child; the latter situation requires proof beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

There is a strong presumption that keeping a child with a parent is in the child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). *Holley v. Adams* contains a nonexclusive list of factors to consider. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). Evidence of the grounds for termination may also be used as evidence that termination is in the best interest of the child. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002).

The statement in the affidavit of relinquishment that termination is in the best interest of the child can ordinarily be ample evidence to support the required best-interest finding. *See In re K.S.L.*, 538 S.W.3d 107, 111 (Tex. 2017). The intent of the legislature was to make an affidavit of relinquishment sufficient evidence on which the trial court can make a finding that termination is in the best interest of the children. *Brown v. McLennan County Children's Protective Services*, 627 S.W.2d 390, 394 (Tex. 1982). However, a statement in an affidavit of relinquishment that termination is in the best interest of the child is not always conclusive evidence of that issue and does not mandate that the termination be granted. *See In re E.J.R.*, 503 S.W.3d 536, 544 (Tex. App.—Corpus Christi–Edinburg 2016, pet. denied); *see also In re Morris*, 498 S.W.3d 624, 633–34 (Houston [14th Dist.] 2016, orig. proceeding [mand. denied]) (trial court entitled to conduct best-interest review of mediated settlement agreement that provided for termination of parental rights; court not required to find best interest as matter of law based solely on statements in agreement and in affidavit of relinquishment that termination was in best interest of child).

Summary judgment is rarely appropriate in contested termination cases for the best interest determination, because the best interest prong of a termination case requires a weighing of the evidence. *In re C.M.J.*, 573 S.W.3d 404, 412 (Tex. App.—Houston [1st Dist.] 2019, no pet.). However, deemed admissions can support a finding that termination is in the best interest of the child. *In re N.L.W.*, 534 S.W.3d 102, 112 (Tex. App.—Texarkana 2017, no pet.).

A child's need for permanence in a "stable, permanent home" is paramount in considering best interest. *See In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.). It is the child's best interest, not the parent's best interest, that is to be considered by the court. *See In re G.A.C.*, 499 S.W.3d 138, 141 (Tex. App.—Amarillo 2016, pet. denied).

§ 50.32 Appointments in Termination Suits by Governmental Entity

To Represent Interests of Child: In a suit filed by a governmental entity seeking termination of the parent-child relationship, the court shall appoint a guardian ad litem to represent the best interest of the child immediately after the filing of the petition but before the full adversary hearing. See Tex. Fam. Code §§ 107.001(5), 107.011(a). The powers and duties of a guardian ad litem are listed in Family Code section 107.002. *See* Tex. Fam. Code § 107.002.

Contrast this with the appointment of an attorney ad litem, who is defined as an attorney who provides legal services to a person, including a child, and who owes to that person the duties of undivided loyalty, confidentiality, and competent representation. *See* Tex. Fam. Code §§ 107.001(2), 107.012. The powers and duties of an attorney ad litem are listed in Family Code sections 107.003 and 107.004. *See* Tex. Fam. Code §§ 107.003, 107.004.

An attorney may be appointed to serve in the dual role, which is defined as the role of an attorney who is appointed to act as both guardian ad litem and attorney ad litem for a child in a suit by a governmental entity. Tex. Fam. Code § 107.0125(a); *see also* Tex. Fam. Code § 107.001(4).

All powers and duties of the court-appointed representatives are discussed in chapter 13 of this manual.

To Represent Interests of Parent or Alleged Father: In a suit filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for a child, the court shall appoint an attorney ad litem to represent the interests of (1) an indigent parent of the child who responds in opposition to the termination, (2) a parent served by citation by publication, (3) an alleged father who failed to register with the registry under Family Code chapter 160 and whose identity or location is unknown, and (4) an alleged father who registered with the paternity registry under Family Code chapter 160 but on whom the petitioner's attempt to personally serve cita-

tion at the address provided to the registry and at any other address for the alleged father known by the petitioner has been unsuccessful. Tex. Fam. Code § 107.013(a).

If a parent is not represented by an attorney at the parent's first court appearance, the court must inform the parent of the right to be represented by an attorney and, if the parent is indigent and appears in opposition to the suit, of the right to an attorney ad litem appointed by the court. Tex. Fam. Code § 107.013(a–1).

If an alleged father for whom an attorney ad litem has been appointed is adjudicated to be a parent of the child and is determined by the court to be indigent, the court may appoint the attorney ad litem to continue to represent the father's interests as a parent. Tex Fam. Code § 107.0132(c).

The powers and duties of an attorney ad litem appointed under Code section 107.013 to represent the interests of a parent are listed in Tex. Fam. Code § 107.0131. The powers and duties of an attorney ad litem appointed under Code section 107.013 to represent the interests of an alleged father are listed in Code section 107.0132. The powers and duties of an attorney ad litem appointed under Code section 107.013 to represent the interests of a parent whose identity or location is unknown or who has been served by publication are listed in Tex. Fam. Code § 107.014. *See* Tex. Fam. Code §§ 107.0131, 107.0132, 107.014.

The court must require a parent claiming indigence for appointment of an attorney ad litem to file an affidavit of indigence before the court may conduct a hearing to determine the parent's indigence. The court may consider additional evidence at the hearing, and, if it determines that the parent is indigent, shall appoint an attorney ad litem. Tex. Fam. Code § 107.013(d).

A parent determined to be indigent is presumed to remain indigent for the duration of the suit and any appeal, absent a determination that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances. Tex. Fam. Code § 107.013(e); Tex. R. App. P. 20.1(b).

The court may appoint an attorney ad litem to represent a parent's interests for a limited period beginning at the time the court issues a temporary restraining order or attachment of the child until the court determines whether the parent is indigent before commencement of the full adversary hearing. Tex. Fam. Code § 107.0141(a). An attorney ad litem who identifies and locates the parent shall inform the parent of the right to representation and the appointment of an attorney if the parent is indigent; help the parent

make an indigence claim, if applicable; and assist the parent in preparing for the full adversary hearing. Tex. Fam. Code § 107.0141(c).

Counsel appointed to represent an indigent birth parent must provide effective assistance of counsel. The Texas Supreme Court has adopted the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine if the representation was effective. *See In re M.S.*, 115 S.W.3d 534 (Tex. 2003); *In re D.J.J.*, 178 S.W.3d 424 (Tex. App.—Fort Worth 2005, no pet.). There is a split of authority as to whether a non-indigent parent who has retained counsel can raise the issue of ineffective assistance of counsel on appeal in a termination suit filed by a governmental entity. A number of cases have held that a parent cannot challenge ineffective assistance of retained counsel. *See In re Z.C.*, No. 12-15-00279-CV, 2016 WL1730740, at *2 (Tex. App.—Tyler Apr. 29, 2016, no pet.) (mem. op.); *In re J.B.*, No. 07-14-00187-CV, 2014 WL 5799616, at *5 (Tex. App.—Amarillo Nov. 6, 2014, no pet.) (mem. op.); *see also In re A.B.B.*, 482 S.W.3d 135, 140–41 (Tex. App.—El Paso 2015, pet. denied) (private termination). *But see In re E.R.W.*, 528 S.W.3d 251, 261 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (mother found to have right to challenge effectiveness of retained counsel since she has right to counsel under Tex. Fam. Code § 107.013).

If the appointed counsel fails to be present and participate at a "critical stage" of litigation, it is appropriate to presume that prejudice to the rights of the indigent parent occurred. *In re J.A.B.*, 562 S.W.3d 726 (Tex. App.—San Antonio 2018, pet. denied); *In re J.M.O.*, 459 S.W.3d 90, 94 (Tex. App.—San Antonio 2014, no pet.).

Duration of Appointment: An order appointing the Texas Department of Family and Protective Services as the child's managing conservator may provide for the continuation of the appointment of the guardian ad litem or attorney ad litem for the child for any period during the time the child remains in the department's conservatorship and for the continuation of the appointment as long as the child remains in the department's conservatorship. Tex. Fam. Code § 107.016(1), (2). If such an order does not continue the appointment and the child is committed to the Texas Juvenile Justice Department or released under the department's supervision, the court may appoint a guardian ad litem or attorney ad litem for the child. Tex. Fam. Code § 107.0161.

An attorney appointed to serve as an attorney ad litem for a parent or an alleged father continues to serve in that capacity until the earliest of the date (1) the suit affecting the parent-child relationship is dismissed, (2) all appeals in relation to any final order terminating parental rights are exhausted or waived, or (3) the attorney is relieved of the

attorney's duties or replaced by another attorney after a finding of good cause is rendered by the court on the record. Tex. Fam. Code § 107.016.

Fees and Expenses: An attorney appointed to serve as an attorney ad litem for a child, an attorney in the dual role, or an attorney ad litem for a parent is entitled to reasonable fees and expenses. *See* Tex. Fam. Code § 107.015.

Note: This manual does not contain forms for suits filed by governmental entities.

For a more complete discussion of appointments of court-ordered representatives, see chapter 13 of this manual.

§ 50.33 Appointments in Termination Suits Other than Suits by Governmental Entity

In a suit requesting termination of the parent-child relationship that is not filed by a governmental entity, the court shall, unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child's interests, appoint an amicus attorney or an attorney ad litem. Tex. Fam. Code § 107.021(a–1).

An amicus attorney is defined as an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interest rather than to provide legal services to the child. Tex. Fam. Code § 107.001(1). The powers and duties of an amicus attorney are listed in Family Code sections 107.003 and 107.005. *See* Tex. Fam. Code §§ 107.003, 107.005.

An attorney ad litem is defined as an attorney who provides legal services to a person, including a child, and who owes to that person the duties of undivided loyalty, confidentiality, and competent representation. *See* Tex. Fam. Code § 107.001(2). The powers and duties of an attorney ad litem are listed in Family Code sections 107.003 and 107.004. *See* Tex. Fam. Code §§ 107.003, 107.004.

An attorney ad litem appointed to represent an alleged father is required only to attempt to locate the alleged father and prepare a written summary for the court of the efforts to identify or locate the alleged father. The court shall discharge the attorney from the appointment on receipt of the report. *See* Tex. Fam. Code § 107.0132.

In determining whether to make a discretionary appointment under Family Code section 107.021, the court shall give due consideration to the ability of the parties to pay reasonable fees to the appointee but may not require a person appointed to serve without reasonable compensation for the services rendered by that person. Tex. Fam. Code § 107.021(b)(1)(A), (b)(3). In a private suit for termination there are no provisions for the county to pay for the fees of the appointed attorney if the parents are indigent.

In addition to attorney's fees that may be awarded under Family Code chapter 106, an amicus attorney or an attorney ad litem for the child is entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit. Tex. Fam. Code § 107.023(a). The court may determine that such fees are necessaries for the benefit of the child. Tex. Fam. Code § 107.023(d). The fees cannot be classified as additional child support and therefore are not enforceable by contempt. *In re R.H.W.*, 542 S.W.3d 724, 743–44 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

COMMENT: According to the U.S. Supreme Court, indigent parents in suits for termination of parental rights are not constitutionally entitled to representation. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Even though it is not constitutionally required, many states, including Texas, have enacted statutes to provide for representation of indigent parents in certain situations. Texas specifically requires the appointment of an attorney ad litem to represent indigent parents when the suit to terminate is filed by a governmental agency. Tex. Fam. Code § 107.013(a)(1).

Because of the changes to the law concerning the appointment of an attorney ad litem to represent birth parents who are indigent in nongovernmental termination cases, there will be more pro se litigants defending against the termination of their parental rights. Indigent parents may often be incarcerated. If so, the issue of whether the court should issue a bench warrant will arise. See section 3.15 in this manual for a discussion of an inmate's participation at trial.

§ 50.34 Effect of Decree

Generally, a person whose parental rights have been terminated is divested of all legal rights and duties between that former parent and the child. *See* Tex. Fam. Code § 161.206.

Limited Posttermination Contact: If a suit for voluntary termination of parental rights is filed by a nongenetic father pursuant to Family Code section 161.005(c), the court may order posttermination periods of possession of and access to the child if the

court determines that denial of the periods of possession of or access to the child would significantly impair the child's physical health or emotional well-being. *See* Tex. Fam. Code § 161.005(*l*), (m).

The order of termination in a suit filed by the Texas Department of Family and Protective Services may include terms for limited posttermination contact between a child and the biological parents under certain circumstances. *See* Tex. Fam. Code § 161.2061. The court must find that the biological parent requesting the contact has filed an affidavit of voluntary relinquishment of parental rights under Family Code section 161.103. The contact must be agreed on by the biological parent and the department. Further, the court must find the limited posttermination contact to be in the best interest of the child. Tex. Fam. Code § 161.2061(a).

The order may also include terms that allow the biological parent to receive specified information regarding the child, provide written communications to the child, and have limited access to the child until a final adoption is granted. Tex. Fam. Code § 161.2061(b). The terms of the posttermination contact may be enforced only if the party seeking enforcement pleads and proves that, before filing the motion for enforcement, the party attempted in good faith to resolve the disputed matters through mediation. Tex. Fam. Code § 161.2061(c). The terms of the posttermination contact are not enforceable by contempt and may not be modified. Tex. Fam. Code § 161.2061(d), (e).

An order under Family Code section 161.2061 does not affect the finality of a termination order or grant standing to a parent whose parental rights have been terminated to file any action other than a motion to enforce the terms regarding limited posttermination contact until the court renders a subsequent adoption order with respect to the child. Tex. Fam. Code § 161.2061(f). The posttermination contact will cease on the adoption of the child, and the termination order may not require that the provisions be included in an adoption decree. Tex. Fam. Code § 161.2062(a).

Support: A court may order a financially able person whose parental rights have been terminated with respect to a child in substitute care for whom the department has been appointed managing conservator. The court may also order support by a parent whose rights have been terminated with respect to a child for a reason described by Code section 161.001(b)(1)(T)(iv) or (b)(1)(U) (concerning sexual assault of the other parent). This provision also applies for a child who was conceived as a direct result of conduct that constitutes an offense under section 21.02, 22.011, 22.021, or 25.02 of the Texas Penal Code. An order may be entered to support the child until the child's adoption, the later of the child's eighteenth birthday or graduation from high school, removal

of the child's disabilities, or the child's death or, in the case of a disabled child, for an indefinite period. Tex. Fam. Code § 154.001(a–1).

Inheritance Rights: The child may still inherit from and through the parent whose rights have been terminated, unless the court specifically terminates the child's inheritance rights. Tex. Fam. Code § 161.206(b). Termination of inheritance rights may be requested, but the practitioner should seriously consider the advisability of such a request. Typically the termination of inheritance rights is not requested. *See Lutheran Social Service, Inc. v. Meyers*, 460 S.W.2d 887 (Tex. 1970) (orig. proceeding).

Estates Code section 201.052 also addresses rights of inheritance by and from certain children who have no presumed father. *See* Tex. Est. Code § 201.052; *see also McNary v. Khan*, 792 S.W.2d 126, 127 (Tex. App.—Dallas 1990, no writ).

The Estates Code provides that the probate court may declare that a parent of a child under eighteen years of age may not inherit from or through the child on a finding by clear and convincing evidence of certain facts that substantially mirror several of the grounds for termination in Family Code section 161.001; these grounds involve abandonment, failure to support, or responsibility for death or serious injury of a child. *See* Tex. Est. Code § 201.062. If the court determines that the parent may not inherit from or through the child, the parent is treated as if the parent predeceased the child for purposes of inheritance through the laws of descent and distribution and any other cause of action based on parentage. Tex. Est. Code § 201.062(b).

Grandparent Rights: A biological or adoptive grandparent has standing to seek access under Family Code chapter 153 if one of the child's biological or adoptive parents remains a legal parent after the termination. Tex. Fam. Code § 161.206(c); *see* Tex. Fam. Code §§ 153.433–.434. However, a grandparent seeking possession or access must meet stringent requirements, including overcoming the presumption set forth in section 153.433(a)(2).

§ 50.35 Appointment of Managing Conservator

If the court terminates the parental rights of both parents or of the only living parent, the court shall appoint a suitable, competent adult, the Texas Department of Family and Protective Services, or a licensed child-placing agency as managing conservator. Tex. Fam. Code § 161.207(a). The appointment of the department as managing conservator is limited to certain circumstances. *See* Tex. Fam. Code § 161.208.

If the termination petition requests the appointment of a nonparent as managing conservator with authority to consent to adoption of a child, the petition must include a verified allegation that there has been compliance with the interstate compact or a verified statement of the particular reasons for noncompliance. Tex. Fam. Code § 162.002(b); *see also Rodriguez v. Lutheran Social Services of Texas, Inc.*, 814 S.W.2d 153, 154–55 (Tex. App.—San Antonio 1991, writ denied).

If temporary orders are requested in a suit for termination of parental rights, there remains a strong presumption that a parent should be appointed as the temporary managing conservator. Only on a verified pleading or affidavit and a showing that placement of the child with a parent could endanger the child's well-being should a nonparent be appointed temporary managing conservator. *In re Mata*, 212 S.W.3d 597 (Tex. App.—Austin 2006, orig. proceeding).

In a termination suit, the preplacement portion of an adoption evaluation or a combined pre- and postplacement adoption evaluation must be filed with the court before entry of the decree of termination if the termination is not contested. *See* Tex. Fam. Code § 107.159(d). In a contested termination the parties should consider requesting a custody evaluation. *See* Tex. Fam. Code § 107.202. A custody evaluation will permit the court to allocate the costs between the parties to the case.

§ 50.36 Trial

Termination cases have been treated by some courts as quasi-criminal in nature, but this does not mean that all of the substantive due process of a criminal case should be applied in the trial of a termination case. There is no requirement that a parent be mentally competent to participate in the trial. When determining whether to proceed, the court must weigh the private interest at stake of both the parent and the child, the government's interest in the proceeding, and any other private interest that is affected. *In re R.M.T.*, 352 S.W.3d 12, 21–22 (Tex. App.—Texarkana 2011, no pet.).

Any party has a statutory right to a jury trial in a termination case. Tex. Fam. Code § 105.002(a), (b). However, a jury trial cannot be requested for the first time when asking for a de novo hearing. *In re A.L.M.-F.*, 593 S.W.3d 271 (Tex. 2019). Broad-form submission of issues is not permitted in a termination case. (*Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 648–49 (Tex. 1990), in which the court had specifically approved broad-form submission, is superseded by amendment of rule 277 of the Texas Rules of Civil Procedure effective May 1, 2020. *See* Texas Supreme Court, *Order Amending Texas Rule of Civil Procedure 277*, Misc. Docket No. 20-9008 (Jan. 8,

2020), 83 Tex. B.J. 104 (2020); proposed rule subject to change in response to public comments to be sent by Apr. 1, 2020.) Suggested jury questions, instructions, and definitions will be contained in State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate*.

§ 50.37 Standard of Proof

The Family Code provides that the "clear and convincing evidence" standard of proof is required in proceedings for termination of the parent-child relationship. Tex. Fam. Code §§ 161.001, 161.206(a); *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980). The term *clear and convincing evidence* is defined as the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Tex. Fam. Code § 101.007. However, in cases relating to American Indian children under the Indian Child Welfare Act, proof beyond a reasonable doubt is required. 25 U.S.C. § 1912(f).

In termination cases there is an increased standard of appellate review of factual findings. That standard is whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the state's allegations. *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002).

§ 50.38 Trial or Hearing before Associate Judge

The judge of a court having jurisdiction of suits under Family Code title 5 may appoint a full-time or part-time associate judge to perform specified duties if the commissioner's court for the county authorizes employment of an associate judge. Tex. Fam. Code § 201.001(a). An associate judge may hear a contested trial on the merits in a termination suit, unless a written objection has been timely filed. Tex. Fam. Code § 201.005(a), (b). A party may request a de novo hearing before the referring court. *See* Tex. Fam. Code § 201.015. De novo hearings are discussed in section 8.17 in this manual.

§ 50.39 Preferential Setting

In a termination suit, after a hearing, the court shall grant a motion for a preferential setting for a final hearing on the merits filed by a party to the suit or by the amicus attorney or attorney ad litem for the child. The court shall give precedence to the hearing over other civil cases if the termination would make the child eligible for adoption and dis-

covery has been completed or sufficient time has elapsed since the filing of the suit for the completion of all necessary and reasonable discovery if diligently pursued. Tex. Fam. Code § 161.202.

In termination suits brought by the Texas Department of Family and Protective Services the trial court is mandated to follow the stringent time limitations relating to the rendition of final orders. *See* Tex. Fam. Code § 263.401; *In re Department of Family & Protective Services*, 273 S.W.3d 637 (Tex. 2009) (orig. proceeding); *In re L.L.*, 65 S.W.3d 194, 196–97 (Tex. App.—Amarillo 2001, pet. dism'd); *In re Ruiz*, 16 S.W.3d 921, 926–28 (Tex. App.—Waco 2000, orig. proceeding); *In re Bishop*, 8 S.W.3d 412, 418–19 (Tex. App.—Waco 1999, orig. proceeding [mand. denied]); *In re Neal*, 4 S.W.3d 443, 447 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding [mand. denied]); *see also In re L.J.S.*, 96 S.W.3d 692, 693–94 (Tex. App.—Amarillo 2003, pet. denied).

§ 50.40 Medical History Report

The court shall order each parent before the court in a termination suit to provide information regarding the medical history of the parent and the parent's ancestors. A parent may comply with the order by completing the medical history report form adopted by the Texas Department of Family and Protective Services, designed to permit them to identify any of their medical conditions that could indicate a predisposition for the child to develop the condition. If the department is a party to the termination suit, the information provided in the report must be maintained in the department's records about the child and made available to persons with whom the child is placed. Tex. Fam. Code §§ 161.2021, 161.1031, 162.006.

COMMENT: The attorney should obtain a HIPAA authorization before the release of any medical history.

§ 50.41 Attorney's Fees and Costs

The court may award costs in a suit or motion under title 5 of the Family Code and in a habeas corpus proceeding. Tex. Fam. Code § 106.001. The court may render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to an attorney. A judgment for attorney's fees and expenses may be enforced in the attorney's name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 106.002.

A family court is not required to state good cause for adjudging costs against the successful party as is required in other civil cases. *Goheen v. Koester*, 794 S.W.2d 830, 836 (Tex. App.—Dallas 1990, writ denied).

For fees for appointed representatives, see sections 50.32 and 50.33 above.

§ 50.42 Attack on Termination Order

The general rule is that the validity of an order terminating the parental rights of a person who has been served personally or by publication, who has executed an affidavit of relinquishment of parental rights or an affidavit of waiver of interest in a child, or whose rights have been terminated under section 161.002(b) is not subject to collateral or direct attack after the sixth month following the date the order was signed. Tex. Fam. Code § 161.211(a), (b). However, a termination after service by publication may be challenged more than six months after the entry of the decree to determine if publication provided constitutionally adequate notice. If not, the failure to provide adequate notice deprives the party of due process and deprives the trial court of personal jurisdiction. The court must determine if the challenging party acted promptly after learning of the termination and analyze whether granting relief would impair another party's substantial reliance interest, in which case the court has discretion to deny the relief. *In re E.R.*, 385 S.W.3d 552, 565–69 (Tex. 2012).

A termination order based on an unrevoked affidavit of relinquishment or affidavit of waiver of interest in a child may be attacked only on the basis of fraud, duress, or coercion in the execution of the affidavit. Tex. Fam. Code § 161.211(c).

A termination order based on an affidavit of relinquishment can be challenged only for fraud, duress, or coercion in the execution of the affidavit. The legal and factual insufficiency of the best interest findings cannot be raised on appeal in these cases. *In re K.S.L.*, 538 S.W.3d 107, 111 (Tex. 2017).

§ 50.43 Appeal of Termination Order

An appeal from a final order rendered in a suit in which termination of the parent-child relationship is ordered must be given precedence over other civil cases by the appellate courts, shall be accelerated, and shall follow the procedures for an accelerated appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.002(a–1); Tex. R. App. P. 28.4(a)(1); *see also* Tex. Fam. Code § 263.405(a). See the discussion in section 26.16 in this manual concerning appeals of parental termination cases.

A final order in a termination case filed by a governmental entity must contain a statement prescribed in Family Code section 263.405 regarding the right to appeal, application of the rules for accelerated appeals, and the possible result of failure to follow those rules. *See* Tex. Fam. Code § 263.405(b).

COMMENT: Termination cases have an accelerated time table for appeal. A notice of appeal must be filed on or before the twentieth day following the signing of the termination order. Tex. R. App. P. 26.3 indicates that, if the appellant files a timely motion, the deadline for filing notice of an accelerated appeal may be extended. A statement of inability to afford payment of costs must be filed on or before the notice of appeal unless a presumption of indigence has been established under Tex. R. App. P. 20.1(b). See the discussions in sections 26.16 and 26.18 in this manual.

See section 50.32 above for discussion of appointment of attorneys ad litem for indigent parents, including representation through the appeal process.

Standard of Review: In termination cases, the burden of proof at trial is by clear and convincing evidence. *In re C.H.*, 89 S.W.3d 17, 18 (Tex. 2002). The appellate standard for reviewing termination findings is whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the state's allegations. *In re C.H.*, 89 S.W.3d at 25.

[Sections 50.44 through 50.50 are reserved for expansion.]

III. Useful Websites

§ 50.51 Useful Websites

The following websites contain information relating to the topic of this chapter:

Indian Child Welfare Act (§ 50.3)
https://www.bia.gov
https://www.NICWA.org
https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf

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Chapter 51

Adoption of Child

I. General Information on Adoption

§ 51.1 Statutory Restrictions on Child Placing

It is a criminal offense for a person who has possession, custody, conservatorship, or guardianship of a child under eighteen years of age to accept, offer to accept, or agree to accept a thing of value for the delivery or possession of the child for purposes of adoption. It is also a criminal offense for a person to give, offer to give, or agree to give a thing of value to another for acquiring or maintaining the possession of a child for the purpose of adoption. *See* Tex. Penal Code § 25.08(a). The offense is generally a third-degree felony but may be a second-degree felony in certain circumstances. *See* Tex. Penal Code § 25.08(c). Such conduct is not a criminal offense if the thing of value is a fee or reimbursement paid to a child-placing agency as authorized by law or a fee paid to an attorney, social worker, mental health professional, or physician for services rendered in the usual course of the person's practice. The statute also authorizes the payment of legal and medical expenses incurred for the child's benefit and any necessary pregnancy-related expenses paid by a child-placing agency, as permitted under specified rules. *See* Tex. Penal Code § 25.08(b).

A person who is not the natural or adoptive parent of the child, the legal guardian of the child, or a licensed child-placing agency commits a class B misdemeanor if the person serves as an intermediary between a prospective adoptive parent and the expectant parent(s) to identify the parties to each other or places the child for adoption. Tex. Fam. Code § 162.025(a), (c). Even providing the name of a person interested in adoption to a person seeking to place a child for adoption is a violation of this provision. This criminal penalty is in addition to that provided under chapter 42 of the Texas Human Resources Code.

No person may operate a child-placing agency unless licensed. Tex. Hum. Res. Code § 42.041(a). Human Resources Code section 42.075 provides for civil penalties, and

section 42.076 provides for criminal penalties. *See* Tex. Hum. Res. Code §§ 42.075, 42.076.

The Texas Department of Family and Protective Services sets standards and issues licenses to agencies that place children for adoption. A child's parent or legal guardian can make an adoption plan without being licensed as an agency. Placement activities include purposeful acts to facilitate or arrange an adoptive placement. Serving as an intermediary between an adoptive couple and a parent who desires to place a child for adoption, including disclosing names, requires a license. Any assistance in making the arrangements for an adoptive placement, other than providing legal or medical services, could be construed as an illegal placement. *See* Tex. Hum. Res. Code § 42.076(d).

Court approval is required for the transfer of permanent physical custody of an adopted child by a parent, managing conservator, or guardian to any person who is not a relative or stepparent of the child or an adult who has a significant and long-standing relationship with the child. *See* Tex. Fam. Code § 162.026. It is a felony offense to conduct, facilitate, or participate in an unregulated custody transfer of an adopted child except as provided in Tex. Penal Code § 25.081(d). *See* Tex. Penal Code § 25.081. This topic is discussed in more depth in section 51.30 below.

§ 51.2 Interstate Compact on Placement of Children

The Interstate Compact on the Placement of Children (ICPC) is a uniform act that has been enacted in all states and establishes procedures and fixes responsibilities for those involved in placing a child across state lines for adoption. *See* Tex. Fam. Code §§ 162.101–.107. The ICPC requires approval from the appropriate state authorities before a child crosses state lines for the purposes of adoption. The state the child is coming from is called the "sending state," and the state where the adoptive parents reside is called the "receiving state." The receiving state ultimately gives approval for the placement.

Anyone who sends, brings, or causes a child to be sent or brought into the receiving state without complying with the ICPC is subject to the penalties in both the sending and the receiving states. Tex. Fam. Code § 162.102, art. IV. It is a class B misdemeanor to violate the Texas ICPC. Tex. Fam. Code § 162.107(a).

The ICPC does not apply if a child is sent or brought into a receiving state by the child's parent, stepparent, grandparent, adult sibling, adult aunt or uncle, or guardian and left

with any such relative or nonagency guardian in the receiving state. Tex. Fam. Code § 162.102, art. VIII(a).

An ICPC file is opened by filing a Form 100A, Interstate Compact on the Placement of Children Request. The compact administrator should also be provided a copy of (1) the legal documents along with an opinion letter by a licensed attorney that the relinquishment is executed in compliance with the law; (2) the preplacement home study with verification of state and federal criminal clearances; (3) the health, social, educational, and genetic history report; (4) medical records and a discharge summary; (5) verification of compliance with ICWA if required; and (6) a statement of authority to place the child. The Association of Administrators of the Interstate Compact on the Placement of Children has adopted Regulation No. 12, Private/Independent Adoptions, which provides the entire list of documents required for such adoptions. The regulation can be viewed at **https://aphsa.org/AAICPC/AAICPC/Resources.aspx**.

Some states have additional ICPC requirements, so it is a good idea to check with the compact administrators in both states to see what additional documents may be required. Once the receiving state has approved the placement, the child may be taken into the receiving state. *See* Tex. Fam. Code § 162.102, art. III.

Texas requires that an affidavit be filed in any suit for the appointment of a nonparent managing conservator with authority to consent to adoption or for the adoption of a child, stating whether or not there has been compliance with the ICPC. If there has not been compliance, the affidavit must state the reasons for noncompliance. *See* Tex. Fam. Code § 162.002(b).

Contact the Texas office at:

TDFPS
Texas Interstate Compact Office
Attn: Deputy Compact Administrator
Mailing address:
P.O. Box 149030 MC W-223
Austin, TX 78714-9030
Physical address:
701 W. 51st St. MC W-223
Austin, TX 78751
512-438-5141

§ 51.3 Interstate Jurisdiction Issues

The UCCJEA applies to suits for termination of parental rights. *See* Tex. Fam. Code § 152.102(3), (4). In an initial custody proceeding the Texas court will conduct a home-state analysis to determine if jurisdiction is proper. *See* Tex. Fam. Code § 152.102(7). If the child is a newborn, home state is established if the child lived from birth with a parent or a person acting as a parent. *See* Tex. Fam. Code § 152.102(7). In an interstate adoption the central question is whether the child is physically present in the state at the time the suit is filed. If so, Texas will have jurisdiction because the child lived with the prospective adoptive parents who were persons acting as a parent. *See* Tex. Fam. Code §§ 152.102(13)(B), 161.104.

The UCCJEA states that it does not apply to adoption proceedings. *See* Tex. Fam. Code § 152.103. However, there are a number of ways that the application of the UCCJEA could be triggered in an adoption case. If the suit is a combined suit for termination and adoption, the UCCJEA will apply because the termination of parental rights portion of the case is a "child custody proceeding." *See* Tex. Fam. Code § 152.102(3), (4). If the suit is the first proceeding relating to the child, the "home state" analysis applies. The provisions of the UCCJEA would also be triggered if the adoption is being finalized in Texas and there was a prior custody determination regarding the child made in another state, such as a child abuse or neglect case, a paternity suit, or a divorce action. In these adoption cases there must be compliance with the UCCJEA in order for the Texas court to have jurisdiction. *See* Tex. Fam. Code §§ 152.102(3), (4), 152.203.

If another state has jurisdiction, a Texas court can acquire jurisdiction by making a determination that the child, the child's parents, or any persons acting as the child's parents do not presently reside in the other state. *See* Tex. Fam. Code § 152.203(2). The other avenue for the Texas court to gain jurisdiction is for the court in the other state to make a determination that it no longer has exclusive continuing jurisdiction or that the Texas court would be a more convenient jurisdiction. *See* Tex. Fam. Code § 152.203(1). The court with continuing jurisdiction is the *only* court that can determine if it will continue to exercise that jurisdiction. *Saavedra v. Schmidt*, 96 S.W.3d 533, 541 (Tex. App.—Austin 2002, no pet.). *But see In re T.B.*, 497 S.W.3d 640, 651 (Tex. App.—Fort Worth 2016, pet. denied) (there can be implied determination that court in state with continuing jurisdiction is declining jurisdiction if that court fails to communicate with Texas court for over six months, despite repeated attempts to contact).

§ 51.4 Termination and Adoption

Actions to terminate the parent-child relationship and to grant an adoption are often interrelated. Two separate proceedings are recommended, but occasionally the circumstances will justify a combined proceeding.

COMMENT: For a full discussion of these options, as well as other important topics involved in both proceedings, see chapter 50 of this manual.

[Sections 51.5 through 51.10 are reserved for expansion.]

II. Adoption

§ 51.11 Nature of Remedy

Adoption establishes the parent-child relationship between the child and the adoptive parent or parents.

§ 51.12 Pleadings

The name of the child shall be omitted from the style, and the case shall be styled "In the Interest of a Child." Tex. Fam. Code § 102.008(a). The petition must contain the information required by Family Code section 102.008(b), except that the name of the child may be omitted. Tex. Fam. Code § 102.008(b)(2). *See* Tex. Fam. Code § 102.008(b).

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

The first pleading by each party must contain the information set forth in section 152.209 of the Family Code unless all the parties reside in Texas. *See* Tex. Fam. Code § 152.209.

§ 51.13 Venue

Venue for an adoption suit may be in the county where the child resides or where the petitioners reside. The adoption does not have to be filed in the court of continuing jurisdiction. Generally, if the suit is not filed in the court with continuing, exclusive

jurisdiction that court may, but is not required to, transfer the suit affecting the parent-child relationship to the court in which the adoption suit is filed. However, if the suit is filed in another court in the county where the child resides, transfer is mandatory. *See* Tex. Fam. Code §§ 103.001(b), 155.201(a–1), 155.202–.203.

§ 51.14 Qualifications of Petitioner

Subject to the requirements of Family Code chapter 102, any adult may petition to adopt a child who may be adopted. Tex. Fam. Code § 162.001(a).

If a petitioner is married, both spouses must join in the petition. Tex. Fam. Code § 162.002(a).

The fact that a petitioner is a member of the armed forces, the national guard, or a reserve component of the armed forces may not be considered by the court or any person performing an adoption evaluation or home screening as a negative factor in determining whether the adoption is in the child's best interest or whether the petitioner would be a suitable parent. Tex. Fam. Code § 162.0025.

An original suit affecting the parent-child relationship may be brought by any person authorized by Family Code section 102.003. *See* Tex. Fam. Code § 102.003. In particular, an original suit seeking only an adoption may be brought by a stepparent of the child (when the petition is joined by the petitioner's spouse, Tex. Fam. Code § 162.002(a)); by an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the thirty-day period immediately preceding the filing of the petition; by an adult who has had actual possession and control of the child for at least two months during the three-month period immediately preceding the filing of the petition; by an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or by another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so. Tex. Fam. Code § 102.005.

A pregnant woman or a parent may execute a statement to confer standing in a suit for termination or adoption, which will give the prospective adoptive parents standing to file suit. Tex. Fam. Code §§ 102.003(a)(14), 102.0035.

§ 51.15 Who May Be Adopted

Any child residing in Texas at the time a petition is filed may be adopted if—

1. the parent-child relationship between the child and each living parent has been terminated or a termination suit is joined with the adoption proceeding;
2. the parent whose rights have not been terminated is the spouse of the petitioner in a stepparent adoption (in which case the parent must join in the stepparent's petition for adoption as evidence of the parent's consent, Tex. Fam. Code § 162.010(b));
3. the child is at least two years old, the parent-child relationship has been terminated with respect to one parent, the person seeking adoption has been a managing conservator or has had actual care, possession, and control of the child for a period of six months preceding the adoption or is the child's former stepparent, and the nonterminated parent consents to the adoption; or
4. the child is at least two years old, the parent-child relationship has been terminated with respect to one parent, and the person seeking the adoption is the child's former stepparent and has been a managing conservator or has had actual care, possession, and control of the child for a period of one year preceding the adoption.

Tex. Fam. Code § 162.001(b). The term *residence of the child* is defined in Family Code section 103.001(c). *See* Tex. Fam. Code § 103.001(c).

The adoption forms in this manual, except for a stepparent adoption, presuppose that all necessary terminations have already taken place. If that is not the case, see section 50.2 in this manual for a discussion of whether to use a one-step or two-step procedure.

§ 51.16 Required Six Months' Residence

The child to be adopted must have lived at least six months in the home of the petitioner. The court may waive this requirement if the waiver is in the best interest of the child. Tex. Fam. Code § 162.009. For a discussion of the need for a waiting period, see *Catholic Charities of the Diocese of Galveston, Inc. v. Harper*, 337 S.W.2d 111 (Tex. 1960).

§ 51.17 Consents Required

Managing Conservator: The managing conservator, if one has been appointed, must consent to the adoption in writing, and the consent must be filed in the record. Because a managing conservator is entitled to service of citation under Family Code section 102.009(a), the consent should contain a waiver of citation. The requirement of written

consent by the managing conservator does not apply if the managing conservator is a petitioner. The court may waive the requirement of consent by the managing conservator if it finds the consent is being refused or has been revoked without good cause. Tex. Fam. Code § 162.010(a).

If the managing conservator is the spouse of the adopting parent and has joined as a petitioner, no further consent is required. Tex. Fam. Code § 162.010(b).

Child: If the child to be adopted is twelve years of age or older, the child's consent to the adoption must be given in writing or in court. The court may waive this requirement if it would serve the child's best interest. Tex. Fam. Code § 162.010(c).

Revocation: Before an order granting adoption is rendered, any required consent may be revoked by filing a signed revocation with the court. Tex. Fam. Code § 162.011.

§ 51.18 Criminal History Report

In an adoption suit the court must order each petitioner to obtain that person's own criminal history record information in the manner provided in section 411.128 of the Government Code. The court shall accept a person's criminal history record information that is provided by the Texas Department of Family and Protective Services or by a licensed child-placing agency that received the information from the department if the information was obtained not more than one year before the date the court ordered the history to be obtained. Tex. Fam. Code § 162.0085.

The person must provide the Department of Public Safety the name and address of the court in which the suit is pending and the date the adoption is scheduled to be heard. Tex. Gov't Code § 411.128.

§ 51.19 Adoption Evaluations

In a suit for adoption, an adoption evaluation must be conducted as provided in chapter 107 of the Family Code. Tex. Fam. Code § 162.003. Provisions regarding adoption evaluations are found in Tex. Fam. Code. §§ 107.151–.163.

§ 51.20 Health, Social, Educational, and Genetic History Report

Before placing a child for adoption with any person other than the child's stepparent, grandparent, or aunt or uncle by birth, marriage, or prior adoption, the Texas Depart-

ment of Family and Protective Services, a licensed child-placing agency, or the child's parent or guardian shall compile a report on the available health, social, educational, and genetic history of the child. The department must ensure that each agency, contractor, or other person placing a child for adoption receives a copy of any portion of the report prepared by the department. Tex. Fam. Code § 162.005(a)–(c).

The information to be included in the report, described in Family Code section 162.007, is very comprehensive and includes any history of physical, sexual, or emotional abuse. *See* Tex. Fam. Code § 162.007. See form 53-23 in this manual.

If the child is placed for adoption by a person or entity other than the department, a licensed child-placing agency, or the child's parent or guardian, the placing person or entity must prepare the report. Tex. Fam. Code § 162.005(d).

The placing person or entity is required to provide the prospective adoptive parents a copy of the report, edited to protect the identity of birth parents and their families, as early as practicable before the first meeting of the adoptive parents with the child. Tex. Fam. Code § 162.005(e).

Before a petition for adoption by a person other than the child's stepparent, grandparent, aunt, or uncle may be granted, a copy of the report signed by the child's adoptive parents and, if appropriate, a certificate from the Department of Family and Protective Services acknowledging receipt of the report must be filed. Tex. Fam. Code § 162.008.

If the child is placed for adoption by a person or entity other than the Department of Family and Protective Services or a licensed child-placing agency *and* the child is being adopted by anyone other than the child's stepparent, grandparent, aunt, or uncle, the person or entity who places the child must file the report with the department. Tex. Fam. Code § 162.006(e).

The prospective adoptive parents generally have a right to examine the records relating to the child. Tex. Fam. Code § 162.0062(a), (c). The records must include any investigation of abuse in which the child was alleged or confirmed to be the victim of sexual abuse while residing in a foster home. Tex. Fam. Code § 162.0062(b). A prospective adoptive parent with whom the child is placed before adoption is entitled to examine information about the child's health history. Tex. Fam. Code § 162.0062(a–1).

The person or entity who prepares and files the original report is required to update the medical, psychological, and psychiatric information in the report and to furnish the sup-

plemental information to the adoptive parents, should it become available. Tex. Fam. Code § 162.005(f).

A court having jurisdiction of a suit affecting the parent-child relationship may by order waive the making and filing of the report if the child's biological parents cannot be located and their absence results in insufficient available information to compile a report. Tex. Fam. Code § 162.008(c).

§ 51.21 Grounds

The court must be satisfied that adoption is in the best interest of the child. This requirement is in addition to finding that the court has jurisdiction and that the prerequisites to adoption have been met. Tex. Fam. Code § 162.016(b). When considering best interest, the court can look at whether the adoption would result in the child's loss of access to family. *See In re C.J.T.*, No. 04-14-00621-CV, 2016 WL 413262, at *5 (Tex. App.—San Antonio Feb. 3, 2016, no pet.) (mem. op.).

§ 51.22 No Jury

Jury trials are not permitted in adoption cases. Tex. Fam. Code § 105.002(b).

§ 51.23 Effect of Decree

An order of adoption creates the parent-child relationship between the adopted child and adoptive parents for all purposes. Tex. Fam. Code § 162.017(a).

The adoptive parents and the child, after the child is an adult, are entitled to receive copies of the records and other information (edited for confidentiality) about the child's history, maintained by the person or entity placing the child for adoption. The placing person or entity has the duty to edit the records and information to protect the identity of the biological parents and any other person whose identity is confidential. The court shall provide information about the voluntary adoption registry under Family Code chapter 162, subchapter E, to the adoptive parents (and to the child, if the child is fourteen years or older). Tex. Fam. Code § 162.0062(d)–(f).

The adopted child inherits from and through the adoptive parents. The terms *child*, *descendant*, and *issue* and other terms denoting the relationship of parent and child include an adopted child unless the context clearly indicates otherwise. Tex. Fam. Code § 162.017(b), (c).

A final order of adoption issued by a court with continuing, exclusive jurisdiction ends a court's continuing jurisdiction, and any subsequent suit affecting the child shall be commenced as though the child had not been the subject of a suit for adoption or any other suit affecting the parent-child relationship before the adoption. Tex. Fam. Code § 155.001(b)(3). But see the comment in section 51.13 above about the effect of an adoption decree if the order is not issued by the court with continuing, exclusive jurisdiction.

§ 51.24 Change of Name

The name of the child may be changed in the adoption order if requested. Tex. Fam. Code § 162.016(c).

§ 51.25 New Birth Certificate

The birth certificate for the child can be revised to reflect that the child is the child of the adopting parents. Tex. Health & Safety Code §§ 192.006–.008.

The form entitled "Certificate of Adoption" must be filled out to obtain a new birth certificate. The form is reproduced as form 53-28 in this manual.

§ 51.26 Direct or Collateral Attack

A final adoption decree is not subject to attack on the basis that a health, social, educational, and genetic history report was not filed. Tex. Fam. Code § 162.012(b).

The validity of an adoption order is not subject to attack after six months after the date the order was signed. Tex. Fam. Code § 162.012(a); *see In re C.R.P.*, 192 S.W.3d 823, 826 (Tex. App.—Fort Worth 2006, no pet.). There are no exceptions to the six-month limitation—not even to challenge a purportedly void adoption order, not for good cause, and not for public policy reasons. *Hobbs v. Van Stavern*, 249 S.W.3d 1, 4 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). A collateral attack on an adoption decree will not be permitted even if the court erroneously applied the substantive law to the case. *See Goodson v. Castellanos*, 214 S.W.3d 741, 748 (Tex. App.—Austin 2007, pet. denied) (adoption granted to same-sex couple attacked as void).

The question of whether a collateral attack could be used to invalidate an order entered without jurisdiction is still unanswered.

§ 51.27 Appointment of Ad Litem or Amicus

The appointment of an amicus attorney, an attorney ad litem, or a guardian ad litem in an adoption proceeding is discretionary with the court. Tex. Fam. Code § 107.021(a).

§ 51.28 Confidentiality of Records

The clerk of a court that renders an adoption order must transmit to the vital statistics unit a certified report of adoption. The records maintained by the district clerk concerning a child after entry of an order of adoption and the vital statistics unit records on the adoption are confidential and require a court order, for good cause shown, to be accessed. Tex. Fam. Code § 108.003(a), (b).

The court, on the motion of a party or on its own motion, may order the sealing of the file or the sealing of the minutes, or both, in a suit requesting adoption. Tex. Fam. Code § 162.021(a).

§ 51.29 Adoption Registry Report

Texas has a mutual consent voluntary adoption registry. *See* Tex. Fam. Code § 162.403. The clerk of the court in which an adoption is granted must transmit to the central registry of the vital statistics unit a certified report of adoption containing specified information. Tex. Fam. Code § 108.003(a). See form 53-28 in this manual. Adoptees, birth parents, and biological siblings may apply for the disclosure of information. Tex. Fam. Code § 162.406. Before any information is disclosed, both sides must consent in writing to the disclosure. *See* Tex. Fam. Code §§ 162.407(a), 162.409(a)(6).

§ 51.30 Transfer of Permanent Physical Custody of Adopted Child

A parent, managing conservator, or guardian of an adopted child may not transfer permanent physical custody of the child to any person who is not a relative or stepparent of the child or an adult who has a significant and long-standing relationship with the child unless the parent, managing conservator, or guardian files a petition with a court of competent jurisdiction requesting a transfer of permanent physical custody and the court approves the petition. Tex. Fam. Code § 162.026. A transfer of permanent physical custody without court approval is considered an "unregulated transfer" and carries criminal penalties. *See* Tex. Penal Code § 25.081(b). Conducting, facilitating, or participating in such a transfer without court approval is a felony offense. *See* Tex. Penal Code § 25.081(b), (c). The offense is generally a third-degree felony but may be a sec-

ond-degree felony in certain circumstances. *See* Tex. Penal Code § 25.081(c). There are no criminal penalties if the adopted child is placed with a licensed child-placing agency, the Department of Family and Protective Services, or an adult relative, stepparent, or other adult with a significant and long-standing relationship to the child. *See* Tex. Penal Code § 25.081(d)(1). A temporary placement for a designated short-term period with a specified intent and period for return of the child due to temporary circumstances is permitted. *See* Tex. Penal Code § 25.081(d)(3). See form 46-1 in this manual for an authorization agreement to provide temporary care for a child.

Warning: The practitioner should inquire in the initial client interview in any custody or adoption case to determine if the child the subject of the suit was previously adopted. If so, an analysis must be conducted to determine if the case involves the transfer of permanent physical custody and whether court approval will be required. The practitioner should note that the felony penalty for an unregulated transfer applies to a person who facilitates an unregulated transfer, and it is unclear if that would include an attorney who provided legal services to effectuate the transfer.

[Sections 51.31 through 51.40 are reserved for expansion.]

III. General Information on Birth Records

§ 51.41 Certificate of Adoption

The Texas Department of State Health Services provides a certificate of adoption form, which is used to amend the birth certificate information to reflect the information about the adoptive parents and the name change for the child. See form 53-28 in this manual. This form is to be signed by the clerk of the court and transmitted to the vital statistics unit.

§ 51.42 Birth Record Correction Not Required

Occasionally, even though the child's status has been changed through an adoption or other proceeding, the child or parents will not want the record changed but will want merely an addition made to it. For example, if an older child is adopted and his name is not changed or if a single person adopts a child, the parties may prefer that the record not be changed to show the child was born to the adopting parents. Instead, a notation of the adoption may be added to the original record. If that is the case, the certificate of

adoption should clearly indicate that an addition to, not a change of, the record is desired.

§ 51.43 Child Born in Another State

If the child was born in another state, the laws of the other state will control the issuance of the new birth certificate. The attorney should contact the vital statistics department in the state where the child was born to obtain the forms and procedures for correcting birth records.

[Sections 51.44 through 51.50 are reserved for expansion.]

IV. Useful Websites

§ 51.51 Useful Websites

The following websites contain information relating to the topic of this chapter:

ICPC-Regulation 12 (§ 51.2)
https://aphsa.org/AAICPC/AAICPC/Resources.aspx

Texas Department of State Health Services, Central Adoption Registry (§§ 51.29, 51.41)
www.dshs.texas.gov/vs/reqproc/adoptionregistry.shtm

Chapter 52

Combined Termination and Adoption of Stepchild

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Chapter 52

Combined Termination and Adoption of Stepchild

§ 52.1 Scope of Chapter

The forms in this chapter of this manual are specifically designed for the termination of the rights of one biological parent and adoption by the remaining parent's spouse. The two causes of action are joined. *See* Tex. Fam. Code § 162.001(b)(1).

The forms also contain pleadings appropriate to terminate all legal relationships and rights that exist or may exist between a child and an alleged father who is not the child's presumed father, so that the child may be adopted by a stepfather.

§ 52.2 Grandparent Access

Stepparent adoptions ordinarily will not affect the right of a biological or adoptive grandparent to seek access under Family Code chapter 153 since one of the child's biological or adoptive parents will remain a legal parent after the termination. Tex. Fam. Code § 161.206(c); *see* Tex. Fam. Code §§ 153.433, 153.434. However, a grandparent seeking possession or access must meet stringent requirements, including overcoming the presumption set forth in section 153.433(a)(2).

§ 52.3 Other Practice Notes

For information on termination of parental rights, see the practice notes in chapter 50 of this manual. For information on adoption, see parts I. and II. of the practice notes in chapter 51. Necessary ancillary forms will be found in chapter 53. Part III. of the practice notes in chapter 51, entitled "General Information on Birth Records," contains information concerning updating birth records to reflect an adoption.

Chapter 53

Ancillary Forms for Termination and Adoption

There are no practice notes for this chapter.

Chapter 54

Parentage

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Chapter 54

Parentage

§ 54.1 Nature of Remedy; Overview

Establishing in some manner the legal relationship of parent and child is an essential first step in many legal proceedings. Support obligations, inheritance rights, custody, possession, and access rights, and even the termination of parental rights to free a child for adoption, depend on at least an implied finding of parentage.

The Texas version of the Uniform Parentage Act (hereinafter UPA) governs *every determination of parentage* in Texas, including probate proceedings, interstate custody, and interstate support actions, except as provided by chapter 233 of the Family Code. Tex. Fam. Code § 160.103(a). The applicable law does not depend on the place of birth of the child or the past or present residence of the child. Tex. Fam. Code § 160.103(b). If a provision of UPA conflicts with another Family Code title 5 provision or another state statute or rule and the conflict cannot be reconciled, UPA prevails. Tex. Fam. Code § 160.002. As of the publication date of this manual, no court has ruled on the question of whether these provisions overrule the supreme court's holding in 1989 that the legitimation provisions of the Family Code do not apply to wrongful death actions. *See Garza v. Maverick Market, Inc.*, 768 S.W.2d 273, 275 (Tex. 1989) (requiring "clear and convincing" standard of proof to establish parent-child relationship for purposes of wrongful death claim and specifically refusing "to incorporate the requirements of legitimation under the Family Code into the Wrongful Death Act"); *Tamez v. Mack Trucks, Inc.*, 100 S.W.3d 549, 563 (Tex. App.—Corpus Christi–Edinburg 2003), *rev'd on other grounds*, 206 S.W.3d 572 (Tex. 2006) (court order establishing the parent-child relationship (pre-UPA) was some evidence of parentage to defeat motion for summary judgment).

Parentage actions include determination of mother-child as well as father-child relationships. *See* Tex. Fam. Code §§ 160.106, 160.201.

A court with jurisdiction to adjudicate parentage under "another law of this state" is authorized to adjudicate parentage under UPA. Tex. Fam. Code § 160.104(2).

A proceeding for adoption, termination of parental rights, possession of or access to a child, child support, divorce, annulment, or probate or administration of an estate or another appropriate proceeding may generally be joined with a suit to determine parentage. However, a respondent may not join such a proceeding with a proceeding to adjudicate parentage brought under Family Code chapter 159, the Uniform Interstate Family Support Act (UIFSA). Tex. Fam. Code § 160.610.

A court with jurisdiction to hear a suit affecting the parent-child relationship under Family Code title 5 has jurisdiction to adjudicate parentage. Tex. Fam. Code § 160.104(1). Habeas corpus proceedings to recover a child and suits filed under UIFSA are the only title 5 suits that are not suits affecting the parent-child relationship. Tex. Fam. Code § 101.032(b). A Texas court authorized to determine the parentage of a child may serve as a responding tribunal in a proceeding to determine parentage brought under UIFSA. *See* Tex. Fam. Code § 159.701.

A probate court may determine parentage for a person claiming to be a biological child or descendant of the decedent. *See* Tex. Est. Code § 201.052. The effective date provision of the legislation that adopted UPA makes the new provisions applicable to proceedings commenced after the effective date of the act. However, the Waco court of appeals refused to apply UPA in a probate case in which the decedent died before June 14, 2001, holding that to do so would impair substantive rights of the heirs that vested on death. *Wilson ex rel. C.M.W. v. Estate of Williams*, 99 S.W.3d 640, 645 (Tex. App.—Waco 2003, no pet.).

§ 54.2 Nonjudicial Determination of Parentage

The Family Code definition of "parent" includes a mother, a man who has acknowledged his paternity of the child, or a man presumed under UPA to be the father. *See* Tex. Fam. Code § 101.024. If the mother, alleged father, and presumed father all agree and are available to execute an acknowledgment and denial of paternity, judicial action to establish parentage is neither necessary nor appropriate. An unrebutted presumption of paternity or maternity also establishes the parent-child relationship without court action.

§ 54.3 Presumption of Parentage

The mother-child relationship is established by (1) the woman's giving birth to the child, (2) an adjudication of the woman's maternity, or (3) the adoption of the child by

the woman. Tex. Fam. Code § 160.201(a). If maternity is disputed, UPA applies for the purpose of adjudicating maternity. *See* Tex. Fam. Code § 160.106.

The father-child relationship is established by (1) an unrebutted presumption of the man's paternity of the child; (2) an effective acknowledgment of paternity unless the acknowledgment has been rescinded or successfully challenged; (3) an adjudication of the man's paternity; (4) the adoption of the child by the man; or (5) the man's consenting to assisted reproduction by his wife, which resulted in the birth of the child. Tex. Fam. Code § 160.201(b).

A man is presumed to be the father of a child if—

1. he is married to the mother of the child and the child is born during the marriage;
2. he is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
3. he married the mother of the child before the birth of the child in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
4. he married the mother of the child after the birth of the child in apparent compliance with law, regardless of whether the marriage is or could be declared invalid, he voluntarily asserted his paternity of the child, and (a) the assertion is *in a record* filed with the vital statistics unit, (b) he is voluntarily named as the child's father on the child's birth certificate, or (c) he promised *in a record* to support the child as his own; or
5. during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.

Tex. Fam. Code § 160.204(a).

"Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form." *See* Tex. Fam. Code § 160.102(15).

Effective September 1, 2003, two additional presumptions were added in the gestational agreement context: "the mother-child relationship exists between a woman and a child by an adjudication confirming the woman as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law, regardless of the fact that the gestational mother gave birth to the child," and the "father-child relationship exists between a child and a man by an adjudication confirming the man as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law." *See* Tex. Fam. Code § 160.753. In the absence of a valid gestational agreement, however, the rule of Family Code section 160.201(a)(1) that the mother-child relationship is established by the woman's giving birth is not rebuttable by the results of genetic testing. *In re M.M.M.*, 428 S.W.3d 389 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

§ 54.4 Acknowledgment of Paternity

A properly completed and filed acknowledgment of paternity (hereinafter AOP) establishes the parent-child relationship without judicial action. A court or administrative agency may not ratify an unchallenged acknowledgment of paternity. Tex. Fam. Code § 160.310.

A valid acknowledgment of paternity filed with the vital statistics unit (hereinafter VSU) is the equivalent of an adjudication of the paternity of a child and confers on the acknowledged father all rights and duties of a parent. A valid denial of paternity filed with the VSU in conjunction with a valid acknowledgment of paternity is the equivalent of an adjudication of the nonpaternity of the presumed father and discharges the presumed father from all rights and duties of a parent. Tex. Fam. Code § 160.305. The filing of a valid denial of paternity by a presumed father in conjunction with the filing of a valid acknowledgment of paternity by another person also rebuts the presumption of paternity. Tex. Fam. Code § 160.204(b)(2). An acknowledgment of paternity constitutes an affidavit under 42 U.S.C. § 666(a)(5)(C). Tex. Fam. Code § 160.302(d).

However, an acknowledgment is *void* if it (1) states that another man is a presumed father of the child, unless a denial of paternity signed or otherwise authenticated by the presumed father is filed with the VSU; (2) states that another man is an acknowledged or adjudicated father of the child; or (3) falsely denies the existence of a presumed, acknowledged, or adjudicated father of the child. Tex. Fam. Code § 160.302(b).

An AOP cannot be used to establish the parent-child relationship if there is a presumed father unless the presumed father files a denial of his presumed paternity. *See* Tex. Fam. Code § 160.302(b)(1).

An "adjudicated" or "acknowledged" father cannot file a valid denial of paternity. Accordingly, an AOP cannot be used to establish the parent-child relationship if there is a prior acknowledgment or court order establishing another man as the father of the child. Tex. Fam. Code § 160.303(3).

§ 54.5 Form for Acknowledgment and Denial of Paternity

Forms for acknowledgment of paternity, denial of paternity, and rescission of an acknowledgment or denial of paternity are prescribed by the VSU. *See* Tex. Fam. Code § 160.312(a). Instructions regarding the AOP form are available at **https://www.texasattorneygeneral.gov/cs/aop-certified-entities**. The AOP form, in a usable format, will be provided by VSU only to a "certified entity" authorized to complete the forms; birth registrars in hospitals with birthing facilities generally are "certified" to complete the forms. The VSU may not charge a fee for filing this form. Tex. Fam. Code § 160.306.

However, the unit charges a fee for providing a certified copy after the form has been filed. In addition to the fee, the agency requires a copy of the client's driver's license and a release from the signatory granting the VSU permission to deliver the certified copy to the attorney. The agency has one other method to verify that the form was accepted and filed. A search of the paternity registry may be requested by submitting an Acknowledgment of Paternity Inquiry Request on the VSU form VS-134.1 with a search fee. The VSU may release information relating to the acknowledgment of paternity or denial of paternity to a signatory of the acknowledgment or denial and to the courts and title IV-D agency of Texas or another state. Tex. Fam. Code § 160.313.

Information about the unit's requirements for filing the acknowledgment of paternity and the denial of paternity or the combined acknowledgment/denial of paternity and obtaining a certified copy of the form(s) may be obtained from the AOP Registry at 1-888-963-7111, ext. 2558 or ext. 2523.

An acknowledgment of paternity will be rejected by the VSU unless it is executed on the official VSU form VS-159.1 (dated "9/2005" or later) and contains a valid "entity code," demonstrating that the person assisting with the execution of the form is properly certified as described below.

Individuals who assist with filling out or processing the AOP must be certified by the office of the attorney general under subchapter J, chapter 55, of the Texas Administrative Code. Certification must be renewed each year. *See* 1 Tex. Admin. Code §§ 55.401–.407. Each agency, organization, or individual certified to complete the forms receives an entity code, which must be entered on the form. The attorney general has established an online certification program for individuals or entities that intend to assist in completion of the AOP. The online training may be found at **https://www.texasattorneygeneral.gov/cs/acknowledgment-of-paternity-aop-certification-training**.

COMMENT: The Family Code no longer recognizes a "statement of paternity" as binding, and the provision making a statement of paternity signed before January 1, 1999, valid has been repealed. Acts 1999, 76th Leg., R.S., ch. 556, § 37, *repealed by* Acts 2001, 77th Leg., R.S., ch. 821, § 3.02 (H.B. 920), eff. June 14, 2001.

§ 54.6 Effective Date of Acknowledgment and Denial of Paternity

An acknowledgment becomes effective when filed by the VSU or on the birth of the child, whichever occurs later. Tex. Fam. Code § 160.304(c). If there is a presumed father and the acknowledgment and denial of paternity are filed as separate documents, neither is effective until both have been filed. Tex. Fam. Code § 160.304(a). The VSU will not file the acknowledgment or denial until one or both forms have been reviewed and meet the unit's requirements.

§ 54.7 Effect of Unchallenged Acknowledgment and Denial of Paternity

The courts are specifically prohibited from ratifying an unchallenged acknowledgment and denial of paternity. Tex. Fam. Code § 160.310. It would therefore be improper to file a parentage suit to set support or provide for conservatorship, possession, or access to the child if an acknowledgment of paternity has been filed and no party is seeking to rescind or challenge the acknowledgment.

A suit for conservatorship or support may be filed based on an unrescinded and unchallenged acknowledgment of paternity. See chapter 40 of this manual.

An acknowledgment of paternity may not be ruled invalid based solely on testimony questioning the male signatory's paternity given at a hearing on child support. The acknowledgment must be rescinded or challenged as provided by section 160.307 or

section 160.308 of the Family Code. *See In re S.R.B.*, 262 S.W.3d 428 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

§ 54.8 Special Procedures for Rescission or Challenge of Acknowledgment or Denial of Paternity

Rescission: A person signing the acknowledgment or denial of paternity may rescind the document within sixty days after the effective date or before the date a proceeding to which the signatory is a party is initiated before a court to adjudicate an issue relating to the child, whichever is earlier. Tex. Fam. Code § 160.307(a).

A signatory seeking to rescind an acknowledgment or denial of paternity must file with the VSU a completed rescission, on the form prescribed under Code section 160.312, in which the signatory declares under penalty of perjury that, as of the date the rescission is filed, a proceeding has not been held affecting the child identified in the acknowledgment of paternity or denial of paternity, including a proceeding to establish child support. The signatory must also swear that a copy of the completed rescission was sent by certified or registered mail, return receipt requested, to (1) the other signatory of the acknowledgment of paternity and the signatory of any related denial of paternity if the rescission is of an acknowledgment of paternity or (2) the signatories of the related acknowledgment of paternity if the rescission is of a denial of paternity. If a signatory to the acknowledgment of paternity or denial of paternity is receiving services from the title IV-D agency, the rescinding signatory must also swear that a copy of the completed rescission was sent by certified or registered mail to the title IV-D agency. Tex. Fam. Code § 160.307(b).

When the VSU receives a completed rescission, it must void the affected acknowledgment or denial of paternity and amend the child's birth record, if appropriate. Tex. Fam. Code § 160.307(c). Any party affected by the rescission, including the title IV-D agency, may contest the rescission by bringing a proceeding under Family Code subchapter G to adjudicate the parentage of the child. Tex. Fam. Code § 160.307(d).

Challenge: After the rescission period has passed, a person signing the acknowledgment or denial may commence an action to challenge the acknowledgment or denial only on the basis of fraud, duress, or material mistake of fact. The proceeding may be commenced at any time before the issuance of an order affecting the child, including an order relating to support of the child. Tex. Fam. Code § 160.308(a).

Genetic testing evidence showing that the acknowledged father is not rebuttably identified as the father of the child "constitutes a material mistake of fact." Tex. Fam. Code § 160.308(d). If the genetic testing shows that the acknowledged father is not the biological father, the court shall adjudicate him as not being the father of the child. Tex. Fam. Code § 160.631(d).

Parties and Procedures: A person who has signed an acknowledgment or denial of paternity submits to personal jurisdiction in Texas, effective on the filing of the document with the VSU, for the purposes of a suit to challenge. Tex. Fam. Code § 160.309(b). Each signatory to the acknowledgment and any related denial of paternity must be made a party to the suit to challenge. Tex. Fam. Code § 160.309(a). Support obligations and other rights and duties flowing from the acknowledgment may not be suspended during the pendency of the challenge except for good cause. Tex. Fam. Code § 160.309(c).

The proceeding to challenge "shall be conducted in the same manner as a proceeding to adjudicate parentage under Subchapter G." Tex. Fam. Code § 160.309(d). That subchapter requires the court, based on genetic testing, presumptions, or other evidence, to adjudicate a man as being, or not being, the father of the child. *See* Tex. Fam. Code § 160.631.

COMMENT: It appears that the court hearing a suit to challenge must determine parentage. If the man seeking to challenge the acknowledgment is the only alleged father of the child before the court and is excluded, the adjudication would consist only of a finding that he is not the father of the child. *See* Tex. Fam. Code § 160.631(d). If genetic testing identifies a man as a father of the child, the court must adjudicate that man to be the father of the child. Tex. Fam. Code § 160.631(c).

§ 54.9 Caption; Contents of Petition

The petition and all other documents in the proceeding shall be entitled "In the Interest of _____, a Child." Tex. Fam. Code § 102.008(a).

COMMENT: A suit under UIFSA is not a suit affecting the parent-child relationship but still should be styled "In the Interest of _____, a Child" because it is a suit under Family Code title 5. A suit to challenge an acknowledgment or denial of paternity is also a title 5 suit.

The Family Code specifies the minimum contents of a petition in a suit affecting the parent-child relationship. *See* Tex. Fam. Code § 102.008(b). See section 40.5 in this manual.

If the suit is filed under Family Code chapter 159, the pleadings and accompanying documents must substantially conform to the requirements of UIFSA, and federally promulgated forms are commonly used. *See* Tex. Fam. Code § 159.311. See section 43.39 in this manual.

For special pleading requirements relating to challenge of an acknowledgment of paternity, or suit to set aside a prior order based on a statement of paternity, see section 54.8 above.

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

If the parentage action includes child custody as an issue and any party to the proceeding resides outside Texas, the first pleading by each party must also contain, either in the body of the pleading or in an attached affidavit, information concerning the child's present and past residences, potential parties, prior litigation, and other matters relating to the status of the child. *See* Tex. Fam. Code § 152.209. See chapter 40 of this manual.

If the parentage action includes a proceeding in which periodic payments of child support are ordered or modified or a suit in which medical support must be established, modified, or clarified or is a proceeding under UIFSA, the parties must provide in the pleading or a separate statement required health insurance and dental insurance information. *See* Tex. Fam. Code §§ 154.181, 154.1815. See section 40.5 in this manual.

The petition must state whether, in regard to a party to the proceeding or a child of a party to the proceeding, there is in effect a protective order under Family Code title 4, a protective order under chapter 7A of the Code of Criminal Procedure (effective January 1, 2021, chapter 7A will become subchapter A, chapter 7B), or an order for emergency protection under article 17.292 of the Code of Criminal Procedure. The petition also must state whether an application for any of these orders is pending. The petitioner must attach a copy of each such protective order in which a party to the proceeding or the child of a party to the proceeding was the applicant or victim of the conduct alleged in the application or order and the other party was the respondent or defendant of an action regarding the conduct alleged in the application or order without regard to the date of the order. If a copy of the order is not available at the time of filing, the petition must state that a copy will be filed with the court before any hearing. Tex. Fam. Code

§ 160.6035. The Title IV-D agency is exempt from this petition requirement. Tex. Fam. Code § 160.6035(c).

§ 54.10 Collaborative Law

If the parentage action is also a suit affecting the parent-child relationship, the parties may agree to conduct the proceedings under collaborative law procedures. *See* Tex. Fam. Code § 15.053. For further information on collaborative law agreements and procedures, see chapter 15 of this manual.

§ 54.11 Persons Entitled to Service of Process; Citation

The only necessary parties to a proceeding to adjudicate parentage are the mother of the child and a man whose paternity of the child is to be adjudicated. Tex. Fam. Code § 160.603. If the suit seeks to challenge an acknowledgment or denial of paternity, then each signatory to the acknowledgment and any related denial of paternity must be made a party. Tex. Fam. Code § 160.309(a). Citation must be served on other individuals and agencies entitled to notice, under provisions applicable to any "joined" proceeding. For example, in a suit affecting the parent-child relationship, those entitled to service of citation are—

1. a managing conservator;
2. a possessory conservator;
3. a person having possession of or access to the child under an order;
4. a person required by law or by order to provide for the support of the child;
5. a guardian of the person of the child;
6. a guardian of the estate of the child;
7. each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Family Code chapter 161;
8. an alleged father, unless there is attached to the petition an affidavit of waiver of interest in a child executed by the alleged father as provided by Family Code chapter 161 or unless the petitioner has complied with the provisions of Family Code section 161.002(b)(2), (b)(3), or (b)(4);
9. a man who has filed a notice of intent to claim paternity as provided by Family Code chapter 160;

10. the Department of Family and Protective Services, if the petition requests that the department be appointed as managing conservator of the child;
11. the title IV-D agency, if the petition requests the termination of the parent-child relationship and support rights have been assigned to the title IV-D agency under Family Code chapter 231;
12. a prospective adoptive parent to whom standing has been conferred under Family Code section 102.0035; and
13. a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Family Code chapter 161 or to whom consent to adoption has been given in writing under Family Code chapter 162.

Tex. Fam. Code § 102.009(a).

Estates Code requirements for service or notice depend on the nature of the proceeding and of the interested parties.

> (a) Except as provided by Subsection (b), a person is not required to be cited or otherwise given notice except in a situation in which this title expressly provides for citation or the giving of notice.
>
> (b) If this title does not expressly provide for citation or the issuance or return of notice in a probate matter, the court may require that notice be given. A court that requires that notice be given may prescribe the form and manner of service of the notice and the return of service.

Tex. Est. Code § 51.001(a), (b).

Waiver of Service: A party may waive service after the suit is filed by filing a waiver acknowledging receipt of a copy of the citation. The waiver may not be signed using a digitized signature. The waiver must contain the party's mailing address, and it must be sworn before a notary public who is not an attorney in the suit unless the party waiving is incarcerated. The Texas Rules of Civil Procedure do not apply to these waivers. Tex. Fam. Code § 102.0091.

§ 54.12 Jurisdiction

UPA does not grant jurisdiction but provides that a court with jurisdiction to hear a suit affecting the parent-child relationship or to adjudicate parentage under another law is authorized to adjudicate parentage under Family Code chapter 160. Tex. Fam. Code § 160.104.

UPA may, however, restrict jurisdiction in some circumstances. UPA provides that an individual may not be adjudicated to be a parent unless the court has personal jurisdiction over the individual. Tex. Fam. Code § 160.604(a). This provision does not answer the question of whether the court must have personal jurisdiction over an individual before adjudicating an individual *not* to be the parent. Custody, visitation, and termination of parental rights have historically been viewed as status-based adjudications, not requiring personal jurisdiction over an absent parent or alleged father, although due process requires notice and an opportunity to be heard. *See, e.g.*, Tex. Fam. Code § 152.201 ("home state of the child" determines jurisdiction of custody court, without regard to personal jurisdiction over parents); *see also In re Calderon-Garza*, 81 S.W.3d 899, 903–04 (Tex. App.—El Paso 2002, orig. proceeding) (Texas court held to have home-state jurisdiction in paternity proceeding involving child born in El Paso and removed out of state at two months). UPA prevails only if it conflicts with another statute "and the conflict cannot be reconciled." Tex. Fam. Code § 160.002. The status-based jurisdiction of the Uniform Child Custody Jurisdiction and Enforcement Act can be reconciled with UPA by limiting the UPA restriction to its exact words. That is, an individual may not be adjudicated to be a parent absent personal jurisdiction, but an individual may be adjudicated *not* to be a parent on the basis of status jurisdiction over the child.

The commissioners' comment to UPA section 604 does not incorporate this view. UPA empowers the court to adjudicate parentage with an order binding on individuals over whom the court has personal jurisdiction, even if the court lacks jurisdiction over another party. Tex. Fam. Code § 160.604(c). With respect to this provision, the commissioners observed that a parentage order binding a mother and alleged father before the court "may not technically bind the husband (presumed father), but more than likely it will end litigation on the subject." The comment to UPA section 604 (Nat'l Conf. of Comm'rs on Unif. State Laws, Jan. 5, 2001) is available at **www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20(2017)**.

UPA provides that a presumption of paternity may be rebutted by genetic testing results "identifying another man as the father of the child." Tex. Fam. Code § 160.631(b). Even a child not made a party to or represented in the suit is bound by an adjudication "based on a finding consistent with the results of genetic testing." Tex. Fam. Code § 160.637(b)(2). Given the availability of genetic testing, it seems unnecessary to eliminate the power of the court to adjudicate nonpaternity based on status jurisdiction. This issue will, however, remain open until resolved by the courts or the legislature.

Jurisdiction of the court is also restricted in a parentage suit under Family Code chapter 159. The court has subject-matter jurisdiction to determine parentage and support

issues, but custody proceedings may not be joined to a parentage action brought under that chapter. *See* Tex. Fam. Code §§ 159.305(b), 160.610(b). An out-of-state petitioner has immunity from personal jurisdiction and service of process while in Texas to participate in the UIFSA proceeding. Tex. Fam. Code § 159.314. See chapter 43 of this manual.

§ 54.13 Long-Arm Jurisdiction

COMMENT: Since there is some room for dispute on the effect of UPA's personal jurisdiction requirement in child custody or termination suits, the best practice whenever possible is to establish personal jurisdiction over nonresident parties in any suit adjudicating parentage.

UPA adopts the long-arm provisions of UIFSA. Tex. Fam. Code § 160.604(b). Thus, the court has personal jurisdiction over a nonresident individual if—

1. the individual is personally served with citation in Texas;
2. the individual submits to the jurisdiction of Texas by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
3. the individual resided with the child in Texas;
4. the individual resided in Texas and provided prenatal expenses or support for the child;
5. the child resides in Texas as a result of the acts or directives of the individual;
6. the individual engaged in sexual intercourse in Texas and the child may have been conceived by that act of intercourse;
7. the individual asserted parentage in the paternity registry maintained in Texas by the VSU; or
8. there is any other basis consistent with the constitutions of Texas and the United States for the exercise of personal jurisdiction.

Tex. Fam. Code § 159.201(a).

A nonresident signatory of an acknowledgment of paternity or denial of paternity is subject to personal jurisdiction in Texas only for the purposes of a suit to challenge the acknowledgment or denial. Tex. Fam. Code § 160.309(b). Thus, for example, if the sig-

natory is adjudicated to be the father in the course of the proceeding to challenge, he is not automatically subject to the court's jurisdiction for the purpose of setting child support. Texas does, however, claim personal jurisdiction for all purposes over an individual who registers with the paternity registry as a possible father of the child. Tex. Fam. Code § 159.201(a)(7). Thus, under a strict reading of these two provisions, an out-of-state father who registered as a possible father in the paternity registry could be brought into a Texas court for parentage and child support establishment, but a father who took the much more drastic step of completing an acknowledgment of paternity swearing he was the father could challenge the court's jurisdiction to set support in the challenge proceeding. If the acknowledged father is the petitioner in the challenge proceeding, his request for affirmative relief may subject him to the court's jurisdiction. In the absence of some other basis for long-arm jurisdiction, however, the court could not establish a support order against an out-of-state acknowledged father on petition to challenge by the mother.

§ 54.14 Venue

An original suit shall be filed in the county in which the child resides unless another court has continuing, exclusive jurisdiction under Family Code chapter 155 or venue is fixed in a suit for dissolution of a marriage under Family Code chapter 6. Tex. Fam. Code § 103.001(a). A child is presumed to reside where the child's parent resides, but there are several exceptions. *See* Tex. Fam. Code § 103.001(c).

If all parties and children reside in Texas and venue was improper in the court in which the original suit was filed, the court must transfer the proceeding on timely motion. Tex. Fam. Code § 103.002(a). If no child resides in Texas and the suit is filed under Family Code chapter 159 (UIFSA), the court must transfer the suit to the county of residence of the respondent. Tex. Fam. Code § 103.003(a). If the child resides in Texas, or two parties reside in Texas, the court must transfer the case to the court of continuing, exclusive jurisdiction or the county of residence of the child. Tex. Fam. Code § 103.003(b).

Transfer of venue is governed by the procedures for transfer in Family Code chapter 155. Tex. Fam. Code §§ 103.002(c), 103.003(c). See chapter 42 of this manual.

§ 54.15 Who May Bring Suit

The Family Code recognizes that the need to establish or rebut parentage may arise in many different situations and has adopted an expansive approach to standing. A proceeding to adjudicate parentage may be maintained by—

1. the child;
2. the mother of the child;
3. a man whose paternity of the child is to be adjudicated;
4. the support enforcement agency or another governmental agency authorized by other law;
5. an authorized adoption agency or licensed child-placing agency;
6. a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, is incapacitated, or is a minor;
7. a person related within the second degree by consanguinity to the mother of the child, if the mother is deceased; or
8. a person who is an intended parent.

Tex. Fam. Code § 160.602(a).

After a child having no presumed, acknowledged, or adjudicated father becomes an adult, a proceeding to adjudicate parentage may be maintained only by the adult child. Tex. Fam. Code § 160.602(b). *But see Gribble v. Layton*, 389 S.W.3d 882, 888 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (mentally disabled adult child not precluded from maintaining action to determine parentage through court-appointed guardian).

An individual may have standing to bring a parentage action but still have genetic testing denied on equitable principles or be barred by limitations. See sections 54.16 and 54.17 below.

The issue of whether a sperm donor in assisted reproduction has standing to bring a parentage proceeding has thus far resulted in two opposing opinions by Texas courts. In a 2005 case in which an unmarried man provided sperm for the impregnation of an unmarried woman, the court determined that UPA, in section 160.602(a)(3), confers standing on "a man whose paternity of the child is to be adjudicated." The man's status as sperm donor was, therefore, a matter to be decided at the merits stage of the proceeding and not as a threshold issue of standing. *See In re Sullivan*, 157 S.W.3d 911 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding [mand. denied]). A completely opposite position was taken in a 2006 case—again involving an unmarried man and an unmarried woman—with the court's holding that a sperm donor, by definition, was not

"an alleged father," and only "a man alleging himself to be the father of a child" could bring a parentage action under UPA (citing Family Code sections 101.0015 and 102.003(a)(8)). *See In re H.C.S.*, 219 S.W.3d 33 (Tex. App.—San Antonio 2006, no pet.). However, in 2007 the legislature amended UPA by adding section 160.7031, under which an unmarried man is deemed the father of a child resulting from assisted reproduction if the man provides sperm to an unmarried woman with the intent to be the child's father. To achieve this end the donor must provide the sperm to a licensed physician, and the consent of the man to be the father must be in a record signed by both the man and the woman and kept by the physician. Tex. Fam. Code § 160.7031. Without the formal agreement between the unmarried man and unmarried woman and observance of the procedures laid out in the new statute, the issues raised in the two above-cited cases are left to the judgment of the court.

A person cannot rely on a court order changing his gender identity to male to confer standing to adjudicate parentage as "a man whose paternity of the child is to be adjudicated." *In re Sandoval*, No. 04-15-00244-CV, 2016 WL 353010 (Tex. App.—San Antonio Jan. 27, 2016, orig. proceeding) (mem. op.). Family Code section 160.602(a)(8), which allows a proceeding to be brought by an "intended parent," pertains to a proceeding brought by a man alleged or claiming to be the father of the child and does not confer standing on the girlfriend of a mother whose child was produced through artificial insemination. *In re N.M.B.*, No. 04-18-000111-CV, 2018 WL 6516120, at *2 (Tex. App.—San Antonio Dec. 12, 2018, pet. denied) (mem. op.).

§ 54.16 Denial of Parental Presumption

"Denial of paternity" was at one time available only to the husband. The Texas Equal Rights Amendment eliminated that restriction, so a wife could also deny the husband's paternity, and the Family Code was amended to permit either spouse to deny the presumption. Children have been allowed to rebut the presumption in order to establish the paternity and support obligation of the true father. In 1994, the supreme court established a constitutional right in Texas for a self-alleged father to deny the paternity of the husband of his paramour under limited circumstances. *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994). With the passage of the UPA, an alleged father clearly has the right to bring an action to adjudicate parentage of a child having a presumed father, although it must be filed by the child's fourth birthday except in limited situations. Tex. Fam. Code § 160.607. In fact, the UPA makes no distinction between the biological parent and the presumed father or other litigants with respect to standing or limitations. See section 54.15 above and section 54.17 below.

One remaining distinction between the various possible litigants provides some additional protections for a child. In *In re J.A.C.*, No. 05-15-00554-CV, 2016 WL 3854215 (Tex. App.—Dallas July 13, 2016, no pet.) (mem. op.), fourteen-year-old twins were found to have standing to adjudicate parentage and, under Family Code section 160.637(b), were not bound by previous determination of parentage in divorce decrees. There was no evidence that the twins were parties to or represented in the divorce proceedings and no evidence of an acknowledgment of paternity, genetic testing, or formal adjudication of parentage.

If a child has a presumed, acknowledged, or adjudicated father, the results of genetic testing are inadmissible to adjudicate parentage unless performed (1) with the consent of both the mother and the presumed, acknowledged, or adjudicated father or (2) pursuant to a court order. Tex. Fam. Code § 160.621(c).

The statutory scheme assumes that the paternity of a presumed father not only may but must be rebutted in the same suit that seeks to establish paternity of a biological father. Paternity of a child having a presumed father may be disproved either by genetic tests that exclude the presumed father or by tests identifying another man as the father. Tex. Fam. Code § 160.631(b). The presumption may also be rebutted by the filing of a valid denial of paternity by the presumed father together with a valid acknowledgment of paternity by another person with the VSU. *See* Tex. Fam. Code § 160.204(b)(2).

Denial of Testing: Even if the proceeding is timely, the trial court may deny genetic testing if the court finds, by clear and convincing evidence, that (1) the conduct of the mother or the presumed father estops that party from denying parentage and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed father. Tex. Fam. Code § 160.608(a), (d); *see In re C.M.H.G.*, No. 02-12-00074-CV, 2014 WL 1096011 (Tex. App.—Fort Worth Mar. 20, 2014, no pet.) (per curiam) (mem. op.) (Tex. Fam. Code § 160.608 codifies paternity by estoppel and allows court to deny motion for genetic testing if conduct of deceased mother estops grandmother from denying acknowledged father's parentage).

The elements of estoppel in a parentage case are (1) a false representation or concealment of material facts, (2) made with knowledge, actual or constructive, of those facts, (3) to a party without knowledge or the means of knowledge of those facts, (4) with the intention it be acted on, and (5) reliance on the misrepresentation, to his prejudice, by the party to whom it was made. *See Stamper v. Knox*, 254 S.W.3d 537 (Tex. App.—Houston [1st Dist.] 2008, no pet.). If genetic testing is denied, the court must issue an

order adjudicating the presumed father to be the father of the child. Tex. Fam. Code § 160.608(e).

§ 54.17 Limitations

There is no longer a limitation on the right of any person with an interest in the matter to seek to establish parentage if the child does not have an acknowledged, presumed, or adjudicated father. Adults are subject to limitations, generally set at four years, on efforts to establish or rebut a parent-child relationship under UPA if there is a presumed or acknowledged father. The child has a broader right than adults to maintain a suit for parentage in some circumstances.

No Limitation on Initial Parentage Determination: A suit to establish parentage of a child having no presumed, acknowledged, or adjudicated father may be brought at any time including before the birth of the child or after the child becomes an adult. *See* Tex. Fam. Code §§ 160.606, 160.611(a). Only the adult child has standing to maintain the suit after emancipation. *See* Tex. Fam. Code § 160.602(b). Equitable estoppel has been applied to bar a mother in the course of a custody battle from litigating a four-year-old child's parentage after the child had bonded with putative father. *See In re Shockley*, 123 S.W.3d 642, 652–53 (Tex. App.—El Paso 2003, no pet.) (mother's insistence that putative father was only possible father, refusal of biological father's request for genetic testing, answering parentage suit by putative father with admission that he was father, and waiting more than four years "until custody litigation loomed on the horizon" before consenting to DNA testing that showed another man to be biological father equitably estopped her from litigating child's parentage in suit by putative father to establish himself as parent of child).

Limitation on Contest of Acknowledged Parentage: An individual who has signed an acknowledgment or denial of paternity may rescind the agreement without stating a reason, by filing a completed rescission form with the VSU within sixty days after the effective date of the acknowledgment or denial or before the date a proceeding to which the signatory is a party is initiated to adjudicate "an issue relating to the child," whichever is earlier. Tex. Fam. Code § 160.307(a), (b).

If the sixty-day period passes or a proceeding is initiated before the filing of a rescission, an individual who has signed an acknowledgment or denial of paternity may file an action to challenge the acknowledgment or denial only on the basis of fraud, duress, or material mistake of fact. The proceeding may be commenced at any time before the issuance of an order affecting the child, including an order relating to support. Tex.

Fam. Code § 160.308(a). As noted above, evidence that the acknowledged father is not rebuttably identified as the father by genetic testing is evidence of a "material mistake of fact" for purposes of setting aside the acknowledgment. Tex. Fam. Code § 160.308(d).

The parties to the acknowledgment are subject to personal jurisdiction in Texas for purposes of the suit to challenge, and if genetic testing, conducted as a result of the suit to challenge, shows the alleged or the presumed father who signed the acknowledgment or denial to be the genetic father of the child, the court hearing the contest shall adjudicate the father's paternity. Tex. Fam. Code §§ 160.309(b), 160.631(c).

Limitation on Contest of Presumed Parentage: A proceeding to adjudicate the parentage of a child having a presumed father must be brought within four years after the birth of the child unless the presumed father and the mother of the child did not live together or engage in sexual intercourse with each other during the probable time of conception *or* the presumed father was precluded from bringing a proceeding within the four-year period because of the mistaken belief that he was the child's biological father based on misrepresentations that led him to that conclusion. Tex. Fam. Code § 160.607; *see In re K.M.T.*, 415 S.W.3d 573 (Tex. App.—Texarkana 2013, no pet.) (paternity suit filed by alleged father four years and six days after birth of child barred where elements of equitable estoppel not established). The four-year limitation is not unconstitutional, as there is no fundamental right of an alleged father to establish paternity when a child has a presumed father. *In re J.C.*, ___ S.W.3d ___, No. 02-18-00029-CV, 2019 WL 4019682, at *8 (Tex. App.—Fort Worth Aug. 27, 2019, no pet. h.).

UPA allows the alleged father up to four years in which to assert his claim. However, a party in a paternity action may be equitably estopped from relying on an otherwise applicable statutory bar to recovery. The application of estoppel in paternity actions is aimed at achieving fairness as between the parents by holding both the mother and father to their prior conduct regarding the paternity of the child. *Quiroz v. Gray*, 441 S.W.3d 588 (Tex. App.—El Paso 2014, no pet.) (although father filed suit to establish paternity more than four years after child's birth, mother and presumed father are equitably estopped from relying on Code section 160.607(a)'s statute of limitations defense). *But see* Tex. Fam. Code § 160.608(a) (estoppel), § 160.637(d) (adjudication may be a defense in a subsequent suit by an individual not a party to the earlier proceeding), § 160.637(e) (a party to an adjudication may challenge the adjudication only by appeal or other judicial review).

Limitation on Husband's Dispute of Paternity If Child Is Result of Assisted Reproduction: If a husband provides sperm for assisted reproduction by his wife in accordance with Family Code subchapter H, chapter 160, he is the father of a resulting child. Tex. Fam. Code § 160.703. If the marriage is dissolved or the husband dies before the placement of eggs, sperm, or embryos, then the husband is not a parent of the resulting child unless he has consented, in a record kept by a licensed physician, that the placement take place after his death or the dissolution of the marriage. *See* Tex. Fam. Code §§ 160.706, 160.707. If a husband consents to assisted reproduction by his wife, he is the father of the resulting child. Tex. Fam. Code § 160.703. However, in one pre-UPA case, the court held that genetic testing is irrelevant in an assisted reproduction case, but that the wife is entitled to contest the husband's claim that he ratified the assisted reproduction. *In re Marriage of M.C.*, 65 S.W.3d 188, 192–93 (Tex. App.—Amarillo 2001, no pet.). A husband who did not consent to the assisted reproduction before or after the birth of the child may commence a parentage action within four years after learning of the birth of the child. Tex. Fam. Code § 160.705(a). The four-year limitation period does not apply if the husband did not provide sperm for or consent to the assisted reproduction, did not cohabit with the mother of the child since the probable time of assisted reproduction, and never openly treated the child as his own. Tex. Fam. Code § 160.705(b). If there is an established relationship between the presumed father and the child, the trial court may deny genetic testing and adjudicate the presumed father as the father of the child. *See* Tex. Fam. Code § 160.608. Since the suit is a "parentage action" under UPA, a husband whose sperm was used in the assisted reproduction will be identified as the genetic father and adjudicated as the father. Tex. Fam. Code § 160.631(c).

Limitation on Third-Party Challenge to Adjudication or Acknowledgment: An individual, other than the child, who was not a party to the acknowledgment or an adjudication of parentage must commence a proceeding to challenge the acknowledgment or order within four years after the effective date of the acknowledgment or adjudication, or the suit will be barred by limitations. Tex. Fam. Code § 160.609(b); *see In re R.A.H.*, 130 S.W.3d 68 (Tex. 2004).

However, the child or other party may be able to argue estoppel based on the conduct of the mother or presumed father and that it would be inequitable to disprove the father-child relationship. Tex. Fam. Code § 160.608(a); *see also Hausman v. Hausman*, 199 S.W.3d 38 (Tex. App.—San Antonio 2006, no pet.) (presumed father in divorce proceeding excluded by genetic testing as biological father, but mother equitably estopped from denying his paternity); *In re Shockley*, 123 S.W.3d 642.

In addition, the prior adjudication may be a "defense" to the subsequent suit by the third party—presumably meaning that, if the prior judgment is interposed as a defense, the third party would have to show at least a lack of actual notice, in addition to simply meeting the four-year limitation. Tex. Fam. Code § 160.637(d).

§ 54.18 Adjudication as Defense to Suit

A determination of parentage may be a defense to a subsequent proceeding seeking to adjudicate parentage brought by an individual, other than the child, who was not a party to the prior suit. Tex. Fam. Code § 160.637(b), (d). A prior determination of parentage may be a defense to a subsequent parentage action brought by a child only if (1) the determination was based on an unrescinded acknowledgment of paternity that is consistent with genetic testing results, (2) the adjudication was based on a finding consistent with genetic testing results and the consistency is declared in the determination or otherwise shown, or (3) the child was a party or represented by an attorney ad litem in the prior proceeding. Tex. Fam. Code § 160.637(b). It should be noted that the prior adjudication is not a bar to the suit, only an affirmative defense to the proceeding.

UPA may not be entirely consistent with the result reached by the supreme court applying former Family Code section 160.007, if that case is considered to turn on the definition of "alleged father" under prior law. *See Texas Department of Protective & Regulatory Services v. Sherry*, 46 S.W.3d 857 (Tex. 2001). The *Sherry* case has been criticized for implying that a father could be barred from ever claiming parentage by the simple expedient of obtaining a paternity decree against a known nonfather without notice to the actual father. Under UPA, the definition of "alleged father" includes a self-alleged father. *See* Tex. Fam. Code § 101.0015(a). The trial court may issue an order adjudicating paternity on default only if the alleged father is "found by the court to be the father." Tex. Fam. Code § 160.634. Thus, an alleged father claiming to have been deceived and who was not served with notice of a suit to establish parentage will continue to have a remedy. *Cf. In re K.M.S.*, 68 S.W.3d 61 (Tex. App.—Dallas 2001, pet. denied) (paternity order obtained without notice to man claiming to be father could be set aside by bill of review). However, the result in *Sherry* would arguably be the same under UPA. The child was born on January 7, 1992. A man named Cannon was listed on the child's birth certificate as the father, resided with the child and the mother for approximately three years, and sometime in 1993 was adjudicated to be the father of the child. Cannon died in 1995, and the child's mother died in May 1998, at which time Sherry came forward claiming to be the child's biological father. *Sherry*, 46 S.W.3d at 859–60. Cannon's actions in holding out the child as his own created at that time, and

would create under the 2003 amendments to the Texas version of UPA, a presumption of parentage. *See* Tex. Fam. Code § 160.204(a)(5) (during first two years of child's life, he continuously resided in household in which child resided and he represented to others that child was his own). Sherry's suit would be barred by limitations four years after the birth of the child under these facts. *See* Tex. Fam. Code § 160.607. Furthermore, his suit would be barred by the four-year statute of limitations on a nonparty's suit to set aside a parentage order, which ran from the date of the paternity order in 1993 and expired some time in 1997. *See* Tex. Fam. Code § 160.609(b).

A decree of divorce is considered to be an adjudication of parentage if the final order (1) expressly identifies the child as "a child of the marriage" or "issue of the marriage" or uses similar words indicating that the husband is the father of the child or (2) provides for the payment of child support for the child by the husband unless paternity is specifically disclaimed in the order. Tex. Fam. Code § 160.637(c).

A child is not bound by the determination of parentage in a divorce decree unless the child was a party to the proceeding or represented by an attorney ad litem or one of the other exceptions in Code section 160.637(b) applies. *See* Tex. Fam. Code § 160.637(b); *see also In re J.W.*, 97 S.W.3d 818, 823 n.9 (Tex. App.—Dallas 2003, pet. denied) (child not bound by prior paternity proceeding where his interests not adequately represented).

§ 54.19 Representation of Child

The child is not a necessary party to a parentage suit but may be made a party. Tex. Fam. Code § 160.612(a). If the child is a minor or is incapacitated and is made a party to the suit, the court must appoint an amicus attorney or attorney ad litem for the child. Tex. Fam. Code § 160.612(b). The court must also appoint an amicus attorney or attorney ad litem for a child who is not made a party to the proceeding if the court finds that the interests of the child are not adequately represented. Tex. Fam. Code § 160.612(b). UPA requires the court to appoint an amicus attorney or attorney ad litem for the child if there is a request to deny a motion for genetic testing. Tex. Fam. Code § 160.608(c). Chapter 107 of the Family Code also provides that, in a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint an amicus attorney, an attorney ad litem, or a guardian ad litem. Tex. Fam. Code § 107.021(a).

The child is bound by a parentage adjudication if (1) the determination was based on an unrescinded acknowledgment of paternity and the acknowledgment is consistent with the results of genetic testing, (2) the adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown, or (3) the child was a party or was represented in the proceeding determining parentage by an attorney ad litem. Tex. Fam. Code § 160.637(b). In other words, the child is *not* bound by an adjudication of paternity unless parentage was established in accordance with genetic test results or the child had an attorney ad litem in the suit.

The powers and duties of court-appointed representatives are set out in Family Code chapter 107. See chapter 13 of this manual for more detailed information about court-appointed representatives.

§ 54.20 Voluntary or Court-Ordered Testing

Provisions for genetic testing are set out in Family Code, subchapter F, chapter 160. These provisions govern testing whether it is done voluntarily, by court order, or by order of a support enforcement agency. Tex. Fam. Code § 160.501.

The court must order genetic testing if requested to do so by a party to the proceeding. Tex. Fam. Code § 160.502(a). There are, however, some restrictions on the right of a party to get court-ordered genetic testing, as discussed below. There is no longer a requirement that the court order genetic testing before making an adjudication of parentage. Agreed orders, orders entered for failure to submit to genetic testing, or orders on default are authorized. *See* Tex. Fam. Code §§ 160.622, 160.623, 160.634. UPA is, however, inconsistent on this point, at least with respect to a child having a presumed, acknowledged, or adjudicated father, since it provides that the paternity of a child having a presumed, acknowledged, or adjudicated father may be disproved only by genetic testing. *See* Tex. Fam. Code § 160.631(b). Genetic testing may also be used to establish or rebut the presumed biological relationship of the birth mother and the child. Tex. Fam. Code § 160.106.

If a court does order genetic testing, the order for genetic testing is enforceable by contempt. In addition, if an individual whose paternity is being determined—that is, an alleged father or a presumed father seeking to rebut the presumption—refuses to submit to genetic testing as ordered by the court, the court may adjudicate parentage contrary to the position of that party. Tex. Fam. Code § 160.622(a), (b).

Testing of the mother is not a prerequisite to testing the child and the man whose paternity is being determined. If the mother is unavailable or declines to submit to genetic testing, the court may order the testing of the child and each man whose paternity is being adjudicated. Tex. Fam. Code § 160.622(c). However, the provisions relating to the determination of paternity also apply to a determination of maternity. Tex. Fam. Code § 160.106. Presumably, if the mother was the party denying her relationship to the child or denying that the alleged father was the father of the child, the court could adjudicate either paternity or maternity contrary to her position if she failed to submit to genetic testing.

There is no statutory right to counsel under the genetic testing provisions of the Texas Family Code. *Wynn v. Johnson*, 200 S.W.3d 830 (Tex. App.—Texarkana 2006, no pet.).

§ 54.21 Experts

Genetic testing must be of a type reasonably relied on by experts in the field of genetic testing and must be performed in a properly accredited testing laboratory. Tex. Fam. Code § 160.503(a).

§ 54.22 Specimen

The specimen used for testing may consist of one or more samples of blood, buccal cells, bone, hair, or other body tissue or fluid. The specimen used in the testing is not required to be of the same kind for each individual undergoing genetic testing. Tex. Fam. Code § 160.503(b).

§ 54.23 Who May Be Tested

A court shall order the child and "other designated individuals" to submit to genetic testing if requested to do so by a party. Tex. Fam. Code § 160.502(a). UPA specifically permits genetic testing on a deceased individual. Tex. Fam. Code § 160.509. It also permits testing of various relatives of the missing father if the court "finds that the need for genetic testing outweighs the legitimate interests of the individual sought to be tested." *See* Tex. Fam. Code § 160.508.

If a child has two or more alleged or presumed fathers, the parties may agree or the court may order testing of each man concurrently or sequentially. Tex. Fam. Code § 160.502(c).

§ 54.24 Standard and Effect of Genetic Testing

To create a rebuttable presumption of paternity, the genetic testing must disclose that the man has (1) at least a 99 percent probability of paternity, using a prior probability of 0.5, as calculated by using the combined paternity index obtained in the testing and (2) a combined paternity index of at least 100 to 1. Tex. Fam. Code § 160.505(a). The presumption created by genetic testing can be rebutted only by other genetic testing that excludes the man as a genetic father of the child or identifies another man as the possible father of the child. Tex. Fam. Code § 160.505(b). Conflicts in the genetic testing results should be resolved by further genetic testing. *See* Tex. Fam. Code § 160.505(c). The court may rely on nongenetic evidence to rebut the presumption only in the case of identical brothers. *See* Tex. Fam. Code § 160.510. A similar rule would presumably apply if the case involved identical sisters. *See* Tex. Fam. Code § 160.106.

Costs of testing must be advanced by the support enforcement agency providing services in the case, by the person requesting the tests, as agreed by the parties, or as ordered by the court. Tex. Fam. Code § 160.506(a). If the support enforcement agency advances the costs, the agency may seek reimbursement from the identified father. Tex. Fam. Code § 160.506(b). A man contesting the original tests that determined him to be the father must advance the costs if he demands additional testing. *See* Tex. Fam. Code § 160.507.

A party objecting to the laboratory's choice of racial or ethnic group for statistical calculations relating to the probability of paternity may, within thirty days after receiving the report, require the testing laboratory to recalculate the probability of paternity using an ethnic or racial group different from that used by the laboratory. The individual objecting to the testing laboratory's initial choice shall, (1) if the frequencies are not available to the testing laboratory for the ethnic or racial group requested, provide the requested frequencies compiled in a manner recognized by accrediting bodies or (2) engage another testing laboratory to perform the calculations. Tex. Fam. Code § 160.503(c)(1), (c)(2).

§ 54.25 Pretrial Hearing; Temporary Orders

There is no requirement in UPA that the court hold a pretrial hearing. The court shall render a temporary order for child support for a child if the order is appropriate and the individual ordered to pay child support is (1) a presumed father of the child, (2) petitioning to have his paternity adjudicated, (3) identified as the father through genetic testing, (4) an alleged father who has declined to submit to genetic testing, (5) shown by

clear and convincing evidence to be the father of the child, or (6) the mother of the child. Tex. Fam. Code § 160.624(a).

A temporary order may include provisions for possession or access, and presumably other matters that are properly joined, but only if permitted by other law. Tex. Fam. Code § 160.624(b).

§ 54.26 Preferential Setting

There is no specific statutory requirement of a preferential setting in parentage cases. The trial court may grant a motion for preferential setting filed by a party, the amicus attorney, or the attorney ad litem for the child and give precedence to that hearing over other civil cases if the delay caused by ordinary scheduling practices will unreasonably affect the best interest of the child. Tex. Fam. Code § 105.004.

§ 54.27 Evidence at Trial

If a child has a presumed, acknowledged, or adjudicated father, the results of genetic testing are inadmissible to adjudicate parentage unless performed (1) with the consent of both the mother and the presumed, acknowledged, or adjudicated father or (2) under an order of the court. Tex. Fam. Code § 160.621(c).

The report of a genetic testing expert is self-authenticating and admissible in evidence if signed under penalty of perjury. *See* Tex. Fam. Code § 160.504(a).

In addition, the records are admissible for chain-of-custody purposes if the documentation includes (1) the name and photograph of each individual whose specimens have been taken, (2) the name of each individual who collected the specimens, (3) the places in which the specimens were collected and the date of each collection, (4) the name of each individual who received the specimens in the testing laboratory, and (5) the dates the specimens were received. Tex. Fam. Code § 160.504(b).

Copies of bills for genetic testing and for prenatal and postnatal health care for the mother and child that are furnished to the adverse party on or before the tenth day before the date of a hearing are admissible to establish the amount of the charges billed and that the charges were reasonable, necessary, and customary. Tex. Fam. Code § 160.621(d).

A party objecting to the results of genetic testing may call one or more genetic testing experts to testify in person or by telephone, videoconference, deposition, or another

method approved by the court. Unless otherwise ordered by the court, the party offering the testimony bears the expense for the expert testifying. Tex. Fam. Code § 160.621(b).

COMMENT: There is no longer a hearsay objection to the admissibility of the bills for health care and for genetic testing if copies are furnished at least ten days before the trial. It is not the apparent purpose of the statute to prevent the introduction of controverting evidence, only to avoid the necessity of live testimony or a business records affidavit to authenticate the record and prove the charges are reasonable, necessary, and customary.

§ 54.28 No Jury Trial

The court shall adjudicate paternity of a child without a jury. Tex. Fam. Code § 160.632; *see also* Tex. Fam. Code § 105.002(b)(2).

§ 54.29 Order

At the conclusion of the case, the court shall render an order adjudicating whether a man alleged or claiming to be the father is the parent of the child. Tex. Fam. Code § 160.636(a).

Dismissal with Prejudice Prohibited: A dismissal for want of prosecution can be only without prejudice; a dismissal that purports to be with prejudice is void and has the effect of a dismissal without prejudice. Tex. Fam. Code § 160.635.

Default Order or Order on Admission of Alleged Father: If the respondent defaults and is found by the court to be the father, the court shall issue an order adjudicating his paternity. Tex. Fam. Code § 160.634. The court shall render an order adjudicating paternity based on an admission by the alleged father only if (1) the man has filed a pleading admitting paternity or admitted paternity under penalty of perjury when making an appearance or during a hearing and (2) the court finds that there is no reason to question the admission. Tex. Fam. Code § 160.623.

Order on Exclusion: If genetic testing excludes the man from the possibility of being the father of the child, the man shall be adjudicated as not being the father of the child. Tex. Fam. Code § 160.631(d). A properly conducted blood test positively excluding the man has been judicially found to be clear and convincing evidence of nonpaternity. *See Murdock v. Murdock*, 811 S.W.2d 557, 560 (Tex. 1991).

Order on Positive Tests: If the court finds that the genetic tests identify the alleged father as the child's father, the court shall adjudicate the man as being the father of the child. Tex. Fam. Code § 160.631(c).

Order If Child Has Presumed, Acknowledged, or Adjudicated Father: If paternity of a child is to be *disproved*, the order must be based on genetic tests excluding the presumed, acknowledged, or adjudicated father as the father of the child or identifying another man as the father of the child. Tex. Fam. Code § 160.631(b).

Order Relating to Child: An order adjudicating parentage must identify the child by name and date of birth. Tex. Fam. Code § 160.636(b). On request of a party and for good cause shown, the court may order that the name of the child be changed. Tex. Fam. Code § 160.636(e); *see Anderson v. Dainard*, 478 S.W.3d 147, 153 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (no abuse of discretion in changing child's last name when best-interest evidence "mixed"); *In re M.C.F.*, 121 S.W.3d 891 (Tex. App.—Fort Worth 2003, no pet.) (reversing finding that name change was in child's best interest). If the order of the court is at variance with the child's birth certificate, the court shall order the VSU to issue an amended birth record. Tex. Fam. Code § 160.636(f).

Order Relating to Challenge of Acknowledgment or Denial of Paternity: The court shall order the VSU to amend the birth certificate "if appropriate" at the conclusion of a proceeding to challenge an acknowledgment or denial of paternity. Tex. Fam. Code § 160.309(e).

Child Support: On a finding of parentage, the court may order retroactive child support as provided by Family Code chapter 154 and, on a proper showing, order a party to pay an equitable portion of all the prenatal and postnatal health-care expenses of the mother and the child. Tex. Fam. Code § 160.636(g). In rendering an order for retroactive child support, the court shall use the child support guidelines provided by chapter 154, together with any relevant factors. Tex. Fam. Code § 160.636(h). See chapter 9 of this manual.

COMMENT: A suit to establish parentage is an original suit affecting the parent-child relationship and is governed by many of the same Family Code provisions that are relevant to custody actions in the context of a divorce or otherwise. Review the discussion in chapter 40 of this manual before proceeding with a temporary hearing or final trial to ensure that all applicable statutes are followed, such as Code section 153.603, which requires a parenting plan in the final order. (The parenting plan requirements do not

apply to proceedings in a title IV-D case relating to the determination of parentage. Tex. Fam. Code § 153.611.)

§ 54.30 Attorney's Fees and Costs

The court may assess filing fees, reasonable attorney's fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses. Attorney's fees awarded by the court may be paid directly to the attorney, and the attorney may enforce the order in the attorney's own name. However, the court may not assess fees, costs, or expenses against the support enforcement agency of Texas or another state, except as provided by other law. Tex. Fam. Code § 160.636(c), (d).

The following persons are also entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit: (1) an attorney appointed as an amicus attorney or as an attorney ad litem for the child and (2) a professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate. Tex. Fam. Code § 107.023(a). The court may determine that fees awarded to an amicus attorney, an attorney ad litem for the child, or a guardian ad litem for the child are necessaries for the benefit of the child. Tex. Fam. Code § 107.023(d).

A family court is not required to state good cause for adjudging costs against the successful party as is required in other civil cases. *Goheen v. Koester*, 794 S.W.2d 830, 835–36 (Tex. App.—Dallas 1990, writ denied).

§ 54.31 Inheritance Rights

If the parent-child relationship between a decedent and a child has not previously been established or terminated, the probate court may determine parentage for the purpose of inheritance. *See* Tex. Est. Code §§ 201.051, 201.052. Proof of paternity under the Estates Code must be made "by clear and convincing evidence." Tex. Est. Code § 201.052(d).

The Family Code does not address the standard of proof but mandates that parentage be "adjudicated"—

1. on the basis of an admission of paternity if "there is no reason to question the admission" (Tex. Fam. Code § 160.623(b));

2. on the basis of a presumption if there is a presumed father and genetic testing is denied (Tex. Fam. Code § 160.608(e)); and

3. on the basis of genetic testing results, if they meet the statutory standard and are not rebutted by other results of genetic testing (Tex. Fam. Code § 160.631(c)).

Whether UPA, which now governs in probate proceedings, prevails over the "clear and convincing evidence" standard in the Estates Code is yet to be determined. *See* Tex. Fam. Code §§ 160.002, 160.103(a).

The Estates Code provides that the probate court may declare that a parent of a child under eighteen years of age may not inherit from or through the child on a finding by clear and convincing evidence of certain facts that substantially mirror several of the grounds for termination of the parent-child relationship in Family Code section 161.001; these grounds involve abandonment, failure to support, or responsibility for death or serious injury of a child. *See* Tex. Est. Code § 201.062.

§ 54.32 Birth Certificate

On a determination of paternity, the petitioner must provide the clerk of the court in which the order was rendered the information necessary to prepare the report of determination of paternity. (The report is section 4 of the VSU form entitled "Information on Suit Affecting the Family Relationship," which is reproduced as form 56-18 in this manual.) The clerk must prepare the report immediately after the order becomes final and forward it to the state registrar. Tex. Fam. Code § 108.008.

The state registrar will substitute a new birth certificate for the original based on the order. The new certificate may not show that the parent-child relationship was established after the child's birth but may show the child's actual place and date of birth. Tex. Fam. Code § 108.009.

§ 54.33 Paternity Registry

Although it does not create a presumption of paternity, a man may register to be notified of a proceeding for adoption or termination of parental rights regarding a child he may have fathered by filing a "registration for notification" with the VSU before, or within thirty-one days after, the birth of the child. Tex. Fam. Code § 160.402(a). The mother is not entitled to notice of the registration unless she has provided an address to the VSU. Tex. Fam. Code § 160.412(a).

Registration with the paternity registry entitles the registrant to notice of a proceeding for termination or adoption with respect to the child, but it does not "commence a proceeding to establish paternity." Tex. Fam. Code § 160.411(3). The registration may be used against the registrant as an admission in a suit to establish paternity. Tex. Fam. Code § 160.411(4). However, the registrant may rescind his registration at any time. Tex. Fam. Code § 160.414. The registration simply identifies a child the man "may have fathered." Tex. Fam. Code § 160.402(a).

The paternity registry may be a source for service information on a self-alleged father and probably should be searched as a precaution against a subsequent claim of parentage by a nonparty to the parentage action. *See In re K.M.S.*, 68 S.W.3d 61 (Tex. App.—Dallas 2001, pet. denied) (paternity order set aside by bill of review when notice was not given to man claiming to be father). A man who registers subjects himself to long-arm jurisdiction. Tex. Fam. Code § 159.201(a)(7).

No fee may be charged for filing or rescinding a registration. A fee for processing a search or furnishing a certificate concerning the search may be charged, except to a support enforcement agency. Tex. Fam. Code § 160.416. A support enforcement agency includes the office of the attorney general, domestic relations offices, and the Department of Family and Protective Services. *See* Tex. Fam. Code § 160.102(17).

Failure to register may facilitate the termination of the father's parental rights by allowing termination without notice. Tex. Fam. Code § 160.404; *In re O.L.R.M.*, No. 04-13-00681-CV, 2014 WL 2548349 (Tex. App.—San Antonio June 4, 2014, no pet.) (mem. op.) (alleged father had no standing to file suit to adjudicate paternity of adopted infant child when he failed to register with paternity registry before birth of child or by thirty-first day after child was born). See chapter 50 of this manual.

§ 54.34 Gestational Agreements

A "gestational" mother is a woman who gives birth to a child pursuant to an agreement that she will not have a mother-child relationship with that child. *See* Tex. Fam. Code §§ 160.751, 160.754. The Texas Family Code authorizes an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and that provides that the intended parents become the parents of the child. *See* Tex. Fam. Code § 160.752(a).

Parties and Prerequisites: A gestational agreement must be in writing and agreed to by the gestational mother, her husband if she is married, and each donor (egg or sperm

donor) other than the intended parents. Tex. Fam. Code § 160.754(a)(2). The agreement must also be agreed to by the intended parents, who must be married to each other. Tex. Fam. Code § 160.754(b).

The gestational mother's eggs may not be used in the assisted reproduction procedure. Tex. Fam. Code § 160.754(c). A gestational agreement may not be used if the child is conceived by means of sexual intercourse. Tex. Fam. Code § 160.754(f).

Medical Issues and Disclosures: The gestational agreement must state that the physician who will perform the assisted reproduction procedure has informed the parties to the agreement of (1) the rate of successful conceptions and births attributable to the procedure, including the most recent published outcome statistics of the procedure at the facility at which it will be performed; (2) the potential for and risks associated with the implantation of multiple embryos and consequent multiple births resulting from the procedure; (3) the nature of and expenses related to the procedure; (4) the health risks associated with, as applicable, fertility drugs used in the procedure, egg retrieval procedures, and egg or embryo transfer procedures; and (5) reasonably foreseeable psychological effects resulting from the procedure. Tex. Fam. Code § 160.754(d).

In addition, a court may not validate an agreement unless "the prospective gestational mother has had at least one previous pregnancy and delivery and carrying another pregnancy to term and giving birth to another child would not pose an unreasonable risk to the child's health or the physical or mental health of the prospective gestational mother." Tex. Fam. Code § 160.756(b)(5). The medical evidence must also show "that the intended mother is unable to carry a pregnancy to term and give birth to the child or is unable to carry the pregnancy to term and give birth to the child without unreasonable risk to her physical or mental health or to the health of the unborn child" as a prerequisite to validation of the agreement by the court. Tex. Fam. Code § 160.756(b)(2).

Time for Executing Agreement: The agreement must be signed at least fifteen days before the implantation of eggs, sperm, or embryos to the gestational mother. Tex. Fam. Code § 160.754(e).

Gestational Mother's Right to Make Health-Care Decisions: A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo. Tex. Fam. Code § 160.754(g).

Validation Requirement: A gestational agreement must be validated by a court before the birth of the child, or it is unenforceable; if the agreement is unenforceable,

the gestational mother becomes the presumed parent on birth of the child. *See* Tex. Fam. Code § 160.762(a), (b).

Effect of Failure to Validate: A party who is an intended parent under an agreement that has not been validated may be held liable for the support of a child born under the agreement even if the agreement is otherwise unenforceable. Tex. Fam. Code § 160.762(c). The intended parent party to an unenforceable gestational agreement may also be required to pay the gestational mother's costs relating to the agreement and all her costs and attorney's fees incurred to enforce her right to support and reimbursement. Tex. Fam. Code § 160.762(d).

Petition to Validate Gestational Agreement: A petition to validate a gestational agreement may be filed if (1) the prospective gestational mother or the intended parents have resided in Texas for the ninety days preceding the date the proceeding is commenced; (2) the prospective gestational mother's husband, if she is married, is joined as a party to the proceeding; and (3) a copy of the gestational agreement is attached to the petition. Tex. Fam. Code § 160.755(b). Intended parents have standing to maintain the suit. Tex. Fam. Code § 160.602(a)(8). The gestational agreement statute contains no venue provision; however, personal jurisdiction over the parties is required. *See* Tex. Fam. Code § 160.756(b)(1).

Hearing on Petition to Validate Agreement: The court may validate a gestational agreement only if the court finds (1) the parties have submitted to the jurisdiction of the court under the jurisdictional standards of UPA; (2) the medical evidence provided shows that the intended mother is unable to carry a pregnancy to term and give birth to the child or is unable to carry the pregnancy to term and give birth to the child without unreasonable risk to her physical or mental health or to the health of the unborn child; (3) unless waived by the court, an agency or other person has conducted a home study of the intended parents and has determined that the intended parents meet the standards of fitness applicable to adoptive parents; (4) each party to the agreement has voluntarily entered into and understands the terms of the agreement; (5) the prospective gestational mother has had at least one previous pregnancy and delivery and carrying another pregnancy to term and giving birth to another child would not pose an unreasonable risk to the child's health or the physical or mental health of the prospective gestational mother; and (6) the parties have adequately provided for which party is responsible for all reasonable health-care expenses associated with the pregnancy, including providing for who is responsible for those expenses if the agreement is terminated. Tex. Fam. Code § 160.756(b).

Order Validating Agreement: If the court finds that the requirements of Family Code section 160.756(b) have been met, the court may render an order validating the gestational agreement and declaring that the intended parents under the agreement will be the parents of a child born under the agreement. Tex. Fam. Code § 160.756(c). If a gestational mother marries *after* the rendition of an order validating the agreement (1) the validity of the agreement is not affected, (2) the husband's consent is not required, and (3) the husband is not a presumed father of the child born under terms of the validated agreement. Tex. Fam. Code § 160.761.

Termination of Gestational Agreement: Before the gestational mother becomes pregnant by means of assisted reproduction, the gestational mother, her husband if she is married, or either intended parent may terminate a validated agreement by giving written notice of the termination to each other party to the agreement. Notice of the termination of the agreement must also be filed with the court. On receipt of the notice of termination of the agreement, the court must vacate the order validating the agreement. A prospective gestational mother and her husband are not liable to the intended parents for termination of the agreement if proper notice is given in accordance with Family Code section 160.759. Tex. Fam. Code § 160.759.

The statute does not address potential liability of the intended parents to the gestational mother, if the intended parents terminate the agreement.

Confirmation of Intended Parents after Birth of Child: The intended parents are required to file a notice of birth with the court not later than the three-hundredth day after the date assisted reproduction occurred. After receiving the notice of birth, the court shall render an order that confirms that the intended parents are the child's parents, requires the gestational mother to surrender the child to the intended parents, if necessary, and requires the vital statistics unit to issue a birth certificate naming the intended parents as the child's parents. If a person alleges that the child born to the gestational mother did not result from assisted reproduction, the court must order parentage testing to determine the child's parentage. If the intended parents fail to file the required notice of birth, the gestational mother or an appropriate state agency may do so, and on a showing that an order validating the gestational agreement was properly rendered the court shall order that the intended parents are the child's parents and are financially responsible for the child. Tex. Fam. Code § 160.760.

Court's Jurisdiction: Except as theoretically limited by the jurisdictional provision of the Uniform Child Custody Jurisdiction and Enforcement Act, the court validating a gestational agreement has continuing, exclusive jurisdiction of all matters arising out of

the gestational agreement until the child is 180 days of age. *See* Tex. Fam. Code § 160.758.

Access to Records: Records relating to the validation of gestational agreements "are subject to inspection under the same standards of confidentiality that apply to an adoption under the laws of this state." Tex. Fam. Code § 160.757. Presumably, the intended parents would stand in the shoes of adoptive parents under chapter 162 of the Family Code for the purpose of this statute.

Irrebuttable Presumption Resulting from Gestational Birth: The parent-child relationship established by gestational agreement is akin to adoption. The mother-child relationship exists between the intended mother and the child on confirmation by the court "notwithstanding any other" law and "regardless of the fact that the gestational mother gave birth to the child." Tex. Fam. Code § 160.753(a). The father-child relationship exists between the intended father and the child on confirmation by the court of his parentage under the gestational agreement. Tex. Fam. Code § 160.753(b).

Reporting Requirement: Health-care facilities are required to make statistical reports to the Texas Department of Health of the number of assisted reproduction procedures under a gestational agreement performed during the year and the number and current status of embryos created through such procedures but not implanted. Tex. Fam. Code § 160.763. This requirement places no additional requirements on the parties to the agreements or their attorneys.

§ 54.35 Useful Websites

The following websites contain information relating to the topic of this chapter:

Attorney general's Acknowledgement of Paternity (AOP) Certification Training (§ 54.5)
https://www.texasattorneygeneral.gov/cs/acknowledgment-of-paternity-aop-certification-training

Attorney general's instructions regarding AOP form (§ 54.5)
https://www.texasattorneygeneral.gov/cs/aop-certified-entities

Uniform Parentage Act as approved by NCCUSL (§ 54.12)
www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20(2017)

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Chapter 55

International SAPCR Issues

I. Prevention of International Parental Child Abduction Act

§ 55.1 Introduction

The Prevention of International Parental Child Abduction Act (PIPCA) applies to all suits affecting the parent-child relationship. *See* Tex. Fam. Code §§ 153.501–.503. In applicable cases, PIPCA ensures that courts determine the risk of international parental child abduction and order preventive measures based on that risk with the goal of discouraging or preventing international parental abduction in high-risk cases. *See* John J. Sampson, et al., *Sampson, Tindall & England's Texas Family Code Annotated* ch. 153, subchapter I, cmt. (29th ed. 2019).

§ 55.2 Potential Risk of Abduction

In a suit affecting the parent-child relationship, if a party presents credible evidence to the court that indicates a potential risk of international abduction of a child by the child's parent, the court, on its own motion or at a party's request, shall determine whether it is necessary to take one or more of the measures described in Family Code section 153.503 to protect the child from the risk of abduction by the parent. Tex. Fam. Code § 153.501(a).

In making its determination whether to take any of the measures described in Family Code section 153.503, the court shall consider (1) the public policy of Texas assuring that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child and the consideration of the best interest of the child under Family Code section 153.002; (2) the risk of international abduction of the child by a child's parent based on the court's evaluation of the risk factors described in Family Code section 153.502; (3) any obstacles to locating, recovering, and returning the child if the child is abducted to a foreign country; and (4) the potential

physical or psychological harm to the child if the child is abducted to a foreign country. Tex. Fam. Code § 153.501(b).

In a hearing under PIPCA, it is a third-degree felony to knowingly make a false statement relating to a child custody determination made in a foreign country, or to knowingly cause such a false statement to be made. Tex. Penal Code § 37.14.

§ 55.3 Abduction Risk Factors

To determine whether there is a risk of the international abduction of a child by the child's parent, the court shall consider evidence that the parent (1) has taken, enticed away, kept, withheld, or concealed a child in violation of another person's right of possession of or access to the child, unless the parent presents evidence that parent believed in good faith that the parent's conduct was necessary to avoid imminent harm to the child or the parent; (2) has previously threatened to take, entice away, keep, withhold, or conceal a child in violation of another person's right of possession of or access to the child; (3) lacks financial reason to stay in the United States, including evidence that the parent is financially independent, is able to work outside the United States, or is unemployed; (4) has recently engaged in planning activities that could facilitate the removal of the child from the United States by the parent, including quitting a job, selling a primary residence, terminating a lease, closing bank accounts, liquidating other assets, hiding or destroying documents, applying for a passport or visa or obtaining other travel documents for the parent or the child, or applying to obtain the child's birth certificate or school or medical records; (5) has a history of domestic violence that the court is required to consider under Family Code section 153.004; or (6) has a criminal history or a history of violating court orders. Tex. Fam. Code § 153.502(a). In considering evidence of planning activities in item (4) above, the court must also consider any evidence that the parent was engaging in those activities as part of a safety plan to flee from family violence. Tex. Fam. Code § 153.502(a–1).

If the court finds that there is credible evidence of a risk of international abduction of a child by the child's parent based on the court's consideration of the above risk factors, the court shall also consider evidence regarding whether the parent (1) has strong familial, emotional, or cultural ties to another country, particularly a country that is not a signatory to or compliant with the Hague Convention on the Civil Aspects of International Child Abduction and (2) lacks strong ties to the United States, regardless of whether the parent is a citizen or permanent resident of the United States. Tex. Fam. Code § 153.502(b).

If the court finds that there is credible evidence of a risk of international abduction of a child by the child's parent based on the court's consideration of the risk factors listed in Family Code section 153.502(a), the court may also consider evidence regarding whether (1) the parent is undergoing a change in the status with the United States Immigration and Naturalization Service that would adversely affect that parent's ability to legally remain in the United States; (2) the parent's application for United States citizenship has been denied by the United States Immigration and Naturalization Service; or (3) the parent has forged or presented misleading or false evidence to obtain a visa, a passport, a Social Security card, or any other identification card or has made any misrepresentation to the United States government. Tex. Fam. Code § 153.502(c)(1)–(3). *See also Wiese v. AlBakry*, No. 03-14-00799-CV, 2016 WL 3136874, at *6 (Tex. App.—Austin June 1, 2016, no pet.) (mem. op.) (Hague Convention expressly provides that parent's residency status is immaterial to evaluation of potential risk of abduction, and change in residency status is not considered material and substantial change to support imposition or modification of restrictions on international travel).

The court may also consider whether the foreign country to which the parent has ties (1) presents obstacles to the recovery and return of a child who is abducted to the country from the United States; (2) has any legal mechanisms for immediately and effectively enforcing an order regarding the possession of or access to the child issued by a Texas court; (3) has local laws or practices that would enable the parent to prevent the child's other parent from contacting the child without due cause; restrict the child's other parent from freely traveling to or exiting from the country because of that parent's gender, nationality, or religion; or restrict the child's ability to legally leave the country after the child reaches the age of majority because of the child's gender, nationality, or religion; (4) is included by the United States Department of State on a list of state sponsors of terrorism; (5) is a country for which the United States Department of State has issued a travel warning to United States citizens regarding travel to the country; (6) has an embassy of the United States in the country; (7) is engaged in any active military action or war, including a civil war; (8) is a party to and compliant with the Hague Convention on the Civil Aspects of International Child Abduction according to the most recent report on compliance issued by the United States Department of State; (9) provides for the extradition of a parental abductor and the return of the child to the United States; or (10) poses a risk that the child's physical health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children, including arranged marriages, lack of freedom of religion, child labor, lack of child abuse laws, female genital mutilation, and any form of slavery. Tex. Fam. Code § 153.502(c)(4).

§ 55.4 Preventive Measures

If the court finds credible evidence of a risk of international abduction of a child and that orders are necessary under Family Code section 153.501, the court may appoint a person other than the child's parent who presents a risk of abducting the child as the child's sole managing conservator or require supervised visitation of the parent by a visitation center or independent organization until the court finds under section 153.501 that supervised visitation is no longer necessary. Tex. Fam. Code § 153.503(1), (2); *In re Sigmar*, 270 S.W.3d 289 (Tex. App.—Waco 2008, orig. proceeding [mand. denied]).

The court may enjoin the parent or any person acting on the parent's behalf from disrupting or removing the child from the school or child care facility in which the child is enrolled or approaching the child at any location other than a site designated for supervised visitation. Tex. Fam. Code § 153.503(3).

The court may order passport and travel controls, including controls that prohibit the parent and any person acting on the parent's behalf from removing the child from Texas or the United States; require the parent to surrender any passport issued in the child's name, including any passport issued in the name of both the parent and the child; and prohibit the parent from applying on behalf of the child for a new or replacement passport or international travel visa. Tex. Fam. Code § 153.503(4).

The court may require the parent to provide (1) to the United States Department of State's Office of Children's Issues and the relevant foreign consulate or embassy written notice of the court-ordered passport and travel restrictions for the child and a properly authenticated copy of the court order detailing the restrictions and documentation of the parent's agreement to the restrictions and (2) to the court proof of receipt of the required written notice by the United States Department of State's Office of Children's Issues and the relevant foreign consulate or embassy. Tex. Fam. Code § 153.503(5).

The court may order the parent to execute a bond or deposit security in an amount sufficient to offset the cost of recovering the child if the child is abducted by the parent to a foreign country. Tex. Fam. Code § 153.503(6).

The court may authorize the appropriate law enforcement agencies to take measures to prevent the abduction of the child by the parent. Tex. Fam. Code § 153.503(7).

The court may include in its order provisions identifying the United States as the country of habitual residence of the child, defining the basis for the court's exercise of jurisdiction, and stating that a party's violation of the order may subject the party to a civil

penalty or criminal penalty or to both civil and criminal penalties. Tex. Fam. Code § 153.503(8).

§ 55.5 Additional Resources

The Hague Convention website, **www.hcch.net**, provides the text of the Hague Convention, a list of contracting states, contact details of Central Authorities, and other helpful information.

Other helpful resources are **https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction.html** and **http://bringseanhome.org/** (lists active cases and helpful resources).

[Sections 55.6 through 55.10 are reserved for expansion.]

II. Adoption of Foreign-Born Children

§ 55.11 International Adoptions and U.S. Citizenship

International adoptions fall into two categories: Hague Convention adoptions and non–Hague Convention adoptions. In April 2008 the United States became compliant with the rules and regulations of the Hague Convention on Intercountry Adoption. The Convention standards were designed to create international practices that prevent the sale of children, human trafficking, and child abduction. They also help to ensure that the adoptions are in the best interest of the child. To process an adoption with a Hague Convention country, the adoptive family must work with an approved person or an accredited agency who meets federal requirements.

As of July 14, 2014, families who adopt from non–Hague Convention countries are also required to work with an approved person or an accredited agency in order to comply with the Intercountry Adoption Universal Accreditation Act of 2012 (UAA). 42 U.S.C. §§ 14901–14925.

Children born abroad who have been adopted by U.S. citizens in a foreign country will be issued a variety of visas. The adoptive parents will apply for the appropriate visa at the U.S. consulate office in the country where the adoption is granted. If the adoptive parents traveled to meet the child before the adoption they will receive an IR-3 visa if they are adopting from a non–Hague Convention country or an IH-3 visa if they are

adopting from a Hague Convention country. The IH visa is a new classification for children coming from a Hague Convention country. Pursuant to the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000), a child born abroad and adopted by a U.S. citizen who enters the U.S. with an IR-3 or IH-3 visa automatically obtains the status of a U.S. citizen on entry into the U.S. A certificate of citizenship should be received within forty-five days after the child's arrival in the U.S. There is no need to apply for a certificate of citizenship in these cases.

If both of the adoptive parents did not travel to meet the child before the adoption finalization in the foreign country, they will receive an IR-4 or an IH-4 visa. Children born abroad who enter the United States based on a custody order will also be issued an IR-4 or IH-4 visa. A child who enters the U.S. with one of these visas will not automatically receive a certificate of citizenship. If the adoptive parents only have legal guardianship when they enter the U.S. with the child they *must* obtain a U.S. adoption before the child turns sixteen years of age and then apply to the U.S. Citizenship and Immigration Services to receive citizenship for the child.

If the adoption is granted abroad and the child enters with an IR-4 or IH-4 visa, the adoptive parents can (1) apply for citizenship after they reside with the child in the U.S. for two years or (2) apply for a judicial recognition of their adoption and apply for citizenship following the entry of the decree. Failure to apply for citizenship on behalf of the child could result in deportation at a later date.

For more details regarding foreign adoption, see **https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process.html** and **https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/child-citizenship-act.html** (Child Citizenship Act of 2000).

§ 55.12 Registration of Foreign Order

An adoption order (or its equivalent) rendered to a resident of Texas by a foreign country must be accorded full faith and credit by a Texas court and enforced as if the order were rendered by a Texas court unless the adoption law or process of the foreign country violates the fundamental principles of human rights or the laws or public policy of Texas. Tex. Fam. Code § 162.023(a).This is accomplished by the filing of a petition for registration of a foreign adoption, which may include a request for a name change. See form 55-11 in this manual. On a finding by the court that the foreign adoption order meets the requirements of Family Code section 162.023(a), it shall order the state registrar to register the order under Health and Safety Code chapter 192 and file a certificate

of birth for the child under Health and Safety Code section 192.006. Tex. Fam. Code § 162.023(b).

Some judges take the position that the registration is ministerial and administrative and a hearing with testimony is unnecessary. Judges following this line of thought believe that the filing of the petition, with supporting documents, and an order is sufficient for the court to sign the registration order. Other judges believe that a hearing is required. Before filing a petition to register a foreign adoption order, the attorney should check with the district clerk and the court to ascertain the policy in that jurisdiction. The practitioner should also check with the court to determine what supporting documents should be filed. Some judges see their role as ruling that the adoption is in the best interest of the child, and therefore they will require a copy of the home study, post-placement reports, and the criminal history check. Other judges take the position that the adoption has already been ruled on and that they merely have to determine that the order submitted for registration is a valid order.

§ 55.13 New Birth Certificate

The vital statistics unit will require a completed certificate of adoption (see form 53-28 in this manual) in order to prepare the new certificate of birth. The fees associated with filing and obtaining an amended birth certificate based on a foreign adoption are the same as for an amended birth certificate following a domestic adoption. Under the federal regulations an adoption that is finalized in compliance with the Hague Convention does not require a readoption; however, the Texas Department of Health vital statistics unit requires a certificate of adoption in order to issue a Texas birth certificate for a child who is born abroad. For the clerk of the court to issue a certificate of adoption, a suit must be filed to register the foreign judgment and an order entered.

§ 55.14 Domestic Adoption of Foreign-Born Children

COMMENT: The practitioner should be extremely cautious when processing an adoption in the United States when the adoption involves a child from a Hague Convention country. Failure to handle the case correctly can result in the child's being denied permanent residence in the U.S.

If a child to be adopted is a citizen of a Hague Convention country but is present in the U.S., it may be possible to process the adoption as a domestic adoption by securing a letter from the Central Authority of the child's country of origin stating that they consider the child to be a habitual resident of the U.S. If the Central Authority in the child's

country of origin does not respond within 120 days after receiving notice or a longer time as determined by the court, the case can proceed as a domestic adoption. There must be proof that the Central Authority was notified, and the decree must contain a recital that the notice was provided. Failure to process the case in the proper manner can lead to the child's failure to receive legal status in the U.S., and therefore the child will be subject to future deportation even though the child has been adopted by U.S. citizens.

A child who was born in a non–Hague Convention country but is residing in the U.S. can be adopted through a domestic adoption process. The child will qualify for citizenship if he is adopted by U.S. citizens and the adoption is finalized before the child's sixteenth birthday.

[Sections 55.15 through 55.20 are reserved for expansion.]

III. Hague Convention and International Child Abduction Remedies Act

§ 55.21 Hague Convention

The Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention") was established at The Hague on October 25, 1980, to provide a remedy for international child abductions. *See* Hague Convention on the Civil Aspects of Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10498 (March 26, 1986). The objectives of the Hague Convention are to secure the prompt return of children wrongfully removed to or retained in any contracting state and to ensure the rights of custody and of access under the law of the contracting state are effectively respected in other contracting states. Hague Convention, art. 1, 51 Fed. Reg. at 10498.

The text of the Hague Convention can be found at **https://www.hcch.net/en/instruments/conventions/full-text/?cid=24**.

A list of nations that have ratified or acceded to the Convention with respect to the United States can be found at **http://travel.state.gov/content/dam/childabduction/complianceReports/2014.pdf**.

§ 55.22 International Child Abduction Remedies Act

The United States ratified the Hague Convention on April 29, 1988, and became a "contracting state" effective July 1, 1988. To implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. ch. 121 (later transferred to 22 U.S.C. ch. 97).

In implementing the Convention, Congress found that the Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter wrongful removal and retention. 22 U.S.C. § 9001(a)(4). The remedies set out in the Hague Convention and ICARA are not exclusive, but are in addition to others available under other laws or international agreements. 22 U.S.C. § 9003(h).

The text of ICARA can be found at **http://travel.state.gov/content/dam/childabduction/International_Child_Abduction_Remedies_Act.pdf**.

§ 55.23 Application of Hague Convention

The Convention applies to any child under the age of sixteen who was a habitual resident in a contracting state immediately before the breach of any custody or access rights. Hague Convention, art. 4, 51 Fed. Reg. at 10498; *In re S.J.O.B.G.*, 292 S.W.3d 764 (Tex. App.—Beaumont 2009, no pet.) (Convention did not apply because child was not habitually resident in Norway immediately before child's removal to Texas).

The Convention does not apply if either the country of habitual residence of the child or the one in which the child is being retained is not a signatory to the Convention. See *David B. v. Helen O.*, 625 N.Y.S.2d 436 (N.Y. Fam. Ct. 1995); *In re Mohsen*, 715 F. Supp. 1063 (D. Wyo. 1989).

§ 55.24 Central Authority

To promote cooperation, the Hague Convention provides for the creation of a central authority responsible for applying the Convention in each country in which it is in force. Any person, institution, or body claiming that a child has been removed or retained in breach of custody rights may apply either to the central authority of the child's habitual residence or to the central authority of any contracting state for assistance in securing return of the child. Hague Convention, art. 8, 51 Fed. Reg. at 10499.

Each central authority, either directly or through an intermediary, is charged to—

1. discover the whereabouts of a child who has been wrongfully removed or retained;
2. prevent further harm to the child or prejudice to the parties;
3. secure the voluntary return of the child or to bring about an amicable resolution of the issues;
4. exchange social background information regarding the child;
5. provide information as to the law in their state in connection with the application of the Convention;
6. initiate or facilitate judicial or administrative proceedings to obtain the return of the child and rights of access in some cases;
7. where required, provide or facilitate legal advice, counsel, and advisors;
8. provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; and
9. keep each other informed with respect to the operation of the Convention and to attempt to eliminate any obstacles to its application.

Hague Convention, art. 7, 51 Fed. Reg. at 10498.

By executive order dated August 11, 1988, the president designated the United States Department of State as the central authority for the United States, as authorized by ICARA. *See* 22 U.S.C. § 9006(a). Questions regarding the Convention may be directed to the Office of Children's Issues, U.S. Department of State, 2201 C Street N.W., SA-22, Room 2100, Washington, D.C. 20520-4818, (telephone) 888-407-4747, (facsimile) 202-312-9743. Information on the Office of Children's Issues can be found at **https://travel.state.gov/content/travel/en/about-us/au-intl-parent-child-abduct.html**.

§ 55.25 Habitual Residence

The term *habitual residence* is not defined in the Convention or ICARA. It is a concept intended to be applied to the facts and circumstances of each case. *Flores v. Contreras*, 981 S.W.2d 246, 249 (Tex. App.—San Antonio 1988, pet. denied) (child's residence with mother in Mexico for first fifty days of his life sufficient to establish habitual residence in Mexico within meaning of Hague Convention); *see also In re J.J.L.-P.*, 256 S.W.3d 363 (Tex. App.—San Antonio 2008, no pet.). Courts are generally in agreement that habitual residence should be determined by focusing on the child, not the parents, and the court will examine past experience, not future intentions. *Friedrich v. Friedrich*,

983 F.2d 1396 (6th Cir. 1993); *see also Flores*, 981 S.W.2d at 249; *In re J.J.L.-P.*, 256 S.W.3d at 372.

The concept of "habitual residence" refers to that place that is the focus of the child's life, where the child's day-to-day existence is centered. *See In re S.H.V.*, 434 S.W.3d 792 (Tex. App.—Dallas 2014, no pet.) (child's habitual residence is determined by parents' last shared intentions and whether children have acclimatized to a new location and thereby acquired a new habitual residence despite any conflict with the parents' last shared intent); *see also In re J.G.*, 301 S.W.3d 376 (Tex. App.—Dallas 2009, no pet.) (parents' last place of shared intent as to children's residence was California and not Mexico, although both parents and children had resided with various relatives in Mexico for a year prior to proceedings). *But see In re S.E.*, No. 02-18-00327-CV, 2019 WL 3492399 (Tex. App.—Fort Worth Aug. 1, 2019, no pet. h.) (mem. op.) (United States habitual residence status not superseded by children's subsequent acclimation to Argentina where evidence insufficient to support such finding).

Habitual residence status is unaffected by temporary absences from the state or the family's staying in another state for a defined period of less than one year. *In re Morris*, 55 F. Supp. 2d 1156 (D. Colo. 1999); *see also Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998), *cert. denied*, 525 U.S. 1158 (1999).

§ 55.26 Wrongful Removal or Retention; Rights of Custody; Rights of Access

The removal or retention of a child is considered wrongful if (1) it is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention and (2) at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Hague Convention, art. 3, 51 Fed. Reg. at 10498; *see also In re Prevot*, 59 F.3d 556 (6th Cir. 1995), *cert. denied*, 516 U.S. 1161 (1996); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) (wrongful removal to be strictly defined). *But see Toren v. Toren*, 191 F.3d 23 (1st Cir. 1999) (mother had custody of children in U.S. by agreement for stated duration; no wrongful retention simply because father believed she would not return children).

The terms *wrongful removal or retention* and *wrongfully removed or retained*, as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child. 22 U.S.C. § 9003(f)(2).

"Rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. Hague Convention, art. 5(a), 51 Fed. Reg. at 10498. Under article 12 of the Hague Convention, a child abducted in violation of "rights of custody" must be returned to the child's country of habitual residence. The U.S. Supreme Court has determined that a ne exeat right is a "right of custody" under the Convention, and therefore a violation of ne exeat rights requires a return remedy. *Abbott v. Abbott*, 130 S.Ct. 1983 (2010) (if parent has right to consent before other parent can remove child from country where child is living, parent also has right of custody under Hague Convention on International Child Abduction, and child must be returned).

"Rights of access" shall include the right to take a child for a limited time to a place other than the child's habitual residence. Hague Convention, art. 5(b), 51 Fed. Reg. at 10498.

See the opinion of the Superior Court of New Jersey in *Goldman v. Goldman v. Ribeiro Filho & Filho*, available at **http://bringseanhome.org/nj-superior-court-guadagno-decision-02-17-2011.pdf** (U.S. father filed suit for return from Brazil of his child, who was in custody of deceased mother's family).

§ 55.27 Administrative Remedy

Any person, institution, or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the central authority of the child's habitual residence or to the central authority of any other contracting state for assistance in securing the return of the child. Hague Convention, art. 8, 51 Fed. Reg. at 10499.

The application for assistance under the Convention must contain—

1. information concerning the identities of the applicant, the child, and the person alleged to have removed or retained the child;
2. if available, the date of birth of the child;
3. the grounds on which the applicant's claim for return is based; and
4. all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

Hague Convention, art. 8, Fed. Reg. at 10499.

The application may be accompanied or supplemented by—

1. an authenticated copy of any relevant decision or agreement;
2. a certificate or an affidavit emanating from a central authority, or other competent authority of the state of the child's habitual residence, or from a qualified person, concerning the relevant law of the state; and
3. any other relevant document.

Hague Convention, art. 8, 51 Fed. Reg. at 10499.

If the central authority that receives an application referred to it has reason to believe that the child is in another contracting state, it shall directly and without delay transmit the application to the central authority of that contracting state and inform the requesting central authority or the applicant, as the case may be. Hague Convention, art. 9, 51 Fed. Reg. at 10499.

The central authority of the state where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child. Hague Convention, art. 10, 51 Fed. Reg. at 10499.

In the United States, the application will be forwarded by the U.S. State Department, along with a pamphlet entitled "International Parental Child Abduction." The application for assistance under the Hague Convention on international child abduction can be found online at **https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html**. Once the State Department has received the completed application, a representative of the State Department will attempt to place a petitioner in contact with an attorney in the state in which the child is likely to be retained.

§ 55.28 Judicial Remedy

Petition to Seek Return of Child: Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court that has jurisdiction of such action and is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed. 22 U.S.C. § 9003(b). *See also In re J.J.L.-P.*, 256 S.W.3d 363, 369–70 (Tex. App.—San Antonio 2008, no pet.).

Jurisdiction: State courts and the United States district courts have concurrent original jurisdiction of actions arising under the Convention. 22 U.S.C. § 9003(a). Jurisdiction under the Convention confers only the power to decide the merits of a wrongful removal claim. A decision concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. Hague Convention, art. 19, 51 Fed. Reg. at 10500; *see also Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998), *cert. denied*, 525 U.S. 1158 (1998); *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) (whether parent exercised custody rights well or badly goes to merits of custody dispute, which is beyond subject matter jurisdiction of federal courts).

Federal courts lack jurisdiction to resolve suits seeking access to a child. *Fernandez v. Yeager*, 121 F. Supp. 2d 1118 (W.D. Mich. 2000).

COMMENT: The attorney should carefully consider where the petition should be filed. Usually, cases are filed in state courts because most attorneys practicing family law are more familiar with the state courts. However, because federal courts do not normally hear custody cases, a federal judge may be better able to look solely at the issue of jurisdiction, as required by the Convention, without becoming distracted by the custody issues.

Notice to Respondent: Notice of the filing of a petition under the Convention must be effectuated according to the applicable law governing notice in interstate child custody proceedings. 22 U.S.C. § 9003(c). In the United States, the Parental Kidnapping Prevention Act (PKPA) governs the issue of notice, requiring that reasonable notice and opportunity to be heard shall be given. *See* 28 U.S.C. § 1738A.

Petitioner's Burden of Proof: The petitioner must establish by a preponderance of the evidence (1) in a case for return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention and (2) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights. 22 U.S.C. § 9003(e)(1); *see also Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998); *In re Prevot*, 59 F.3d 556 (6th Cir. 1995), *cert. denied*, 516 U.S. 1161 (1996).

Admissibility of Documents: No authentication of the application to the United States central authority, the petition, or any other document or information shall be required in order for the application, petition, document, or information to be admissible in court. 22 U.S.C. § 9005.

Defenses and Exceptions: Among the defenses and exceptions a respondent has available in an action for return of a child are the following:

1. The petitioner had no right of custody or access at the time of the removal or retention. Hague Convention, art. 3, 51 Fed. Reg. at 10498.

2. The petitioner was not exercising a right of custody. Hague Convention, art. 13(a), 51 Fed. Reg. at 10499.

3. The petitioner acquiesced to the removal or retention. Hague Convention, art. 13(a), 51 Fed. Reg. at 10499; *see Currier v. Currier*, 845 F. Supp. 916 (D. N.H. 1994) (German mother did not consent to father's removal of children from Germany by signing subsequently rescinded private custody agreement).

4. There is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Hague Convention, art. 13(b), 51 Fed. Reg. at 10499; *see Friedrich*, 78 F.3d 1060 (usual adjustment problems associated with relocation of child not sufficient); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000) (fact that father was intemperate, was often unkind, and slapped and spanked child did not justify refusing return).

5. The child is of appropriate age and degree of maturity and objects to the return. Hague Convention, art. 13, 51 Fed. Reg. at 10499.

6. The child is settled in the new environment. Hague Convention, art. 12; *see Friedrich*, 78 F.3d at 1060; *In re A.V.P.G.*, 251 S.W.3d 117, 124 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.).

7. A return would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. Hague Convention, art. 20, 51 Fed. Reg. at 10500.

If the respondent is alleging article 13(b) or article 20 exceptions, the respondent's burden of proof is by clear and convincing evidence. 22 U.S.C. § 9003(e)(2)(A). Any other article 12 exception or the other article 13 exceptions may be proved by a preponderance of the evidence. 22 U.S.C. § 9003(e)(2)(B); *see also Lops*, 140 F.3d 927; *In re Prevot*, 59 F.3d 556.

Determination by Court: The court in which an action is brought shall decide the case in accordance with the Convention. 22 U.S.C. § 9003(d).

The judge must act expeditiously in proceedings for the return of a child. If a decision has not been reached within six weeks from the date of the commencement of the action, the petitioner or the United States central authority has the right to request a statement from the authority regarding the reason for the delay. Hague Convention, art. 11, 51 Fed. Reg. at 10499. Once a Texas court receives notice of a Hague Convention order, that court is obligated to enforce the order and return the parties to the factual status quo before the wrongful retention of the child and wrongful removal to Texas. *In re Lewin*, 149 S.W.3d 727 (Tex. App.—Austin 2004, orig. proceeding).

Attorney's Fees and Costs: Any court ordering the return of the child in an action brought under ICARA must order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home, or other care during the course of the proceeding and transportation costs relating to the return of the child, unless the respondent establishes that such order would be clearly inappropriate. 22 U.S.C. § 9007(b)(3). *See also In re J.J.L.-P.*, 256 S.W.3d at 376–77, which states that a valid alternate basis for the award of fees based on the trial court's findings of facts and conclusions of law is consistent with 22 U.S.C. § 9007(b)(3).

International Comity: Under the Hague Convention, tribunals of party countries should afford deference to a foreign court's decision of a related Hague petition. However, a court may decline to extend comity if the foreign court clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness. *Guimaraes v. Brann*, No. 01-16-00093-CV, 2018 WL 3543022 (Tex. App.—Houston [1st Dist.] July 24, 2018, pet. denied) (mem. op.) (Texas court retained subject-matter jurisdiction over custody issues despite Brazilian order holding that child should remain in Brazil, because Texas court found that Brazilian court's application of "well-settled" and "grave-risk" exceptions were clear misinterpretations of Convention; therefore there was no abuse of discretion in refusing to extend comity on those exceptions).

[Sections 55.29 and 55.30 are reserved for expansion.]

IV. Useful Websites

§ 55.31 Useful Websites

The following websites contain information relating to the topic of this chapter:

Application for assistance under the Hague Convention on international child abduction (§ 55.27)
https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html
https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-app-wizard.html

Child abduction resources (§ 55.5)
https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction.html
http://bringseanhome.org/

Child Citizenship Act of 2000 (§ 55.11)
https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/child-citizenship-act.html

Hague Convention (§ 55.21)
https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

International Adoptions (§ 55.11)
https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process.html

International Child Abduction Remedies Act (§ 55.22)
http://travel.state.gov/content/dam/childabduction/International_Child_Abduction_Remedies_Act.pdf

List of nations that have ratified or acceded to the Hague Convention with respect to the U.S. (§ 55.21)
http://travel.state.gov/content/dam/childabduction/complianceReports/2014.pdf

Office of Children's Issues (§ 55.24)
https://travel.state.gov/content/travel/en/about-us/au-intl-parent-child-abduct.html.html

Chapter 56

Miscellaneous SAPCR and Other Child-Related Forms

There are no practice notes for this chapter.

[Chapters 57 through 59 are reserved for expansion.]

Chapter 60
Adoption of Adult

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Chapter 60

Adoption of Adult

§ 60.1 Pleadings

The petition to adopt an adult is entitled "In the Interest of _____, an Adult." If the petitioner is married, both spouses must join in the petition for adoption. Tex. Fam. Code § 162.503.

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

§ 60.2 Who May Adopt

Any adult resident of Texas wanting to adopt an adult person may file a petition in the county of the petitioner's residence. The petition may be filed in the district court or a statutory county court granted jurisdiction in family law cases and proceedings by chapter 25 of the Texas Government Code. Tex. Fam. Code §§ 162.501, 162.502.

§ 60.3 Consent

A court may not grant an adoption unless the adult consents in writing to be adopted by the petitioner. Tex. Fam. Code § 162.504.

§ 60.4 Hearing

The petitioner and the adult to be adopted must attend the hearing. For good cause shown, the court may waive this requirement, by written order, if the petitioner or the adult to be adopted is unable to attend. Tex. Fam. Code § 162.505.

The court shall grant the adoption if the statutory requirements are met. Tex. Fam. Code § 162.506(a).

Even though both spouses petition for the adoption as required, the court may grant the adoption to only one spouse on request of both spouses. Tex. Fam. Code § 162.506(b).

§ 60.5 Effect of Adoption Order

The adopted adult is the son or daughter of the adoptive parents for all purposes. The adopted adult may inherit from and through the adopted adult's adoptive parents as though the adopted adult were a biological child. Tex. Fam. Code § 162.507(a), (b); *Lehman v. Corpus Christi National Bank*, 668 S.W.2d 687, 688 (Tex. 1984). The adopted adult may not inherit from or through the adult's biological parent, and a biological parent may not inherit from or through an adopted adult. Tex. Fam. Code § 162.507(c). The adoption does not affect the citizenship of the adult adopted.

§ 60.6 No Change of Name

An adult may file a separate petition requesting a change of name. Tex. Fam. Code §§ 45.101–.104. See section 61.3 in this manual.

Chapter 61
Miscellaneous Litigation

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Chapter 61

Miscellaneous Litigation

§ 61.1 Bill of Review

A bill of review is an independent action to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. Although it is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review. If a petitioner has ignored available legal remedies, a petition for bill of review will not be granted. *Wembley Investment Co. v. Herrera*, 11 S.W.3d 924, 926–27 (Tex. 1999) (per curiam). If a bill of review is dismissed without prejudice, the dismissal does not bar the filing of a second bill of review on the basis of res judicata. *Barnes v. Deadrick*, 464 S.W.3d 48, 54 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

The filing of a restricted appeal, however, is not a prerequisite to the filing of a bill of review. There are only three prerequisites for the filing of a bill of review: (1) a meritorious defense, (2) that was not made due to fraud, accident, or wrongful act by an opponent or official mistake by a clerk, and (3) unmixed with any fault or negligence of the party filing the bill. Failure to file a restricted appeal could be relevant only to the last requirement, and then only if it constituted fault or negligence. If a motion to reinstate, motion for new trial, or direct appeal is available, it is hard to imagine any case in which failure to pursue one of them would not be negligence. But the same cannot be said about choosing to appeal by bill of review rather than a restricted appeal, for several reasons. First, a bill of review allows trial courts to rectify their own errors, eliminating the need for lengthy appellate review. Second, all facts may be considered, not just those appearing on the face of the record. Third, discovery is available to find out what all the facts are. Finally, it avoids the need to follow both avenues of appeal seriatim. A party is not "ignoring" its remedies when it chooses one appellate avenue rather than another. *Gold v. Gold*, 145 S.W.3d 212 (Tex. 2004) (per curiam).

As a direct attack, the bill must be brought in the court in which the judgment was rendered. *Dunklin v. Land*, 297 S.W.2d 360, 362 (Tex. App.—Eastland 1956, no writ). Once a bill of review is granted, all subsequent filings should be made in the bill-of-review proceeding and not in the prior case. *See Alaimo v. U.S. Bank Trust National*

Ass'n, 551 S.W.3d 212, 216 (Tex. App.—Fort Worth 2017, no pet.) (when bill of review is granted, parties proceed to final judgment on merits of underlying claims in bill-of-review proceeding, not in underlying case in which judgment was vacated); *Hartford Underwriters Insurance v. Mills*, 110 S.W.3d 588, 590 (Tex. App.—Fort Worth 2003, no pet.) (citing *State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463, 465 (Tex. 1989) (per curiam)) (when trial court grants bill of review and sets aside judgment in prior case, subsequent trial on merits of prior case occurs in same proceeding as trial on bill of review). Any party to a prior proceeding has standing to bring the bill of review. *Durham v. Barrow*, 600 S.W.2d 756, 760 (Tex. 1980). All parties who are interested in the original judgment and whose interest may be directly or materially affected must be named as parties. *Hunt v. Ramsey*, 345 S.W.2d 260, 264 (Tex. 1961).

Because the domestic relations office is not an official court functionary, the office's mistake in miscalculating the father's child support arrearages did not entitle the mother to a bill of review. *Bialaszewski v. Bialaszewski*, 557 S.W.3d 88, 93 (Tex. App.—Austin 2017, no pet.).

In a bill of review in a default judgment case in which service was called into question because the return did not state word-for-word from the rule 106 order granting alternative service, the court could consider the testimony of the process server in concluding that the requirements of the rule 106 order were strictly followed; in a restricted appeal, by contrast, the court is limited to reviewing the face of the record only. *In re M.C.B.*, 400 S.W.3d 630, 634–35 (Tex. App.—Dallas 2013, no pet.). A bill of review is proper when the return of service was not on file for ten days before the trial court's issuance of a default order; service of process did not comply with rule 107 and was invalid. *Lancaster v. Lancaster*, No. 01-14-00845-CV, 2015 WL 9480098, at *4 (Tex. App.—Houston [1st Dist.] Dec. 29, 2015, no pet.) (mem. op.).

Pleadings: Because it is fundamentally important in the administration of justice that some finality be accorded to judgments, the grounds on which interference will be allowed are narrow, and the rules are not to be relaxed merely because it may appear in a particular case that an injustice has been done. *Alexander v. Hagedorne*, 226 S.W.2d 996, 998 (Tex. 1950). To set aside a judgment by bill of review, the petitioner must plead (1) a meritorious defense to the cause of action alleged to support the judgment (2) that he was prevented from making by the fraud, accident, or wrongful act of his opponent (3) unmixed with any fault or negligence of his own. *Wembley*, 11 S.W.3d at 927; *Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979).

The petitioner must present prima facie proof of a meritorious defense as a pretrial matter. After a prima facie showing, the trial court then conducts a trial on the remaining elements. *Beck v. Beck*, 771 S.W.2d 141, 141–42 (Tex. 1989). To prevail, the petitioner in a bill-of-review action has the burden of proving his lack of fault or negligence in permitting a meritorious defense to go unasserted in a prior action. *Jarrett v. Northcutt*, 592 S.W.2d 930, 930–31 (Tex. 1979) (per curiam).

A prima facie meritorious claim or defense is established when it is determined that the petitioner's claim or defense is not barred as a matter of law and that he will be entitled to judgment on retrial if no evidence to the contrary is offered. If, however, a prima facie meritorious defense has not been made out, the proceeding terminates and the trial court shall dismiss the case. The preliminary determination of whether a prima facie meritorious defense is made out is a question of law. *Baker*, 582 S.W.2d at 408–09.

Denial of a bill of review was not error where the trial court found that the mother had not established a meritorious defense to the district court's decision that the modification was in the best interest of the child. Although a parent's alleged perjury and his and his family's mental health and mental-health history may be factors that a trial court could consider in determining the best interests of the child, they are not the only factors in such a determination. Thus, even if the trial court did consider the matters alleged by the mother, those matters would not necessarily be dispositive of the trial court's custody determination on retrial. *Stokes v. Corsbie*, No. 03-17-00469-CV, 2018 WL 6816824 (Tex. App.—Austin Dec. 28, 2018, no pet.) (mem. op.).

If the petitioner relies on fraud in the bill of review, the fraud must be extrinsic. Extrinsic fraud is collateral fraud in the sense that it must be collateral to the matter actually tried and not something that was actually or potentially at issue in the trial. *Montgomery v. Kennedy*, 669 S.W.2d 309, 312 (Tex. 1984). Extrinsic fraud is conduct that prevents a real trial on the issues involved. *Montgomery*, 669 S.W.2d at 313. It is fraud committed by the other party to the suit that prevented the losing party either from knowing about his rights or defenses or from having a fair opportunity to present them at trial. *Alexander*, 226 S.W.2d at 1001. Extrinsic fraud is wrongful conduct practiced outside the adversary trial, such as keeping a party away from court or making false promises of compromise, that affects the manner in which the judgment is procured. *Rhamey v. Fielder*, 203 S.W.3d 24, 29 (Tex. App.—San Antonio 2006, no pet.); *see also Montgomery*, 669 S.W.2d at 313 (fiduciary's concealment of material facts to induce an agreed or uncontested judgment); *In re Marriage of Stroud*, 376 S.W.3d 346, 356 (Tex. App.—Dallas 2012, pet. denied) (husband's threats to render business worthless causing wife to believe she would put her future at risk if she continued to litigate her inter-

est in community estate); *Griffith v. Conard*, 536 S.W.2d 658, 660 (Tex. App.—Corpus Christi–Edinburg 1976, no writ) (false promise of settlement causing petitioner not to appear at trial).

Denial of a bill of review was not error where the trial court found that the party's signature on an agreed order was not secured by deception or fraud; even though the party was not served with a citation, did not sign a waiver of service, and did not appear in person at the hearing resulting in the final order, she made a general appearance when she voluntarily and intentionally signed the order as approved and consented to in both form and substance. *In re C.R.B.*, 256 S.W.3d 876, 877 (Tex. App.—Texarkana 2008, no pet.). Denial of a bill of review was not error where the trial court concluded that the mother understood English very well and, in any event, was negligent in signing the final order if she did not understand it and in failing to make the other parties or the court aware that she required translation services. *Castro v. Ayala*, 511 S.W.3d 42 (Tex. App.—El Paso 2014, no pet.).

In contrast, intrinsic fraud relates to the merits of the issues that were presented and presumably were or should have been settled in the former action. Intrinsic fraud is inherent in the matter considered and determined in the trial if the fraudulent acts pertain to an issue involved in the original action or if the acts constituting the fraud were, or could have been, litigated in that action. For example, a mother's misrepresentation to a man that he was the child's father was intrinsic, not extrinsic, fraud. *In re Office of Attorney General*, 193 S.W.3d 690, 693 (Tex. App.—Beaumont 2006, orig. proceeding) (per curiam).

Likewise, allegations of fraud that amount to "nothing more than allegations that the decree of divorce provided an inequitable and unfair division of the marital estate" do not support relief for a party by a bill of review. *In re Marriage of Noonan*, 280 S.W.3d 339, 344 (Tex. App.—Amarillo 2008, pet. denied).

COMMENT: Because a bill of review is not available unless there has been clear extrinsic fraud, a separate lawsuit based on fraud should be considered instead.

A court will not vacate a judgment in an independent suit brought for that purpose on the basis that the judgment was founded on intrinsic fraud. *Alexander*, 226 S.W.2d at 1001. Judgments are not impeachable for frauds relating to the merits between the parties; all mistakes and errors must be corrected from within by motion for new trial, by motion to reopen the judgment, or by appeal. *Alexander*, 226 S.W.2d at 1002; *Forney v. Forney*, 672 S.W.2d 490, 498 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd

w.o.j.). "Intrinsic fraud" includes fraudulent instruments, perjured testimony, or any matter that was actually presented to and considered by the trial court in rendering the judgment assailed. The alleged perjury of a witness on a contested issue, which the opposing party had the opportunity to refute, is intrinsic fraud. *Montgomery*, 669 S.W.2d at 313.

A husband sought a bill of review after he discovered that his wife was ten years older than she had represented. He claimed that because he wanted children, he would not have married the wife. The denial of his bill of review was not error, because the husband could not show that his failure to raise a meritorious claim was not due in part to his own fault or negligence. The wife testified that the husband could have discovered her true age by looking at documents stored in an unlocked file cabinet or on a shared hard drive, or he should have known because the wife suffered medical conditions commonly suffered by women of her actual age. *Zielinski v. Zielinski*, No. 03-18-00063-CV, 2019 WL 491913, at *3 (Tex. App.—Austin Feb. 8, 2019, pet. denied) (mem. op.).

Laches and Limitations: Ordinarily, a person must exercise due diligence to avail himself of all adequate legal remedies against a former judgment before filing a bill of review. The residual four-year statute of limitations applies to bills of review. Tex. Civ. Prac. & Rem. Code § 16.051.

Since a bill of review is equitable in nature, laches may be raised as a defense to its prosecution. Two essential elements of laches are (1) unreasonable delay by one having legal or equitable rights in asserting them and (2) a good-faith change of position by another to his detriment because of the delay. Generally, in the absence of some element of estoppel or such extraordinary circumstances as would render inequitable the enforcement of petitioners' right after a delay, laches will not bar a suit short of the period set forth in the limitations statute. Laches should not bar an action on which limitations has not run unless allowing the action would work a grave injustice. *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998).

Violation of Due Process: If the record establishes that the petitioner did not have actual or constructive notice of the original suit or of the trial setting, the Fourteenth Amendment to the United States Constitution requires that the petitioner be granted a new trial, even if he cannot show a meritorious defense. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 80–81 (1988) (process was served untimely, and party was never personally served); *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam) (party was not served with notice of trial setting after his attorney withdrew). In *Peralta*, the U.S. Supreme Court rejected the argument that the appellant suffered no

harm because the same judgment would again be entered on retrial absent a meritorious defense. *See Peralta*, 485 U.S. at 80. *But see Texas Sting, Ltd. v. R.B. Foods*, 82 S.W.3d 644, 649–50 (Tex. App.—San Antonio 2002, pet. denied) (trial court may refuse to grant new trial if case dismissed for want of prosecution and no good cause shown why case should be maintained).

If the petitioner proves lack of service of citation, he does not need to prove that he was prevented from making a meritorious claim or defense because of fraud, accident, or wrongful act of the other party. *Texas Industries, Inc. v. Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975) (per curiam).

Trial: If the trial court determines that a prima facie meritorious defense has been shown, the case proceeds to trial. The petitioner must open and assume the burden of proving that the judgment was rendered as a result of fraud, accident, or wrongful act of the opposite party or official mistake unmixed with any negligence of his own. While the petitioner must assume this burden, the defendant has the burden of proving his original cause of action, thereby ensuring that the original underlying cause of action is supported by the weight of the evidence. The fact finder then determines whether the petitioner has established by a preponderance of the evidence that the prior judgment was rendered as a result of the fraud, accident, or wrongful act of the opposite party or official mistake unmixed with any negligence on the petitioner's part. Conditioned on an affirmative finding to this issue, the fact finder determines whether the bill-of-review defendant has proved the elements of his original cause of action. *Baker*, 582 S.W.2d at 409.

§ 61.2 Breach of Contract

Particularly in agreements incident to divorce, parties may contract to provide payments or perform acts that the court cannot order them to do. For example, spouses may agree by contract that one spouse will make payments for the support of the other following the divorce; such an agreement does not violate public policy. *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967). These agreements are enforceable in accordance with the law of contracts. *Francis*, 412 S.W.2d at 33.

A petition seeking damages for breach of the agreement must allege all traditional elements of a breach-of-contract action: the terms of the agreement and its execution, the plaintiff's performance, particular facts demonstrating that the defendant has breached or intends to breach the contract, and the damages sought. However, if the agreement is made a part of the pleadings, they "shall not be deemed defective because of the lack of

any allegations which can be supplied from said exhibit." Tex. R. Civ. P. 59. A judgment that awards a recovery of past-due installments does not bar subsequent suits for subsequent defaults. *Andrews v. Andrews*, 441 S.W.2d 244, 247 (Tex. App.—Fort Worth 1969, writ ref'd n.r.e.).

If the conduct of the payor indicates a distinct and unequivocal intention not to perform under the terms of the contract, the doctrine of anticipatory breach may apply. *Chavez v. Chavez*, 577 S.W.2d 306, 307 (Tex. App.—El Paso 1979, writ ref'd n.r.e.). Under these circumstances, the payee-spouse may recover damages for the entire breach and is entitled in one suit to receive in damages the present value of all of what he would have received if the contract had been performed. *Lee v. Lee*, 509 S.W.2d 922, 927 (Tex. App.—Beaumont 1974, writ ref'd n.r.e.). Because such a suit sounds in the law of contracts, reasonable attorney's fees may be recovered. Tex. Civ. Prac. & Rem. Code § 38.001; *Conner v. Bean*, 630 S.W.2d 697, 703 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

An agreement incident to divorce may provide that one spouse will pay all or a certain portion of the expenses of a child's college education. Agreements of this nature are enforceable in contract, and suit may be brought by the child or by the spouse who was the promisee in the agreement. *Stegall v. Stegall*, 571 S.W.2d 564, 566 (Tex. App.—Fort Worth 1978, no writ). A breach of contract claim for failure to comply with a divorce decree or an agreement incident to divorce may be brought in any civil district court that has jurisdiction, not just the court that rendered the decree. *Ishee v. Ishee*, No. 09-15-00197-CV, 2017 WL 2293150, at *4 (Tex. App.—Beaumont May 25, 2017, no pet.) (mem. op.).

See chapter 32 of this manual for enforcement of spousal maintenance by contempt.

§ 61.3 Change of Name of Adult

An adult may file a petition requesting a change of name in the county of the adult's place of residence. Tex. Fam. Code § 45.101. It is not necessary for a married petitioner's spouse to be made a party to the suit. *In re Erickson*, 547 S.W.2d 357, 359 (Tex. App.—Houston [14th Dist.] 1977, no writ).

The petition must be verified and include the present name and place of residence of the petitioner, the full name requested for the petitioner, the reason the change in name is requested, whether the petitioner has been the subject of a final felony conviction, whether the petitioner is subject to the registration requirements of Texas Code of

Criminal Procedure chapter 62, and a legible and complete set of the petitioner's fingerprints on a fingerprint card format acceptable to the Texas Department of Public Safety and the Federal Bureau of Investigation. Tex. Fam. Code § 45.102(a). The petition must include a number of items of information or a reasonable explanation of why one or more is not included. *See* Tex. Fam. Code § 45.102(b).

A party may waive service after the suit is filed by filing a waiver acknowledging receipt of a copy of the citation. The waiver may not be signed using a digitized signature. The waiver must contain the party's mailing address. It must be sworn before a notary public who is not an attorney in the suit or conform to the requirements for an unsworn declaration under section 132.001 of the Texas Civil Practice and Remedies Code unless the party waiving is incarcerated. The Texas Rules of Civil Procedure do not apply to these waivers. Tex. Fam. Code § 45.107.

In a suit to change the name of an adult brought under Family Code chapter 45, subchapter B, the court shall order a change of name for any person other than a person with a final felony conviction or a person subject to the registration requirements of Texas Code of Criminal Procedure chapter 62, if the change is in the interest or to the benefit of the petitioner and in the interest of the public. Tex. Fam. Code § 45.103(a).

Generally, the grant of an application for change of name is a matter of judicial discretion and should be granted unless there exists some wrongful, fraudulent, or capricious purpose; however, a person does not have an absolute right to change his name by court order. *Erickson*, 547 S.W.2d at 359. The court has wide discretion in deciding whether to grant a petition for change of name of an adult and may inquire into many areas, other than sex, such as whether the petitioner has judgments against him or has been a bankrupt or whether the change is sought to conceal an adverse credit rating or a criminal record or to otherwise work a fraud. In short, the court may inquire into such matters as may be reasonably necessary to protect the family from disruption and the public from imposition (assumption of the name of a celebrity or well-known entity for commercial purposes), fraud, or improper purpose. *Erickson*, 547 S.W.2d at 359–60.

A court may order a change of name under Family Code chapter 45, subchapter B, for a person with a final felony conviction if, in addition to the requirements of Family Code section 45.103(a), the person (1) has been pardoned or has received a certificate of discharge by the Texas Department of Criminal Justice or completed a period of community supervision or juvenile probation ordered by a court and not less than two years have passed from the date of the receipt of discharge or completion of community supervision or juvenile probation or (2) is requesting to change his name to the primary

name used in his criminal history record information. Tex. Fam. Code § 45.103(b). A court may order a change of name for a person subject to Texas Code of Criminal Procedure chapter 62 registration requirements if the person meets the requirements of section 45.103(a) or is requesting to change his name to the primary name used in his criminal history record information and provides the court with proof that he has notified the appropriate local law enforcement authority (as defined by Texas Code of Criminal Procedure article 62.001) of the proposed name change. Tex. Fam. Code § 45.103(c). A change of name under chapter 45, subchapter B, does not release a person from any liability incurred in that person's previous name or defeat any right the person had in the person's previous name. Tex. Fam. Code § 45.104.

Additionally, on the final disposition of a suit for divorce, for annulment, or to declare a marriage void, the court shall change the name of a party specifically requesting the change to a name previously used unless the court states in the decree a reason for denying the name change. The court may not deny the name change solely to keep the last name of family members the same. Tex. Fam. Code §§ 6.706(a), (b), 45.105(a). A court may not change the name of an adult at the request of a third party and against the wishes of the adult. *Gault v. Gault*, No. 13-18-00097-CV, 2019 WL 4008403, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 26, 2019, pet. filed) (mem. op.) (husband does not have standing to request name change for wife against her wishes).

A change of name does not release a person from any liability incurred in that person's previous name or defeat any right the person held under a previous name. Tex. Fam. Code §§ 6.706(c), 45.104. A person whose name has been changed in a suit for divorce, for annulment, or to declare a marriage void may apply for a change-of-name certificate from the clerk of the court as provided in Family Code section 45.106. Tex. Fam. Code §§ 6.706(d), 45.105(b); *see also* Tex. Fam. Code § 45.106. The certificate under section 45.106 constitutes proof of the change of name. Tex. Fam. Code § 45.106(d).

Although chapter 45 of the Texas Family Code provides procedures for a change of name, there is no similar chapter for a change of gender; thus Texas courts lack jurisdiction over gender change orders. *In re McReynolds*, 502 S.W.3d 884 (Tex. App.—Dallas 2016, no pet.).

§ 61.4 Change of Name of Child

A parent, managing conservator, or guardian of a child may file a petition requesting a change of name of the child in the county where the child resides. Tex. Fam. Code § 45.001. The petition must be verified and include the present name and place of resi-

dence of the child; the reason a change of name is requested; the full name requested for the child; whether the child is subject to the continuing, exclusive jurisdiction of a court under Family Code chapter 155; and whether the child is subject to the registration requirements of chapter 62 of the Texas Code of Criminal Procedure. Tex. Fam. Code § 45.002(a). *See In re L.M.*, No. 02-17-00173-CV, 2018 WL 3154187 (Tex. App.—Fort Worth June 28, 2018, no pet.) (mem. op.) (trial court erred in changing child's name when father's petition was filed only twenty-six days before trial, petition was not verified, and petition did not include any supporting details to show name change was in best interest of child). If the child is ten years of age or older, the child's written consent to the change of name must be attached to the petition. Tex. Fam. Code § 45.002(b).

Citation must be given to a parent of the child whose parental rights have not been terminated, any managing conservator of the child, and any guardian of the child. Citation must be issued and served in the same manner as under Family Code chapter 102. Tex. Fam. Code § 45.003.

A party may waive service after the suit is filed by filing a waiver acknowledging receipt of a copy of the citation. The waiver may not be signed using a digitized signature. The waiver must contain the party's mailing address, and it must be sworn before a notary public who is not an attorney in the suit unless the party waiving is incarcerated. The Texas Rules of Civil Procedure do not apply to these waivers. Tex. Fam. Code § 45.0031.

The court may order the name of the child changed if the change is in the best interest of the child. Tex. Fam. Code § 45.004(a)(1). The burden is on the applicant to establish that the change will be in the best interest of the child. *Bennett v. Northcutt*, 544 S.W.2d 703, 708 (Tex. App.—Dallas 1976, no writ) (per curiam). In addition to the best-interest requirement, if the child is subject to the registration requirements of chapter 62 of the Texas Code of Criminal Procedure, the change must be in the interest of the public and the person petitioning on behalf of the child must provide the court with proof that the child has notified the appropriate local law enforcement authority (as defined by Texas Code of Criminal Procedure article 62.001) of the proposed name change. Tex. Fam. Code § 45.004(a)(2), (c).

Courts will exercise their power to change a child's name reluctantly and only when the substantial welfare of the child requires the change. *Newman v. King*, 433 S.W.2d 420, 423 (Tex. 1968). The father does not have a constitutional right to have the child bear his surname. *Newman*, 433 S.W.2d at 422–23. The name of a child chosen by one of the

parents will not be changed unless the dissident parent shows a good reason for the change. *In re M.L.P.*, 621 S.W.2d 430, 431 (Tex. App.—San Antonio 1981, writ dism'd). A guardian ad litem may be required in a name-change law suit. *See Bennett*, 544 S.W.2d at 708.

A court has the power to enforce its decree and require a party to use the proper surname of a child. The petitioner does not need to show harm, only that the proper surname is not being used by the other party. *In re Griffiths*, 780 S.W.2d 899, 900 (Tex. App.—Amarillo 1989, no writ); *see also In re Baird*, 610 S.W.2d 252, 254 (Tex. App.—Fort Worth 1980, no writ). In *In re Baird*, the mother permitted the child to use a name other than the child's legal surname while attending school. On the father's request, the trial court ordered that the mother cease that conduct. On appeal, the court affirmed the trial court's order, finding that the Texas Family Code provides the proper method of changing a child's name. *In re Baird*, 610 S.W.2d at 254.

In *G.K. v. K.A.,* the court upheld the trial court's refusal to change the surname of the child to that of the child's biological father in a paternity suit. The trial court had noted it would be inappropriate to change the child's surname because the father had never lived with the child or the mother. The record further showed that the child was born as a result of an adulterous affair, the father was married to another person at the time of the conception and birth of the child, and the father continued to be married to that person. The court of appeals distinguished these facts from those of the cases cited by the father in which the child already had the father's surname and the contesting party sought to change the name from the father's surname to another surname, such as that of a stepfather. *G.K. v. K.A.,* 936 S.W.2d 70, 73 (Tex. App.—Austin 1996, writ denied). The father in *G.K.* had relied on cases that held that a father has a protectable interest in his child's retaining his surname. *See Newman*, 433 S.W.2d at 423; *In re Griffiths*, 780 S.W.2d at 900; *Brown v. Carroll*, 683 S.W.2d 61, 63 (Tex. App.—Tyler 1984, no writ).

If the child is subject to the continuing jurisdiction of a court under Family Code chapter 155, the court shall send a copy of the order to the central record file as provided in Family Code chapter 108. Tex. Fam. Code § 45.004(b).

A change of name does not release the child from any liability incurred in the child's previous name or defeat any right the child had in the child's previous name. Tex. Fam. Code § 45.005.

Although the information is not technically required, forms 61-6 and 61-7 in this manual (petition for change of name of child and order granting change of name of child,

respectively) include the child's Social Security number and the date and place of his birth. This information stated in the order will probably facilitate the process of changing the child's name on governmental, school, medical, and other types of records.

§ 61.5 Hardship Driver's License

Clients sometimes ask for assistance in obtaining a driver's license for a child who is under sixteen years of age. The Department of Public Safety may issue a license to a person who is at least fifteen years old, has passed a driver-education course approved by the department, and has passed the department's driver's license examination. If the department determines that an applicant must assist in the responsibilities imposed by a family illness, disability, death-related emergency, or economic emergency, the department may waive the driver-training course requirement and issue a temporary sixty-day license. This temporary license is renewable for additional sixty-day periods as long as the emergency continues. Tex. Transp. Code § 521.223(b), (d).

To grant the hardship license, the department must make one of the following findings:

1. The failure to issue the license will result in an unusual economic hardship for the applicant's family.
2. The license is necessary because of the illness of a member of the applicant's family.
3. The license is necessary because the applicant is enrolled in a vocational education program and requires a driver's license to participate in the program.

Tex. Transp. Code § 521.223(a).

An application form for this license is available from the Department of Public Safety, Driver's License Division.

§ 61.6 Postdivorce Property Division

Either former spouse may file a suit under Family Code chapter 9, subchapter C, to divide property not divided or awarded to a spouse in a final decree of divorce or annulment. Except as provided in Family Code sections 9.201 through 9.205, the suit is governed by the Texas Rules of Civil Procedure that apply to filing an original lawsuit. Tex. Fam. Code § 9.201.

Limitations: The suit for division must be filed before the second anniversary of the date a former spouse unequivocally repudiates the existence of the ownership interest of, and communicates that repudiation to, the other spouse. Tex. Fam. Code § 9.202(a). Neither the failure to transfer property nor the filing of a general denial in a suit for partition constitutes an unequivocal repudiation for the purposes of limitations. *Sagester v. Waltrip*, 970 S.W.2d 767, 769 (Tex. App.—Austin 1998, pet. denied). The two-year limitations period is tolled for the period that a Texas court does not have jurisdiction over the former spouses or over the property. Tex. Fam. Code § 9.202(b).

Division: If a Texas court failed to dispose of property subject to division in a final decree of divorce or annulment even though the court had jurisdiction over the spouses or the property, the court shall divide the property in a manner that the court deems just and right, having due regard for the rights of each party and of any children of the marriage. Tex. Fam. Code § 9.203(a); *Haynes v. McIntosh*, 776 S.W.2d 784, 788 (Tex. App.—Corpus Christi–Edinburg 1989, writ denied).

If a final decree of divorce or annulment rendered by a court in another state failed to dispose of property subject to division under the law of that state even though the court had jurisdiction to do so, the Texas court shall apply the law of the other state regarding undivided property. Tex. Fam. Code § 9.203(b).

If a Texas court failed to dispose of property subject to division in a final decree of divorce or annulment because the court lacked jurisdiction over a spouse or the property, and if that court subsequently acquires the requisite jurisdiction, that court may divide the property in a manner that the court deems just and right, having due regard for the rights of each party and of any children of the marriage. Tex. Fam. Code § 9.204(a).

If a final decree of divorce or annulment rendered by a court in another state failed to dispose of property subject to division under the law of that state because the court lacked jurisdiction over a spouse or the property and if a Texas court subsequently acquires the requisite jurisdiction, the Texas court may divide the property in a manner that the court deems just and right, having due regard for the rights of each party and of any children of the marriage. Tex. Fam. Code § 9.204(b).

Attorney's Fees: In any proceeding to divide property previously undivided in a decree of divorce or annulment as provided by Family Code sections 9.201 through 9.205, the court may award reasonable attorney's fees and order that they be paid directly to the attorney. The attorney may enforce the order in the attorney's own name

by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 9.205.

Non-Code Provisions: Partition not made in accordance with Family Code chapter 9, subchapter C, is generally governed by chapter 23 of the Texas Property Code and rules 756 through 778 of the Texas Rules of Civil Procedure.

Military Benefits: For a discussion of postdivorce division of military retirement benefits, see chapter 25 of this manual.

§ 61.7 Removal of Disabilities of Minority

A minor may file a petition in the county in which the petitioner resides to have the disabilities of minority removed for limited or general purposes if the minor is a resident of Texas; seventeen years of age, or at least sixteen years of age and living separate and apart from the minor's parents, managing conservator, or guardian; and self-supporting and managing the minor's own financial affairs. Tex. Fam. Code §§ 31.001(a), 31.003. A minor may file this suit in the minor's own name and need not be represented by a next friend. Tex. Fam. Code § 31.001(b). The petition must state the information listed in Family Code section 31.002(a). *See* Tex. Fam. Code § 31.002(a).

A parent of the petitioner must verify the petition, except that if a managing conservator or guardian of the person has been appointed, the managing conservator or guardian must verify the petition. If the person who is to verify the petition is unavailable or that person's whereabouts are unknown, the amicus attorney or attorney ad litem shall verify the petition. Tex. Fam. Code § 31.002(b).

The court shall appoint an amicus attorney or attorney ad litem to represent the interest of the petitioner at the hearing. Tex. Fam. Code § 31.004.

The court by order, or the Supreme Court of Texas by rule or order, may remove the disabilities of minority of a minor, including any restriction imposed by Family Code chapter 32 (consent to treatment), if the court or the Supreme Court of Texas finds the removal to be in the best interest of the petitioner. The order or rule must state the limited or general purposes for which disabilities are removed. Tex. Fam. Code § 31.005.

Except for specific constitutional and statutory age requirements, a minor whose disabilities are removed for general purposes has the capacity of an adult, including the capacity to contract. Also, except as provided by federal law, all education rights accorded to the parent of a student, including the right to make education decisions

under Family Code section 151.001(a)(10), transfer to the minor whose disabilities are removed for general purposes. Tex. Fam. Code § 31.006.

A nonresident minor who has had the disabilities of minority removed in the state of the minor's residence may file a certified copy of the order removing disabilities in the deed records of any Texas county. When a certified copy of the order of a court of another state or nation is filed, the minor has the capacity of an adult, except as provided by section 31.006 and by the terms of the order. Tex. Fam. Code § 31.007.

A party may waive service after the suit is filed by filing a waiver acknowledging receipt of a copy of the citation. The waiver may not be signed using a digitized signature. The waiver must contain the party's mailing address. It must be sworn before a notary public who is not an attorney in the suit or conform to the requirements for an unsworn declaration under section 132.001 of the Texas Civil Practice and Remedies Code unless the party waiving is incarcerated. The Texas Rules of Civil Procedure do not apply to these waivers. Tex. Fam. Code § 31.008.

§ 61.8 Harassing Behavior

An action against an ex-spouse for harassing behavior must meet the pleading and bond requirements of rules 680 through 693 of the Texas Rules of Civil Procedure. The exceptions provided by rule 693a (bond in divorce case) and Family Code section 6.503 (affidavit) do not apply.

Under the Texas Rules of Civil Procedure, no temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had. Tex. R. Civ. P. 680. No injunction shall be granted unless the applicant presents to the judge his petition, verified by affidavit, containing a plain and intelligible statement of the grounds for the relief sought. Tex. R. Civ. P. 682.

A bond must be set for any temporary restraining order or temporary injunction. Tex. R. Civ. P. 684. The provision for waiver of bond in divorce cases under rule 693a applies only in connection with an ancillary injunction in behalf of one spouse against the other, not when third parties are involved. Failure of the applicant to file a bond on issuance of an injunction against a lienholder renders the injunction void from its inception. *Nationwide Life Insurance Co. v. Nations*, 654 S.W.2d 860, 861 (Tex. App.—Houston [14th Dist.] 1983, no writ).

Before issuance of the temporary restraining order or temporary injunction, the applicant shall execute and file with the clerk a bond payable to the adverse party, with two or more good and sufficient sureties, to be approved by the clerk. The judge shall fix the sum of the bond. The bond will be conditioned on the applicant's abiding by the decision that may be made in the case and on the applicant's paying all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction is dissolved in whole or in part. Tex. R. Civ. P. 684.

If the harassing behavior involves the use or threat of physical force, it may be appropriate to use the provisions of title 4 of the Family Code. See chapter 17 of this manual.

§ 61.9 Interference with Possessory Interest in Child

A person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person. Tex. Fam. Code § 42.002(a). A person who aids or assists in such conduct is jointly and severally liable for damages. Tex. Fam. Code § 42.003(a). One who was not a party to the original suit granting the possessory right is not liable unless at the time of the violation the person had actual notice of the existence and contents of the order or had reasonable cause to believe that the child was the subject of an order and that his actions were likely to violate the order. Tex. Fam. Code § 42.003(b); *Bos v. Smith*, 556 S.W.3d 293 (Tex. 2018); *Lozano v. Lozano,* 983 S.W.2d 787, 789 (Tex. App.—Houston [14th Dist.] 1998), *aff'd in part, rev'd in part,* 52 S.W.3d 141 (Tex. 2001). Inconclusive inferences as to what a defendant knew or did not know based on the defendant's conduct will not support a verdict against the defendant. An inference must be reasonably and logically drawn from the evidence. *Lozano,* 983 S.W.2d at 792. However, failure to notify a party regarding the location of an abducted child will not state a cause of action unless an affirmative duty exists. *See A.H. Belo Corp. v. Corcoran*, 52 S.W.3d 375, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

Damages may include the actual costs and expenses incurred, including attorney's fees, in locating the child, recovering possession of the child if the plaintiff is entitled to possession, and enforcing the order and prosecuting the suit. Damages may also include mental suffering and anguish incurred by the plaintiff because of a violation of the order. Exemplary damages may be awarded if a person liable for damages acted with malice or with an intent to cause harm to the plaintiff. Tex. Fam. Code § 42.006.

The defendant may plead as an affirmative defense that the defendant acted in violation of the order with the express consent of the plaintiff. Tex. Fam. Code § 42.007.

A person who is sued for damages under Family Code chapter 42 is entitled to recover attorney's fees and court costs if the claim is dismissed or judgment is awarded to the defendant and the court or jury finds that the claim for damages is frivolous, unreasonable, or without foundation. Tex. Fam. Code § 42.009.

For a detailed analysis of the application of Family Code chapter 42, see *Smith v. Smith*, 720 S.W.2d 586 (Tex. App.—Houston [1st Dist.] 1986, no writ).

The use of an enforcement proceeding under Family Code chapter 157 does not limit or preclude the use of other proceedings, including a suit for damages under Family Code chapter 42. Tex. Fam. Code § 157.003(b).

Texas recognizes a cause of action for intentional infliction of emotional distress but does not recognize an independent cause of action for negligent infliction of emotional distress within the context of a parental kidnapping case. No cause of action for negligent interference with the family relationship exists in Texas. *Weirich v. Weirich*, 796 S.W.2d 513, 515–16 (Tex. App.—San Antonio 1990), *rev'd on other grounds*, 833 S.W.2d 942 (Tex. 1992).

§ 61.10 Declaratory Judgment

A declaratory judgment is an action to declare rights, status, and other legal relations whether or not further relief is or could be claimed. Tex. Civ. Prac. & Rem. Code § 37.003(a). The purpose of the Declaratory Judgments Act, chapter 37 of the Texas Civil Practice and Remedies Code, is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; it is to be liberally construed and administered. Tex. Civ. Prac. & Rem. Code § 37.002(b). An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for. Tex. Civ. Prac. & Rem. Code § 37.003(a). The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree. Tex. Civ. Prac. & Rem. Code § 37.003(b).

A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder. Tex. Civ. Prac. & Rem. Code § 37.004(a). In *Monk v. Pomberg*, 263 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2007, no pet.), the court permitted an action for a declaratory judgment to

allow the trial court to determine if it should decline to exercise its continuing jurisdiction in an interstate custody determination. It has been held that a declaratory judgment is a proper procedure to determine the validity of a mediated settlement agreement. *See Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237, 244 (Tex. App.—Austin 2007, pet. denied).

If a proceeding under the Declaratory Judgments Act involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending, including trial by jury. *See* Tex. Civ. Prac. & Rem. Code § 37.007. However, the court may refuse to render or enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding. Tex. Civ. Prac. & Rem. Code § 37.008. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application must be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith. Tex. Civ. Prac. & Rem. Code § 37.011. All orders, judgments, and decrees under the Declaratory Judgments Act may be reviewed as other orders, judgments, and decrees. Tex. Civ. Prac. & Rem. Code § 37.010.

The court may award costs and reasonable and necessary attorney's fees as are equitable and just. Tex. Civ. Prac. & Rem. Code § 37.009.

§ 61.11 Texas Citizens Participation Act

The Texas Citizens Participation Act (TCPA) is found at chapter 27 of the Texas Civil Practice and Remedies Code. Its purpose is to "safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government . . . and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002. The TCPA was intended to be an anti-SLAPP statute (to stop Strategic Lawsuits Against Public Participation in governance). In response to extensive commentary from judges and practitioners about the expansive application of the TCPA and the need for clarity, numerous modifications to the Act were made effective September 1, 2019. Of particular interest to family law practitioners, the amended version expressly exempts a legal action filed under title 1, 2, 4, or 5 of the Family Code, or an application for a protective order under chapter 7A of the Code of Criminal Procedure. Tex. Civ. Prac. & Rem. Code § 27.010(a)(6). On its face, this exemption applies only to legal actions brought under

the Family Code—for example, divorce, modification, and suits affecting the parent-child relationship. However, the TCPA does not appear to exempt legal actions not expressly brought under a Family Code title. For example, the TCPA still applies to legal actions in the form of ancillary action suits, such as intervenor suits or conventional civil claims not arising under the Family Code. Finally, family practitioners should note that the TCPA still applies to a legal action against a victim or alleged victim of family violence or dating violence as defined in chapter 71 of the Family Code. Tex. Civ. Prac. & Rem. Code § 27.010(c).

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Chapter 62

Annulment and Suit to Declare Marriage Void

I. General Considerations

§ 62.1 Void and Voidable Marriages

Various portions of title 1 of the Texas Family Code address the validity of marriage, the presumptions of validity, and the grounds to set aside a marriage as either void or voidable.

There is a statutory presumption as well as a policy of the state to uphold each marriage against claims of invalidity unless strong reasons exist for holding it void or voidable. Therefore, every marriage entered into in Texas is considered valid, unless it is expressly made void by Family Code chapter 6 or expressly made voidable by chapter 6 and annulled as provided by that chapter. Tex. Fam. Code § 1.101; *see Davis v. Davis*, 521 S.W.2d 603, 605 (Tex. 1975).

If two or more marriages of a person to different spouses are alleged, the most recent marriage is presumed valid as against each marriage that precedes it until one who asserts the validity of a prior marriage proves the validity of the prior marriage. Tex. Fam. Code § 1.102; *Jordan v. Jordan*, 938 S.W.2d 177, 179 (Tex. App.—Houston [1st Dist.] 1997, no writ); *Loera v. Loera*, 815 S.W.2d 910, 911 (Tex. App.—Corpus Christi–Edinburg 1991, no writ).

As used in the Family Code, an "annulment" is a proceeding to invalidate a voidable marriage (*see* Tex. Fam. Code §§ 6.102–.111) and a "suit to declare marriage void" is a proceeding to adjudicate the status of a void marriage (*see* Tex. Fam. Code §§ 6.201–.206).

COMMENT: Use forms 62-1 through 62-5 in this manual for an annulment proceeding and forms 62-6 through 62-8 for a suit to declare the marriage void.

[Sections 62.2 through 62.10 are reserved for expansion.]

II. Annulment

§ 62.11 Caption

The pleadings shall be styled "In the Matter of the Marriage of _____ and _____." Tex. Fam. Code § 6.401(a). The petitioner's name should be stated first. If there is a child, the caption continues with "and in the Interest of _____, (a) Child(ren)." Tex. Fam. Code § 102.008(a).

§ 62.12 Jurisdiction

A suit for an annulment is an in rem proceeding and may be maintained in Texas only if the marriage took place in Texas or one of the parties is domiciled in Texas. Tex. Fam. Code § 6.306. There are no prescribed periods of durational residency or domicile like those established in section 6.301 of the Family Code for maintaining a divorce.

§ 62.13 Jurisdiction over Nonresidents

The court may exercise personal jurisdiction over a nonresident respondent or his personal representative if the petitioner is a resident or domiciliary of Texas at the time the suit for annulment is filed and (1) Texas is the last marital residence of the petitioner and respondent and the suit is filed before the second anniversary of the date on which the marital residence ended or (2) if there is any basis consistent with the Texas and United States Constitutions for the exercise of personal jurisdiction. Tex. Fam. Code § 6.305(a). This jurisdiction over a nonresident party is necessary, even in an annulment suit, in order for the court to divide the marital estate. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 324 (Tex. 1998). A court acquiring jurisdiction in this manner also acquires jurisdiction over the respondent in a suit affecting the parent-child relationship. Tex. Fam. Code § 6.305(b).

A Texas court may grant an annulment to a Texas resident even if there is no personal jurisdiction over the nonresident spouse; such an order is called a "status adjudication."

Personal jurisdiction over a nonresident may be established by the service of process on the nonresident while the nonresident was temporarily in the state. *Burnham v. Superior Court of California*, 495 U.S. 604, 619 (1990). The establishment of a marital residence requires more than occasional visits by one spouse to the other's residence during marital separation. *See Cossey v. Cossey*, 602 S.W.2d 591, 595–96 (Tex. App.—Waco 1980, no writ).

§ 62.14 Venue

No special provisions exist regarding venue in a suit for annulment; presumably venue is determined by the rules applicable to civil cases generally. *See* Tex. Civ. Prac. & Rem. Code § 15.002.

§ 62.15 Grounds

State policy creates a presumption in favor of the validity of a marriage unless strong reasons exist for holding it void or voidable. Tex. Fam. Code § 1.101. The Family Code provides various grounds on which an annulment may be sought. *See* Tex. Fam. Code §§ 6.102–.110.

Underage: Any marriage entered into on or after September 1, 2017, by a party younger than eighteen years of age is *void* unless a court order removing the disabilities of minority of the party for general purposes has been obtained in Texas or another state. Tex. Fam. Code § 6.205.

An annulment suit pertaining to a marriage entered before September 1, 2017, may be brought if one party was under eighteen years but sixteen years or older, no parental consent was given and no court order was obtained, and suit is brought by the parent, managing conservator, or guardian of the underage party. Tex. Fam. Code § 6.102(a), (b). Although the statute does not say so, presumably the underage party could sue after coming of age if he had not ratified the marriage by voluntarily cohabiting after age eighteen.

Suit by a parent, managing conservator, or guardian may not be brought after the underage person has reached age eighteen. Tex. Fam. Code § 6.103.

For marriages entered before September 1, 2005, the relevant age limit is fourteen, rather than sixteen, years. *See* Acts 2005, 79th Leg., R.S., ch. 268, §§ 4.15, 4.16, 4.24 (S.B. 6), eff. Sept. 1, 2005.

Alcohol or Narcotics: The court may grant an annulment of a marriage if the petitioner was under the influence of alcoholic beverages or narcotics at the time of the marriage and as a result did not have the capacity to consent and the petitioner did not voluntarily cohabit with the other party to the marriage after the effects of the alcohol or narcotics ended. Tex. Fam. Code § 6.105.

Impotency: The court may grant an annulment if either party was permanently impotent at the time of the marriage and the petitioner did not know of the impotency at the time of the marriage and the petitioner did not voluntarily cohabit with the other party to the marriage after learning of the impotency. Tex. Fam. Code § 6.106.

Fraud or Duress: The court may grant an annulment if the other party used fraud, duress, or force to induce the petitioner to enter the marriage and the petitioner did not voluntarily cohabit with the other party to the marriage after learning of the fraud or being released from the duress or force. Tex. Fam. Code § 6.107.

Notwithstanding the passage of nearly six years between the dates of marriage and separation, sufficient evidence supported a finding of fraud as the basis for annulment under section 6.107 when the wife had disclosed three prior marriages before the marriage ceremony but had actually been married eight times, the husband said he would not have married had he known the true number of the wife's prior marriages, and the husband did not discover the true number of prior marriages until the wife had moved out of the residence and filed for divorce. *Leax v. Leax*, 305 S.W.3d 22 (Tex. App.—Houston [lst Dist.] 2009, pet. denied). *See also Montenegro v. Avila*, 365 S.W.3d 822, 828 (Tex. App.—El Paso 2012, no pet.) (annulment granted because husband fraudulently induced wife to marry him so he could obtain a permanent green card).

Mental Incompetency: The court may grant annulment of a marriage to a party if the court finds that at the time of the marriage the party did not have the mental capacity to consent to marriage or to understand the nature of the marriage ceremony because of a mental disease or defect, and if the party did not voluntarily cohabit with the other party to the marriage during any period since the marriage when the party possessed the mental capacity to recognize the marriage relationship. The court may also grant annulment of a marriage to a party if the court finds that at the time of the marriage the other party did not have the mental capacity to consent to marriage or to understand the nature of the marriage ceremony because of a mental disease or defect, and at the time of the marriage the petitioner did not know or reasonably should not have known of the mental disease or defect, and since the date the petitioner discovered or reasonably should have discovered the mental disease or defect, the petitioner has not voluntarily cohabited with the other party. Tex. Fam. Code § 6.108; *see Kerckhoff v. Kerckhoff*, 805 S.W.2d 937, 940 (Tex. App.—San Antonio 1991, no writ).

Concealed Divorce: The court may grant an annulment to the petitioner if the respondent was divorced from a third party within thirty days before the marriage, the petitioner did not know and reasonably could not have known of the divorce, and the

petitioner did not voluntarily cohabit with the respondent since the petitioner discovered or reasonably should have discovered the divorce. A marriage may not be annulled on the ground of concealed divorce after the first anniversary of the date of the marriage. Tex. Fam. Code § 6.109.

Marriage Less Than Seventy-Two Hours after License Issued: The court may grant an annulment if the marriage ceremony took place in violation of Family Code section 2.204 during the seventy-two-hour period immediately following the issuance of the marriage license. However, a suit may not be brought on this ground after the thirtieth day after the date of the marriage. Tex. Fam. Code § 6.110.

§ 62.16 Limitation of Actions

Except as provided by subchapter C, chapter 123, of the Texas Estates Code (certain proceedings to declare a marriage void based on mental incapacity), a marriage subject to annulment may not be challenged in a proceeding instituted after the death of either party. Tex. Fam. Code § 6.111; *see Coulter v. Melady*, 489 S.W.2d 156, 159 (Tex. App.—Texarkana 1972, writ ref'd n.r.e.).

§ 62.17 Pleadings

A petition is sufficient without the necessity of specifying the underlying evidentiary facts if the petition alleges the grounds relied on substantially in the language of the statute. Allegations of grounds for relief, matters of defense, or facts relied on for a temporary order that are stated in short and plain terms are not subject to special exceptions because of form or sufficiency. The court shall strike an allegation of evidentiary fact from the pleadings on the motion of a party or on the court's own motion. Tex. Fam. Code § 6.402.

The petition must state whether, in regard to a party to the suit or a child of a party to the suit, there is in effect a protective order under Family Code title 4, a protective order under chapter 7A (subchapter A, chapter 7B, for suits filed on or after September 1, 2021) of the Code of Criminal Procedure, or an order for emergency protection under article 17.292 of the Code of Criminal Procedure. The petition also must state whether an application for any of these orders is pending. The petitioner must attach a copy of each such protective order in which a party to the suit or the child of a party to the suit was the applicant or victim of the conduct alleged in the application or order and the other party was the respondent or defendant of an action regarding the conduct alleged in the application or order without regard to the date of the order. If a copy of the order

is not available at the time of filing, the petition must state that a copy will be filed with the court before any hearing. Tex. Fam. Code § 6.405.

The first numbered paragraph of the petition must include an allegation of the intended discovery level. Tex. R. Civ. P. 190.1.

§ 62.18 Children

A man is the presumed father of a child born during or not more than three hundred days after the date of termination of a marriage or attempted marriage that is annulled. *See* Tex. Fam. Code § 160.204(a)(1)–(3). A man is also presumed to be the father of a child if he married the mother of the child after the birth of the child, he voluntarily asserted his paternity of the child, and (1) the assertion is in a record filed with the bureau of vital statistics, (2) he is voluntarily named as the child's father on the child's birth certificate, or (3) he promised in a record to support the child as his own. Tex. Fam. Code § 160.204(a)(4). A man is also presumed to be the father of a child if, during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own. Tex. Fam. Code § 160.204(a)(5).

The presumption may be rebutted only by an adjudication under subchapter G of chapter 160 of the Family Code or the filing of a valid denial of paternity by a presumed father in conjunction with the filing by another person of a valid acknowledgment of paternity as provided by Family Code section 160.305. Tex. Fam. Code § 160.204(b).

A suit affecting the parent-child relationship brought in conjunction with an annulment is treated in the same manner as in a divorce.

§ 62.19 Temporary Orders

After a suit for annulment is filed, on the motion of a party or on the court's own motion, the court may grant temporary orders, temporary restraining orders, and temporary injunctions in the same manner as applicable to divorce. Tex. Fam. Code §§ 6.501–.503.

See chapter 4 of this manual for further discussion, including temporary orders in a parent-child suit.

§ 62.20 Orders Protecting against Family Violence

On the motion of a party to a suit for annulment, the court may render a protective order. Tex. Fam. Code § 6.504. Protective orders are discussed in chapter 17 of this manual.

§ 62.21 Spousal Maintenance (Alimony)

Spousal maintenance (alimony) may be granted in a suit for annulment. *See* Tex. Fam. Code § 8.001 *et seq.* See section 23.9 in this manual.

§ 62.22 Property

In a suit for annulment, the court shall order a division of the estate of the parties in the same manner as in a divorce. Tex. Fam. Code § 7.001.

§ 62.23 Change of Name

In the final decree of annulment, the court must change the name of a party specifically requesting the change to a name previously used unless the court states in the decree a reason for denying the change of name. The court may not deny a change of name solely to keep the last name of family members the same. Tex. Fam. Code §§ 6.706(a), (b), 45.105(a). A court may not change the name of an adult at the request of a third party and against the wishes of the adult. *Gault v. Gault*, No. 13-18-00097-CV, 2019 WL 4008403, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 26, 2019, pet. filed) (mem. op.) (husband does not have standing to request name change for wife against her wishes).

A change of name does not release a person from liability incurred under a previous name or defeat a right the person held under a previous name. Tex. Fam. Code §§ 6.706(c), 45.104.

A person whose name has been changed in a suit for annulment may apply for a change-of-name certificate from the clerk of the court. Tex. Fam. Code §§ 6.706(d), 45.105(b); *see also* Tex. Fam. Code § 45.106.

The certificate under section 45.106 constitutes proof of the change of name. Tex. Fam. Code § 45.106(d).

§ 62.24 Trial

An annulment under Family Code section 6.102 (regarding underage persons) may be granted at the court's discretion without a jury. In exercising its discretion, the court shall consider all pertinent facts concerning the welfare of the parties to the marriage, including whether the female is pregnant. Tex. Fam. Code § 6.104.

[Sections 62.25 through 62.30 are reserved for expansion.]

III. Suit to Declare Marriage Void

§ 62.31 Caption

The pleadings shall be styled "A Suit to Declare Void the Marriage of _____ and _____." Tex. Fam. Code § 6.401(b). If there is a child, the caption continues with "and in the Interest of _____, (a) Child(ren)." Tex. Fam. Code § 102.008(a).

§ 62.32 Who May Bring Suit

Either party may bring suit to declare a marriage void. However, unlike the voidable marriage, the void marriage may also be attacked collaterally. Tex. Fam. Code § 6.307(a).

§ 62.33 Jurisdiction

A suit to declare a marriage void is an in rem proceeding affecting the status of the parties to the purported marriage and can be maintained in Texas only if the purported marriage took place in Texas or one of the parties is domiciled in Texas. Tex. Fam. Code § 6.307(b), (c). There are no prescribed periods of durational residency or domicile like those established in section 6.301 of the Family Code for maintaining a divorce.

§ 62.34 Jurisdiction over Nonresidents

The provisions for acquiring jurisdiction over nonresidents in a suit to declare a marriage void are the same as in a suit for annulment. See section 62.13 above.

§ 62.35 Venue

There are no special provisions regarding venue in a suit to declare a marriage void; presumably venue is determined by the rules applicable to civil cases generally. *See* Tex. Civ. Prac. & Rem. Code § 15.002.

§ 62.36 Grounds

Consanguinity: A marriage is void if one of the parties is related to the other as an ancestor or descendant, by blood or adoption; a brother or sister, of the whole or half blood or by adoption; a parent's brother or sister, of the whole or half blood or by adoption; or a son or daughter of a brother or sister, of the whole or half blood or by adoption. Tex. Fam. Code § 6.201.

Prior Marriage: A marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved. Tex. Fam. Code § 6.202(a). The validity of the second marriage relates back to the date of the dissolution of the first marriage. *Caddel v. Caddel*, 486 S.W.2d 141, 145 (Tex. App.—Amarillo 1972, no writ). This principle applies even if the first marriage is terminated by the death of one spouse and the second marriage is a common-law marriage. *See Rodriguez v. Avalos*, 567 S.W.2d 85, 86–87 (Tex. App.—El Paso 1978, no writ).

If multiple marriages are alleged, the most recent marriage is presumed to be valid as against each preceding marriage until one who asserts the validity of a prior marriage proves its validity. Tex. Fam. Code § 1.102. A spouse seeking to annul a marriage on the ground that the other spouse had a prior undissolved marriage has the burden of establishing the prior marriage and its continuing validity at the time of the subsequent marriage. *Loera v. Loera*, 815 S.W.2d 910, 911 (Tex. App.—Corpus Christi–Edinburg 1991, no writ).

Marriage to Minor: A marriage entered on or after September 1, 2017, is void if either party to the marriage is younger than eighteen years of age, unless removal of the disabilities of minority of the party has been obtained by court order in Texas or another state. Tex. Fam. Code § 6.205. (A marriage entered on or after September 1, 2007, but before September 1, 2017, is void if either party to the marriage was younger than sixteen years of age, unless a court order was obtained under former section 2.103 of the Family Code. Acts 2007, 80th Leg., ch. 52, § 6 (S.B. 432), eff. Sept. 1, 2007. A marriage entered on or after September 1, 2005, but before September 1, 2007, is void if

either party to the marriage was younger than sixteen years of age. Acts 2005, 79th Leg., R.S., ch. 268, § 4.24 (S.B. 6), eff. Sept. 1, 2005.)

Marriage to Stepchild or Stepparent: A marriage entered on or after September 1, 2005, is void if a party to the marriage is a current or former stepchild or stepparent of the other party. Tex. Fam. Code § 6.206; Acts 2005, 79th Leg., R.S., ch. 268 § 4.24 (S.B. 6), eff. Sept. 1, 2005.

§ 62.37 Limitations of Actions

No limitation to bring suit to void a marriage is stated in the Family Code, and the provision for collateral attack presumably allows a challenge after the death of one party or both. *See Jordan v. Jordan*, 938 S.W.2d 177, 179 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

§ 62.38 Pleadings

The provisions for pleadings in a suit to declare a marriage void are the same as in a suit for annulment. See section 62.17 above.

§ 62.39 Children

A man is the presumed father of a child born during or not more than three hundred days after the date of termination of a marriage or attempted marriage that is declared invalid. *See* Tex. Fam. Code § 160.204(a)(1)–(3). A man is also presumed to be the father of a child if he married the mother of the child after the birth of the child, he voluntarily asserted his paternity of the child, and (1) the assertion is in a record filed with the bureau of vital statistics, (2) he is voluntarily named as the child's father on the child's birth certificate, or (3) he promised in a record to support the child as his own. Tex. Fam. Code § 160.204(a)(4). A man is also presumed to be the father of a child if, during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own. Tex. Fam. Code § 160.204(a)(5).

The presumption may be rebutted only by an adjudication under subchapter G of chapter 160 of the Family Code or the filing of a valid denial of paternity by a presumed father in conjunction with the filing by another person of a valid acknowledgment of paternity as provided by Family Code section 160.305. Tex. Fam. Code § 160.204(b).

A suit affecting the parent-child relationship brought in conjunction with a suit to declare a marriage void is treated in the same manner as in a divorce.

§ 62.40 Temporary Orders

Temporary orders may issue in a suit to declare a marriage void, and the same rules apply in such cases as in suits for annulment. See section 62.19 above.

§ 62.41 Orders Protecting against Family Violence

On the motion of a party to a suit to declare a marriage void, the court may issue a protective order. Tex. Fam. Code § 6.504. Protective orders are discussed in chapter 17 of this manual.

§ 62.42 Spousal Maintenance (Alimony)

Spousal maintenance (alimony) may be granted in a suit to declare a marriage void to putative spouse who did not have knowledge of an existing impediment to a valid marriage. Tex. Fam. Code § 8.060. See the practice notes in section 23.9 in this manual.

§ 62.43 Property

The Family Code does not provide for division of property in a suit to declare a marriage void, and the form in this manual presupposes that no property exists.

However, a putative spouse, one acting in good faith, believing the marriage was valid, does have rights to property acquired during the time the parties lived together. *See Davis v. Davis*, 521 S.W.2d 603, 606 (Tex. 1975). A putative spouse should request an equitable property division.

Although in a suit for divorce or annulment certain transfers of real or personal community property or debts incurred by one spouse while such suit is pending may be void (*see* Tex. Fam. Code § 6.707(a)), the Family Code does not provide any such provision pertaining to a suit to declare a marriage void.

§ 62.44 Change of Name

In the final decree in a suit to declare a marriage void, the court must change the name of a party specially praying for the change to a prior used name unless the court states in

the decree a reason for denying the change of name. The court may not deny a change of name solely to keep the last name of family members the same. A court may not change the name of an adult at the request of a third party and against the wishes of the adult. *Gault v. Gault*, No. 13-18-00097-CV, 2019 WL 4008403, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 26, 2019, pet. filed) (mem. op.) (husband does not have standing to request name change for wife against her wishes).

A person whose name has been changed in a suit to declare a marriage void may apply for a change-of-name certificate from the clerk of the court. Tex. Fam. Code § 45.105; *see also* Tex. Fam. Code § 45.106.

A change of name does not release a person from liability incurred under the previous name or defeat a right the person held under the previous name. Tex. Fam. Code § 45.104.

The certificate under section 45.106 constitutes proof of the change of name. Tex. Fam. Code § 45.106(d).

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Chapter 63

Property Agreements

I. Nonmarital Cohabitation Agreements

§ 63.1 Purpose of Agreement

A promise or agreement made on consideration of marriage or nonmarital conjugal cohabitation is not enforceable unless the promise or agreement or a memorandum of the promise or agreement is in writing and signed by the person obligated by the promise or agreement.Tex. Fam. Code § 1.108. *See O'Farrill Avila v. Gonzales*, 974 S.W.2d 237, 243–44 (Tex. App.—San Antonio 1998, pet. denied) (court enforced written contract between unmarried parents for monthly support and oral agreement to pay mortgage).

§ 63.2 Precautions in Drafting

Except for the requirement of Tex. Fam. Code § 1.108 that the agreement be in writing, the Family Code makes no provision for nonmarital cohabitation agreements. Sections 4.001 through 4.010 apply to single persons but only those intending to marry. *See* Tex. Fam. Code § 4.001(1). All other agreements covered within the chapter pertaining to property agreements (sections 4.101 through 4.106 and 4.201 through 4.206) involve married persons.

Even though basic contract law obviously applies, a successful argument that the same degree of confidentiality or fiduciary obligation exists between persons who live together as between those who are married or about to marry could trigger virtually the same burdens of proof as those found in Family Code sections 4.006 and 4.105. *See Andrews v. Andrews*, 677 S.W.2d 171, 174 (Tex. App.—Austin 1984, no writ).

In drafting contractual agreements between unmarried persons who do not intend to marry, much of the terminology and all the presumptions and marital property concepts become useless and inapplicable.

The following advice on drafting these types of agreements is instructive:

> Because the body of law on "marital property" may not apply to these types of agreements, . . . the presumptions and rules which ultimately protect a married party from divestiture of property are not available. Representing clients within this foreign territory requires the draftsman to forget the protections of marital property law and draft provisions which cover ownership, management and division of property acquired by inheritance and gift as well as the property which was owned by each party before the partnership or cohabitation began. There are no assumptions that can be made when drafting an agreement between unmarried persons. The attorney drafting such an agreement must ask extensive questions and seek out the parties' intent in a much more comprehensive way. The attorney cannot simply use seemingly ubiquitous terms like "separate" and "community" property and expect a court of law to later apply the common definitions which are used for married couples. In fact, as discussed infra, use of these terms might actually invalidate the contract based on stated public policy grounds.
>
> It is wise for any contractual agreement to define terminology where necessary, but specifically for non-marital cohabitation agreements, it is imperative to expressly provide for definitions necessary to reflect the parties' intent.

Diana S. Friedman, Thomas A. Greenwald, Lynn Kamin, Katherine A. Kinser, Jimmy Vaught, Aaron M.Reimer, *The Future of Premarital, Postmarital, and Cohabitation Agreements*, State Bar of Tex. Prof Dev. Program, New Frontiers in Marital Property Law Course 2 (2010).

COMMENT: To minimize future claims of overreaching, the prudent attorney should follow the same strict precautions in executing a cohabitation agreement as in executing a premarital agreement. The attorney should always recommend that both parties employ independent counsel to permit full disclosure and to ensure informed consent and an absence of fraud or duress.

No reported cases relating to enforcement of nonmarital cohabitation agreements under the statute of frauds have been found.

See section 63.26 below concerning agreements to arbitrate.

[Sections 63.3 through 63.10 are reserved for expansion.]

II. Marital Property Agreements

§ 63.11 Definitions

Premarital Agreements: A premarital agreement is an agreement between prospective spouses made in contemplation of marriage to be effective when the parties are married. Tex. Fam. Code §§ 4.001(1), 4.004. The official comment to section 2 of the Uniform Premarital Agreement Act (Family Code section 4.002) refers specifically to a ceremonial marriage rather than an informal marriage; see **https://www.uniformlaws.org/viewdocument/final-act-with-comments-126?CommunityKey=77680803-bd1c-4f01-a03b-64db132a35fa&tab=librarydocuments**.

Partition and Exchange Agreements: Partition and exchange agreements allow spouses to partition or exchange between themselves all or part of their community property, then existing or to be acquired, in any manner they desire. Property transferred to a spouse by partition or exchange agreement becomes that spouse's separate property. Partition and exchange agreements made on or after September 1, 2005, may also provide that future earnings and income arising from the transferred property will be the separate property of the owning spouse. Tex. Fam. Code § 4.102. (For agreements made on or after September 1, 2003, but before September 1, 2005, the partition or exchange of property includes future earnings and income arising from the property as the separate property of the owning spouse unless the spouses agree in a record that the future earnings and income will be community property after the partition or exchange. Acts 2003, 78th Leg., R.S., ch. 230, § 2 (H.B. 885), eff. Sept. 1, 2003.)

Agreements between Spouses Regarding Income from Separate Property: Spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner. Tex. Fam. Code § 4.103. Partition and exchange agreements made on or after September 1, 2005, may provide that future earnings and income arising from the transferred property will be the separate property of the owning spouse. Tex. Fam. Code § 4.102. (For agreements made on or after September 1, 2003, but before September 1, 2005, the partition or exchange of property includes future earnings and income arising from the property as the separate property of the owning spouse, unless the spouses agree in a record that the future earnings and income will be community property after the partition or exchange. Acts 2003, 78th Leg., R.S., ch. 230, § 2 (H.B. 885), eff. Sept. 1, 2003.)

If a partition or exchange agreement is made retroactive to January 1 of the year in which the suit for dissolution of marriage is filed, the court, in a decree of divorce or annulment, can confirm as separate property the income and earnings from the spouse's property, wages, salaries, and other forms of compensation received on or after January 1 of the year in which the suit for dissolution of marriage was filed or received in another year during which the spouses were married for any part of the year. Tex. Fam. Code § 7.002(c).

COMMENT: Family Code section 7.002(c) provides statutory authority to the practice of divorcing spouses filing separate tax returns and reporting their individual earnings at the end of divorce as if they were not married any part of that year and thus not having to go through the complication of reporting one half of each other's income up to the day of divorce. It is unclear whether the Internal Revenue Service or the tax courts will recognize the retroactive effect of such a partition. The wise practitioner will advise the client to consult with a certified public accountant or tax attorney before relying on this statute.

Agreements to Convert Separate Property to Community Property: Spouses may agree that all or part of the separate property owned by either or both of them is converted to community property. Tex. Fam. Code § 4.202.

§ 63.12 Constitutional Basis

The Texas Constitution provides as follows:

> All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property

> from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.

Tex. Const. art. XVI, § 15.

In *Beck v. Beck*, 814 S.W.2d 745, 749 (Tex. 1991), the court held that a premarital agreement entered into before 1980 under Family Code section 5.41 (now section 4.001) was impliedly validated by adoption of the 1980 amendment to section 15 of article XVI. The implied-validation doctrine was applied by the court only to constitutional amendments and not to legislative statutory changes.

§ 63.13 Contents of Marital Property Agreements

§ 63.13:1 Generally

"Property" is defined as an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. Tex. Fam. Code § 4.001(2).

Prospective spouses may contract in a premarital agreement with respect to—

1. the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
2. the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
3. the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
4. the modification or elimination of spousal support;
5. the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

6. the ownership rights in and disposition of the death benefit from a life insurance policy;
7. the choice of law governing the construction of the agreement; and
8. any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

Tex. Fam. Code § 4.003(a).

A premarital or marital property agreement, whether executed before, on, or after September 1, 2009, that satisfies the requirements of Family Code chapter 4 is effective to waive, release, assign, or partition a claim for economic contribution, reimbursement, or both under Family Code chapter 3, subchapter E, to the same extent the agreement would have been effective to waive, release, assign, or partition a claim for economic contribution, reimbursement, or both under the law as it existed immediately before September 1, 2009, unless the agreement provides otherwise. Tex. Fam. Code § 3.410.

In a marital property agreement, spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire. Marital property agreements can affect only community interests in property. To the extent an agreement purports to affect property that was already undisputedly either party's separate property, the agreement has no effect. *Robertson v. Robertson*, No. 13-14-00523-CV, 2015 WL 7820814, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 3, 2015, no pet.) (mem. op.).

Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. Partition and exchange agreements made on or after September 1, 2005, may also provide that future earnings and income arising from the transferred property will be the separate property of the owning spouse. Tex. Fam. Code § 4.102. (For agreements made on or after September 1, 2003, but before September 1, 2005, the partition or exchange of property includes future earnings and income arising from the property as the separate property of the owning spouse unless the spouses agree in a record that the future earnings and income will be community property after the partition or exchange. Acts 2003, 78th Leg., R.S., ch. 230, § 2 (H.B. 885), eff. Sept. 1, 2003.) Only after marriage may parties agree that income or property arising from separate property will be separate property rather than community property. Tex. Const. art. XVI, § 15; Tex. Fam. Code § 4.103.

If a premarital agreement or marital property agreement provides for an obligation to sign an agreed-on release of interests in the other party's separate property in the event

of divorce, that obligation will arise only on a court's rendering of an order of divorce and not by the mere filing of a petition for divorce. *In re Estate of Loftis*, No. 07-14-00135-CV, 2015 WL 6447179, at *5 (Tex. App.—Amarillo Oct. 23, 2015, no pet.) (mem. op.) (where husband died while divorce case was pending but before order of divorce was rendered, disposition of property was governed by provisions of parties' premarital agreement pertaining to dissolution of marriage by death, rather than provisions pertaining to dissolution of marriage by divorce).

Spouses may agree to convert all or part of the separate property owned by either or both spouses to community property. Tex. Fam. Code §§ 4.202, 4.203.

§ 63.13:2 Division of Future Earnings

Persons about to marry may partition or exchange between themselves salaries and earnings to be acquired by them during their future marriage. *Winger v. Pianka*, 831 S.W.2d 853, 858 (Tex. App.—Austin 1992, writ denied). This is true, however, only if the agreement specifically provides for such division. *See Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.—Waco 1992), *rev'd in part*, 847 S.W.2d 225 (Tex. 1993). In *Dewey v. Dewey*, the court stated, "Since appellant's income was not expressly listed in the premarital agreement and it was apparently acquired during marriage, it was clearly community property." *See Dewey v. Dewey*, 745 S.W.2d 514, 517 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied).

Without express language in a premarital agreement stating that a party's salary, earnings, income, or employee benefits during the marriage would be the party's separate property, contributions made to the party's retirement plan during the marriage were community property, not separate property. *McClary v. Thompson*, 65 S.W.3d 829, 838 (Tex. App.—Fort Worth 2002, pet. denied). Similarly, the court held that a premarital agreement with the statement that the parties would take all steps necessary to maintain the separate-property character of their property, including earnings, merely expressed their intent and was not sufficient to act as an actual partition, absent a more specific written agreement. *Bradley v. Bradley*, 725 S.W.2d 503, 504 (Tex. App.—Corpus Christi–Edinburg 1987, no writ).

Premarital agreements will be construed narrowly in favor of the community estate. *Williams v. Williams*, 246 S.W.3d 207, 211 (Tex. App.—Houston [14th Dist.] 2007, no pet.). In *Williams* the court stated that the premarital agreement language, "all revenues, increases, and income from such separate property and from their respective personal efforts will be separate property," considered in the context of the entire agreement, did

not convert wages and salaries earned during the marriage into separate property. *See Williams*, 246 S.W.3d at 214.

§ 63.13:3 Division of Income from Separate Property

The Texas Constitution clearly states that prospective spouses and spouses may make certain agreements relating to their marital property. In addition, spouses (but not prospective spouses) may enter into written agreements recharacterizing as separate property the income or property from separate property. Tex. Const. art. XVI, § 15.

Historically, courts have strictly adhered to the language of the constitution and thus have refused to enforce premarital agreements that attempted to prospectively partition income from separate property. Contrary to the *Fanning* decision, the Fourteenth Court of Appeals upheld a premarital agreement dividing income from separate property on the grounds that courts should "validate the intent of the parties and . . . uphold premarital agreements against constitutional challenges unless the language of the agreement forecloses that choice." *See Dokmanovic v. Schwarz*, 880 S.W.2d 272, 275 (Tex. App.—Houston [14th Dist.] 1994, no writ).

COMMENT: Despite the *Dokmanovic* decision, it is still a better practice to have the parties, following their marriage, execute an additional partition and exchange agreement reaffirming that income from separate property will remain separate to conform to the literal wording of the Texas Constitution.

§ 63.13:4 Provisions Relating to Children

Premarital property agreements that adversely affect child support are prohibited. Tex. Fam. Code § 4.003(b). However, the official comment to section 3 of the Uniform Premarital Agreement Act (Family Code section 4.003) indicates that an agreement could include provisions such as those relating to the upbringing of children (see **https://www.uniformlaws.org/viewdocument/final-act-with-comments-126?CommunityKey=77680803-bd1c-4f01-a03b-64db132a35fa&tab=librarydocuments**); examples might include attendance at private school, residency, funding of a trust, or funds for college expenses. Presumably, some child-related agreements could be found to be a violation of public policy and therefore prohibited by section 4.003(a)(8).

Provisions relating to support of children from a prior marriage are frequently contained in premarital agreements and would not be in violation of public policy as

between the parent and stepparent. In *Ex parte Hall*, prospective spouses Craig and MaryAnna entered into a prenuptial agreement calling for Craig to pay MaryAnna's living expenses throughout their marriage, as well as the reasonable expenses for maintenance and support of her two children by her former spouse. *Ex parte Hall*, 854 S.W.2d 656, 657 (Tex. 1993) (orig. proceeding). The trial court entered temporary orders requiring Craig to pay temporary support, based solely on the prenuptial agreement, of $23,982.75 per month. Craig was held in contempt for nonpayment and filed a writ of mandamus to the Texas Supreme Court. The court held that Craig's failure to pay temporary spousal support and temporary child support for his stepchildren, pursuant to a court order, which was based on a prenuptial agreement, is not enforceable by contempt but could be enforceable under a breach-of-contract theory. *Ex parte Hall*, 854 S.W.2d at 657. The court stated that an obligation that the law imposes on spouses to support one another and on parents to support their children is not considered a "debt" within Texas Constitution article I, section 18, but a legal duty arising out of the status of the parties. However, a person may also contract to support his or her spouse and children, and that obligation, to the extent it exceeds his or her legal duty, is a debt. The contract may be enforced by an order requiring payment of the support as agreed, but to the extent the obligation is a debt, it is enforceable only by ordinary processes of law. *Ex parte Hall*, 854 S.W.2d at 658.

COMMENT: There is neither statutory authority for nor prohibition against married persons including child-related provisions in a postnuptial agreement, but there is no reason to think that courts would treat postnuptial agreements differently from premarital agreements in this regard.

§ 63.13:5 Spousal Support

Spousal support is recognized as a subject appropriate for premarital property agreements. *See* Tex. Fam. Code § 4.003(a)(4). The official comment to section 3 of the Uniform Premarital Agreement Act (Family Code section 4.003) notes that there is a split among states about whether provisions in marital property agreements relating to spousal support will control when the parties divorce. It further states that "the better view and growing trend is to permit a premarital agreement to govern this matter if the agreement and the circumstances of its execution satisfy certain standards." See **https://www.uniformlaws.org/viewdocument/final-act-with-comments-126?CommunityKey=77680803-bd1c-4f01-a03b-64db132a35fa&tab=librarydocuments**. Since the Texas spousal support statutes have been enacted, no cases have addressed this issue.

COMMENT: When Texas adopted the Uniform Premarital Agreement Act in 1987, the legislature eliminated the following language from the Uniform Act:

> If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

Certainly, an argument could be made that an unconditional waiver of maintenance violates public policy in circumstances in which an award of alimony could be based on a conviction or a no-contest plea to criminal family violence charges or if the waiver of spousal maintenance would force a former spouse to require governmental assistance.

No specific mention of spousal support, maintenance, or alimony is contained in the Family Code sections relating to postnuptial agreements.

§ 63.13:6 Creditors' Rights

Premarital and marital property agreements must be made "without the intention to defraud pre-existing creditors." Tex. Const. art. XVI, § 15. The Family Code does not expressly address provisions in premarital agreements relating to the rights of preexisting creditors. However, section 4.106(a) regarding marital agreements states, "A provision of a partition or exchange agreement made under this subchapter is void with respect to the rights of a preexisting creditor whose rights are intended to be defrauded by it." Tex. Fam. Code § 4.106(a). Further, section 4.206(a) contains the following language to protect the rights of preexisting creditors: "A conversion of separate property to community property does not affect the rights of a preexisting creditor of the spouse whose separate property is being converted." Tex. Fam. Code § 4.206(a).

Little case law exists as to the rights of creditors with regard to premarital and marital property agreements. However, in *Calmes v. United States*, the court upheld a Texas premarital agreement in light of the Internal Revenue Service's attempts to levy on the wife's personal earnings. *See Calmes v. United States*, 926 F. Supp. 582, 584 (N.D. Tex. 1996). The IRS sought to levy against the wife's salary to satisfy a tax deficiency for the years 1984–89 owed by her husband. However, before their marriage in September 1989, the parties entered into a premarital agreement providing that their separate property remain separate and that their respective employment income remain their separate

property. Thus, when the IRS attempted to levy on the wife's wages, she argued that her separate property could not be attached to satisfy her husband's separate debt. The IRS, on the other hand, argued that the agreement's characterization of the wife's earnings "is void as to the United States, as it was entered into in an effort to hinder, delay or defraud the defendant, a preexisting creditor." *Calmes*, 926 F. Supp. at 585.

After a thorough review of Texas community property law, as well as the rights of spouses and persons about to marry to enter into marital property agreements, the court found the Calmes's agreement to be a valid premarital agreement under Texas law. The court then looked at the IRS's argument that the agreement was void as an attempt to defraud a "preexisting creditor." *Calmes*, 926 F. Supp. at 585.

The court found in favor of Susan Calmes and against the IRS for a wrongful levy:

> The premarital agreement effectively exchanged the community interests in the personal service income between the parties. Therefore, under Texas law, Jack N. Calmes never had, and does not now have, a community property interest in half of Susan Calmes personal service income. *Additionally, the premarital agreement was not a fraudulent transfer which the United States may set aside by virtue of its status as a preexisting creditor.*

Calmes, 926 F. Supp. at 592 (emphasis added).

A different result was reached in *In re Hinsley*, 201 F.3d 638 (5th Cir. 2000), a bankruptcy case brought by the bankruptcy trustee against the husband and wife. In 1989, the parties executed partition agreements that purported to divide their community estate into separate property, pursuant to Family Code section 4.102. The partition agreements were at issue because the husband filed for bankruptcy on August 10, 1995, and the bankruptcy trustee sought to reach assets assigned to the wife in the partition. In holding that the partition of the community estate with a Texas debtor and his nondebtor wife was void as fraudulent, the court noted Family Code section 4.106(a), which provides, "A provision of a partition or exchange agreement made under this subchapter is void with respect to the rights of a preexisting creditor whose rights are intended to be defrauded by it." *In re Hinsley*, 201 F.3d at 642. The court observed that Texas courts have not addressed whether actions brought under Family Code section 4.106 must meet the requirements of the Texas Uniform Fraudulent Transfer Act (Tex. Bus. & Com. Code § 24.005). The court held that the burden in Family Code section 4.106 cases should be the same as that of Texas Business and Commerce Code section 24.005 cases. *In re Hinsley*, 201 F.3d at 643.

The court noted that section 24.005(b) of the Texas Business and Commerce Code lists eleven nonexclusive badges of fraud that may be used to prove the fraudulent intent of the transferor and the bankruptcy trustee contended that eight of the badges of fraud were present because of the conduct of the Hinsleys. The court further noted that one of the Texas Uniform Fraudulent Transfer Act's badges of fraud is whether the transferor received consideration reasonably equivalent in value to the asset transferred (*see* Tex. Bus. & Com. Code § 24.005(b)(8)) and stated that "[i]ntangible, non-economic benefits, such as preservation of marriage, do not constitute reasonably equivalent value." *In re Hinsley*, 201 F.3d at 643. In essence, the court held there was a failure of consideration. The Hinsleys' partition agreements were held to be void with respect to the rights of the preexisting creditors, who were defrauded. *In re Hinsley*, 201 F.3d at 644.

§ 63.13:7 Waiver of Rights

Parties can waive their rights, including statutory homestead rights, by means of a marital property agreement. *See Hunter v. Clark*, 687 S.W.2d 811, 816–17 (Tex. App.—San Antonio 1985, no writ).

Federal law preempts the waiver of rights to survivor benefits in ERISA-qualified plans by persons about to marry in a premarital agreement. The federal Employee Retirement Income Security Act (ERISA) statute expressly provides that it supersedes state laws regulating qualified employee benefit plans. 29 U.S.C. § 1144(a). Thus, state law is preempted generally in that area of regulation. It has been routinely held that a waiver of rights to survivor benefits in an ERISA-qualified plan in a premarital agreement is ineffective, allowing the surviving spouse to receive survivor benefits even though others may be named as beneficiaries with the plan administrator. *See, e.g.*, *Hurwitz v. Sher*, 789 F. Supp. 134 (S.D.N.Y. 1992), *aff'd*, 982 F.2d 778 (2d Cir. 1992); *Zinn v. Donaldson Co.*, 799 F. Supp. 69 (D. Minn. 1992).

However, spouses can waive rights to retirement benefits in marital agreements. See the discussion in section 63.23 below.

§ 63.14 Formalities for Premarital Agreements

Consideration: Premarital agreements, which require no consideration, must be in writing and signed by both parties. Tex. Fam. Code § 4.002. *See Ruiz v. Ruiz*, No. 04-16-00016-CV, 2016 WL 7445121, at *3 (Tex. App.—San Antonio Dec. 28, 2016, no pet.) (mem. op.) (Mexican marriage certificate showed parties selected separate-property regime but was not signed by parties, and no signed marriage application was

offered in evidence; thus certificate did not meet requirements of valid and enforceable premarital agreement under Texas law).

Amendment and Revocation: After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration. Tex. Fam. Code § 4.005. However, if parties divorce and remarry each other, the marital property agreement relative to their first marriage will not be effective as to their second marriage. *Marshall v. Marshall*, 735 S.W.2d 587, 592 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

§ 63.15 Formalities for Agreements between Spouses and Partition and Exchange Agreements

No Consideration: Partition and exchange agreements and agreements between spouses concerning income or property from separate property must be in writing and signed by both spouses. Tex. Fam. Code § 4.104. The Family Code specifically provides that such an agreement executed on or after September 1, 2005, is enforceable without consideration. Tex. Fam. Code § 4.104; Acts 2005, 79th Leg., R.S., ch. 477, §§ 2, 4 (H.B. 202), eff. Sept. 1, 2005. However, former spouses cannot enter into partition and exchange agreements and must have mutual consideration for an agreement to be enforceable. *McClain v. McClain*, No. 13-15-00449-CV, 2017 WL 1455089 (Tex. App.—Corpus Christi–Edinburg Apr. 20, 2017, no pet.) (mem. op.). Under the provisions of the Texas Constitution, there could be situations in which spouses agree that one spouse may have all the income from his or her separate property as separate property without any benefit to the other spouse. *See* Tex. Const. art. XVI, § 15.

For agreements made before September 1, 2005, the consideration for partition and exchange agreements would generally be the division of community property between the parties' separate estates. *See McBride v. McBride*, 797 S.W.2d 689 (Tex. App.—Houston [14th Dist.] 1990, writ denied). No judicial approval of a partition and exchange agreement is required. *Patino v. Patino*, 687 S.W.2d 799, 801 (Tex. App.—San Antonio 1985, no writ). Agreements must be for the specific purpose of effecting a present or future partition and exchange of property and must state the intent of the parties to enter into an agreement relating to their marital estate. *Collins v. Collins*, 752 S.W.2d 636, 637 (Tex. App.—Fort Worth 1988, writ ref'd). A valid agreement must contain language setting out an agreement to partition property. A forfeiture of all rights to property does not constitute a partition. *McBride*, 797 S.W.2d at 692. See *In re Hinsley*, 201 F.3d 638 (5th Cir. 2000), in which the court held a failure of consideration in a

partition and exchange agreement caused the agreement to be a fraudulent transfer adversely affecting the rights of preexisting creditors, thus making the partition agreement void with respect to the rights of the preexisting creditors.

Amendment and Revocation: Although there is no specific statutory reference, postnuptial property agreements may be revoked or amended only by written agreement signed by the parties.

§ 63.16 Formalities for Agreements between Spouses to Convert Separate Property to Community Property

An agreement to convert separate property to community property must be in writing and signed by the spouses, identify the property being converted, and specify that the property is being converted to the spouses' community property. The agreement is enforceable without consideration. Tex. Fam. Code § 4.203(a). An agreement to convert separate property to community property must contain warning language, prominently displayed in bold-faced type, in capital letters, or underlined. If the agreement contains the required warning language, it is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting separate property to community property. *See* Tex. Fam. Code § 4.205(b). An agreement that fails to comply with these requirements is void. *See Robertson v. Robertson*, No. 13-14-00523-CV, 2015 WL 7820814, at *7 (Tex. App.—Corpus Christi–Edinburg Dec. 3, 2015, no pet.) (mem. op.).

§ 63.17 Burden of Proof for Enforcement

Burden of Proof: In cases involving agreements signed after September 1, 1987, the burden is on the party resisting enforcement of a marital property agreement to prove that it should not be enforced. The Family Code sets out the elements that must be proved to avoid enforcement of various types of property agreements. Tex. Fam. Code § 4.006 (premarital agreements), § 4.105 (marital agreements), § 4.205 (agreements to convert separate to community). Parol evidence may be used to prove the existence of a premarital agreement. *See Jurek v. Couch-Jurek*, 296 S.W.3d 864 (Tex. App.—El Paso 2009, no pet.).

§ 63.18 Defenses

Statutory Defenses: The Family Code sets out the exclusive remedies and defenses available to enforce marital property agreements signed after September 1, 1993. *See* Tex. Fam. Code §§ 4.006(c), 4.105(c). Cases involving enforcement of agreements signed before that date are governed by the law in effect at the time the agreement was signed. *Marsh v. Marsh*, 949 S.W.2d 734, 738 (Tex. App.—Houston [14th Dist.] 1997, no writ) (citing Acts 1993, 73rd Leg., R.S., ch. 136, § 3 (H.B. 1274)).

Common-Law Defenses: Common-law defenses regarding the enforcement of contracts may still be available to attack pre–September 1, 1993, agreements. The three most frequently used common-law defenses are fraud, duress, and overreaching. *See Matelski v. Matelski*, 840 S.W.2d 124, 129 (Tex. App.—Fort Worth 1992, no writ) ("[n]o duress unless there is a threat to do some act which the party threatening has no legal right to do . . . of such character as to destroy the free agency of the party. . . [and] overcome his will and cause him to do that which he would not otherwise do"); *Citizens Standard Life Insurance Co. v. Muncy*, 518 S.W.2d 391, 394 (Tex. App.—Amarillo 1974, no writ) (setting out elements of fraud).

Voluntariness: A property agreement is not enforceable if the party against whom enforcement is sought proves that he did not execute the agreement voluntarily. Tex. Fam. Code § 4.006(a)(1) (premarital agreement), § 4.105(a)(1) (marital agreement), § 4.205(a)(1) (agreement converting separate property to community property).

"'Voluntary' means done by design or intentionally or purposely or by choice or of one's own accord or by the free exercise of the will. A voluntary act proceeds from one's own free will or is done by choice or of one's own accord, unconstrained by external interference, force or influence." *Prigmore v. Hardware Mutual Insurance Co. of Minnesota*, 225 S.W.2d 897, 899 (Tex. App.—Amarillo 1949, no writ).

Evidence of fraud and duress can provide proof of involuntariness in a premarital agreement. A party is not required to prove an "express direct threat or coercion" to establish that an agreement was involuntarily signed. *Moore v. Moore*, 383 S.W.3d 190, 195–96 (Tex. App.—Dallas 2012, pet. denied). There can be no duress unless there is a threat to do some act that the demanding party has no legal right to do; there must be some illegal exaction or some fault or deception; the restraint must be imminent and such as to destroy the free agency without the present means of protection. *Spring Branch Bank v. Mengden*, 628 S.W.2d 130, 134 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *see In re Marriage of Lehman*, No. 14-17-00042-CV, 2018 WL

3151172, at *3 (Tex. App.—Houston [14th Dist.] June 28, 2018, no pet.) (mem. op.) (financial inability to support children not duress in signing premarital agreement).

Although mental incapacity is a common-law contract defense, which should not be available to defeat a statutory postmarital agreement, it is relevant to the question of whether the agreement was voluntarily executed. *See Sanders v. Sanders*, No. 02-08-00201-CV, 2010 WL 4056196 (Tex. App.—Fort Worth Oct. 14, 2010, no pet.) (mem. op.).

Unconscionability: An agreement will not be enforced against a person who can prove that the agreement was unconscionable at the time it was signed and that, before execution of the document, the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party. Tex. Fam. Code §§ 4.006(a)(2), 4.105(a)(2).

Unconscionability of the agreement is a matter of law for decision by the court. Tex. Fam. Code §§ 4.006(b), 4.105(b); *Pletcher v. Goetz*, 9 S.W.3d 442, 445 (Tex. App.—Fort Worth 1999, pet. denied).

No definition of "unconscionable" is offered in the statute. Citing *Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.—El Paso 1991, writ denied), a postnuptial agreement case, the *Marsh* court stated that Texas courts have addressed unconscionability on a case-by-case basis, "looking to the entire atmosphere in which the agreement was made." *Marsh*, 949 S.W.2d at 740. Further, the *Marsh* court quoted the general discussion in *Wade v. Austin*, 524 S.W.2d 79 (Tex. App.—Texarkana 1975, no writ), to the effect that the trial court must look to the entire atmosphere; the alternatives, if any, that were available to the parties at the time the contract was made; the nonbargaining ability of one party; whether the contract is illegal or against public policy; and whether the contract is oppressive or unreasonable:

> [T]he fact that a bargain is a hard one does not entitle a party to be relieved therefrom if he assumed it fairly and voluntarily. A contract is not unenforceable on the ground that it yields a return disproportionate to the expenditures in time and money, where there has been no mistake or unfairness and the party against whom it is sought to be enforced has received and enjoyed the benefits.

Wade, 524 S.W.2d at 86; *see also Fanning v. Fanning*, 828 S.W.2d 135, 145–46 (Tex. App.—Waco 1992), *rev'd in part*, 847 S.W.2d 225 (Tex. 1993), in which the court also looked to *Wade* for guidance regarding whether an agreement was unconscionable. The trial court found—and the appeals court agreed—that a postnuptial partition agreement was unconscionable as it related to Mrs. Fanning, considering the circumstances (recited at length in the appeals court's decision) surrounding the agreement's execution.

In *Fazakerly v. Fazakerly*, a prenuptial agreement entered into between husband and wife was attacked after the husband's death on the basis of unconscionability. *Fazakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App.—Eastland 1999, pet. denied). The court held that "[t]he mere fact that a party made a hard bargain does not allow him relief from a freely and voluntarily assumed contract; parties may contract almost without limitation regarding their property." *Fazakerly*, 996 S.W.2d at 265.

The official comment to section 6 of the Uniform Premarital Agreement Act (Family Code section 4.006) instructs attorneys to look to commercial and contract law to define the term *unconscionable*. See **https://www.uniformlaws.org/viewdocument/final-act-with-comments-126?CommunityKey=77680803-bd1c-4f01-a03b-64db132a35fa&tab=librarydocuments**. In addition, the *Pletcher* court stated that since neither the legislature nor the supreme court has defined "unconscionable" in the context of marital property agreements, appellate courts have turned to the commercial context for guidance in evaluating "unconscionability." *Pletcher*, 9 S.W.3d at 445. The Texas Deceptive Trade Practices–Consumer Protection Act defines an unconscionable act as an act that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree. Tex. Bus. & Com. Code § 17.45(5). A showing that the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated has been required. *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985); *see also Griffith v. Porter*, 817 S.W.2d 131, 136 (Tex. App.—Tyler 1991, no writ).

Because the court determines whether an agreement was unconscionable when it was made as a matter of law, the court of appeals will independently evaluate the evidence considered by the trial court. *Marsh*, 949 S.W.2d at 739 (citing *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.—Houston [1st Dist.] 1989, no writ)). Mere unfairness does not rise to the level of unconscionability. *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied). In holding that the presumption of enforceability of a premarital agreement had not been defeated, the *Marsh* court stated that the fact that the premarital agreement was signed shortly before the wedding does

not make the agreement unconscionable, that the fact that a party was not represented by independent counsel is not dispositive, that the fact that the agreement was "one-sided" does not support a finding of unconscionability, and that the fact that a party denied reading the agreement before signing it is not grounds for voiding the contract. *Marsh*, 949 S.W.2d at 741–42.

Inadequate Disclosure and No Waiver: As previously indicated, if a party can prove that an agreement was unconscionable when it was signed, he must additionally prove that there was inadequate disclosure of the other party's property or financial obligations; that the complaining party did not have, or reasonably could not have had, adequate knowledge of the other's property or financial obligations; and that the complaining party had not waived disclosure of financial information from the other party. Tex. Fam. Code §§ 4.006(a)(2), 4.105(a)(2). The court found in *Fanning* that Mrs. Fanning did not have adequate disclosure of Mr. Fanning's property or financial obligations when she signed a postnuptial partition agreement prepared by Mr. Fanning. The evidence revealed that Mr. Fanning wanted to keep Mrs. Fanning ignorant of his financial dealings because he feared a criminal investigation. He kept no documents in their home, and Mrs. Fanning did not know how much money was in his accounts, how much money Mr. Fanning made, or how much property he owned. *Fanning*, 828 S.W.2d at 146.

Lack of Fair and Reasonable Disclosure: An agreement to convert property to community property is not enforceable if the spouse against whom enforcement is sought proves that he or she did not receive a fair and reasonable disclosure of the legal effect of converting the property to community property. Tex. Fam. Code § 4.205(a)(2). An agreement that contains the required warning statement is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting separate property to community property. *See* Tex. Fam. Code § 4.205(b).

§ 63.19 Enforcement of Premarital Agreements

Enforcement of premarital agreements is governed by Family Code section 4.006. *See* Tex. Fam. Code § 4.006. This provision (formerly section 5.46), as amended in September 1993, eliminates the common-law remedies or defenses such as fraud, duress, and overreaching formerly available in these cases. The 1993 amendment, however, applies only to enforcement of agreements that were *executed* on or after September 1, 1993. The use of common-law remedies as defenses in suits involving agreements executed before September 1, 1993, will be governed by the law in effect at the time the agreement was executed by the parties. (See *Marsh v. Marsh*, 949 S.W.2d 734, 738 (Tex.

App.—Houston [14th Dist.] 1997, no writ), citing Acts 1993, 73rd Leg., R.S., ch. 136, § 3 (H.B. 1274), which states, "This Act takes effect September 1, 1993, and applies only to an agreement executed on or after that date. An agreement executed before that date is governed by the law in effect at the time the agreement was executed, and the former law is continued in effect for that purpose.")

Case law before the *Marsh* decision on the subject of enforcement and which law controls in a specific case is misleading. The Texas Supreme Court has held that the law in effect at the time the divorce decree is signed determines the enforceability of a premarital agreement. *Sadler v. Sadler*, 769 S.W.2d 886, 886–87 (Tex. 1989) (per curiam). Although in *Sadler* the same law regarding enforcement of premarital agreements was in effect at the time the parties' premarital agreement was signed and at the time the divorce decree was signed, the courts in *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App.—Houston [14th Dist.] 1989, writ denied), and *Grossman v. Grossman*, 799 S.W.2d 511 (Tex. App.—Corpus Christi–Edinburg 1990, no writ), followed the *Sadler* language even though in each of those cases the law had changed between the time the parties' agreements were executed and the time the divorces were granted.

Void Marriages: If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. Tex. Fam. Code § 4.007. *See In re Ja.D.Y.*, No. 05-16-01412-CV, 2018 WL 3424359, at *6 (Tex. App.—Dallas July 16, 2018, no pet.) (mem. op.).

Statute of Limitations: A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. Equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. Tex. Fam. Code § 4.008.

Declaratory Judgments: Declaratory judgments have been used to bolster the enforceability of marital property agreements. A reaffirmation after marriage will still be necessary to provide that the income from separate property will be the separate property of a spouse. The purpose of a declaratory judgment in this situation is to obtain a court order stating that the marital property agreement is enforceable, constitutional, and not unconscionable. Declaratory judgments are discussed in section 61.10 in this manual.

COMMENT: There is some question as to whether the filing of suit for declaratory judgment in such a circumstance requests relief that a court may be unable to grant, on

the basis that there is no justiciable controversy between the parties. *See Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 444 (Tex. 1993); *Boorhem-Fields, Inc. v. Burlington Northern Railroad Co.*, 884 S.W.2d 530, 539 (Tex. App.—Texarkana 1994, no writ).

§ 63.20 Enforcement of Marital Property Agreements

Enforcement of marital property agreements is governed by Family Code section 4.105. *See* Tex. Fam. Code § 4.105. This provision (formerly section 5.55), as amended in September 1993, eliminates the common-law remedies or defenses such as fraud, duress, and overreaching formerly available in these cases. The 1993 amendment, however, applies only to enforcement of agreements that were executed on or after September 1, 1993.

Courts will scrutinize marital property agreements more closely than premarital agreements because spouses owe each other special fiduciary duties. *See Marsh v. Marsh*, 949 S.W.2d 734, 739 n.4 (Tex. App.—Houston [14th Dist.] 1997, no writ).

In *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.—Houston [1st Dist.] 1989, no writ), the court held that the common-law defenses were still viable after the 1987 amendments to former Family Code section 5.55, now section 4.105. That decision is moot after the 1993 amendment, which specifically prohibits use of common-law defenses in challenging postnuptial agreements executed after September 1, 1993.

§ 63.21 Enforcement of Agreement to Convert Separate Property to Community Property

An agreement to convert separate property to community property is not enforceable if the spouse against whom enforcement is sought proves that the spouse did not (1) execute the agreement voluntarily or (2) receive a fair and reasonable disclosure of the legal effect of converting the property to community property. Tex. Fam. Code § 4.205(a). The agreement is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting separate property to community property when the agreement contains prescribed warning language prominently displayed in boldfaced type, in capital letters, or underlined. *See* Tex. Fam. Code § 4.205(b).

Burden of Proof: The burden of proof is on the party resisting enforcement of an agreement to convert separate property to community property to prove that the party did not execute the document voluntarily or that the party did not receive a fair and rea-

sonable disclosure of the legal effect of converting separate property to community property. *See* Tex. Fam. Code § 4.205(a). If an enforcement proceeding occurs after the death of the spouse against whom enforcement is sought, the proof required by Family Code section 4.205(a) may be made by an heir of the spouse or the personal representative of the estate of the spouse. Tex. Fam. Code § 4.205(c).

§ 63.22 Waiver of Disclosure of Financial Information

In many cases, spouses or prospective spouses entering into marital property agreements also sign documents waiving further disclosure of financial information from their partners. Execution of such a waiver effectively limits the party who wants to avoid enforcement of a marital property agreement to an argument that the agreement was not voluntarily signed.

COMMENT: In light of the words "before signing the agreement" in Family Code section 4.006(a)(2) and the words "before execution of the agreement" in section 4.105(a)(2), a waiver of disclosure of financial information should be signed, dated, and time stamped before execution of the agreement.

§ 63.23 Waiver of Retirement Benefits

Despite the provisions of the Family Code, federal law dictates that future spouses cannot waive survivor retirement benefits of the other future spouse in ERISA-qualified plans. The federal Employee Retirement Income Security Act (ERISA) broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). A law "relates to" an employee benefit plan when the law has "a connection with or reference to such plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96–97 (1983).

However, married persons can waive an interest in survivor benefits. ERISA provides that a spouse's waiver of rights to "qualified joint and survivor annuity" and the "qualified preretirement survivor annuity" is not valid unless the waiver (1) is in writing, (2) either names the alternative beneficiary or states that the employee spouse may designate an alternative beneficiary without further consent of the nonemployee spouse, and (3) "acknowledges the effect" of the waiver itself and is witnessed by a plan representative or a notary public. 29 U.S.C. § 1055(c)(2).

Although not specifically dealing with premarital or postmarital agreements, the United States Supreme Court has addressed the issue of whether the terms of 29 U.S.C.

§ 1056(d)(1), barring the assignment or alienation of benefits, "invalidated the act of a divorced spouse, the designated beneficiary under her ex-husband's ERISA pension plan, who purported to waive her entitlement by a federal common law waiver embodied in a divorce decree that was not a QDRO." *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865, 868 (2009). The Supreme Court held that "such a waiver is not rendered invalid by the text of the antialienation provision, but that the plan administrator properly disregarded the waiver owing to its conflict with the designation made by the former husband in accordance with plan documents." *Kennedy*, 129 S. Ct. at 868.

In *Manning*, which interpreted the Texas Family Code, the court held that federal common law applied to the dispute. *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000). The court held that a named ERISA beneficiary may waive entitlement to the proceeds of an ERISA plan providing life insurance benefits if the waiver is explicit, voluntary, and made in good faith. The court concluded that the language in the premarital agreement was not an adequate waiver. *Manning*, 212 F.3d at 874.

§ 63.24 Contractual Remedies

A premarital agreement is interpreted as any other written contract. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d 119, 122 (Tex. 2018). In *I.C.*, the wife sought rescission of a premarital agreement containing a forfeiture provision that stated "if [wife] seeks to invalidate some or all of this Agreement, or seeks to recover property in a manner at variance with this Agreement, then [wife] shall forfeit" the specified cash payment of five million dollars. In upholding the forfeiture, the court further stated that the interpretation of an unambiguous contract is a question of law for the court.

Attorney's fees are recoverable for breach of a premarital agreement. *See In re Marriage of Veldekens*, No. 14-16-00770-CV, 2018 WL 2727837, at *5 (Tex. App.—Houston [14th Dist.] June 7, 2018, no pet.) (mem. op.) (attorney's fees award upheld for wife's defense of premarital agreement when husband breached agreement by claiming wife's separate property).

§ 63.25 Recording and Notice to Creditors

Marital property agreements may be recorded among the deed records in the county in which a party resides and in the county in which the real estate affected is located. An agreement serves as constructive notice to a good-faith purchaser for value or a creditor

without actual notice only if the instrument is acknowledged and recorded in the county in which the real property is located. Tex. Fam. Code § 4.106(b).

A conversion of separate property to community property may be recorded in the deed records of the county in which a spouse resides and of the county in which any real property is located. A conversion of real property is constructive notice to a good-faith purchaser for value or a creditor without actual notice only if the agreement to convert the property is acknowledged and recorded in the deed records of the county in which the real property is located. The conversion of separate property to community property does not affect the rights of a preexisting creditor of the spouse whose separate property is being converted. Tex. Fam. Code § 4.206.

§ 63.26 Arbitration

If a party seeks to avoid arbitration and asserts that the contract containing the agreement to arbitrate is not valid or enforceable, notwithstanding any provision of the contract to the contrary, the court must try the issue promptly and may order arbitration only if the court determines that the contract is valid and enforceable against the party seeking to avoid arbitration. Even if the contract is found valid and enforceable, the court may stay arbitration or refuse to compel arbitration on any other ground. These provisions do not apply to a court order, a mediated settlement agreement, a collaborative law settlement agreement, a written settlement agreement reached at an informal settlement conference, an agreed parenting plan, or any other agreement between the parties that is approved by a court. Tex. Fam. Code §§ 6.6015, 153.00715.

[Sections 63.27 through 63.30 are reserved for expansion.]

III. Useful Websites

§ 63.31 Useful Websites

The following website contains information relating to the topic of this chapter:

Uniform Premarital Agreement Act (§§ 63.11, 63.13:4, 63.13:5, 63.18)
https://www.uniformlaws.org/viewdocument/final-act-with-comments-126?CommunityKey=77680803-bd1c-4f01-a03b-64db132a35fa&tab=librarydocuments

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