SAPCR CASE LAW UPDATE
2021-2022

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Memberships, Affiliations and Awards

- State Bar of Texas, Family Law Section, Appellate Section
- Fellow, Texas Bar Foundation
- American Inns of Court – Burta Rhoads Raborn Inn - Family Law; 2013 Recipient *North Star Award*
- Houston Bar Assoc., Family Law Section, Member and Director 2001 – 2003; Treasurer 2004; Chair Elect 2005-2006; Chair 2006-2007; Past Chair 2007-2008
- Lone Star Legal Aid, Board of Directors 2006 – 2009
- Adjunct Professor, South Texas College of Law 2010 – 2012, 2015
- *Texas Monthly* Super Lawyers, Family Law – 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022
- State Bar of Texas, Family Law Section, Family Law Council 2020 –
- State Bar of Texas, Family Law Section, Form Book Committee Member, Awards & Scholarship Committee Member, Appellate Committee 2020 – 2021, 2021-2022
- State Bar of Texas, Annotated Family Code, Chair Legislative Update Committee, 2018, 2019, 2020, 2021, 2022
- Texas Center for the Judiciary, 2019 Recipient of Exemplary Speaker Award

Legal Publications and Presentations

- *Annual SAPCR Case Law Update*, Judicial Education Conference, Texas Center for the Judiciary, September 2022
- *A Mixed Bag of Tricks: SAPCR Case Law Update*, Advanced Family Law, State Bar of Texas, August 2022
- *That's The Way of the World: Case Law Update*, Family Law Bar Association of San Antonio, March 2022
- *Family Case Law Update*, 2022 Family Justice Conference, Texas Center for the Judiciary, January 2022
- *Legislative Update: Family and Probate*, Houston Bar Association Bench Bar Conference, October 2021
- *Twenty for 2020-2021: What You Might Have Missed*, Gulf Coast Family Law Specialists, October 2021
- *Defaults, Deeds & Debatable Divisions: Property Case Law Update*, Advanced Family Law, State Bar of Texas, August 2021
- *Family Case Law Update 2021*, State Bar Summer School, State Bar College, July 2021
- *In re C.J.C.: A Fit Parent Presumption Emerges*, Marriage Dissolution, State Bar of Texas, April 2021
- *That's the Way of the World, Case Law Update 2021*, Family Law Bar Association of San Antonio, March 2021
- *Ain't Too Proud to Beg: Persuading the Appellate Court*, Advanced Family Law, State Bar of Texas, August 2020
- *Interesting Case Law Update*, State Bar Summer School, State Bar of Texas, July 2020

- *Government 101: Case Law Update*, San Antonio Family Bar Association, February, 2020
- *A Mixed Bag of Old Dogs & New Tricks: SAPCR Case Law Update*, Advanced Family Law, State Bar of Texas, August 2019
- *Case Law Update: SAPCR* , Marriage Dissolution, State Bar of Texas, April 2019
- *Your Sword & Shield: Statutory Findings in Family Law Cases*, 2019 Family Justice Conference, Texas Center for the Judiciary, January 2019
- *Family Law Case Update*, 2018 Annual Judicial Education Conference, Texas Center for the Judiciary, September 2018
- *Appellate Changes in Family Law*, Advanced Civil Appellate Practice, State Bar of Texas, September 2018
- *Amicus, Aliens & Anarchy: SAPCR Case Law Update*, Advanced Family Law, State Bar of Texas, August 2018
- *The Ruling is Wrong – Now What? Preparing for Appeal*, State Bar Summer School, July 2018
- *The Family Law Appeal: A Particular, Sometimes Peculiar, Pursuit*, State Bar Annual Meeting, June 2018
- *Tractors, Traitors & Other Treacheries: Marital Property Case Law Update*, Marriage Dissolution, State Bar of Texas, April 2018
- *The Rules of the Island: Case Law Update*, San Antonio Bar Association Extreme Family Law Makeover IVI, February 2018
- *Family Law Case Update*, 2017 Family Justice Conference, Texas Center for the Judiciary, January 2017
- *Summary Judgments: Help?Hindrance?Headache?*, Advanced Family Law Drafting, State Bar of Texas, December 2017
- *Beginning at the End: Findings, Conclusions and Other Post Judgment Considerations*, Advanced Family Law, State Bar of Texas, August 2017
- *SAPCR Case Law Update*, Marriage Dissolution, State Bar of Texas, April 2017
- *Case Law Update: Is the Pittboss Changing the Deck*? San Antonio Bar Association Extreme Family Law Makeover XV, February 2017
- *2016 Family Law Case Update*, Family Justice Conference, Texas Center for the Judiciary, January 2017
- *Annual Case Law Update 2016*, Advanced on a Shoestring, Tarrant County Bar Assoc., November 2016
- *Case Law Update SAPCR: A Little Something for Everyone*, Advanced Family Law, State Bar of Texas, August 2016
- *Case Law Update SAPCR: A Little Something for Everyone*, Marriage Dissolution, State Bar of Texas, April 2016
- *Annual Family Case Update*, San Antonio Bar Association Extreme Family Law Makeover XIV, February 2016
- *Keeping Up with the Kiddos: Case Law Update*, Texas Association of Domestic Relations Offices, October 2015
- *Legislative & Case Law Update: Marriage & Property*, Family Lawyers for Good Judges PAC, September 2015
- *Case Law Update: Marriage & Property*, Advanced Family Law Course, State Bar of Texas, August 2015
- *Family Law Legislative and Case Update*, State Bar College Summer School, State Bar of Texas, July 2015
- *Keeping Up with the Kiddos: Case Law Update*, Marriage Dissolution, State Bar of Texas, April 2015
- *Top Tips to Keep Your Appellate Lawyer Happy*, Houston Bar Association, Family Law Section, October 2014
- *Keeping Up with the Kiddos: Case Law Update*, Advanced Family Law Course, State Bar of Texas, August, 2014
- *Keeping Up with the Kiddos: Case Law Update*, Marriage Dissolution, State Bar of Texas, April 2014
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- *Findings of Fact & Conclusions of Law*, Family Law Institute, South Texas College of Law, March 2013
- *Case Law Update: Marital Property & Divorce*, Marriage Dissolution, State Bar of Texas, May 2012
- *Keeping Up with the Kiddos: Case Law Update*, Marriage Dissolution, State Bar of Texas, May 2011

- *What's Up with the Kids? Case Law Update*, Parent-Child Conference: Critical Thinking for Critical Issues, University of Texas CLE, January 2011
- *Keeping Up with the Kiddos: Case Law Update*, Marriage Dissolution, State Bar of Texas, May 2010
- *Family Law from Above: The Year in Review*, Ultimate Trial Notebook, State Bar of Texas, December 2009
- *Litigating Outside the Family Code: Dividing Assets Between Unmarried Parties*, Advanced Family Law Course, State Bar of Texas, August 2009
- *Lost! The Legal, Practical and Emotional Conundrum of Losing Custody*, Parent-Child Conference: Critical Thinking for Critical Issues, University of Texas CLE, January 2009
- *Case Law Update: Children's Issues*, Advanced Family Law Course, State Bar of Texas, August 2008
- *Am I In the Right Place? Jurisdiction in SAPCR Cases*, Definitive Short Course on Parent-Child Relationships, University of Texas CLE, November 2007
- *Best Serving Best Interest: Reviewing the Basics*, Adv. Family Law Boot Camp, State Bar of Texas, August 2007
- *Summary Judgments: The Ultimate Trial May Be No Trial At All!*, Ultimate Trial Notebook, State Bar of Texas, December 2006
- *CYA for the OOA: Tips for Avoiding Reversal*, Family Law on the Front Lines, University of Texas School of Law, June 2006
- *Risk Management: Preventing Problems on Appeal*, Family Law Institute, HBAFLS, March 2006
- *Enforcement of Family Law Orders: The Rules and the Tools*, Family Law Practice Institute, University of Houston Law Center Foundation, November 2005
- *Should Biology be the Controlling Factor in Parentage?*, Family Law on the Front Lines, University of Texas School of Law, June 2005
- *Relocation is on the Move*, Texas Bar Journal, Vol. 66, No. 1, January 2003
- *Summary Judgments: What Are You Waiting For?*, Advanced Family Law Drafting Course, State Bar of Texas December 2002
- *Findings of Fact and Conclusions of Law: The Rhyme and Reason of the Ruling,* Texas Advanced Family Law Drafting Course, State Bar of Texas December 2001
- *Enforcement of Family Law Orders: The Rules and the Tools*, Family Law Practice Institute, University of Houston Law Center Foundation, October 2001; June 2002; November 2005
- *To Grandmothers House We Go: A Look at Third Party Standing and Rights of Access*, 4th Annual Family Law Institute, Houston Bar Association, Family Law Section, March 2001
- *Retracing The Conflicting Rules of Tracing*, New Frontiers in Marital Property, State Bar of Texas, October 1999
- *Direct Appeals and Extraordinary Writs: Putting the Judiciary On Trial*, Family Law Institute, Houston Bar Association, Family Law Section March 1998
- *Appellate Practice Pitfalls: New Minefields, Fewer Mines*, 8th Annual Family Law Conference, South Texas College of Law, February 1998
- *Things to Remember so Your Appellate Lawyer Will Like You*, Houston Bar Association Family Law Section presentation, November 1997
- *Mad About Mandamus*, Houston Bar Association Family Law Section presentation, April 1997
- *Effective Use of Paralegals*, Houston Legal Assistants Assoc. presentation, March 1997
- *Family Law Mediation Training,* South Texas Center for Legal Responsibility, October 1996
- *Houston Bar Association Family Law Handbook*, Committee member and author, published Spring, 1996; Editor for revised version published Fall, 2001
- *Protective Orders*, 6th Annual Family Law Conference, South Texas College of Law, April 1996
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- *Handling Post-Judgment Modifications*, Texas Family Law Practice for Paralegals, March, 1995
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SAPCR CASE LAW UPDATE: 2021-2022

I. Introduction

This paper is intended to update the most interesting family law cases over the last year or so relating to issues involved in suits affecting the parent-child relationship.

The appellate decisions summarized herein are those which have been issued since July 2021. The case law updates include not only decisions regarding significant legal issues but also those that are factually interesting and unique, whether or not they include anything of legal note. Cases involving the termination of parental rights and protective orders are not covered.

Within each topic, the cases have been organized chronologically. All references to "TFC" are to the Family Code; "TRCP" to the Texas Rules of Civil Procedure; "TRE" to the Texas Rules of Evidence; and "CPRC" to the Texas Civil Practice and Remedies Code.

II. Procedure and Evidence – SAPCR

A. *In re Gopalan,* 2021 Tex. App. LEXIS 5670 (Tex. App. – Austin July 15, 2021, orig. proceeding) (mem. op.) (Case No. 03-21-00209-CV)

Experts may not testify as to any matter "related to" conservatorship or access unless they have done a child custody evaluation per statute.

During a divorce proceeding the court appointed a child custody evaluator, Dr. X, who prepared an original custody evaluation report and an updated report. F designated Dr. Y in his discovery as someone who would review and analyze Dr. X's reports. Dr. Y eventually prepared rebuttal reports. M filed a motion to exclude Dr. Y from testifying claiming Dr. Y had not been appointed pursuant to TFC Chp. 107 and had not performed a complete custody evaluation. The trial court granted the motion to exclude and F sought mandamus relief. The COA first notes that TFC 104.008(a) specifically provides that no person may offer an expert opinion or recommendation relating to conservatorship or access unless they have conducted a child custody evaluation under Chp. 107. While the parties do not disagree that Dr. Y did not conduct any such evaluation, F argues that he was not planning to offer an opinion or recommendation per 104.008, but instead he was simply critiquing the methodologies employed by Dr. X in his Chp. 107 evaluation. M argues that Dr. Y's testimony still "relates" to conservatorship and possession and thus was properly excluded. The COA notes that the exclusionary effects of TFC 104.008 include all persons who have not performed a statutory custody evaluation. Further the COA notes that Dr. Y's report does in fact criticize some aspects of Dr. X's approach but it also actually recommends that the trial court consider a more equal possession schedule as different from what Dr. X recommended and it offers insight into what Dr. Y would testify to if given the opportunity. The COA determines that Dr. Y's report and testimony was property excluded because it "related to" conservatorship and possession and Dr. Y had not done a statutory evaluation as TFC 104.008 (a) requires. **COMMENT:** TFC 104.008(a) could not be clearer, so let's consider this logically. If you plan to secure a rebuttal expert to challenge a court ordered custody evaluation, you have a mountain to climb. First, if you represent the parent who does not have either an independent or joint right to consent to psychiatric/psychological treatment of the children, you will need court intervention to get the children to participate in the rebuttal evaluation process. Second, you will also need to secure a court order compelling the other parent to participate in the rebuttal evaluation because what attorney is going to willingly recommend that their client cooperate? If you manage to accomplish steps one and two, then will there effectively be two court appointed custody evaluators? What a tangled web we weave.

B. *In the Interest of C.R.D.,* 2021 Tex. App. LEXIS 7039 (Tex. App. – Tyler August 25, 2021, no pet.) (mem. op.) (Cause No. 12-20-00143-CV)

Trial court does not err by refusing to interview child over age 12 if court determines that interview would endanger the child.

In March 2019 the court entered an agreed modification order which appointed parents as JMC, M with right of domicile, and possession on an alternating weekend basis during the school year and alternating weeks during the summer. In August 2019, M filed a MTM seeking appointment as SMC. M alleged the F was making harmful statements to the children and she sought a psychological evaluation of F or in the alternative, supervised visitation. F filed a

counter MTM seeking the right to establish the primary residence of the children. F filed a motion for the court to confer with the children in chambers. The children were aged 12 and 8. During trial, on the date of the planned interview the amicus attorney advised the court that the child was very upset and that it might not be in his best interest to participate in the interview but advised the court that the child was going to speak with his school counselor during lunch and she would let him know if the child was up to it. The counselor later advised that the child could handle the interview and the children were brought to court. Before the interview could take place the maternal grandmother spoke to the child and thereafter the amicus. The amicus reported to the judge that the child was visibly upset, anxious and physically ill. The amicus recommended the court hold off on the interview until trial was concluded. Trial recessed several times and during one break, the amicus interviewed the child at his office. During closing arguments, he advised the court that the child was traumatized by the idea of being put in the middle and that he was uncooperative in engaging with the amicus about his thoughts and feelings. The amicus advised the court that he really believed the interview would not be in the child's best interest because of his physical and emotional reaction to the possibility. The court asked F if he was insisting the interview go forward and his counsel advised that he did not believe the court was going to change primary conservatorship but if he was going to change possession then F wanted the court to speak with the child. The court declined to do so. Based on the evidence the court kept the parties as JMC, with M as primary, ordered F to attend counseling as well as participate with a co-parenting coordinator, reduced his visitation to an SPO but put conditions in place that allowed F to build back to an expanded SPO if he complied. F appealed. Initially, F complained that the court erred in failing to interview the child. The COA recognized that under TFC 153.009, when conservatorship is at issue, the interview of a child 12 and over is mandatory, however when the questions involve possession, the interview is discretionary. Here the COA determined that F waived the mandatory obligation because he said the interview was not needed since the court was not expected to change custody. This left the issue of an interview up to the discretion of the court. The COA thoroughly examined the trial court's mandatory obligation against a more general best interest analysis, similar to the reasoning and rationale applied in *In re Lee* regarding mandatory judgment on a compliant MSA without a general best interest inquiry. The COA holds that trial courts should refrain from conducting broad best interest inquiry about whether or not to interview and child and avoid full evidentiary hearings on every request for a chambers interview. The COA felt that a trial court would err if it simply decided an interview was not in the child's best interest generally. However, the COA also determined that requiring a trial court to interview a child when it could endanger the child's safety and welfare would be an absurd result in construing the requirements of TFC 153.009. Ultimately the COA holds that a courts refusal to conduct the interview is not error if the court determines, based on sufficient evidence, that to do so would endanger the child. The COA concluded that there was sufficient evidence to support the trial court's decision in this case, including the information and concerns expressed by the amicus attorney during the case. The COA recognized that the job of the amicus was to assist the trial court in protecting the interests of the children and thus the trial court was permitted to consider the facts and information relayed by the amicus in consideration of whether or not to interview the child. All of F's other issues were overruled. Judgment affirmed.

C. *In re Comstock,* 639 S.W.3d 118 (Tex. App. – Houston [1st Dist.] 2021, no pet.)

Denial of jury proper under the circumstances and failure to record child interviews harmless error.

H and W married in 2001 and had two children. H filed for divorce in 2015, dismissed and then refiled. The case was set for trial seven times. At some point W paid a jury fee but the case was later withdrawn from the jury docket and the parties entered into an agreed docket control order setting a bench trial. W changed counsel again who demanded a jury. H filed a motion to strike the jury setting. At the hearing H's attorney only presented argument as to the delays caused by W and the disruption of the court's docket. The trial court agreed and struck the jury demand. H thereafter asked for a second hearing for the opportunity to put on evidence in support of striking the jury which the court allowed. W filed a petition for writ of mandamus on the jury setting and the trial date was stayed. Eventually mandamus was denied and the case proceeded to a bench trial months later. Live pleadings for both parties at the time of trial

sought JMC and primary to the pleading party. The children were 17 and 15 at that point. W filed a motion for the court to confer and requested a record be made. The suit was tried over 11 days over several months. The court interviewed both children and did not make a record. At trial the court heard from H, W and W's mother. Evidence established that M's wealthy parents had supported H, W and the children for many years during both the marriage and the pendency of the divorce, providing W with more than $100K per year just for expenses of the children alone. W was the beneficiary of two trusts and it was uncertain their value but she received distributions from those as well. W also received SS disability payments of $1900/month. After considering all the evidence the trial court named H as SMC and gave W an SPO. The court ordered W to pay $1500+ in c/s until the oldest graduated HS and then $1200+ thereafter. The Court awarded $172K in trial and conditional appellate fees to H, payable by W, and ordered W to pay the amicus fees of $36K+. W filed a MNT and MTMCR judgment, claiming newly discovered evidence that the children were consistently tardy or missed school in H's care after trial. The court denied both and W appealed. W challenged (1) the denial of a jury trial; (2) the failure to record the child interviews; (3) child support and (r) attorney fees. Initially the COA assessed its own jurisdiction because both children had now turned age 18, making issues of conservatorship moot. However, the COA concluded that because the c/s and fee awards involved matters which imposed obligations not completely dependent on the age of the children, they remained ripe for review. As to the jury, the COA analyzed the historical setting and the alleged agreement to waive the jury contained within an agreed docket control order. Although W conceded that the parties had entered into an agreed DCO, W failed to include this document in the appellate record and thus the COA was unable to fully address her complaints, however the COA noted that the trial court presumptively took judicial notice of its files and was aware of the parties' agreement to transition from jury to bench trial. Further the COA found that H carried no burden to produce evidence that W's waiver of the jury was knowing and voluntary. The COA affirmed the trial court's decision to strike the jury. As to the W's complaint that the court failed to record the children's interview, the COA found it was error in light of their age and the mandatory nature of the statute, however the error was harmless because the trial court has broad discretion in deciding conservatorship and it is free to take into account the information learned in child interviews or ignore it completely. Judgment affirmed. **Comment:** See analysis of the child support issues in Section IX below.

D. *In the Interest of M.L.P.,* 2022 Tex. App. LEXIS 251 (Tex. App. – Corpus Christi January 13, 2022) (mem. op.) (Cause No. 13-20-00547-CV)

Presumption that trial court took judicial notice of custody evaluation report in its file but never admitted into evidence authorized to support trial court's judgment.

M and F divorced by agreed decree in 2017 naming them JMC of their three children. Domicile was fixed in Gonzales County and they shared possession on and off every 7 days and neither paid child support. In 2019, M filed a motion to modify asking that F be given limited possession and that he be ordered to pay child support. In 2020, F filed a motion for protective order alleging family violence by M against MLP, one of the children. Ex parte orders issued in the protective order matter enjoined W from communicating with the children and set a hearing which finally took place in June. At that hearing the court appointed Brown to conduct a custody evaluation. The court named F, now living in OK, as primary conservator of MLP and ordered possession at times agreed. Temporary domicile of the other two children remained in Gonzales County with M. Brown conducted her evaluation and filed a report with the court. The matter went to trial in October 2020. Brown testified, primarily from her report, but the report itself was not offered or admitted into evidence. Brown recommended that F be named as primary JMC. The court heard evidence from both parties identifying various deficiencies and complaints concerning the others parenting capabilities. In the end, the court named F as primary of all 3 children, ordered M to pay guideline support and granted an SPO for over 100 miles. M appealed. The interesting issue that results from this case relates to the COA's rulings concerning the custody evaluation. M asserted error by the trial court in considering Brown's testimony and her report. M complained that Brown had failed to verify all of her factual statements as required by TFC 107.113. M asserted that Brown's evaluation was incomplete because she did not spend an equal amount of time interviewing each parent and she did not follow up on

concerns or matters that M brought to her attention. Finally, M claimed that Brown's report was subject to the rules of evidence and in this matter it had not been admitted. Speaking to the issue of the custody evaluation, the COA notes that M never objected to Brown's testimony or consideration of Brown's report in any manner, failing to preserve the issue for review. However, the COA goes on to note its agreement that custody evaluation reports are subject to the rules of evidence and here the report was not admitted. However, the COA determines that it is allowed to presume that the trial court took judicial notice of its own files, whether requested to do so or not. In this case, Brown's report was filed with the court clerk months before trial and thus the COA presumed the trial court took judicial notice of the report on its own, allowing the report to support the trial court's judgment. The COA overruled M's remaining sufficiency arguments as affecting the decision to appoint F as primary conservator and otherwise affirmed the trial court's judgment.

E. *In re Mayfield,* 2022 Tex. App. LEXIS 918 (Tex. App. – Texarkana February 8, 2022, orig. proceeding) (mem. op.) (Cause No. 06-21-00115-CV)

Mandamus not a slam dunk when disputed evidence offered to overcome "fit parent" presumption.

F's three children had previously been removed from his care in prior TDPRS cases. In a suit filed by TDPRS in 2019, F was ordered to take a drug test but before the results were returned, the court signed a final order in that case removing the department as conservator and naming F as permanent MC. Several days after the order was signed, F's test results came back positive for meth and TDPRS filed a new petition seeking to terminate F's rights. After a hearing the court appointed TDPRS as temporary conservator and denied F visitation based on his drug use. This suit was dismissed in July 2021 after statutory deadlines for completion passed. TDPRS did not refile. Instead, the children's foster parents (FP) filed a petition seeking SMC, alleging that M and F had a history of neglect and they sought temporary orders. At the hearing FP alleged that F had only made minimal telephone calls, had provided no financial support and that there had been 3 cases by CPS involving F. FP admitted that F was not ordered to pay support and was allowed no contact with the children. F claimed to have worked for the railroad for 27 years and that he had been transferred to Nebraska where he bought a home in October 2020 with his fiancée. He said he did not visit in person because of court orders but he had visited by phone and face time more than 20 times in two years. He claimed passing drug tests at work and that he had proven his sobriety and that he wanted his children returned to him because he loved them very much. The court took the matter under advisement and FP filed additional pleadings claiming that F was unfit. The court issued his ruling in open court at a second hearing date and found F to be unfit, commenting that F's parental rights would have been terminated in the second TDPRS suit had it not been dismissed under statutory deadlines because of F's history of drug abuse. Thereafter the court commented that because of his history with the case he did not think F was credible since he testified to various things that contradicted testimony the court remembered from prior proceedings. The court then stated that he did not think he should remain as the judge and that he would either transfer the case to another court or he would recuse himself, but it was F's choice. F's attorney elected to have the case transferred which the judge said he would do and thereafter he ruled that F and FP would be named temporary JMC and that F would have supervised visitation. F sought mandamus relief. The COA recognized that mandamus relief is available to direct a trial court to vacate orders erroneously permitting non-parents access to a child over a fit parent's objection, noting however, the fit parent presumption is not absolute and can be rebutted. In this case, the COA recognizes that the trial court made a factual determination about F's fitness based on the totality of the evidence it considered. As such, the COA points out that mandamus is not available to resolve purely factual disputes, In this case the COA characterizes F's argument as one attempting to overturn the trial court's factual finding that he is unfit when there was some evidence to support this determination. Under those circumstances, the COA finds that mandamus is not appropriate. (This outcome might have been different if there had been "no evidence" showing F as unfit.) In addition, F complained that the court should have recused itself before making a ruling in light of the court's comments evidencing bias. The COA found F waived this issue by failing to request recusal over transfer when given the option and by failing to object when the trial court made its comments. Mandamus denied.

F. *Nikolenko v. Nikolenko,* 2022 Tex. App. LEXIS 1165 (Tex. App. – Houston [1st Dist.] February 17, 2022) (mem. op.) (Cause No. 01-20-00284-CV)

Due process arguments fail to support reversal of court's denial of continuance and request for Skype testimony.

H and W married in Uzbekistan in 2011. W is from there and H is from Russia. H's company transferred him to Houston soon after and W came to the US on a dependent visa. The parties bought a house and their first child was born in TX in Houston in 2012. H had a 3 year temporary work transfer to Brunei so they rented their TX residence, intending to return. The parties second child was born in Brunei. When H's contract in Brunei ended in February 2017, he sought a transfer back to Houston and the parties began making plans to return. H sought new visas for W, the children and the nanny and began researching schools. In April 2017 W texted her mother that she wanted a divorce. H discovered the texts but begged W for a second chance and continued making plans for the family's return to Houston. Then H purchased tickets for W to take the children to Malaysia to receive dental work for one child and then on to the Phillipines to vacation with friends. While there, W discovered that H blocked her debit card and had canceled all health insurance, causing W to borrow money from friends for her expenses. H eventually canceled the parties' tickets back to the US and told W she had to go live with her mother in Uzbekistan. Instead, W borrowed more money and made her way back to the parties' residence in TX, notifying H that this is what she planned to do and further notifying H in July 2017 that she and the children made it back and were living at the house. H returned to Russia. W filed for divorce in May 2018 and sought substituted service. The court granted her request and thereafter the court issued temporary orders awarding W spousal support and child support and giving H supervised visitation. Thereafter H filed a special appearance, plea in abatement and plea to the jurisdiction, H asserted that the court had no jurisdiction to grant a divorce because he had already obtained a divorce in Russia in March 2018, providing a copy of the Russian decree which stated that W did not appear and that her address was unknown. H filed a second plea asserting that he had obtained custody orders in Russia in a separate proceeding based on allegations of bad conduct by W that later were proven to be false. The court denied H's special appearance and plea to the jurisdiction finding that the Russian orders were invalid. The trial court refused another request to recognize these orders under a claim by H of res judicata. Trial was set in August 2019 and H moved for a continuance because his visa had expired and he could not be present to participate. W opposed the motion stating H had known of the trial date for a long period and could have secured a new visa. The court found that if necessary, H could participate by Skype but stated that H needed to begin the process of securing his visa immediately and continued the trial to October. H filed another continuance a week prior to trial, asserting various reasons why he had been unable to obtain a visa. The court denied the request and announced that H would be required to appear for trial in person. H filed another motion the day before trial stating he got his visa worked out and he could be present in 2 or 3 days. On the first day of trial, H's counsel asked if the court had changed its ruling re: Skype and the court stated no, that Skype was only going to be allowed if H needed it, but the court determined he did not need it. Trial began and ended without H being present. The court appointed W SMC, ordered supervised visitation based on a risk of international abduction and awarded W arrearage judgments for child support, medical support and spousal support under the temporary orders. The court further recognized various community debts incurred by W to persons from whom she had borrowed money. H filed a motion for new trial focusing on his inability to obtain a visa. The court denied the motion as H's claims lacked credibility and H admitted that although his visa had expired in May 2019, he waited until October 2019 to apply for a tourist visa. H appealed. H argued the trial court lacked jurisdiction over the divorce proceedings because the parties were already divorced in Russia. The COA considered W's due process arguments, noting that the court was not required to grant comity or full faith and credit to the Russian divorce since it was obtained in W's absence and based on misrepresentations about H's lack of knowledge as to where W was living. The COA also considered H's challenge to denial of his continuance motions and his request to appear by Skype. The COA reviewed H's various and conflicting claims about his ability to obtain his visa and further his delay in trying to secure one when he knew that it would be necessary. The COA reviewed TRCP 252 requirements when seeking a continuance based on a claim that material

testimony will not be available and found that while H argued he would not be able to attend trial if the continuance was denied, H's motion did not allege that he planned to testify, it did not address the nature of his testimony, and it did not explain how it would be material to the case. In short, the motion did not comply with the rule and denying it was not error. As to his request to participate by Skype, the COA found that although the court had said at one time it would be allowed, this ruling was qualified by the statement "only if it was necessary." The COA found that after the court had considered H's last minute pleas for more time the court determined that H could have been more diligent in obtaining his visa and therefore it was not unreasonable to find that Skype was unnecessary. In reviewing H's complaints, the COA reviewed numerous decisions wherein testimony by alternate means was addressed in criminal cases. The COA found that it was reasonable to determine that H chose not to participate at trial in person because H had chosen not to timely secure a visa when he had ample notice and opportunity to do so. The COA ultimately found that H's due process arguments were not persuasive. The COA did find temporary orders for support void based on H's claims that substituted service was improper. The COA found that W's motion and affidavit supporting alternative service was defective and therefore the temporary orders were issued without jurisdiction. The COA reversed the arrearage judgments. The COA found sufficient evidence supported supervised visitation based on the risk of international abduction. Judgment affirmed as modified to delete the child support, medical support and spousal support arrearage judgments.

G. *In the Interest of N.R.G.,* 2022 Tex. App. LEXIS 3864 (Tex. App. – Houston [14th Dist.] June 9, 2022) (mem. op.) (Cause No. 14-20-00408-CV)

Court appointed expert excluded when TRCP 193.6 burden not met.

M and F met in 2015 when M began working at F's law firm. They began a relationship during a trip to Vegas in 2016 and M learned she was pregnant in November of that year. The parties had an on-again/off-again relationship and F dated someone else during those "off" periods. The child was born in the summer of 2017. Two weeks after the child's birth F filed a suit to adjudicate parentage and requested he be named as SMC. Even after this petition was filed, M and F continued to see one another, making an effort to maintain their relationship. There was an alleged incident of family violence in September 2017 and then in November 2017 M filed a counterpetition seeking to be named SMC. In August 2018 the court considered and granted F's request for a custody evaluation, appointing Dr. Larry Abrams. The parties finally gave up on their relationship in the beginning of 2019. Trial was set in early 2020. In January 2020 F filed a motion for leave to supplement his 194 disclosures, claiming a clerical error in his failure to designated Dr. Abrams as a testifying expert. At the hearing, 4 days before trial, F argued that the designation was not a surprise because Dr. Abrams was court appointed, had been for 15 months, both parties had met with him and been tested and counsel had met with him and knew his recommendations even though he had not yet filed a report. In the alternative F asked for a continuance. M opposed the motion for leave, arguing that she had relied on F's non-designation, her counsel believing that F had decided not to call Dr. Abrams as a witness because he had been "wishy-washy" in his recommendations and kept changing his mind. Counsel pointed out that M had identified her own expert in anticipation of Dr. Abrams testifying, however since he was never designated, she did not plan to use that expert. Counsel indicated that if Dr. Abrams had been designated, his deposition would have certainly been taken but those costs were not incurred because it was not needed. The amicus attorney argued that it was not in the child's best interest to delay the trial. The court denied the motion for leave. F filed a motion to reconsider at midnight the day of trial. F advised that Dr. Abrams had now filed a report (in his favor) and that the jury must hear his testimony. M and the amicus opposed with M's counsel indicating that the report failed to comply with Chp. 107 requirements. F's motion was again denied. The case went to a jury who named M as SMC and found reasonable attorneys fees of $30,000. The balance of the issues were then tried to the court and a final order was signed. F appealed. F challenged the trial court's exclusion of Dr. Abrams and the award of fees. Regarding exclusion, F argued that the record unequivocally established that M could not be surprised by Dr. Abrams late designation since he was court appointed, had been involved for 15 months, had met with everyone, done testing and offered his recommendations. However, in spite of this the COA disagreed finding that M had a right to rely upon the state of F's disclosures as not planning to use Dr. Abrams as an expert at trial and that the last

minute request to do so, did in fact constitute surprise. The COA rejected the notion that because the expert was court appointed this translates to admission of the evidence. Further, the COA found that F failed to preserve any arguments that M was not unfairly prejudiced because F offered no arguments in the trial court to establish that. On the other hand, M's counsel argued that M would be prejudiced because she would have otherwise taken Dr. Abrams deposition and provided that to her own expert and under the circumstances she would not be able to do that. On appeal, F argued that an earlier motion asking to strike M's identification of her own expert stated that Dr. Abrams would be testifying and that this put everyone on notice and in effect served to disclose him as an expert. The COA rejected this argument as well. F also argued that he was late in identifying Dr. Abrams because he had not yet issued a report. However, the COA found that this too was not preserved because this was not the basis of his motion for leave in the trial court. There his basis was that a "clerical" error resulted in the failure to designate. All in all the COA found that there was no abuse of discretion in excluding Dr. Abrams and therefore no harm analysis was required. Ultimately the COA found that the evidence did not support good cause for failing to identify Dr. Abrams and that F failed to establish no unfair surprise or undue prejudice to M, concluding there was no abuse of discretion. The COA rejected F's alternative arguments that a continuance should have been granted based on his allegations that a reset for a week or so would not do any harm to the child of jeopardize his best interest. The COA found no evidence supporting the notion that a continuance would only be for a short period as there was nothing to suggest that Dr. Abrams could be quickly deposed, the rebuttal expert could quickly review any report, that both experts would be available again on short notice, that trial counsel did not have conflicts on their calendar with other cases, etc. Judgment affirmed. (See discussion of attorney fee issue in Section XI below.). **Comment:** This case serves to remind us that under TRCP 193.6, exclusion is automatic unless you establish good cause and either no unfair surprise or unfair prejudice and if you are the party seeking leave you should cover all your bases and make no assumptions about what you believe are rock solid facts allowing admission.

H. *In the Interest of D.A.C.-R.,* 2022 Tex. App. LEXIS 4359 (Tex. App. – Dallas June 27, 2022) (mem. op.) (Case No. 05-21-00033-CV)

Presumption of JMC is not evidence supporting submission of JMC question to jury when pleadings do not expressly seek JMC appointment.

M and F had two children and were living in the Dallas/Plano area. F left M and the children in April 2018 and took a job in Harlingen, in South TX. M went with the children to Mexico for several months but returned and rented a house in Collin County. F filed for divorce originally in Cameron County and sought to be named SMC. He obtained a writ of attachment and took possession of the children with the assistance of law enforcement. After several hearings, M was awarded temporary SMC upon a finding that F had a history of domestic violence. H dismissed his Cameron County suit and refiled in Collin County. Both parties had pleadings on file which sought appointment as SMC of the children. During a pre-trial hearing, F requested submission of a JMC issue to the jury which the court took under advisement. Trial proceeded before the jury and the court admitted the TO into evidence over F's objection. Further the court refused to submit a JMC issue. The jury named M as SMC and F as PC. The jury further found reasonable attorneys fees. F appealed. Initially, F complained that the court erred in refusing to submit a jury issue on JMC. The COA notes that neither party had specific pleadings on file seeking JMC as alternative relief. When M pointed this out in her Appellee's brief, H argued in his reply brief that the issue had been tried by consent. In support, F argued that the presumption of JMC found in TFC 153.131 is evidence sufficient to support trial by consent. F did not suggest that other admitted evidence demonstrated both parties' trial of the JMC issue. Ultimately the COA found that the JMC presumption is NOT evidence. It merely shifts the burden of producing evidence and because JMC was not pled and not tried by consent, the trial court's refusal to submit the issue to the jury was not error. Second F argued that admitting the TO's before the jury was error because they contained findings about his history of family violence which was prejudicial. In examining this issue, the COA noted primarily that F had not established any harm because the jury was specifically asked if F had such a history and they answered "No." Clearly on that matter the jury was not improperly influenced. F also felt that the TO

naming M as SMC influenced the jury's decision to give her sole custody but the COA pointed out sufficient evidence existed to support this finding. Lastly F argued that the TO award of interim fees to M influenced the jury's fee award on final, however the COA rejected this argument also. Finally, F challenged the overall award of attorneys fees and appellate fees on various theories. The COA found evidence sufficient to support a reduced award of fees for trial (rejecting F's arguments that the invoices were too heavily redacted but agreeing that one lump sum entry for trial preparation at $19,000+ was too general and lacked the specificity required by *Rhomoors*. As to appellate fees, the COA agreed that there was no evidence offered to support the $40,000 lump sum amounts awarded for various stages of the anticipated appeal. The COA reversed the fee award but suggested a remitter of the $19,000+ which, if accepted by M, would result in a modified fee award the COA would affirm. The COA reversed the appellate fee award and remanded for further proceedings. All other aspects of the judgment were affirmed.

I. *In the Interest of J.A.*, 2022 Tex. App. LEXIS 4517 (Tex. App. – Fort Worth June 30, 2022) (mem. op.) (Case No. 02-21-00140-CV)

Procedural technicalities undermine no evidence summary judgments in suit to modify.

M and F divorced in 2014 and were named JMC but neither parent was given the exclusive right to establish the children's domicile. After a modification trial in July 2018, the trial court modified the decree and allocated rights of domicile to M and restricted residence to Denton and contiguous counties. A final order was signed in November 2018. In March 2019 (within one year of prior rendition) F filed a motion to modify, seeking to be named SMC and requesting supervised access for M. F's petition asserted a material and substantial change, claimed endangerment based on M's neglect, attaching an affidavit which detailed several incidents concerning M's care for the children. After conducting discovery, M filed a no evidence MSJ (NEMSJ) claiming there was no evidence supporting a material and substantial change. F amended his pleadings and filed a response attaching numerous exhibits and deposition transcripts. M filed various objections to the SJ evidence but the court never issued any ruling. The court granted the NEMSJ on the grounds of material and substantial change but not on the claims within F's pleadings alleging endangerment and neglect by M because M's motion did not specify relief on this ground. The court set the matter for trial on the second ground as pled by F. Thereafter M filed a second NEMSJ claiming no evidence on the other ground. F filed a response attaching the same evidence as before. M objected but obtained no ruling. Before the court set a hearing on the second MSJ F again amended his pleadings and asserted that one of the children, now age 12, would state a preference for living with F, further supporting modification. M never amended her MSJ to seek relief on this additional ground. The trial court held a hearing many months later and granted SJ, issuing a final order denying all relief. F appealed. Initially the COA addresses whether the heightened modification standards of TFC 156.102 applied, noting that by the time the court addressed the motions, more than a year had passed since the rendition of the prior order and F had twice amended his pleadings. M argued that because F's successive pleadings did not include new or distinct allegations, they all reverted back to the original filing date, making the more onerous burden under TFC 156.102 applicable. The COA disagreed holding that TFC 156.102 standards do not apply when there are amended pleadings filed more than a year after rendition. Aa a result, the COA considered all grounds for modification asserted within all of F's pleadings in determining the issues on appeal from the final judgment. M argued that F waived his right to complain because he failed to object to the "finality" language included in the final order. The COA however found that a party is not required to file any post judgment motion to complain that a trial court improperly granted SJ on claims not asserted in the motion. Thereafter, the COA determined that M's motions for SJ only sought relief as to (1) claims of a material and substantial change and (2) claims of endangerment and neglect. M's motions never challenged F's claim that one child, now 12, would prefer to live with F. The COA treated the age 12 preference claim as an independent ground supporting modification of a prior order, ruling that because M did not seek SJ on this issue, the trial court committed error in granting SJ relief on an unpled claim. By virtue of the fact that this required reversal and remand for further proceedings, the COA declined to review whether the trial court erred in granting SJ on the other grounds, noting that these could all be considered against upon remand or

further developed in those proceedings. Reversed and remanded.

J. *In re Hallas,* 2022 Tex. App. LEXIS 6276 (Tex. App. – Austin August 25, 2022) (mem. op.) (Case No. 03-22-00413-CV)

A TRO may be extended once, and only once, and reoccurring extensions are void.

In the midst of a divorce and SAPCR, F obtained a TRO preventing M from exercising possession with the child or from interfering with F's possession. The TRO was issued on April 29 and a show cause hearing was held on May 11 and May 25. The hearing was not concluded and was set to resume on August 31. At the end of the May 25 hearing the court extended the TRO for an additional 14 days. When it expired on June 8, counsel for M contacted F's counsel to note that the TRO was no longer in place. On June 9 F's attorney filed a motion for entry of a temporary injunction consistent with the TRO and on that same date the trial court signed an Order Extending TRO that did not reference F's motion. This order extended the TRO until the signing of a final decree. The court signed another such order on July 19 over M's objection. M filed a petition for writ of mandamus. The COA agreed with M that a TRO may only be extended once under TRCP 680. H argued that the June 9 and 19 orders were in fact temporary injunctions but the COA disagreed, noting that the orders consistently reference a TRO and not a TI and further the orders do not expressly dispose of F's motion. The COA determined that every extension of the TRO past the May 25 extension was void. Mandamus granted.

III. Standing

A. *In re S.W.,* 2022 Tex. App. LEXIS 844 (Tex. App. – Fort Worth February 3, 2022, orig. proceeding) (mem. opinion) (Cause No. 02-21-00409-CV)

Evidence does not rise to a level supporting grandparent standing for conservatorship or possession.

M and F had a child in 2016 when they were still teenagers. In August 2017, the court signed a final order naming M and F as JMC and giving F the right to establish the child's primary residence. For the first two years of the child's life, M and F lived with paternal grandmother (PGM). During this time F was in jail for 8 months and he began a 7 year prison sentence in January 2019. M and the child continued to live with PGM until August 2019. In June 2021, M filed a petition to modify seeking SMC. PGM filed an intervention, seeking appointment as a JMC with the right to establish the child's primary residence, alternatively possession and access, and requesting temporary orders. PGM alleged standing to intervene under TFC 102.004 (alleging child's present circumstances would significantly impair child's physical health and emotional development). PGM further asserted that denying her access would cause significant impairment as provided by TFC 153.432. PGM asserted a variety of events and circumstances within an attached affidavit attempting to demonstrate concerns for the child's safety in M's care, including injuries the child suffered in M's care, concerns for the child's hygiene and M's conduct in allowing the child to sleep with MGM and MGM's boyfriend. M filed a motion to dismiss the intervention based on a lack of standing and the court held an evidentiary hearing. The Court issued temporary orders that named M as temporary SMC and F and PGM as temporary PC and awarded PGM visitation. In ruling the court stated that M was a fit parent and that although she had made some poor choices, she was a young parent and was commended for her efforts to recover from them. The trial court granted access to PGM because of the strong bond between PGM and the child, stating that terminating access might have a traumatic effect on the child and create psychological harm. The temporary orders signed by the court expressly found PGM had standing under TFC 102.003(a)(9) (6 months care, custody and control). M sought mandamus relief. First the COA found PGM had no standing under TFC 102.003(a)(9) because the evidence was undisputed that the child had lived separate and apart from PGM since August 2019 and PGM's intervention was not filed until 2021. PGM's claims that child had been in her possession consistently for the required period because PGM served as her caregiver while M was at work was insufficient to establish standing because the child did not reside with her. As to standing under TFC 102.004, the COA noted that for all the "incidents" of concern alleged within PGM's affidavit supporting her standing claims, PGM admitted she was not present and she was unable to dispute M's claims that they were all explainable "accidents," noting that the trial

court recognized that "accidents" happen and despite that determined that M was a fit parent. On this record, standing was not established under TFC 102.004. Finally, the COA found that the evidence did not support a finding that the child would be significantly impaired if access to PGM was denied, negating standing under TFC 153.432. There was no evidence that a reduction in possession time had caused any harm to the child and there was no evidence that M was going to deny possession altogether. COA found that PGM's suit should have been dismissed. Mandamus granted.

B. *In re C.E.L.,* 2022 Tex. App. LEXIS 1460 (Tex. App. – Beaumont March 3, 2022) (mem. op.) (Cause No. 09-21-00294-CV)

Standing for foster parents is not limited to only those statutes where they are specifically named.

Foster parents intervened in two separate suits wherein the Department sought termination of parental rights to siblings. Foster parents, who had not been in possession of the children for the requisite 12 months required for standing under TFC 102.003(a)(12), asserted standing under TFC 102.005(3) allowing persons who had possession of a child not less than 2 months during the 3 month period before suit standing to file an original suit seeking termination and adoption. The Department moved to dismiss for lack of standing, arguing that foster parents were only allowed to seek relief under TFC 102.003(a)(12). The trial court granted the motion striking the interventions. Foster parents filed for mandamus which was denied because the suit was so close to its dismissal deadline. M and F ultimately relinquished their rights and termination was granted, awarding SMC to the department. Foster parents then appealed. The sole issue to be decided on appeal was whether foster parents could claim standing under TFC 102.005(3). It was undisputed that foster parents had actual care and control for the children for not less than 2 months within the 3 month period before they intervened. The COA examined the legislative history of the relevant standing statutes, determining that nothing in TFC 102.005 expressly limited foster parents to standing only where they were specifically named within the statutes and nothing firmly excluded them from qualifying under other provisions. The COA noted that if a person has standing to file an original suit, they likewise have standing to intervene in a pending suit. Holding that TFC 102.005(3) allowed foster parents standing to intervene, the COA reversed and remanded for a new trial.

IV. Jurisdiction and Venue

A. *Hart v. Jackson,* 2021 Tex. App. LEXIS 9103 (Tex. App. – Houston [1st Dist.] November 9, 2021, pet. denied) (mem. op.) (Cause No. 01-21-00059-CV)

Failure to join a proper party in proper court results in no jurisdiction to enforce agreement for payment of child support arrearage.

H and W (W1) divorced in 2004. The decree obligated H to pay child support for the parties' only child, MM, and made it an obligation of H's estate. In 2016, H died and was survived by his second W (W2) and a child from that marriage, SM. MM, H's child from his first marriage, had already reached majority at the time of his death. In November 2019, W1, W2, MM and SM entered into a Settlement Agreement relating to past due child support claimed by W1. The agreement provided that W1 would receive $58K from the sale of a house within H's estate that was scheduled to close the following month and in exchange she would execute a waiver of her child support claim. In May 2020 someone (never determined who) filed the Settlement Agreement in the divorce court. W1 never filed any pleadings against W2, whether in her individual capacity or as a representative of F's estate. W1 never filed any pleadings seeking to have her claimed arrearages confirmed. A probate proceeding was initiated about the same time and MM and SM were identified as H's only heirs and that H died intestate, having no debts or taxes owing. In June W1 filed a motion to enforce child support in the divorce court asking the court to enter judgment on the Settlement Agreement. W2 filed a suggestion of death and objected that the divorce court had no jurisdiction to grant relief because she had never been served as H's lawful representative. W2 sought a writ of scire facias to compel joinder of the proper parties. W1 argued such a writ was not necessary because W2 had made an appearance in the case when the Settlement Agreement was filed. After a hearing the trial court denied W1's motion to enforce and ordered the matter transferred to the probate court. W1 appealed. W1 argued that the trial court had jurisdiction based on TFC 154.013 obligating the continuation of c/s after

death of an obligee. The COA points out that this statute does not apply because W1, the obligee is still living and it was H, the obligor that died. W1 also claimed the court had an obligation to enforce the Settlement Agreement under TFC 153.0071 however the COA found that mediation was never ordered in any suit and further W2, as the lawful representative of H's estate, was never joined in any proceeding. W1 further argues that probate court approval of the Settlement Agreement is not required because W2 had authority to enter into the agreement on behalf of H's estate and as next friend of his minor daughter, SM and made a general appearance by signing the agreement as filed with the court. The COA points out however that the record never establishes exactly who filed the agreement in the divorce court and personal jurisdiction cannot be conferred upon W2 by the unilateral actions of another individual. Further, even if W2 was the one to file it, the COA finds that this is not sufficient "affirmative action" on the part of W2 to constitute a general appearance. "Affirmative action" necessarily implies that a part asked the court for some affirmative relief and even though W2 signed the Settlement Agreement, there was nothing to show that W2 asked the court to do anything with it. Ultimately the COA holds that because W2 was never served and did not make a general appearance, H's estate was never joined and the trial court did not err in denying relief. The order transferring the matter to probate court was not challenged and therefore the COA did not address any matter regarding it.

V. Alternative Dispute Resolution

A. *In re Bouajram,* 2021 Tex. App. LEXIS 6839 (Tex. App. – Fort Worth August 17, 2021, no pet., orig. proceeding) (mem. op.) (Cause No. 02-21-00072-CV)

Trial court may not grant a new trial, indirectly setting aside an MSA, on grounds not otherwise available to set aside contracts.

H and W married in 2008 and had 5 children. W filed for divorce in 2018. In 2019 they executed a partition agreement whereby H, a physician, received a business entity as his separate property with terms obligating his payment of $8500/month to W for 144 months as her interest in the entity. After the partition agreement was signed, H advised W that the business was performing poorly and that he could not afford to pay himself a salary. The parties went to mediation in October 2019 but did not settle. However, at that mediation they created an asset list with values. They went to mediation again in February 2020 and signed an MSA that incorporated the prior asset list. The MSA provided that the values on the asset list were being used only for illustrative purposes and they might actually be more or less than stated. Further, the MSA provided that if any asset was mistakenly omitted, it remained available for division but if any asset was found to be intentionally omitted, it would be awarded to the other spouse 100%. H then filed a motion to divide undivided assets, identifying four entities not included in the MSA, two of which he disclosed in discovery before the MSA was signed and two never identified. H sought an award of all 4 and claimed that they had not really been used for any purpose, however, he later offered two of the entities to W. The trial court allowed the parties to conduct further discovery after which W filed a motion to set aside the MSA claiming fraudulent inducement. At the hearing the court acknowledged that there were assets which remained undivided but the judge did not want to address those or the allegations of H's alleged fraud, denying W's motion at that time. In October 2020 the court signed a final decree that did not include the four undivided entities. W filed a MNT claiming the newly discovered evidence showed H's fraud. At the hearing the parties' disputed whether H's failure to disclose was intentional or a mistake. The trial court granted the new trial and signed an order specifying it was granted on two grounds: (1) newly discovered evidence and (2) in the interest of justice. A third ground was included in the proposed order, finding that H had made material misrepresentations to W as part of the MSA which she relied upon, but the trial court struck through this finding. Three months after the new trial was granted, H filed for mandamus. The COA determined that common law still allows an MSA to be set aside for "dishonest behavior" since the Supreme Court has not yet held otherwise regarding MSA's compliant with the TFC. However, here the trial court impliedly found that no fraud occurred because it crossed out that finding in the proposed order provided by the W. This left only two grounds as a basis for new trial, newly discovered evidence and in the interests of justice, neither of which are permitted to avoid the effects of a valid MSA. The COA found that the trial court could not grant a new trial as a backhanded method of avoiding enforcement of the MSA. W also asserted laches for

H's 3 month delay in filing the mandamus, however the COA found H's timing was not unreasonable. Mandamus granted and trial court ordered to reinstate MSA and final decree.

B. *Pryor v. Pryor,* 2021 Tex. App. LEXIS 8867 (Tex. App. – Amarillo November 2, 2021, no pet.) (mem. op.) (Cause No. 07-20-00329-CV)

Trial court authorized to interpret ambiguous MSA and enter order the parties intended.

Parties attended mediation in a child support modification action. They signed an MSA which included a one page attachment with a child support calculation of $1,062.60 per month and this amount was also referenced with the body of the MSA. The child support calculation attachment expressly stated that the calculation was based on F's representation that he had no rental income and the amount was based on the W-2 exhibits, which exhibits were also attached to the MSA. Each page of the MSA and child support calculation attachment were initialed by the parties. The W-2 pages were not. At a hearing on entry of the final order the court identified a "scrivener's error" in the child support calculation, where F's 2018 W-2 amount read $2,500 when it should have read $25,000. The court requested briefing on whether or not it was allowed to recalculation c/s in light of the MSA. At a second entry hearing the court modified the c/s number to $1,461.24 over F's objection. F appealed. The COA found that because an MSA is a contract, it must be construed under contract principles. When a contract is susceptible to more than one meaning it is ambiguous and the court may determine that it is ambiguous even if the parties' do not raise the issue. The COA reasoned that the child support number within the MSA was based on a calculation that included an error in the amount of wages relied upon as specified in the exhibits and that the two numbers could not be reconciled, making the agreement ambiguous. As such, the trial court was authorized to make the proper c/s calculation using the exhibits attached to the MSA. Judgment affirmed.

C. *In the Interest of A.D.B.,* 640 S.W.3d 604 (Tex. App. – Houston [14th Dist.] 2022)

MSA signed by some but not all parties only enforceable to the extent it did not infringe upon rights of mother who left mediation.

M and F divorced in 2014 and were named JMC with F having primary. In 2018 M was named temporary primary JMC after allegations of abuse. M lived with the children at MGP's residence and then left the children with MGP and moved in with a boyfriend who was a registered sex offender. While the children were living with MGP, F filed a petition to modify and custody of the children was returned to him. F sought SMC with supervised visitation for M. M filed a counter petition seeking SMC and supervised visitation by F. MGP intervened and asked to be named sole conservators and that M and F be denied access or that it be supervised. In late 2019, M, F, MGP and an amicus all attended mediation. Mother left the mediation before an agreement was reached. After her departure, F and MGP and amicus executed an MSA that provided F would have all primary rights of conservatorship, MGP would have certain specified visitation during the year and they would not be named as conservators. Further, MGP would pay certain counseling expenses and MGM would have the right to consent to medical and surgical treatment of the children in cases of emergency. The MSA expressly recognized that certain issues relating to M would be decided by the court. The matter went to trial thereafter. F advised the court of the MSA and asked that the court enforce it to the greatest extent possible when ruling on the overall issues. M announced that she did not want to go forward on her own petition to modify, but only to defend against F's. The amicus offered that because M had not signed the MSA she did not believe it was binding on the court. At the conclusion of the evidence the court named F as SMC and awarded M visitation, further providing possession by MGP but different from the MSA. The trial court accepted and rejected other terms of the MSA regarding the MGP, i.e. giving M periods of possession at times when the MSA provided the children could visit with MGP. MGP sought FFCL and then appealed. On appeal, MGP argued that the trial court was obligated to enter judgment on the MSA because it met the requirements of 153.0071 since it was signed by the parties and counsel who were present and it included the mandatory warning language. The COA recognized that the MSA met the requirements but found that certain terms (possession for MGP and rights to consent to medical) infringed upon M's rights and therefore M could not be bound by these terms since she was not a party to the agreement. The COA found that the trial court was not obligated to

enforce the MSA in its entirety. However, the COA determined that aside from those terms which interfered with M's rights, the trial court could not simply pick and choose the parts of the MSA it approved, holding that it was obligated to accept any and all terms of the MSA that did not infringe upon M's rights. Reversed and remanded for entry of a proper final order.

D. *In re Campero,* 2022 Tex. App. LEXIS 1968 (Tex. App. – Corpus Christi March 24, 2022) (mem. opinion) (Cause No. 13-20-00415-CV)

It's a potential MSA; it's revoked; it's not an MSA; it's a renegotiated MSA; it's a consent judgment!

H and W married in 2004 and had 3 children. In 2019 W filed for divorce and H filed a counter petition. The parties went to mediation in May 2019 and reached an agreement. H and W as well as H's attorney all signed the MSA but W's attorney did not sign. H filed the MSA with the trial court along with a motion to enter judgment. Before the trial court rendered judgment on the MSA, W filed a motion to revoke her consent to the MSA and an objection to the entry of a decree. W argued that because she was represented by counsel at the mediation and her attorney did not sign, the MSA was not compliant with the statute, constituted only a routine agreement which could be revoked at any time prior to rendition. A hearing was held and the court ruled that it would sign a decree based on the MSA. On July 24 the court signed an order stating that judgment was rendered on the MSA and ordered the parties to submit a decree. On September 1 H appeared with counsel to submit a decree. W and her attorney did not appear. H's counsel represented that the decree had been signed by the parties and counsel and had been approved as to both form and substance. The court expressed relief that there was an agreement and never questioned whether the decree complied with the MSA. The decree submitted had terms that were materially different from the MSA but even so, the trial court signed the decree on September 3 and W appealed. In two issues, W complained that the court erred in entering judgment on the MSA and in signing the decree because she had revoked her consent to the MSA. The COA notes that there were a number of material differences between the MSA and the final decree. One in particular was a clause wherein W stipulated that the decree was compliant with the MSA and further that she waived any objections to the decree as to form or substance and further waived her right to appeal. The COA identifies other differences, some regarding child related matters and others regarding property, noting that because the parties consented to its terms as to form and substance it appears that the parties simply renegotiated their agreement. The COA recognizes that when a compliant MSA exists, a party's revocation has no effect on the court's obligation to render judgment. The COA recognizes that the court's July 24 order was a present rendition of judgment on the MSA. Even so, the COA notes that the July 24 order does not grant a divorce or make any recitation that its actions result in a final judgment. As such, the court retained plenary power to modify its rendition. When the court heard the matter on September 1, the judge indicated he would sign the decree as presented. The COA notes that simply because a party is *entitled* to judgment on an MSA does not mean that once a decree has been signed the party has *received* judgment on the MSA. Because the decree signed by the court was materially different from the MSA, the COA determines that the judge did not render judgment on the MSA, but instead, implicitly set aside his July 24 rendition on the MSA in favor of rendering judgment on the parties' new agreement. Even though the trial court had no discretion to set aside a compliant MSA, neither party objected at trial and W does not raise this as a complaint on appeal. Thereafter the COA considers that the decree operated as a "consent judgment" and while W had in fact revoked her consent to the MSA, she never revoked her consent to the decree before the trial court rendered its modified September 1 judgment. The COA further notes that W waived her right to appeal. The COA expressly does not address the failure of W's counsel to sign the MSA, however notes that even if it had determined this to be fatal, it would not change the outcome as the COA would have treated the settlement as an ordinary agreement incident to divorce and in that circumstance, the trial court could not have rendered a judgment upon it on July 24 because W had in fact revoked her consent. Judgment affirmed. **COMMENT:** I am always fascinated about how the journey from point A to point B can sometimes take so many logical and thoughtful steps. I think the most important aspect of this case comes at the very end with the notation that even if it turns out that an agreement does not comply with all aspects of the MSA statute, it can still be an enforceable AID if you get the court to render on it fast enough!

E. *In the Interest of L.J.L.,* 2022 Tex. App. LEXIS 4424 (Tex. App. – San Antonio June 29, 2022) (Case No. 04-20-00611-CV)

A Rule 11 Agreement reciting all essential terms is enforceable, however the resulting order must literally comply with the recited terms.

M and F divorced in 2018. The decree named them JMC of their two children. In September 2020 M filed a suit to modify and to enjoin harassing behavior. M also filed an application for a protective order. In October the parties began hearings on various motions as filed. After two days the parties announced to the court that they had reached an agreement on all issues. M's counsel read the agreement into the record. Afterwards counsel asked each party if they understood the terms and agreed to them. Both parties answered yes. Counsel asked if they agreed to be bound by the terms if the court approved them and rendered judgment. Both parties answered yes. The trial court then asked if both parties believed the agreement to be in their children's best interest and the answer was again affirmative. The trial court accepted the agreement and rendered judgment on it and set a hearing to enter a final order. Before the entry hearing, M filed a motion to reconsider and a motion for emergency relief, alleging that F had already breached terms of the Rule 11 and further modifications were needed. M however conceded that the court had rendered judgment and thus a final order would have to be entered before she could seek other relief. At entry F's counsel sought a continuance as F intended to hire new counsel. The trial court denied the motion and proceeded to entertain objections to M's proposed order. The court sustained some objections regarding language in the order which had been added to the Rule 11, ultimately signing a final order on November 20. F filed a MNT (overruled by operation of law) and a notice of appeal. O appeal, F asserted three basic issues. F claimed that the Rule 11 contract was void because it lacked "essential terms." F further challenged terms in the order which either varied from the terms of the Rule 11 or had been added without evidentiary support. Initially the COA addresses the "essential terms" argument, noting that a Rule 11 agreement can fail if those terms are lacking. The COA defines "essential terms" as those which the parties would reasonably regard as vitally important elements to their bargain." The mere fact that some detailed terms are left out of a Rule 11 recitation does not necessarily make the agreement indefinite. F complained that the Rule 11 did not contain specific allocation of parental rights, powers and duties. However, the COA notes that the Rule 11 changed the parties from JMC to naming mother as SMC, a designation which includes many specific statutory rights under the TFC. Further the Rule 11 detailed F's possessory rights, substantially modifying the prior decree and the Rule 11 transcript sufficiently detailed significant aspects of how visitation and conditional obligations for visitation would work going forward. The COA concluded that the Rule 11 contained all essential terms regarding allocation of parental rights. F also complained that the Rule 11 failed to include essential terms regarding the logistics of treatment he would undergo, alcohol monitoring requirements and counseling for the children in Arkansas where they were relocating with M. The COA examined the Rule 11 transcript on each of these complaints and determined that all essential terms were covered, ultimately overruling F's first issue. As to whether or not the final order conformed to the terms of the Rule 11, the COA agreed that when the court renders judgment on a Rule 11 agreement, the court's order must "literally comply" with its terms. In this case F identified many, many instances wherein he claimed that the order varied from the agreement. The COA initially notes that it has the authority to correct clerical errors in a judgment by modifying those terms. The balance of the opinion identifies each and every term challenged by F and rules as to whether or not they varied from the Rule 11, modifying some and declining to modify others. With the stated modifications, the judgment is affirmed. **Comment:** The detail regarding these rulings is not included in this summary however I would encourage you to fully review the treatment of these various complaints if you encounter a similar situation in your practice.

VI. Parentage

A. *In the Interest of L.M.R.,* 2022 Tex. App. LEXIS 2402 (Tex. App. – Corpus Christi April 14, 2022) (Cause No. 13-21-00279-CV)

4 year SOL to bring suit to adjudicate parentage when child has presumed father upheld as constitutional.

H and W were married when the child, Lucy, was born in May 2014. In October 2014, H and W separated. W began cohabitating with F in August 2015. H and W sought a divorce in October 2015 and a decree was signed in August 2016. The decree named 4 children born during the marriage, including Lucy, and named W as their primary conservator. Thereafter, W and F married. In September 2019 F filed a petition to adjudicate his parentage to Lucy and offered DNA testing establishing his paternity. H conceded that F was Lucy's biological father but claimed that his suit was untimely under TFC 160.607(a) which provides that a suit for parentage of a child with a presumed father must be filed before the child's 4th birthday. In this case, the child turned 4 in May 2018 and F's suit was not filed until more than a year later. After a trial on the merits the trial court adjudicated F to be Lucy's father and H appealed. H argued on appeal that the only 2 exceptions available to the SOL did not apply in this case. As to the first exception, H argued there was no evidence that H and W were not living together or not having intercourse at the likely time of conception. As to the second exception, nothing indicated that H, as the presumed father (married to mom at time of birth) was prevented from asserting his rights due to a misrepresentation about his paternity. F argued that the second exception applied because W went through a divorce with H and misrepresented to the court that H was the child's father when this was not true. F argued in the alternative that the 4-year SOL was unconstitutional. The COA determined that H was clearly a presumed father because he and W were married when Lucy was born. The COA agreed that in this situation the statute required F to file his suit before the child's 4th birthday unless an exception applied. Agreeing that there was no evidence concerning H and W's lack of contact around conception, exception 1 did not apply. As to the second exception the COA recognized that in order for it to apply, the COA would have to determine that someone other than the presumed father could allege the existence of a misrepresentation. However, the COA noted that this finding was not required because there was no evidence in the record establishing that W made any misrepresentations about H's paternity, that she suspected F to be the father or that H was even misled. Further the COA notes that F was the only one who questioned Lucy's parentage and he failed to secure DNA testing until a month after the child turned 4. Considering F's constitutional issues, the COA found that the SOL was constitutional following precedent by the Dallas and FW COA's relying upon the US Supreme Court decision in *Michael H. v. Gerald D,* 491 U.S. 110 (1989) which found that a natural father did not have a fundamental right to assert parental rights over a child born into a woman's existing marriage with another man. The COA further notes that the TX statute does not completely bar a natural father's rights but gives a natural father 4 years in which to question or assert issues regarding paternity, which F did not take advantage of. F argued that the 4-year period was arbitrary and that parentage cases should be allowed at any time even when a child has a presumed father. The COA notes that this is a legislative issue and that because the statute is constitutional the 4-year SOL must be applied here. Judgment reversed and rendered that F's suit for parentage be dismissed.

B. *In the Interest of Dart,* 2022 Tex. App. LEXIS 4254 (Tex. App. – Waco, June 22, 2022) (Case No. 10-21-00142-CV)

A putative father cannot be adjudicated a parent after his death because the court cannot obtain personal jurisdiction over him as required.

Putative Father (PF) a Dallas police officer, was murdered in the line of duty during a sniper attack in downtown Dallas in July 2016. More than 4 years after his death, Dart, an adult child, filed suit against his mother, his putative father (PF) and the independent executor of his PF's estate (IE), requesting that he be declared the biological child of PF and that he is entitled to all rights and benefits as PF's surviving child. Dart and the executor filed competing motions for SJ, both of which were denied by the trial court. After a bench trial, the court declared PF to be Dart's biological father. The IE appealed, arguing that the trial court did not have personal jurisdiction over PF because he was never served and properly joined as a party to the suit and that a parentage action could not be maintained against a putative father after his death. Dart argued that public policy allowed for an adjudication and further citing to case law holding that actions to adjudicate parentage survive a putative father's death. The COA looked at TFC 160.603 (alleged father a necessary party) and 160.604 (requiring personal jurisdiction to adjudicate) and determined the statutes to be unambiguous. The COA determined that the trial court never had personal jurisdiction over PF because he was deceased at the time suit was filed and

thus, never served. The COA relied on a similar ruling from the 4th Circuit federal court, considering issues as to whether a child is TX had the right to social security benefits derived from a PF where adjudication was sought after the PF's death. The COA noted two decisions (SA in 1986 and Amarillo in 1996) that suggest a contrary position, however the COA determined they had been issued prior to the 2001 recodification of the family code and that the current statutes were clear, no personal jurisdiction, no adjudication. The COA also rejected Dart's public policy arguments, stating that the modern trend supporting a child's right to paternity after their father's death was an argument for the Legislature, not the courts. Reversed and judgment rendered dismissing Dart's suit to adjudicate.

C. *In the Interest of D.A.A.-B.*, 2022 Tex. App. LEXIS 6553 (Tex. App. – El Paso August 30, 2022) (Case No. 08-21-00058-CV)

Every argument bio mom makes to negate parentage claim by same sex spouse fails and spouse's rights are constitutionally protected.

M1 and M2 were legally married in New Mexico in 2013. During marriage they agreed that M1 would undergo artificial insemination and that they would both be mothers to the resulting child. The did not use a physician or medical facility but used an at home artificial insemination kit with sperm provided by their friend Luis. The procedure worked an M1 conceived. M2 attended all prebirth appointments and they both attended multiple baby showers. M2 was present at the hospital for the birth. They informed the registrar that they were both parents but the understood that M2's name could not be included in the birth certificate. However, they did give the child a surname that was a combination of both spouse's last name. Over the next two years they raised the child together and acknowledged to all that they were both mothers of the child. The couple separated in 2015 and M2 remained in the marital home. M1 moved out with the child but the parties followed an informal agreement that allowed M2 to continue seeing the child on a routine basis, similar to an SPO. M2 often had the child more while M1 worked. M2 also paid M1 support for ½ of the child's day care. In April 2016, M1 filed for divorce. Both representing themselves pro se, they obtained an agreed final decree that stated there were no children born during the marriage. As a result, this decree did not include any SAPCR provisions. Despite this the parties agreed they would continue the visitation and support arrangements. This continued until late 2017 when the parties began arguing and M1 terminated the relationship claiming concerns for the child based on M2's depression after a cancer diagnosis. Two months later, M2 filed an original SAPCR, claiming standing as the child's mother under TFC 102.003(a)(1), seeking appointment as JMC with primary rights and child support from M1. M2 further sought temporary orders. At the initial TO hearing the court refused to rule until Luis, the sperm donor, was joined as a party so his rights could also be determined. After service, Luis filed a general denial and sought no relief. In September 2018 the court held a second TO hearing at which M2 was the only one to testify. She gave unrebutted testimony regarding the birth of the child during the marriage and the parties agreements and conduct regarding possession of the child thereafter. At the conclusion of the hearing, M1 orally moved for a directed verdict that M2 did not have standing because she could not meet the definition of a parent and she admitted that she was not the child's biological mother. M2 responded that the court was constitutionally required to construe all applicable statutes in a gender neutral fashion so as to protect the rights of same sex married couples in the same manner as afforded to opposite sex couples. The court granted the directed verdict and found M2 had no standing as a parent but the court did not enter a final order dismissing M2's suit at that time. M2 filed an amended pleading alleging standing under TFC 102.003(a)(9), asserting care, custody and control of the child for the requisite 6 month period and she again sought temporary orders. In this pleading, M2 did not renew her standing claim as a mother under TFC 102.003(a)(1). M1 moved to dismiss M2's suit claiming that this new standing claim was not brought within the required 90 day period and that this new pleading could not be given retroactive effect back to the date of the original SAPCR. The trial heard M1's motion in October 2019 and took it under advisement. The trial court refused temporary orders stating it did not think it best to rekindle the relationship since it might not be permanent. On the last day of its term in office, December 30, 2020, the trial court granted M1's motion to dismiss. M2 sought findings and filed an MNT before the newly elected judge. No findings were issued and her MNT was denied. M2 appealed. M2 alleged that the trial court erred in failing to grant her standing as a parent because the court did not

construe the applicable statutes in a constitutionally sound manner. M2 further argued that the court erred in failing to recognize her standing under TFC 102.003(a)(9) (6 month care, custody and control) as asserted in an amended pleading that related back to her original suit. Addressing M2's standing as a parent, the COA notes that US Supreme Court decisions in *Obergefell,* 576 US 644, and *Pavan,* 197 L.Ed.2d 636, require courts to afford parties in same sex marriages the same rights as those provided for to parties in opposite sex marriages. Acknowledging the decision in *Treto v. Treto,* 622 SW3 297, the COA recognizes that the presumptions of parentage apply to children born during a same sex relationship and that the gender neutral mandate of TFC 160.106 requires courts to apply the provisions of the UPA regarding paternity equally to issues regarding maternity. Based on this analysis, the COA found that M2 was entitled to claim standing as a parent. M1 argued that even if M2 were considered a parent under various provision of the Code, the artificial insemination statues only allowed for parentage in cases where the procedures were conducted by a licensed physician and in this case they were not. However, the COA notes that TFC 160.703 provides that when a husband consents to AR with his wife, he is the father of any resulting child and this section does not set requirements for how the AR procedure is conducted. Using gender neutral application, the COA finds that any child resulting from M2's consent to M1's AR conferred parentage upon M2. M1 further argued that M2's pleadings did not seek standing as a parent because they used the term "mother," however the COA found that mother was included within the definition of parent and thus the pleadings were sufficient. M1 further argued that M2 could not rely on her pleadings for standing as a parent because she abandoned those in her amended petition. However, the COA rejected this argument, determining that under TRCP 65, while an amended pleading normally supersedes a prior pleading, unless the trial court errs in deciding the need for amended pleadings. Here, the trial court initially found that M2 did not have standing under her original pleading as claimed under TFC 102.003(a)(1), because the court found she did not meet the definition of parent. As a result, M2 amended her pleadings to claim standing under TFC 102.003(a)(9). The COA determined that under TRCP 65, because the trial court erred in denying M2 standing as a parent, her standing claims were not waived by her amended pleadings. In addition, the COA found that M2 preserved her constitutional claims by raising them orally during the temporary orders hearing. Case law cited by M1, alleging that written pleadings were required to preserve, was found distinguishable because the written requirement only applied to summary judgment proceedings under TRCP 166a. The COA likewise found that M2 was not required to bring a separate action seeking adjudication as a parent prior to seeking SAPCR relief, acknowledging a variety of TFC statutes which allowed a person claiming parentage to file an original SAPCR and have parentage adjudicated within that proceeding. Finally, in addressing an issue raised by a concurring opinion, the COA noted that the finding within the parties' decree that there were no children born during the marriage did not serve to stop M2 from pursuing her rights as a parent after the divorce. The COA noted that M1 did not raise estoppel as an issue, but further questioned the finality of the parties' divorce, referencing those statutes that require the parties to a divorce to identify any children born during the marriage [TFC 6.406(a)] which effectively mandates joinder of a SAPCR proceeding. The COA cites to several decisions holding that divorce decrees which fail to include SAPCR orders are not final and therefore the decree in this case could not have any conclusive effect on a child that was born during marriage but not disclosed. Ultimately the COA concludes that M2 has a constitutional right to assert her standing as a parent of the child and have her day in court within a SAPCR proceeding. The COA reverses the order dismissing M2's suit and remands the matter for further proceedings.

D. *Munoz v. Cardona,* 2022 Tex. App. LEXIS 7036 (Tex. App. – Houston [1st Dist.] September 20, 2022) (mem. op.) (Cause No. 01-21-00325-CV)

Man claiming parentage of children with presumed father survives summary judgment when mom fails to address all statutory exceptions.

M was married to presumed father (PF) at the time her two children were born in May 2014 and November 2015. In November 2020, alleged father (AF) filed a suit to adjudicate parentage of the two children, claiming that he was their father. M filed a traditional motion for summary judgment contending that the applicable 4 year statute of limitations under TFC 160.607 precluded his claims. M attached her affidavit and that of PF to her motion asserting she and PF had engaged in sexual intercourse at the

probable time of conception of each child and as a result, AF was required to bring his suit within 4 years after the birth of each child because they had a presumed father. In response, AF argued that M did not fully negate the tolling part of the statute and further that the affidavits were conclusory, requesting that SJ be denied. The AJ granted SJ as did the presiding judge on de novo review. AF appealed. In addressing the SJ burdens, the COA recognizes that M carried the burden to conclusively negate all of the tolling exceptions to the statute of limitations. TFC 160.607(a) provides that when a child has a presumed father, the PF, M or another individual must bring a suit to adjudicate within 4 years of the child's birth. However, TFC 160.607(b) allows such a suit to brought at any time in two circumstances, only one of which is applicable here. Under (b)(1) a suit can be brought at any time if the court determines that the PF and the mother did not living together or engage in sexual intercourse at the time the child was probably conceived. The affidavits signed by M and PF asserted that they were married and having sexual intercourse at the time both children were likely conceived. Neither affidavit offered any evidence as to whether or not they were living together. AF argued that M must negate both items (not living together or not having intercourse) in order to prevail. M argued that because of the word "or" she only had to negate one or the other. The COA agreed with AF finding the statute to be unambiguous and determining that use of the word "or" in this situation mean that a suit to adjudicate parentage could proceed at any time if M and PF were not living together or were not engaging in sex. In this case M's affidavits only established that they were having sex but did not establish that they were living together as well. Further the COA agreed with AF's arguments that M's affidavits were "conclusory," finding that her statement that she and PF were having sexual intercourse at the time of the children's probable conception was a conclusion and M had offered no facts to support it, presumably facts which included dates and circumstances (perhaps not explicit ones!) existing at the time the children were conceived. Summary judgment reversed and remanded. **Comment:** SJ practice is very precise and this case demonstrates how thorough practitioners must be when prosecuting these motions and assembling the evidence to support them.

VII. General Conservatorship Issues

A. *In re G.B.,* 2021 Tex. App. LEXIS 7421 (Tex. App. – Dallas September 7, 2021, no pet., orig. proceeding) (mem. op.) (Case No. 05-21-00463-CV)

PGM had standing but failed to overcome the fit parent presumption to be named temporary PC, however orders for GAL and psych eval do not infringe upon rights of parent.

M and F were named JMC, M primary, in a 2011 Final Decree. M became ill in 2019 and her mother, PGM, who lived next door began assisting her in caring for the children. Eventually, the children began living at PGM's residence and M passed away in January 2021. F began discussing transition of the children to his residence but PGM refused. F filed for a writ of habeas corpus and PGM intervened for custody. F moved to strike the intervention claiming PGM lacked standing or alternatively that she could not overcome the fit parent presumption. The court granted the writ and ordered the children surrendered to F but also found that PGM had standing, named her a temporary PC with visitation and appointed a GAL for the children and ordered a psychological evaluation. F filed for mandamus relief. The COA first examined the standing claim and determined that there was sufficient evidence PGM had standing under TFC 102.003(a)(9) (6 months care and control) and (11) (parent resided with PGM for requisite time and now parent was deceased). The COA agreed with F that PGM offered no evidence to overcome the fit parent presumption and that the record supported the children were doing well in school, well in the home of F and his wife, that F was engaged in their education and medical care and that F was allowing PGM to maintain a relationship with the children. Following the Supreme Court's guidance in *In re CJC,* the COA determined that appointment of PGM as a temporary PC was an abuse of discretion. Finally, the COA upheld the appointment of a GAL and psychological evaluation, determining that although no party had specifically requested such relief, nothing in the TFC confines the court's authority to appoint only when a party asks for it and that such appointments do not infringe upon a parent's rights because they do not interfere with the parental relationship. Mandamus granted as to orders for appointment of PGM as PC and visitation.

Mandamus denied on challenge to standing and GAL/psychologist appointments.

B. *In re C.D.W.,* 2021 Tex. App. LEXIS 7507 (Tex. App. – Beaumont September 9, 2021, no pet.) (mem. op.) (Cause No. 09-19-00455-CV)

Restricting geographic area for SMC does not contravene jury verdict.

M and F divorced in 2014 and were named JMC with M as primary of their only child and designating a geographic restriction to Montgomery County. F filed a petition to modify seeking to be named primary JMC and terminating his c/s. M filed an emergency counter petition seeking to be named SMC, alleging that F had engaged in alienation and emotional abuse, asking for supervised visitation by F and requesting a $100/month increase in c/s. M included an affidavit regarding the child's ongoing emotional issues and medication needs, advising that F had convinced the child's physician to stop certain anti-anxiety meds and M feared the child would suffer trauma because of that. Before trial, the court signed an agreed order whereby the parties stipulated that at the date of the order, both parties would be subject to assessment of max guideline support for one child. The matter went to trial before a jury who was asked in Question 1 whether the order should be modified to name M as SMC and if not, Question 2 was whether F should be named the JMC with primary rights. The jury answered Question 1 "Yes" to name M as SMC. In a letter ruling the judge advised the parties that he wanted to impose a geographical restriction on M to Montgomery County but was unsure if he could do so in light of her SMC appointment and requested limited briefing on the issue. F argued in favor of the court's authority to impose under TFC 153.132 which provided the SMC's rights "unless limited by court order." M advised the court that it had no right to contravene the jury's verdict under TFC 105.002 and the jury had not been asked about geographic restrictions. Ultimately the court signed an order naming M as SMC with no restriction, denied the increase in c/s and ordered M to deliver one-month worth of medications to F's house at a specified time each month. F filed a MTMCR the order, seeking imposition of geo restriction which the court granted, limiting residence to Montgomery County. M appealed. As to the geo restriction, the COA confirmed the trial court's authority to limit the rights of a SMC as expressly provided in TFC 153.132. The COA noted that no issues regarding geo restrictions were submitted to the jury and that imposition of such a restriction did not contravene the jury's decision to appoint M as SMC. The COA found no error in denial of the c/s increase, finding that the agreed order containing a stipulation that both parties were subject to a max guideline award was only binding as of the date of the order and did not require the court to grant the requested increase. The COA further found that the orders obligating M to deliver the child's meds to F's residence once each month was reasonable because F had requested some form of workable orders, providing an affidavit with his original petition stating that the meds could not be dropped off for exchange at the child's school and M would no longer let F come to her house. Judgment affirmed. **Comment:** TFC Section 105.002(c)(1)(E) was added effective 9/1/21, allowing for a jury to decide whether to impose a geographic restriction upon an SMC. Even so, pleadings and evidence must still exist to support submission of the question to a jury and the parties must tender a proper jury question.

C. *In re Mach,* 2022 Tex. App. LEXIS 2942 (Tex. App. – Corpus Christi May 3, 2022) (mem. op.) (Cause No. 13-22-00126-CV)

Ex parte temporary orders changing custody in a modification case (issued without evidence in an emergency hearing convened by the court on a Sunday after a party's FaceTime request to the judge) is an abuse of discretion! Really? Who would have guessed!

F was adjudicated a father of the child by order dated in December 2020. This order named F as SMC and M as a PC and gave F the exclusive right to determine the child's residence within Matagorda County. Despite the order M did not relinquish possession of the child to F. M filed an untimely MNT. Thereafter nothing happened until F filed a petition for writ of habeas corpus in May 2021 and M was ordered to appear with the child. The record does not establish what happened with those proceedings. In July 2021 the court appointed an amicus attorney for the child and she facilitated visits. In August M filed a petition to modify along with an affidavit that claimed the new sitting judge and another assigned judge had recused themselves around the time of her MNT causing it to be overruled. The affidavit claimed a new judge had been appointed and M wanted an opportunity to

complete counseling and participate in stair step visitation. According to the parties, M contacted the new judge directly on a Sunday and the judge convened an emergency hearing by Zoom. F's attorney was not able to get in touch with him so only his attorney participated with M, her attorney and the amicus. The court signed an order determining that the trial court had orally granted a new trial in March 2021 and adopted those orders effectively setting aside the prior 2020 final order and entering a temporary order giving each party equal access to the child until they could attend mediation. F filed for mandamus relief. The COA determined that M had managed to contact the judge by face time and the judge had her coordinator convene an emergency hearing on a Sunday which F was unable to attend because his attorney could not locate him. The amicus confirmed that the hearing did take place on a Sunday morning, that there was no notice and further that there was no evidence offered. The COA determined that TFC 156.006 only allows the court to issue temporary orders which have the effect of changing the parent with the exclusive right of domicile in particular situations, but even then only after notice and hearing. Nothing in the statute allows for an "ex parte" order changing the parent designation. Mandamus granted.

D. *In re Barnes,* 2022 Tex. App. LEXIS 3615 (Tex. App. – Dallas May 27, 2022, orig. proceeding) (mem. op.) (Cause No. 05-21-00807-CV)

Trial court has no authority to place a geographic restriction on the non-custodial parent who has no say in deciding the children's primary residence.

M and F were divorced under the terms of an amended decree in 2012. They were named JMC and mother was designated as the parent with the exclusive right to determine the primary residence of their two children as well as the educational facility they would attend within Dallas County. In a final modification order issued in September 2020, M was awarded the exclusive right to designate primary residence within Dallas County and the exclusive right to make all educational decisions after consultation with father. The order further specified that the children would attend school within Highland Park ISD (HPISD). At the time of this order M did not live in HPISD but F did. In December 2020 the court issued orders reducing F's possession with the children to two 90 minute lunches per month. As a result, F decided he no longer needed his large HP residence and he leased it and moved out of HPISD. In February 2021 F filed a notice of address change and informed HPISD of the change. HPISD began considering whether the children could remain enrolled in the district, eventually allowing them to remain for the 2021-22 school year pending further court orders. In May 2021 M filed a motion seeking orders which prevented F from taking any further action that would make the children ineligible for HPISD schools. The court held an evidentiary hearing in August (F did not attend but his counsel did) and M testified that she believed F was still living at the HP house because the children had visited him there and their things remained there. M further testified that F had attempted to bargain with her, admitting that he retained ownership and he would move back there if she gave him the possession he wanted. Evidence suggested that F had transferred utilities at the house out of his name after the Amicus informed him that HPISD would allow the children to stay enrolled if the utilities remained in his name. At the end of the hearing the court found F's residence was the HP home and issued an order enjoining F from taking any action to make the children ineligible from attending HPISD schools, disrupting or attempting to disrupt the children's enrollment there and interfering or causing others to interfere with their HPISD enrollment. After the hearing F submitted proof of an apartment lease in Dallas and his drivers license and voters registration at that address. Thereafter F filed for mandamus relief. F argued that the court erred in determining his residence was in HPISD and violated his due process rights forcing him to continue residence in HPISD. As to the determination of residence issue, the COA notes that upon mandamus review, the court may not resolve factual disputes, determining that the trial court has sufficient evidence in the August 2021 hearing to determine that F lived at his HPISD residence and that finding would not be disturbed. However, the COA examines whether or not a court has the authority to impose a residency restriction upon a parent who does not have the right to determine the children's residence. The COA notes that TFC §153.134(b)(1) requires the court to designate which JMC will have the right to determine residency and it must then either establish the geographic area or specify that there is no geographic restriction, noting there is no authority to impose any restriction on the other parent. M argued that the court was permitted to issue

the injunction based strictly on a best interest determination, however the COA was unpersuaded that TFC 153.002 (best interest is always primary consideration) reaches that far. Mandamus conditionally granted as to injunctions and court directed to vacate them.

E. *In the Interest of A.C.,* 2022 Tex. App. LEXIS 3728 (Tex. App. – Fort Worth June 2, 2022) (mem. op.) (Cause No. 02-21-00121-CV)

TFC§153.004 limitation on court's authority to name parties' JMC when history of family violence present does not prevent parties from reaching agreement for JMC under §153.007 as agreed parenting plan.

M became pregnant at age 16, giving birth to a child in 2007. M lived in and out of her own mother's home (GM) and was in and out of the picture for many years. GM did not know who the child's F was until 2015. In 2018, F entered the child's life and GM allowed F to have shared possession. They stopped getting along and GM filed a SAPCR, asking to be named SMC and for F to be given an SPO. F filed a counter petition seeking adjudication. The court adjudicated F as father and issued temporary orders until trial in February 2020. On the first day of trial, GM testified that M was 16 and F was 20 when M became pregnant. GM called F to testify and asked him to confirm the parties' ages at conception. The trial court took a break in the testimony and was set to reconvene the next day but the judge became ill and the proceedings resumed 3 days later. At that time the attorneys announced that an agreement had been reached, which was read into the record and the parties acknowledged their agreement and the court rendered judgment. F filed 3 separate motions to enter a final order over the next several months, with GM objecting for one reason or another. On the last entry setting GM filed a pleading asserting that F could not be named a JMC because TFC §153.004(b) prohibited it, alleging that the child resulted from a sexual assault by F upon M at the age of 16 from which she became pregnant. The trial court entered the agreed order, GM filed a MNT which was overruled by operation of law and GM appealed. Initially, the COA examined whether or not the court had effectively "rendered" judgment on the parties' agreement in February 2020. Reviewing the record, the COA found that the court made a present rendition by stating approval of the agreement and pronouncing that the agreement would be the order of the court. Having determined that judgment was in fact rendered, the COA then considered GM's arguments regarding the stated prohibition of TFC§153.004(b). In effect, GM argued that the statute clearly prohibited parties from reaching agreements that violated the statute. However, the COA notes that while the statutes does state that a "trial court" may not appoint, there is nothing to suggest that the parties themselves are unable to reach their own agreements and public policy encourages them. Further, TFC §153.007(a) encourages agreed parenting plans and does not limit the terms of those agreements. The COA concludes that TFC §153.004(b) does not automatically void a Section 153.007 agreement for JMC, noting that the court can reject an MSA if it determines that a party was a victim of family violence which impaired their decision-making ability and the agreement is not in the child's best interest under TFC §153.0071(e-1). Judgment affirmed.

F. *In the Interest of N.H.,* 2022 Tex. App. LEXIS 4793 (Tex. App. – Houston [14th Dist.] July 14, 2022) (Case No. 14-21-00409-CV)

ANY non-parent must prove that a denial of possession would significantly impair the child once the fit parent presumption has been rebutted.

M became pregnant through ART while in a relationship with girlfriend (GF). GF was closely involved in all aspects of the pregnancy and birth but was not identified on the child's birth certificate. The couple lived together in GF's house and raised the child together for 16 months before their relationship ended. M and the child moved out and obtained their own residence and M continued to allow GF to see the child, although she would sometimes withhold visits when she would get mad at GF. Within 90 days of the breakup, GF filed a SAPCR, seeking to be named JMC with M as primary or alternatively M as SMC and GF as PC. The AJ issued temporary orders naming M TSMC and GF as TPC and M filed for de novo review. The presiding judge affirmed the AJ ruling after a second evidentiary hearing. The case went to trial before the court and the judge issued final orders which mirrored the TO for the most part. M appealed challenging the sufficiency of the evidence to overcome the fit parent presumption. Initially, although no party challenged GF's standing, the COA evaluated the evidence and determined that GF did in

fact possess standing based on actual care, custody and control for the requisite period. Acknowledging the fit parent presumption, the COA evaluated GF's concerns about M in three areas (1) M used the child as a pawn when she would be angry of upset with GF; (2) M was verbally and emotionally abusive and (3) M may have issues with alcohol, pills and depression. The COA felt that as to items 1 and 2, these were directed more at the relationship between M and GF and did not establish that M failed to adequately care for the child. As to the concerns regarding M's use of alcohol, etc., the incidents GF referred to all occurred while the parties were together and no injury resulted in any situation and M was currently seeing a therapist. The COA further noted that at no time did GF seek the appointment of an amicus for the child, call for a welfare check on the child or ask for a custody evaluation or alcohol assessment. Likewise, the COA found that the trial court's apparent determination that M was "unfit" thereby authorizing GF's appointment as PC with visitation rights was wholly inconsistent with the trial court's decision to appoint M as a SMC. Both findings could not be true, allowing the COA to conclude that the trial court abused its discretion when it found M unfit. M argued that if she is a fit parent, then the trial court must defer to her wishes, leaving the court with no discretion to grant GF relief. The COA disagrees however, determining that pursuant to *In re CJC*, when a parent is found to be fit, this merely gives rise to a presumption that they act in their child's best interest and a non-parent may offer evidence attempting to rebut that presumption and seek conservatorship appointment or visitation. The COA then addresses GF's proper burden of proof, determining that under all existing statutes, the legislative intent appears to require some showing of harm to the child before a non-parent can obtain possessory rights (considering TFC 153.433(a)(2); 153.131(a); and 153.191) Although it expressly encourages the Legislature to provide clearer guidance, the COA decides that any non-parent seeking court ordered possession must, at a minimum, establish that denial of possession would significantly impair the child's physical health or emotional wellbeing (which mirrors the proof required under the grandparent access statute). In this case the COA evaluated the evidence and determined that GF had not met her burden of proof to overcome the fit parent presumption. Judgment reversed and rendered denying GF's petition.

VIII. Possession and Access

A. *In re K.J.B. & T.,* 2022 Tex. App. LEXIS 4134 (Tex. App. – Amarillo – June 16, 2022) (mem. op.) (Cause No. 07-21-00235-CV)

Injunctions to abstain from alcohol consumption authorized under public policy standards for best interest.

Evidence at trial in the divorce between M and F established that F had a long history of drinking alcohol to excess, drove with his children while intoxicated, returned the children from visits smelling of alcohol, consumed on average 12 -18 beers each on Friday and Saturday nights, drank alcohol between 3 – 5 nights per week, could not make it to a bathroom once and urinated on the floor on his daughters shoes, violated orders obligating him to blow into a Soberlink and violated temporary orders which prohibited his drinking while in possession of the children. The final decree included terms which prohibited both parties from consuming alcohol during any period of possession or any 12 hour period immediately prior to any scheduled possession. F appealed, characterizing the court's order as an impermissible injunction. Initially the COA considered whether the terms should be analyzed under standards governing the court's authority to issue an injunction, noting that such relief requires proof of (1) a wrongful act; (2) imminent harm; (3) irreparable injury; and (4) the lack of an adequate remedy at law. Recognizing that the Austin COA (where this case originated but was transferred under a docket equalization order) had previously considered such issues only under a best interest standard, the Amarillo court was bound to do the same under TRAP 41.3 (obligating them to follow precedent of the originating court). In evaluating best interest, the COA points out that TFC 153.193 allows the trial court to place restrictions upon a parent's right to possession but only to the extent necessary to protect the child's best interest. Here the COA observed that there was ample evidence to support F's abuse of alcohol despite there being no real evidence that this had ever caused any physical or other harm to the children. However, the COA emphatically states that a trial court is not required to forego taking action to protect a child until the child suffers harm. Public policy insists that children be provided with a safe and stable environment. Further the COA notes that F is not prevented from drinking altogether, but

only immediately prior to and while in possession of the children. M argued that while marriage, she was able to buffer the children from F's conduct but she will not be in a position to continue to do so after the divorce. In the end the COA felt that the evidence fully supported the restraints imposed, noting that F's appeal evidenced his plan to continue his journey in seeking the opportunity to drink as he pleased. Judgment affirmed.

IX. Child Support

A. *Daves v. McKnight,* 2021 Tex. App. LEXIS 6811 (Tex. App. – Houston [14th] August 19, 2021, no pet.) (mem. op.) (Cause No. 14-20-00101-CV)

Health care premiums paid by an employer are not included as net resources of the obligor and fees need not be awarded in proportion to amount recovered from enforcement.

M and F were named JMC's in a final decree and F was obligated to pay c/s and provide health care coverage. Three years later, M filed a modification seeking changes in possession and an increase in c/s. M filed a separate motion for enforcement claiming F had failed to pay her unreimbursed medical expenses. During discovery, M received documents which indicated that F had misrepresented the existence of certain retirement accounts at the time of the divorce and she filed another motion seeking to divide those accounts. All matters were consolidated into one trial. The trial court granted an order increasing c/s, awarded M $30,000 in fees awarded as c/s in connection with her enforcement claims and awarded W a judgment for a share of the unreported retirement assets. H appealed. As to the increase in c/s, H complained that the trial court improperly calculated his net resources because it included the amount of health insurance premiums paid by H's employer (in excess of $2200). The COA examined TFC 154.062(b) detailing what should be included in a calculation of net resources and noted that premiums paid by an employer are not included within the statute. The COA next examined other TFC provisions which suggest that the Legislature could have certainly provided for this if it had intended to, i.e. TFC 154.062(d)(5) requiring the court to calculate net resources by deducting the amount an obligor must pay for health care expenses and further TFC 154.123(b)(1) allowing the trial court to deviate from the guidelines based in part on "other benefits provided by an employer." Considering these other two statutes, the COA found that the Legislature could have specifically included premiums paid by an employer as part of the net resources calculation but did not, making the trial court's calculation incorrect. Regarding attorney fees, F did not dispute that they could be awarded as c/s because they related to an enforcement issue, however, he argued that they were punitive because the amount of $30,000 was excessive when the unreimbursed amount enforced was only a little more than $1500. The COA notes that F did not complain about the lawyer's hourly rate or time spent, only generally that the fees were excessive. The COA found that the ratio of fees to recovery is not a basis for reversal as reasonableness of fees is not determined by a mathematical formula. Further, the COA found that the ratio is only one factor for the court to consider and that overall, F's conduct in ignoring M's repeated requests to pay for the expenses over a two-year period as well has his failure to cover the children with health insurance altogether for a short period was sufficient to justify the fee award. The COA further found that the evidence was sufficient to establish that F had failed to identify several retirement accounts at the time of divorce, supporting the trial court's judgment. Affirmed.

B. *Carter-Noll v. AG of Tex.,* 2021 Tex. App. LEXIS 7474 (Tex. App. – Houston [1st Dist.] September 9, 2021, no pet.) (mem. op.) (Case No. 01-20-00660-CV)

Below guideline child support affirmed where obligor incurred travel costs to maintain a relationship with children.

After a long marriage, M and F divorced in 2019 when their 4 children were between the ages of 5 and 14. The originally lived in TX but M and the children moved to Maryland in 2014 and the parties separated. M moved back in 2015 but returned to Maryland in 2016 where she and the children lived with her mother. A Maryland court resolved issues of divorce and property division and TX decided child support. The parties stipulated that guideline c/s was $1822 however temporary orders set c/s at $1313 and then increased it to $1525. At a third and final hearing, M and F testified. F offered evidence of the costs for him to travel to and from Maryland once each month to visit the children. M claimed these should not bear on his child support because he had a history of not

visiting and she did not expect him to be consistent in the future. F testified that he had not been consistent in the past because M interfered with his visits, citing to one particularly bad one where the police had been called to the hotel where he was staying with the children. The trial court ultimately set c/s at $1022/month which was $800 less than maximum guideline support and made findings that all factors for variance of c/s had been considered. M appealed. The COA recognized the trial court's discretion in varying from the guidelines and found that F offered sufficient evidence of his travel expenses as an offset to guideline amount. F stated that he wanted to consistently visit with his children and M testified that she wanted the children to have a relationship with F. The COA noted that the reduction in c/s based on travel expenses was in the children's best interest because it might increase the likelihood that F would visit and strengthen his bond with the children. M also challenged the trial court's apparent reliance on evidence that she had interfered with F's visitation in the past. The COA determined that this evidence was relevant to M's claims that F would not continue visits, thus reduction for travel should not be considered, ultimately determining that resolution of the parties' respective claims was a fact issue properly considered by the trial court. Judgment affirmed.

C. *In re Comstock,* 639 S.W.3d 118 (Tex. App. – Houston [1st Dist.] 2021, no pet.)

Substantial, ongoing gifts from W's parents supported W's child support obligation.

H and W married in 2001 and had two children. H filed for divorce in 2015, dismissed and then refiled. The case was tried to the bench. Evidence established that M's wealthy parents had supported H, W and the children for many years during both the marriage and the pendency of the divorce, providing W with more than $100K per year just for expenses of the children alone. W was the beneficiary of two trusts and it was uncertain their value but she received distributions from those as well. W also received SS disability payments of $1900/month. After considering all the evidence the trial court named H as SMC and gave W an SPO. The court ordered W to pay $1500+ in c/s until the oldest graduated HS and then $1200+ thereafter. The Court awarded $172K in trial and conditional appellate fees to H, payable by W, and ordered W to pay the amicus fees of $36K+. W filed a MNT and MTMCR judgment, claiming newly discovered evidence that the children were consistently tardy or missed school in H's care after trial. The court denied both and W appealed. W challenged several issues including child support and attorney fees. As to c/s, the trial court found that W had income in excess of $8550. W complained that this finding took into account her parent's money, not hers and that she only had $1900/mo in disability. The COA disagreed, finding that the definition of net resources includes gifts and funds from other sources, such as trust income and that that there was more than enough evidence that W's parents gifted her more than $100K per year, often paid all of her bills, and further planned to continue this pattern in the future. AS such, the COA affirmed the c/s obligation. Finally, W challenged the award of fees on the basis that the size of the community estate did not support such a large award. The COA notes that nothing in TFC 6.708 requires the court to consider the value of the marital estate when determining fees and further nothing prohibits the court from awarding an amount that is more than the estate's total value. The COA found the evidence sufficient to support the award of trial fees, amicus fees and conditional appellate fees. Judgment affirmed. **Comment:** See *Procedure and Evidence* section for analysis of ruling to disallow jury and failure to interview children.

D. *In the Interest of C.S.,* 2021 Tex. App. LEXIS 9496 (Tex. App. – San Antonio November 24, 2021, no pet.) (mem. op.) (Cause No. 04-20-00421-CV)

Orders obligating F to pay for 50% of children's activities in addition to max guideline child support reversed absent evidence of need and taking into accounts M's complete control.

M filed a motion to increase F's c/s as payable for the benefit of the parties 13 and 15 year old children. M also requested that F be obligated to share in the payment of expenses for the children's extracurricular activities. F filed a counter petition seeking primary conservatorship. At a hearing on temporary orders the parties agreed that F's c/s would be temporarily increased from $1500/mo to $2760/mo. F filed a motion asking the court to interview the children. At the bench trial, the parties agreed that if M retained primary conservatorship, F c/s would be $2760 under the guidelines. Despite F's request, the court never interviewed the children although during opening and closing arguments, F's

counsel advised the court that if questioned, the children would advise the court that they wanted to live with F. After hearing the evidence the court retained M as primary conservator, increased F's c/s to $2760 and ordered F to pay one-half of the activity expenses and awarded W $6K in fees. F appealed. F first claimed the trial court erred in failing to interview the children as required. M argued that F waived error because he did not put on an offer of proof as to their expected statements, but F claimed his counsel's statements that the children wanted to live with him was sufficient. The COA notes that the information gathered by a court when interviewing children is purely supplemental to the evidence property admitted at trial. As such, F could not show that he was harmed by the failure to interview because there was sufficient evidence supporting the trial court's decision to retain M as primary conservator and the children's preference would not have required a different decision. Next, F complained that the orders to share in 50% of activity expenses was an abuse of discretion. F argued that his monthly c/s obligation was the maximum under the guidelines and that the activity expenses were tantamount to an additional child support order. As such, F argued that the trial court was not allowed to deviate from the guidelines absent evidence that the additional amounts are necessary to meet the needs of the children and F claimed that W offered no such evidence. The COA noted that the parties stipulated that F should pay c/s in accordance with the guidelines and that this amount to $2760/mo. W offered evidence that the children were enrolled in various activities and further evidence of their costs, however there was little evidence regarding "needs." Further the COA noted that that there were no limitations or restrictions upon what W could spend for these activities, leaving F to pay unlimited amounts of additional child support. Under these circumstances, the COA found orders for F to pay a share of activity expenses to be an abuse of discretion. Finally, F challenged the fee award but the COA found the evidence sufficient to support it. Conservatorship and fees were affirmed. The order for payment of extracurricular activities was reversed and remanded for further proceedings to consider evidence of the factors allowing for deviation from the child support guidelines.

X. Modification

A. *Nalley v. Quevedo,* 2022 Tex. App. LEXIS 3317 (Tex. App. – Houston [1st] May 17, 2022) (mem. op.) (Cause No. 01-20-00400-CV)

Rendition on MSA creates a lot of extra work and a lot of extra expense, but the rules are the rules.

M and F obtained a SAPCR order in 2010. In 2019 M and the children moved to OK. F filed a suit to modify and the parties entered into an MSA. The MSA terms mistakenly provided that F would have visitation with the children one weekend "per year" upon 14 days notice when the parties lived more than 100 miles from one another. The parties and their attorneys signed the MSA and initialed all pages. These terms were thereafter incorporated into a final order in September 2019. F filed a motion for judgment nunc pro tunc in November 2019 which M opposed, asserting that the order complied with the MSA and the court rendered on the MSA, making any error judicial, not clerical. F filed a second motion attaching an affidavit of the mediator who advised that the MSA contained a mistake. F filed a petition to modify asserting a material and substantial change and sought to have the visitation terms specify that he would have visits once per month. The court heard and denied the NPT request and advised counsel for M that a petition to modify had been filed. Her attorney stated that he had no knowledge of the filing. F filed a motion to reconsider the NPT and a hearing was set for February 18. Thereafter F obtained service of the modification on M and she was notified of a show cause hearing on February 26. M's answer date under TRCP fell on February 17 and M did not file an answer. F asked for a default late in the afternoon on February 17 but the court stated it would hear it at the hearing the next day. M's attorney was present in the courtroom and objected to the default going forward but admitted that no answer was on file. M's attorney argued that there was a show cause the following week and they were preparing for it. The AJ proceeded with the default and did not allow M's attorney to participate. F put on brief testimony regarding the mistake in the MSA and the court signed an order granting the modification. M filed a timely MNT asserting the elements of *Craddock* as excusing her absence from the default proceedings and further argued that F had failed to put on evidence of a material and substantial change. The MNT was overruled by operation of law and M appealed. The

COA examined the M's sworn proof in support of the *Craddock* elements: (1) failure to appear was not intentional or the result of conscious indifference but due to accident or mistake; (2) setting up a meritorious defense to F's motion to modify and (3) alleging that grant of new trial would not cause injury or delay. The COA found that the mistake of M's attorney in planning to make an appearance for M at the show cause hearing was sufficient to show that her failure to answer was not intentional. Further, M's motion for new trial argued that the travel for the children from OK to TX was long and was not justified for short weekend visits each month and further there was no evidence of any material change. The COA found these allegations (which were not controverted by F and had to be taken as true) were enough to set up a meritorious defense. Finally, the COA acknowledged that M's motion offered to go to trial immediately and F did not present any evidence of injury. Under the *Craddock* standards, the trial court abused its discretion in failing to set aside the final order and grant a new trial. Reversed and remanded.

B. *Dunn v. Garcia,* 2022 Tex. App. LEXIS 4502 (Tex. App. – Houston [1st Dist.] June 30, 2022) (mem. op.) (01-21-00100-CV)

Anticipated changes will not support modification and a failure to comply with duties for reporting abuse cannot be used to support a private individual's civil cause of action.

By an agreed order in July 2017 M and F were named JMC of their 3 children. F was granted the right to establish the children's domicile anywhere in TX for one year and thereafter with no geographic restriction and given certain other exclusive rights. M was granted possession under a modified order and required to pay child support. At the time of the order the parties were living in Scurry County and the children were ages 3, 4 and 5. F was an emergency room physician who traveled for work in several counties around TX. M was a nurse. M lived with her boyfriend and the children stayed in their home during visits. Several days after the order was signed, M and boyfriend married so they would not be in violation of terms in the order preventing cohabitation. F enrolled the oldest child in school in Scurry County. In October one of the children, a girl age 5, made an outcry of inappropriate touching by a boy. The child was interviewed by school officials but F was not notified. The child made a similar statement to F and identified the boy and F made certain she was not allowed to be around the boy further. F did not report the outcry to authorities. F removed the child from school and began homeschooling. In November of 2017, F moved with the children to Friendswood, TX. In 2018 M filed a petition to modify alleging material and substantial change and alleging a history of abuse and neglect by F. She sought to be retained as a JMC with exclusive rights or named SMC with F to have an SPO and shared rights. The court issued TO giving M exclusive rights of domicile in Scurry or Galveston County, allocated shared rights, issued an SPO and terminated M's c/s, ordering F to pay $2565/month. The case was thereafter transferred to Galveston County. The case was tried and the court issued findings. The court granted modification finding the following to support a material and substantial change (1) F's relocation from Scurry to Galveston County and the increased costs this created for M to exercise her possession; (2) M's remarriage; (3) F's enrollment and withdrawal of the daughter from school; (4) F's failure to report the inappropriate touching outcry to authorities; and (5) F's work schedule and travel requirements which kept him away from home often. F appealed challenging sufficiency of the evidence to support a material and substantial change. Further, F complained that the type of modification orders issued were not connected to and/or limited to the changes found. The COA notes that anticipated changes will not support modification when they eventually occur. Further the COA notes that modifications, when warranted, should be limited to only those terms affected by the change. In other words, remarriage might be a reason to change some terms but it does not give carte blanche to modify other terms unaffected by the remarriage. The COA examined each reason as offered by the trial court's findings. F's relocation did not warrant modification because it was fully contemplated by the prior order and was permitted. M's remarriage was not material because she was living with her husband before her remarriage and the children visited in their home. F had the right to make educational decisions and M did not demonstrate that these decisions were material as supporting modification. F's work schedule was the same before the prior order and thus could not be a change. Finally, as to the claim that F failed to report possible child abuse as required in his capacity as a medical professional, the court considered F's testimony that

a 5 yo's one time report of being touched outside her clothes was not a reportable offense and he was able to determine that she suffered no harm. The COA points out that TFC 261.101 only requires reporting when the professional has reason to believe the child has been adversely affected or has been abused. The COA notes that there was no evidence F had been found guilty of a failure to report. Further the COA finds that an alleged failure to report cannot support a private individual's civil cause of action. As such, M could not rely upon a failure to report as a basis for her civil modification claim. Agreeing with F, the COA determined that the modification order was not supported by sufficient evidence. Reversed and remanded.

C. *In re S.C.S.,* 2022 Tex. App. LEXIS 6493 (Tex. App. – Corpus Christi August 30, 2022) (mem. op.) (Case No. 13-21-00386-CV)

Court has no authority to modify MSA terms in child's best interest but could have if they had previously been rendered as a temporary order.

F filed a petition to modify in 2017. In March 2019 the parties signed an MSA which was filed with the court the following day. The MSA provided that exchanges of the child would occur at M's residence. At that time, M lived Corpus Christi in Nueces County and F lived in Weslaco in Hidalgo County. The MSA further provided for a geographic restriction of the child's residence to Nueces, Hidalgo or Bee County, Texas and those counties in between. After the MSA was signed but before any rendition of judgment, M moved to Bee County. In August 2020 F filed an amended petition to modify, requesting that exchanges of the child take place at a ½ point between his residence and M's new residence. The court held a final hearing in February 2021 and M objected to the entry of any order that failed to comply with the MSA. H argued that there had been a material and substantial change since mediation, specifically M's move and therefore the court had the authority to modify the MSA terms regarding the exchange location. The trial court indicated that it did not feel comfortable requiring F to drive so far with the child and ordered that the exchange take place at paternal grandmother's residence, halfway between the residences of M and F. The trial court signed an order to that effect and M filed a MNT. At the MNT hearing the court stated that it found the deviation to be in the child's best interest and denied the MNT. No order was signed and the MNT was therefore overruled by operation of law. M appealed. The COA reiterates the state of the law that a trial court has no discretion to deviate from the terms of a compliant MSA absent the statutory exception regarding family violence. F argues that the court has the authority to modify the MSA when there has been a material and substantial change. In rejecting F's argument, the COA notes that although the MSA was filed with the court, the trial court did not render any kind of temporary order incorporating the terms of the MSA. Citing to *Highsmith,* 587 SW3 771, *Martinez Jordan v. Pfister,* 593 SW3 810 and *Harrison,* 557 SW3 99, the COA notes that TFC 156.101(a)(1)(B) allows a court to modify an order if there has been a material and substantial change in circumstances since the signing of an MSA or collaborative law agreement on which the order is based. Here however, the COA notes that there had been no rendition on the MSA and it had not been incorporated into any kind of order. F's amended pleading sought only a modification of the prior decree, not the MSA itself, and since there had been no rendition upon the MSA, any material and substantial change did not affect the court's duty to render judgment on the MSA. Further, there was no finding of family violence allowing the court to disregard the MSA terms. Finding that the trial court abused its discretion, the COA reversed and rendered judgment removing the terms for exchange at the grandmother's residence and inserting terms for the exchange to take place at M's residence. **Comment:** The COA is apparently saying if you have the court render judgment on an MSA as a temporary order before a final order is entered, and then material changes occur between the date of the MSA and entry of a final order, the trial court can consider those changes and modify the MSA terms in a child 's best interest. This interesting nuance could certainly be useful in divorce cases where the parties settled SAPCR issues in a partial MSA but reserved property issues for trial, contemplating a significant delay until the entire case was resolved. Even in SAPCR only situations where a delay in final judgment could be foreseen, taking this extra step to have the MSA issued as a temporary order may be a extra strategic step worth taking. I'm not 100% sure that I agree with this Opinion since TFC Chp. 156 standards might not always be in play as they were in this case.

XI. Attorney's Fees – SAPCR

A. *In re O'Connor,* 2021 Tex. App. LEXIS 7255 (Tex. App. – Austin August 31, 2021, no pet., orig. proceeding) (mem. op.) (Case No. 03-21-00159-CV)

Fees awarded in connection with temporary orders must be proven necessary for the safety and welfare of the child and award based on "good cause" or "prevailing party" is error.

F filed a petition to modify the original SAPCR order along with a request for temporary orders. M responded with her own request for TO and further filed a motion for interim attorneys fees, seeking $50K. At the end of the hearing the court announced it was denying the motion for interim fees but indicated that he would entertain a request for fees connected solely with the TO hearing. M's attorney filed a subsequent affidavit supporting fees for the TO hearing, stating that they were reasonable and necessary and authorized pursuant to the TFC and TRCP. At a hearing on these fees, F's attorney objected, stating there was no evidence that the fees were necessary for "the safety and welfare of the children" as provided in TFC 105.001. M's counsel responded that he was not seeking fees under that authority, but instead as a sanctions under TRCP 13 and CPRC Chp. 10. The trial court later signed an order awarding M $4,205 in fees "for good cause." F filed for mandamus relief. The COA finds that attorneys fees in this situation were only authorized by TFC 105.001 which required evidence that such fees were necessary for the safety and welfare of the child, noting that "good cause" is not the operative standard. Because there was no evidence under the proper standard, the trial court abused its discretion. The COA recognized that while the trial court expressly stated it was not granting "sanctions," the judge appeared to believe he had the authority to award fees to the prevailing party. The COA states that aside from sanctions for bad faith abuses of the judicial process, fees can only be awarded when specifically provided by contract or statute. Here, the only statute at play was TFC 105.001 and M did not meet the evidentiary standard required to recover fees. Mandamus granted.

B. *In re Jobe,* 2021 Tex. App. LEXIS 8159 (Tex. App. – Tyler October 6, 2021, no pet.) (mem. op.) (Cause No. 12-20-00105-CV)

Fee terms in property related MSA did not prevent an award of fees in SAPCR case which went to trial.

The parties executed a final MSA relating to a division of their property, payment of child support, insurance coverage, contractual alimony and issues surrounding a protective order (referred to by the COA as "the Property MSA"). The Property MSA provided that each party would pay their own fees. The parties also entered into a temporary MSA concerning conservatorship (the "SAPCR MSA") and when these issues were not resolved on a final basis, they were tried to a jury. M's counsel offered evidence supporting her request for attorneys fees as incurred after the final Property MSA and related only to the jury trial of SAPCR issues. H did not object but sought a directed verdict claiming the Property MSA obligated each to pay their own fees. The trial court ruled that the terms for fees only related to the issues covered by the Property MSA and awarded W $60K+ in attorneys fees. H appealed. The COA found that while the fee term in the Property MSA was not ambiguous on its face, a latent ambiguity was revealed when the parties went to trial on SAPCR issues and both sought to recover fees. Determining that MSA's must be construed under contract principles, the COA found that the attorneys fees clause was ambiguous as to its scope and the pleadings, evidence, actions, inactions and representations of the parties through their counsel at trial indicate that the fee clause applied only to fees related to the issues that were resolved within the Property MSA. These considerations were sufficient to allow the trial court to determine the parties' intent and therefore properly construe the ambiguity. Because evidence of fees offered by W's counsel was limited to those incurred after the Property MSA was signed and related only to her efforts on issues outside that MSA, the trial court's award of fees was affirmed.

C. *In the Interest of N.R.G.,* 2022 Tex. App. LEXIS 3864 (Tex. App. – Houston [14th Dist.] June 9, 2022) (mem. op.) (Cause No. 14-20-00408-CV)

Father's evidence and trial court's own observations considered sufficient to support award of attorney's fees to Mother!

In a suit to adjudicate parentage, issues regarding conservatorship were tried to a jury and thereafter the trial court considered all other matters including the request for attorney's fees, ultimately awarding M the sum of $30,000. F appealed. As to the fee award, the COA recounted the testimony of M's counsel which offered generalized statements in narrative form regarding her belief that fees were reasonable and necessary. She testified to her hourly rate and advised the court that she had an agreement with her client to charge no more than $30,000. She testified that her time in trial alone would support that amount. She offered no billing records and offered no testimony about the specific work performed but did suggest that her associate and her legal assistants had also spent time on the case. F challenged the fee award based on sufficiency of the evidence. For reasons that COA itself describes as "somewhat unconventional" the fees were affirmed because billing for F's counsel showed the amount of time his lawyers were actually in trial and if these hours were multiplied by the hourly rate of M's counsel, they would total in excess of $30K without accounting for any pre-trial efforts while the case had been pending. Further the COA recognized that the trial court had personally witnessed all the work that M's counsel had done throughout the case and during trial, the services she performed, when she performed them and how much time that took to likewise justify the reasonableness and necessity of the fees incurred. Fee award affirmed. **Comment:** I recommend review of the Supreme Court decision in *Rohrmoos* (578 S.W.3d 469) to make sure you know what you need to admit into evidence as sufficient to support your fee request. This case takes judicial notice of reasonable fees to a whole new level! Here I think M's counsel got extremely lucky that the COA was willing to look past the deficiency of her own evidence and rely on other matters to affirm, but certainly remember these "other matters" if you find yourself in a pinch! **Comment:** See analysis covering exclusion of court appointed expert in Section II above.

D. *In the Interest of D.A.C.-R.,* 2022 Tex. App. LEXIS 4359 (Tex. App. – Dallas June 27, 2022) (mem. op.) (Case No. 05-21-00033-CV)

Evidence supporting an award of conditional appellate attorney's fees must meet the same standard for proving up fees at trial.

M and F had two children and were living in the Dallas/Plano area. F left M and the children in April 2018 and took a job in Harlingen, in South TX. M went with the children to Mexico for several months but returned and rented a house in Collin County. F filed for divorce originally in Cameron County and sought to be named SMC. He obtained a writ of attachment and took possession of the children with the assistance of law enforcement. After several hearings, M was awarded temporary SMC upon a finding that F had a history of domestic violence. H dismissed his Cameron County suit and refiled in Collin County. Both parties had pleadings on file which sought appointment as SMC of the children. During a pre-trial hearing, F requested submission of a JMC issue to the jury which the court took under advisement. Trial proceeded before the jury and the court admitted the TO into evidence over F's objection. Further the court refused to submit a JMC issue. The jury named M as SMC and F as PC. The jury further found reasonable attorneys fees. F appealed. The procedural issues are discussed in Section II above. As to the jury's answer on reasonable fees, F argued that the TO award of interim fees to M influenced the jury's fee award on final, however the COA rejected this argument. F challenged the overall award of attorneys fees and appellate fees on various theories. The COA found evidence sufficient to support a reduced award of fees for trial (rejecting F's arguments that the invoices were too heavily redacted but agreeing that one lump sum entry for trial preparation at $19,000+ was too general and lacked the specificity required by *Rhomoors.* As to appellate fees, the COA agreed that there was no evidence offered to support the $40,000 lump sum amounts awarded for various stages of the anticipated appeal. The COA reversed the fee award but suggested a remitter of the $19,000+ which, if accepted by M, would result in a modified fee award the COA would affirm. The COA reversed the appellate fee award and remanded for further proceedings. All other aspects of the judgment were affirmed.

E. *Reyes v. Fraga,* 2022 Tex. App. LEXIS 6696 (Tex. App. – Houston [14th Dist.] September 1, 2022) (mem. op.) (Case No. 14-21-00036-CV)

Request for fees in an original answer survives non-suit.

GM filed a suit to modify, seeking managing conservatorship of her two grandchildren and/or possession. F filed an answer which included a request for attorneys fees which asserted that the GM's claims were frivolous and designed to harass F. Thereafter GM filed a motion for nonsuit and the court signed an order granting nonsuit of the GM's claims on 11/13/20. The trial court conducted a trial on F's claims for fees and awarded F $10,000 in fees, signing an order to that effect in January 2021. GM appealed claiming the order was void as being signed after the trial court lost plenary power, alternatively, fees were awarded on an improper basis. The COA notes that a request for attorneys' fees, even when asserted in an original answer, is a claim for affirmative relief which will survive a non-suit of the petitioner's suit. As such, the order on non-suit was only a partial resolution of the issues before the trial court and not a final judgment. As to the basis of the fee award, GM argued that a docket entry established the trial court's finding that GM's suit was not frivolous and since this was the only basis upon which F's pleadings had requested fees, the court had no authority to order them. However, the COA notes that docket entries are not the same as findings of fact and that they are typically made for the clerk's convenience and are often unreliable. Specifying that the trial court's order did not include any statement as to the basis for awarding the fees, the COA indicated that they would have been authorized under TFC 106.002 and thus could be affirmed.

XII. Miscellaneous – SAPCR

A. *H.L.S. & W.A.S.,* 2022 Tex. App. LEXIS 1639 (Tex. App. – Corpus Christi March 10, 2022) (Cause No. 13-20-00533-CV)

Court establishes factors to be considered when a request is made to unseal adoption records.

In 2013, Paige and her husband established three trusts, one for their step-granddaughter and one for each of their step-great grandchildren. Rachel, biological mother of Diane and grandmother of the two great grandchildren, was named trustee. In November 2017, Paige adopted her two great grandchildren. In 2019 Rachel, as trustee, brought suit against Paige for fraud and breach of fiduciary duty, seeking an accounting of trust funds and other relief. As part of her claims, Rachel also requested that the adoption records of the children be unsealed. Paige responded to the suit alleging that trust funds had not been distributed because Rachel had either been incarcerated or could not be found and noted that both children had previously been removed from Rachel's care prior to the adoption, objecting to the request that their adoption records be unsealed. To support her request for unsealing the records, Rachel argued that she was a person interested in the adoption, she had not been give proper notice of those proceedings and further she claimed to have certain rights regarding the children under a 2014 non-parent caregiver authorization agreement. Rachel admitted at the hearing that she sought to undo the adoption. Rachel also argued that Paige had waived her right to object based on the offensive use doctrine which claimed Paige sought to use the confidential nature of the adoption records as both a sword and shield. Paige argued that Rachel's request for unsealing the documents did not establish good cause because Rachel could no longer challenge the adoption (6 month deadline had passed). The trial court denied Rachel's request and she appealed. Both parties agreed that what constitutes "good cause" to unseal adoption records as allowed by statute presents a case of first impression in Texas. As such, the COA reviewed the standards adopted in a variety of other states, noting the significant privacy protections at stake. As noted, other states had recognized good cause in situations where life threatening medical issues were at stake, a child could obtain citizenship benefits based on their heritage and in cases where it was necessary to determine if an adopted child was a member of an Indian tribe to comply with ICWA. The COA found in some states access to the records was allowed by a non-interested third party who could then report the requested information to the court. The COA noted that curiosity about parentage did not constitute good cause and all cases dealt with a child's request to unseal, not a grandparent's request. Based upon this multi-jurisdictional review, the COA identified ten factors to be considered in determining good cause to unseal adoption records including (1) relationship of persons seeking to unseal with parties to adoption; (2) stated reason for unsealing; (3) evidencing supporting that stated reason; (4) privacy

interests of the parties, including the biological parents; (5) whether the person is seeking complete or partial; (6) whether they seek identifying or non-identifying information; (7) whether the information sought is available through other means; (8) whether disclosure is mandated by other law; (9) the timing of the request; and (10) the best interest of the child. In reviewing these various factors the COA found that Rachel's purpose in seeking the records conclusively established she was not entitled to them. One, Rachel sought to undo the adoption by use of the records, something law did not allow her to do more than 6 months after the adoption as granted. Two, Rachel did not establish application of the offensive use doctrine which requires (1) proof that party claiming privilege seeks affirmative relief, (2) the information sought is outcome determinative and (3) the information cannot be obtained from any other source. Somewhat conceding that Rachel may have established factors one and two the COA found that there was no evidence showing the information might be available through other sources, such as a subpoena or deposition of the Department in removing the children and placing them for adoption. Finding no abuse of discretion in refusing to unseal the adoption records, the trial court was affirmed.

B. *Taylor v. Tolbert,* 2022 Tex. LEXIS 385 (Tex. Sup. Ct. May 6, 2022) (Cause No. 20-0727)

Attorney Immunity defense available for damage claims under state, but not federal, wiretap act, so long as attorney was acting within the scope of their duties to client.

In the midst of a modification suit, the child visited her paternal aunt in the summer of 2013. Using the aunt's IPAD, the child signed in through her M's account and the IPAD begin receiving text messages and emails between M and at least 30 other people, all of whom were unaware and none of whom had consented. The aunt and her husband (F's brother) mailed the IPAD to F who then provided it to his attorney, T, for use in the modification suit. M and several of the other individuals whose messages had been "intercepted" sued T under the Texas and federal wiretap statutes, both of which allow private citizens to assert a civil claim for wrongful interception, disclosure and use of electronic communications. The plaintiffs alleged that T improperly used these communications by having them in her possession, using them during court proceedings and in pleadings, including stated plans to use a nude picture as demonstrative evidence, using them as leverage to try and get a favorable settlement for F and turning them over to a forensics expert. The plaintiffs petition did not allege that T played any part in the actual "interception" or that she advised F to take the actions which resulted in the interception. T filed a motion for summary judgment alleging the defense of attorney immunity, asserting that all claims stemmed from T's role as an attorney in the modification suit. The trial court agreed and granted SJ. The Plaintiffs appealed and the COA majority reversed and remanded, finding that the attorney immunity doctrine does not extend to situations where the attorney may be involved in criminal conduct in violation of state or federal statutes because that conduct would be foreign to the duties of any attorney. The dissent found this ruling contrary to precedent which refused to carve out a criminal conduct exception to the attorney immunity defense. The Supreme Court granted petition for review. The SCt examined the immunity doctrine recognizing that it is available when an attorney is acting in a uniquely lawyerly capacity. The Court found that all of T's conduct fell within the scope of her duties as an attorney for F. As such, the Court determined that the defense would be available unless the state or federal wiretap statutes preclude it. Thereafter the Court analyzed the Texas statute and determined that it did not expressly preclude use of the defense as otherwise available under common law, determining that T was immune from claims asserting damages under the state statute. However, in analyzing the federal statute, the Court found that its wording is different, indicating an intent to allow defenses only as the statute prescribes. Further the Court notes that state law cannot modify federal law, further finding that it would be unlikely that a federal court would apply a state attorney immunity defense to the federal wiretap statute if presented the opportunity to do so. As such the Court held that T could not invoke the attorney immunity defense to M's federal wiretap claims, making summary judgment improper on those. COA judgment affirmed in part and reversed in part.

C. *In re Soulsby,* 2022 Tex. App. LEXIS 4210 (Tex. App. – San Antonio June 22, 2022, orig. proceeding) (mem. op) (Case No. 04-22-00173-CV)

Disqualification of attorney and injunctions in perpetuity for receiving HIPAA records by mistake goes too far.

Attorney S intervened within a SAPCR, representing paternal GM. As part of her representation, Attorney S issued a trial subpoena to a hospital requesting the custodian of records to appear on a date certain and produce medical records relating to Mom (M). Instead of appearing in court the hospital sent a hard copy of the records directly to Attorney S. The attorney would later claim that she was shocked to receive them without a HIPAA release, she did not review them, she instructed her staff not to review them and she destroyed the records. In an effort to correct the issue, Attorney S issued two additional subpoenas and again the hospital sent the records, this time as both a hard copy and in digital form. After the second and third subpoenas Attorney S advised M's counsel that she would be seeking a limited scope hearing on the admissibility of the records she obtained. This was the first time M learned that her records had been produced and she filed a motion for sanctions against Attorney S, seeking a protective order preventing use of the records and fees. At the hearing, it was agreed that the digital records were deleted before the trial court and Attorney S testified that the first set of hard copies were destroyed and she had not reviewed the additional records sent. The trial court found that Attorney S had not acted with candor to the court because she failed to bring the HIPAA violation to the attention of the M's attorney shortly after it happened and delayed notification for almost 3 weeks. The trial court took the matter under advisement and issued a ruling disqualifying Attorney S from representing any party contrary to M's interests in the case or from conferring with any subsequent attorney involved in the case. Attorney S filed a petition for writ of mandamus. Initially, M questioned Attorney S's standing. The COA agreed that normally an attorney does not have standing to challenge their own disqualification, however this ruling went further by effectively enjoining counsel from conferring with new counsel and since the case was a SAPCR, it effectively precluded her from being involved in the matter for years to come. The COA determined that these rulings created a unique injury to Attorney S's own interests, giving her standing to challenge the ruling by mandamus. As far as the substantive issues were concerned, the COA was unwilling to question the trial court's factual finding, recognizing that the court was allowed to make a credibility determination regarding Attorney S's claims. However, the COA notes that disqualification is not always the proper remedy, even if an attorney violates a disciplinary rule and it is only proper if harm can be shown. Here the COA found that there was no apparent harm because the trial granted M's request for a protective order and disallowed use of the record in any hearing unless and until they were fully vetted by an *in camera* review. In this situation the potential for harm was insufficient to support disqualification. Mandamus conditionally granted with proviso that M was allowed to ask the trial court to reconsider her non-disqualification remedies

D. *In the Interest of A.C.P.C.*, 2022 Tex. App. LEXIS 5976 (Tex. App. – Tyler August 17, 2022) (mem. op.) (Case No. 12-22-00080-CV)

Trial court lacks the authority to obligate third party tiebreakers unless they are joined in the suit!

A modification suit was filed in connection with the child, ACPC. At the time of the filing, the child was receiving inpatient care at The Menninger Clinic. As a result, the amicus attorney served several therapists at the clinic with subpoenas for documents and trial testimony. Before the case reached trial, the parties and amicus reached an agreement in mediation. The MSA provided that M would be SMC and F would be PC. Regarding F's periods of possession the MSA specified a schedule but made it dependent upon agreement by the parties, the child and the child's therapists/team at Menninger, further making Menninger the tiebreaker if there was no agreement. The MSA was signed by the parties, the amicus and the mediator. Menninger did not participate in the mediation. The parties submitted a proposed order to the court which Menninger learned about. Menninger wrote a letter to the trial court asking that it be removed from any order because it was not asked to serve in any such capacity nor was it willing to do so. The court signed the order before it received the letter and the parties refused to file a motion to set aside the order. Menninger filed a motion to modify the order asking for removal of the language involving them and the court refused. Menninger appealed. The COA is clear that a judgment may not be rendered against a party who is not named or served as a party defendant. In this case, Menninger was not named, was not served, was not asked about playing any role in the case, did not participate in the mediation, did not agree to serve and asked the trial court several times to remove the terms naming them as tiebreaker. Because the order includes an entity that was not named or served, the trial court abused its discretion.

Judgment affirmed as modified to delete the provisions obligating Menningers to remain involved. **Comment:** Because parties employ tiebreakers all the time within their settlement agreements, and these terms are often helpful in getting a case resolved, perhaps it would be best to make sure that those individuals or entities named consent to their involvement. I might even suggest that you go so far as having them sign off on a final order as approving those specific terms.

XIII. Conclusion

Another year has now come and gone and our appellate courts have not slowed down their efforts to address all matters unique to family law. As the cases within this paper demonstrate, the combined efforts of family lawyers, trial judges and appellate courts continue to generate fascinating issues for ongoing discussions and debates.

As an attorney I can acknowledge that the practice of family law is not easy. Collaborating to share our experiences and our knowledge with one another is vital to success. I hope that these case summaries are helpful to you in some small way.

Once again, I graciously acknowledge and thank David Gray who inspired me to take on the project of summarizing cases in 2007. David passed away in 2020 and his contribution to the practice of family law left an impression on many.