TEXAS FAMILY LAW PRACTICE MANUAL

2022

Practice Notes
volume 1

Texas Family Law Practice Manual
2022 Edition

Practice Notes

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

Austin

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2022 Edition

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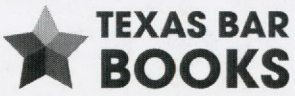

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Contents

List of Chapters ix
Summary of Contents xiii
Introduction xxi
1 Ethics and Malpractice Considerations 1
2 Attorney-Client Relationship and Communications 55
3 Divorce Pleadings 79
4 Divorce—Temporary Orders 165
5 Discovery 185
6 Information Gathering and Third-Party Notices 259
7 Inventory and Appraisement 267
8 Ancillary Motions and Proceedings 273
9 Child Support 327
[Chapters 10 through 12 are reserved for expansion.]
13 Court-Ordered Representatives 381
14 Judicial Bypass 403
15 Collaborative Law 419
16 Parenting Plans, Parenting Coordinators, and Parenting Facilitators 435
17 Protective Orders 451
18 Alternative Dispute Resolution and Informal Settlement 489
19 Trial Proceedings 509
20 Attorney's Fees 531
[Chapters 21 and 22 are reserved for expansion.]
23 Divorce—Decrees and Agreements Incident to Divorce 561
24 Closing Documents 599
25 Employment and Retirement Benefits 631

26 Posttrial Proceedings and Appeals 689

List of Chapters

VOLUME 1

1 Ethics and Malpractice Considerations

2 Attorney-Client Relationship and Communications

3 Divorce Pleadings

4 Divorce—Temporary Orders

5 Discovery

6 Information Gathering and Third-Party Notices

7 Inventory and Appraisement

8 Ancillary Motions and Proceedings

9 Child Support

10–12 reserved

13 Court-Ordered Representatives

14 Judicial Bypass

15 Collaborative Law

16 Parenting Plans, Parenting Coordinators, and Parenting Facilitators

17 Protective Orders

18 Alternative Dispute Resolution and Informal Settlement

19 Trial Proceedings

20 Attorney's Fees

21–22 reserved

23 Divorce—Decrees and Agreements Incident to Divorce

24 Closing Documents

25 Employment and Retirement Benefits

26 Posttrial Proceedings and Appeals

VOLUME 2

27 Mandamus

28–30 reserved

31 Enforcement—Property

32 Enforcement—Spousal Maintenance and Alimony

33 Enforcement—Child Support

34 Enforcement—Possession and Access

35 Contempt

36 Physical Possession of Child

37–39 reserved

40 Original Suit Affecting Parent-Child Relationship

41 Modification of Texas Orders

42 Transfer

43 Interstate Proceedings

44 Grandparents and Other Nonparents

45 Military Duty of Conservator

46 Authorizations for Care of Child

47–49 reserved

50 Termination

51 Adoption of Child

52 Combined Termination and Adoption of Stepchild

53 Ancillary Forms for Termination and Adoption

54 Parentage

55 International SAPCR Issues

56 Miscellaneous SAPCR and Other Child-Related Forms

57–59 reserved

60 Adoption of Adult

61 Miscellaneous Litigation

62 Annulment and Suit to Declare Marriage Void

63 Property Agreements

64 Retrieval of Personal Property

Statues and Rules Cited

Cases Cited

Subject Index

Summary of Contents

A detailed chapter table of contents immediately precedes the text of each chapter.

Introduction

Overview of how to use the manual and features available in the online and downloadable digital versions of the manual

1 **Ethics and Malpractice Considerations**

Discussion of the regulation of lawyers and law practice, accountability for professional responsibility, liability for professional malpractice, and ineffective assistance of counsel in Texas, with emphasis on family law practice

2 **Attorney-Client Relationship and Communications**

Practice notes and forms for employment agreements and related correspondence with client about case; basic data-collection forms for family law cases

3 **Divorce Pleadings**

Practice notes and forms on petitioner's divorce pleadings, including petition, temporary restraining orders, and motion for nonsuit; respondent's pleadings, including special appearance, plea in abatement, original answer, and waiver; and additional causes of action

4 **Divorce—Temporary Orders**

Practice notes and forms for temporary orders, including modification and extension of temporary orders and motions for counseling

5 **Discovery**

Practice notes and forms for formal discovery, including requests for disclosure, required disclosures, pattern interrogatories, requests for admissions, requests for production of documents, requests for entry upon property, and pattern language for subpoenas

6 **Information Gathering and Third-Party Notices**

Practice notes, including useful websites, and forms for informal discovery, including various form letters about assets, records authorizations, and forms for lis pendens

7 **Inventory and Appraisement**

Practice notes and inventory and appraisement forms

8 **Ancillary Motions and Proceedings**

Practice notes and forms concerning attorneys and judges, service of citation, foreign law, joinder of causes, ancillary relief, witnesses, indigence, and maintaining suit

9 **Child Support**

Practice notes and forms relating to child support, including medical and dental support, withholding from earnings, and support of a disabled child

[chapters 10 through 12 reserved]

13 **Court-Ordered Representatives**

Practice notes and forms relating to attorneys ad litem, guardians ad litem, and amicus attorneys, including appointment, pleadings, expenses, and withdrawal

14 **Judicial Bypass**

Practice notes and forms for abortion without parental notification and consent

15 **Collaborative Law**

Practice notes and forms for collaborative law proceedings, including retainer letter, participation agreements, required status reports and notices, and settlement agreements

16 **Parenting Plans, Parenting Coordinators, and Parenting Facilitators**

Practice notes and forms related to parenting plans and parenting coordinators and facilitators, including a basic plan, other possible provisions, and appointment and removal of coordinator and facilitator

17 **Protective Orders**

Practice notes and forms regarding protection against family violence under title 4

18 **Alternative Dispute Resolution and Informal Settlement**

Practice notes and forms regarding alternative dispute resolution and informal settlement, with mediation and arbitration forms including motions, checklists, rules, mediated and informal settlement agreements, arbitration decision and award, and reports to the court

19 **Trial Proceedings**

Practice notes and forms for pretrial conference, preferential setting, continuance, stay, division of property, conference with child, and various aspects of jury trial, including judgment non obstante veredicto and directed verdict

20 **Attorney's Fees**

Practice notes on setting, proving up, and collecting attorney's fees and statutory authority for fees; forms for intervention for fees and prove-up script

[chapters 21 and 22 reserved]

23 **Divorce—Decrees and Agreements Incident to Divorce**

Practice notes, including tax considerations; forms for final decree of divorce, including provisions for conservatorship of children, division of property, tax language, and injunctions; additional provisions for sale of real estate; statement of evidence; complex agreement incident to divorce; and prove-up questions, affidavit, and declaration

24 **Closing Documents**

Practice notes and forms for transfer of automobile, land, utility deposits, insurance benefits, miscellaneous property, and stock certificates; correspondence regarding insurance; and correspondence with client

25 **Employment and Retirement Benefits**

Practice notes and forms relating to stock options and the division and direct payment of various types of retirement benefits, including qualified domestic relations orders for private and state plans, provisions for military retirement, orders dividing federal civil service and federal employees retirement benefits and railroad retirement benefits, assignment of interest in individual retirement account, and petition for postdivorce domestic relations order

26 **Posttrial Proceedings and Appeals**

Practice notes and forms relating to proceedings after trial, including new trial, setting aside default judgment, temporary orders pending appeal, findings of fact and conclusions of law, judgment nunc pro tunc, notice of appeal, withdrawing exhibits, and sealing court records

27 **Mandamus**

Practice notes regarding mandamus, including subjects thereof; forms for mandamus for return of child and for transfer of cause

[chapters 28 through 30 reserved]

31 **Enforcement—Property**

Practice notes and forms for proceedings, including clarification and contempt, for the enforcement of orders dividing marital property

32 **Enforcement—Spousal Maintenance and Alimony**

Practice notes regarding spousal maintenance and alimony and forms regarding the enforcement of an award of spousal maintenance under the Family Code, including income withholding, QDROs, and contempt

33 **Enforcement—Child Support**

Practice notes and forms for proceedings for the enforcement of orders for the payment of child support, including contempt, withholding from earnings, QDROs, money judgments, security, child support lien, and suspension and denial of renewal of license

34 **Enforcement—Possession and Access**

Practice notes and forms for proceedings for the enforcement of orders for possession of and access to a child, including clarification, contempt, security, and suspension of license

35 **Contempt**

Practice notes and forms for contempt proceedings, including habeas corpus actions to release an adult

36 **Physical Possession of Child**

Practice notes and forms for proceedings to order delivery of children before the court through attachment, habeas corpus actions to return children, and expedited enforcement of child custody determinations under the Uniform Child Custody Jurisdiction and Enforcement Act

[chapters 37 through 39 reserved]

40 **Original Suit Affecting Parent-Child Relationship**

Practice notes and forms for original suits to establish conservatorship or support of a child if no divorce is sought

41 **Modification of Texas Orders**

Practice notes and forms for proceedings to modify orders of Texas courts concerning the conservatorship, possession and access, or support of children and concerning spousal maintenance

42 **Transfer**

Practice notes and forms for proceedings to transfer suits affecting the parent-child relationship

43 **Interstate Proceedings**

Practice notes and forms concerning the Uniform Child Custody Jurisdiction and Enforcement Act, the Parental Kidnapping Prevention Act, the Uniform Interstate Family Support Act, and the Full Faith and Credit for Child Support Orders Act

44 **Grandparents and Other Nonparents**

Practice notes and forms concerning proceedings in which a grandparent seeks possession of or access to a child, for proceedings in which a grandparent or other nonparent seeks to intervene in a suit affecting the parent-child relationship, and for proceedings in which a sibling seeks access to a child

45 **Military Duty of Conservator**

Practice notes and forms concerning temporary orders with regard to rights, duties, possession, access, and support to be effective during the military deployment, military mobilization, or temporary military duty of a conservator

46 **Authorizations for Care of Child**

Practice notes and forms concerning Family Code provisions for care of children by nonparents, including temporary authorizations for care of a child, agreements authorizing adult caregivers to perform statutorily permitted acts in regard to children, and temporary authorizations for voluntary inpatient mental health services for a child

[chapters 47 through 49 reserved]

50 **Termination**

General information on termination and adoption; practice notes and forms for actions to terminate the parent-child relationship without providing for the adoption of the child

51 **Adoption of Child**

General information on termination and adoption and on birth records; forms for actions to adopt a child in which no termination of the parent-child relationship is required

52 **Combined Termination and Adoption of Stepchild**

Practice notes and forms for actions to terminate the parental rights of one natural parent (including an alleged father) and to adopt the child by the other parent's spouse

53 **Ancillary Forms for Termination and Adoption**

Forms, other than petitions and decrees, for termination and adoption actions and for other suits affecting the parent-child relationship

54 **Parentage**

Practice notes and forms for all judicial proceedings relating to parentage, including parentage based on a validated gestational agreement and suits seeking to set aside acknowledgments of paternity

55 **International SAPCR Issues**

Practice notes on the Prevention of International Parental Child Abduction Act, adoption of foreign-born children, and the Hague Convention and International Child Abduction Remedies Act and forms for prevention of international parental child abduction and registration of foreign adoption order

56 **Miscellaneous SAPCR and Other Child-Related Forms**

Variety of forms used in many child-related proceedings, including UCCJEA affidavit; health and dental insurance statements; motions and orders regarding child custody evaluation, parent education course, drug screening, and passports and travel; and split possession order

[chapters 57 through 59 reserved]

60 **Adoption of Adult**

Practice notes and forms for proceedings to adopt an adult

61 **Miscellaneous Litigation**

Practice notes and forms for bill of review, for breach of contract, for change of name of adult and of child, for obtaining a hardship driver's license, for postdivorce property division, for removal of disabilities of minority, for enjoining harassing behavior, for interference with possessory interest in a child, and for declaratory judgment

62 **Annulment and Suit to Declare Marriage Void**

Practice notes and forms for actions to annul voidable marriages and actions to declare marriages void

63 **Property Agreements**

Practice notes and forms for nonmarital cohabitation agreements, premarital agreements, partition or exchange agreements, separation agreements, waivers of disclosure of financial information, property agreements between spouses, agreements to convert separate property to community property, and community interest special warranty deeds

64 **Retrieval of Personal Property**

Practice notes and forms for obtaining writs to enter a residence and retrieve personal property pursuant to Texas Property Code chapter 24A

Introduction

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

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

§ 1 Practice Notes

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

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

§ 2 Digital Versions

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

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

For more information about the online and downloadable versions including usage notes, see the material in the Introduction in volume 1 of the forms portion of this manual.

§ 3 Corrections and Updates

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

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

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

Chapter 1

Ethics and Malpractice Considerations

I. Introduction

§ 1.1 Scope of Chapter 5

II. The Profession and Its Regulation

§ 1.2 State Bar Act 6
§ 1.3 State Bar Rules. 6
§ 1.4 Texas Rules of Disciplinary Procedure 7
§ 1.5 Texas Disciplinary Rules of Professional Conduct 7
§ 1.6 American Bar Association's Model Rules of Professional Conduct 7
§ 1.7 Texas Code of Ethics and Professional Responsibility for Legal Assistants 8
§ 1.8 Texas Lawyer's Creed 8

III. Professional Responsibility

§ 1.11 Professional Misconduct 8
§ 1.11:1 Definitions and Sanctions 8
§ 1.11:2 Examples of Misconduct 11
§ 1.12 Attorney's Fees 12
§ 1.13 Conflicts of Interest 13
§ 1.13:1 Conflicts of Interest between Attorney and Client. 13
§ 1.13:2 Conflicts of Interest among Clients 16
§ 1.14 Confidentiality 20
§ 1.15 Commingling Funds 21
§ 1.16 Advertising 22
§ 1.16:1 Background 22
§ 1.16:2 Texas Advertising Guidelines 22

§ 1.16:3 Television Advertising 28
§ 1.17 Attorney as Witness 28

IV. Professional Malpractice

§ 1.21 Nature of Legal Malpractice Action 29
§ 1.22 Elements of Legal Malpractice 30
§ 1.22:1 Attorney-Client Relationship and Duty 30
§ 1.22:2 Negligent Breach of Duty 31
§ 1.22:3 Proximate Cause 33
§ 1.22:4 Client Must Be Damaged 34
§ 1.22:5 Additional Meritorious Action 35
§ 1.22:6 Breach-of-Contract Action 36
§ 1.23 Who Can Sue for Legal Malpractice 36
§ 1.23:1 No Private Actions under Texas Disciplinary Rules of Professional Conduct 36
§ 1.23:2 Privity Generally Required 37
§ 1.24 Defenses to Legal Malpractice 38
§ 1.24:1 Statutes of Limitation 38
§ 1.24:2 Good-Faith Defense 40
§ 1.24:3 Satisfaction 40
§ 1.24:4 Other Defenses 40
§ 1.25 Potential Areas for Legal Liability 41
§ 1.25:1 Attorney's Fees 41
§ 1.25:2 Failure to Advise Client of Legal Consequences of Acts 41
§ 1.25:3 Failure to Advise Client of Conflict of Interest 41
§ 1.25:4 Failure to Avoid Improper Entry of Judgment against Client 42
§ 1.25:5 Failure to Convey Settlement Offer to Client 42
§ 1.25:6 Failure to Timely Pursue Client's Claim 43

§ 1.25:7 Inappropriate Relationships with Clients 43
§ 1.26 Procedures to Help Avoid Malpractice Actions 43
§ 1.26:1 Calendaring System 44
§ 1.26:2 Nonengagement Letters 44
§ 1.26:3 File Retention 44
§ 1.26:4 Problems When Firms Break Up 45
§ 1.26:5 Supervision of Support Staff and New Associates 45
§ 1.26:6 Avoiding Overload 45
§ 1.27 Standard of Care for Specialists 46
§ 1.28 Standard of Care for Court-Appointed Representatives 46
§ 1.29 Attorney Professional Liability Insurance 46

V. Ineffective Assistance of Counsel

§ 1.31 Right to Effective Assistance of Counsel 47
§ 1.32 Standard for Determining Effective Assistance 48
§ 1.33 Proof of Ineffective Assistance 49
§ 1.34 Presumptions against Ineffective Assistance 49

VI. Texas Deceptive Trade Practices–Consumer Protection Act Liability

§ 1.41 Application of Act to Legal Services 50
§ 1.42 Statute of Limitations 50

VII. Grievances

§ 1.51 Grievance Procedure 51

VIII. Useful Websites

§ 1.61 Useful Websites 53

Chapter 1

Ethics and Malpractice Considerations

I. Introduction

§ 1.1 Scope of Chapter

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

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

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

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

II. The Profession and Its Regulation

§ 1.2 State Bar Act

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

§ 1.3 State Bar Rules

Rules governing the State Bar were initially adopted by the members of the State Bar of Texas and thereafter promulgated by the Supreme Court of Texas on February 22, 1940, and subsequently amended several times. The portions of the rules dealing with discipline and suspension of attorneys are entitled the "Texas Disciplinary Rules of Professional Conduct" and the "Texas Rules of Disciplinary Procedure." A copy of the rules can be found in the Texas Government Code, in the Texas Rules of Court—State (West 2022), and at **www.legalethicstexas.com/Ethics-Resources/Rules.aspx.** A copy can also be obtained without charge at the Office of the Chief Disciplinary Counsel for the State Bar of Texas in the following cities:

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

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

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

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

§ 1.4 Texas Rules of Disciplinary Procedure

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

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

§ 1.5 Texas Disciplinary Rules of Professional Conduct

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

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

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

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

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

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

The Code of Ethics and Professional Responsibility adopted by the board of directors of the Paralegal Division of the State Bar of Texas can be found on the Internet at **https://txpd.org/ethics-pages/professional-ethics-and-the-paralegal/**.

§ 1.8 Texas Lawyer's Creed

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

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

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

[Sections 1.9 and 1.10 are reserved for expansion.]

III. Professional Responsibility

§ 1.11 Professional Misconduct

§ 1.11:1 Definitions and Sanctions

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

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

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

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

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

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

1. acts or omissions, individually or in concert with another person or persons, that violate one or more of the Texas Disciplinary Rules of Professional Conduct;
2. conduct that occurs in another jurisdiction, including before any federal court or federal agency, and results in the disciplining of the attorney in that other jurisdiction, if the conduct is professional misconduct under the Texas Disciplinary Rules of Professional Conduct;
3. violation of any disciplinary or disability order or judgment;
4. conduct that constitutes barratry as defined by Texas law;
5. failure to comply with rule 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of the attorney's cessation of practice;

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

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

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

Tex. Rules Disciplinary P. R. 1.06CC.

An attorney shall not—

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

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

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

4. engage in conduct constituting obstruction of justice;

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

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

7. violate any disciplinary or disability order or judgment;

8. fail to timely furnish to the Office of the Chief Disciplinary Counsel or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he in good faith timely asserts a privilege or other legal ground for failure to do so;

9. engage in conduct that constitutes barratry as defined by Texas law;

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

11. engage in the practice of law when the attorney is on inactive status, except as permitted by section 81.053 of the Government Code or article XIII of the State Bar Rules (concerning certain volunteer work), or when the attorney's right to practice has been suspended or terminated, including but not limited to situations where an attorney's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with article XII of the State Bar Rules relating to mandatory continuing legal education; or

12. violate any other Texas laws relating to the professional conduct of attorneys and to the practice of law.

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

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

§ 1.11:2 Examples of Misconduct

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

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

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

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

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

§ 1.12 Attorney's Fees

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

§ 1.13 Conflicts of Interest

§ 1.13:1 Conflicts of Interest between Attorney and Client

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

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

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

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

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

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

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

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

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

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

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

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

Tex. Disciplinary Rules Prof'l Conduct R. 1.06. (Rule 6.05 provides exceptions to the conflicts-of-interest provisions in rule 1.06 for nonprofit and limited pro bono legal services. *See* Tex. Disciplinary Rules Prof'l Conduct R. 6.05.)

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

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

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

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

resenting opposing parties in a criminal case was a case of first impression but that, if there is impropriety in spouses representing adversaries, the disqualification extends to the partners and associates of the spouse. *Haley*, 824 S.W.2d at 797.

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

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

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

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

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

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

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

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

§ 1.13:2 Conflicts of Interest among Clients

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

Rule 1.06 provides:

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

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

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

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

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

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

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

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

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

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

Tex. Disciplinary Rules Prof'l Conduct R. 1.06. (Rule 6.05 provides exceptions to the conflicts-of-interest provisions in rule 1.06 for nonprofit and limited pro bono legal services. *See* Tex. Disciplinary Rules Prof'l Conduct R. 6.05.)

The prohibition extends only to interests that are in fact adverse and hostile. For example, it did not preclude one attorney from representing both parents in a proceeding to terminate their parental rights. *In re H.W.E.*, 613 S.W.2d 71, 72 (Tex. App.—Fort Worth 1981, no writ); *see also* Tex. Fam. Code § 107.013(b).

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

Conflicts Created by Prior Representation: Without prior consent, an attorney who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client in which the other person questions the validity of the attorney's services or work product for the former client, or if the representation in reasonable probability will involve a violation of Tex. Disciplinary Rules Prof'l Conduct R. 1.05, or if it is the same or a substantially related matter. Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a). (Rule 6.05 provides exceptions to the conflicts-of-interest provisions in rule 1.09 for nonprofit and limited pro bono legal services. *See* Tex. Disciplinary Rules Prof'l Conduct R. 6.05.)

The fact that the lawyer has no recollection of the initial consultation or the matter disclosed in the meeting is of no consequence. The former client is entitled to a conclusive presumption that he imparted confidences and secrets. *In re Z.N.H.*, 280 S.W.3d 481, 485 (Tex. App.—Eastland 2009, no pet.).

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

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

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

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

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

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

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

Separation agreements, like divorces, can generate the same problems with conflict of interest. A separation agreement may be voided because of one party's taking unfair advantage or overreaching. One court found that a husband was the unwitting victim of a separation agreement that was "unconscionable, oppressive and unfair" because of the following conditions: He was unfamiliar with the technicalities of the agreement; he was led to believe that his wife's attorney would protect both their interests; and he was not advised before making the agreement that he should seek independent legal advice. *Jensen v. Jensen*, 557 P.2d 200 (Idaho 1976).

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

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

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

§ 1.14 Confidentiality

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

§ 1.15 Commingling Funds

An attorney must hold funds and other property belonging in whole or in part to clients or third persons that are in an attorney's possession in connection with a representation separate from the attorney's own property. These funds must be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state where the attorney's office is situated or elsewhere with the consent of the client or third person. Other client property must be identified as such and appropriately safeguarded. The attorney must keep complete records of account funds and other property and preserve them for five years after termination of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a).

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

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

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

True retainer fees are earned when received and may be deposited in the attorney's account, but a refundable retainer belongs to the client until it is earned or expenses are

incurred and must be held in the lawyer's trust account. Retainer fees are discussed in section 20.4 in this manual.

§ 1.16 Advertising

§ 1.16:1 Background

It is unconstitutional to prohibit attorneys from advertising prices charged for uncontested divorces, simple adoptions, uncontested personal bankruptcies, changes of name, and routine services, as long as the advertising is not false, deceptive, or misleading. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

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

§ 1.16:2 Texas Advertising Guidelines

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

For purposes of the advertising rules, an "advertisement" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to members of the public in general, which offers or promotes legal services under circumstances where the lawyer neither knows nor reasonably should know that the recipients need legal services in particular matters. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(b)(1). A "solicitation communication" is a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to a specific person who has not sought the lawyer's advice or services that reasonably can be understood as offering to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(b)(2).

A statement or disclaimer required by the advertising rules must be sufficiently clear that it can reasonably be understood by an ordinary person, and it must be made in each

language used in the communication. A statement that a language is spoken or understood does not require a statement or disclaimer in that language. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(d).

Communications about Services: Making or sponsoring false or misleading communications about lawyers' services or qualifications is specifically prohibited. Information about legal services must be truthful and nondeceptive. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading. A statement is misleading if there is a substantial likelihood that the statement will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A statement is also misleading if it is substantially likely to create unjustified expectations about the results the lawyer can achieve. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(a).

A lawyer may not state or imply that the lawyer can achieve results in the representation by unlawful use of violence or means that violate the rules or other law. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(e).

A lawyer who advertises the amount of a verdict, knowing that the verdict was later reduced or reversed or that the case was settled for a lesser amount, must state in each advertisement of the verdict, with equal or greater prominence, the amount of money that the client ultimately received. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(g).

Firm Names: A lawyer may practice law under a trade name that is not false or misleading. A law firm name may include the names of current members of the firm and of deceased or retired members of the firm, or of a predecessor firm, if there has been a succession in the firm identity. The name of a lawyer holding a public office may not be used in the law firm's name, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A law firm with an office in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm must indicate the jurisdictional limitations on those who are not licensed to practice in the jurisdiction where the office is located. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(c).

A lawyer may state or imply that the lawyer practices in a partnership or other entity only when that is accurate. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(f).

Advertisements: Advertisements for legal services are governed by rule 7.02.

An advertisement of legal services must publish the name of a lawyer who is responsible for the content of the advertisement and identify the lawyer's primary practice location. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a).

A lawyer who advertises may communicate that the lawyer does or does not practice in particular fields of law but—with certain exceptions—may not state that the lawyer has been certified or designated by an organization as possessing special competence or that the lawyer is a member of an organization the name of which implies that its members possess special competence. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(b).

The first exception provides that a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised may state with respect to each such area, "Board Certified, area of specialization -- Texas Board of Legal Specialization." Tex. Disciplinary Rules Prof'l Conduct R. 7.02(b)(1).

The second exception is for a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence in a field of practice. Such a lawyer may include a factually accurate, nonmisleading statement of that membership or certification, but only if the organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of published criteria that the Texas Board of Legal Specialization has established as required for such certification. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(b)(2).

If a lawyer's advertisement discloses a willingness to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay for other expenses, such as the costs of litigation. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(c).

A lawyer who advertises a specific fee or range of fees for an identified service must conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period. However, a lawyer is not bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication, unless the lawyer has expressly promised to do so. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(d).

Solicitations and Other Prohibited Communications: A lawyer may not solicit professional employment from a nonclient, in person or by regulated telephone, social media, or other electronic contact, unless the target of the solicitation is another lawyer; a person who has a family, close personal, or prior business or professional relationship with the lawyer; or a person the lawyer knows to be an experienced user of the type of legal services involved for business matters. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(b). A lawyer "solicits" employment by making a "solicitation communication," as that term is defined in rule 7.01(b)(2) ("a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to a specific person who has not sought the lawyer's advice or services that reasonably can be understood as offering to provide legal services that the lawyer knows or reasonably should know the person needs in a particular matter"). Tex. Disciplinary Rules Prof'l Conduct R. 7.03(a)(2). "Regulated telephone, social media, or other electronic contact" means telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(a)(1).

Because rule 7.01 provides that a solicitation communication is one that is substantially motivated by pecuniary gain, this ban does not apply to the activities of lawyers working for public or charitable legal services organizations. Tex. Disciplinary Rules Prof'l Conduct R. 7.03 cmt. 1. Nor does it apply if the communication is directed to the general public. Tex. Disciplinary Rules Prof'l Conduct R. 7.03 cmt. 2. Otherwise permissible targeted solicitation through regular mail, e-mail, or other means not involving communication in a live or electronically interactive manner is not prohibited by rule 7.03. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.03 cmts. 3–6.

A lawyer may not send, deliver, or transmit—or knowingly permit or cause another person to do so—a communication that involves coercion, duress, overreaching, intimidation, or undue influence. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(c). A lawyer may not send, deliver, or transmit—or knowingly permit or cause another person to do so—a solicitation communication to a prospective client, if (1) the communication is misleadingly designed to resemble a legal pleading or other legal document or (2) the communication is not plainly marked or clearly designated an advertisement unless the target of the communication is another lawyer; a person who has a family, close personal, or prior business or professional relationship with the lawyer; or a person the lawyer knows to be an experienced user of the type of legal services involved for business matters. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(d). (Communications containing certain elements are rebuttably presumed to be "plainly marked or clearly

designated" as advertisements. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.03 cmt. 10.)

A lawyer may not pay, give, or offer to pay or give referral fees to a nonlawyer, except for nominal gifts not intended or reasonably expected to be a form of compensation for recommending the lawyer's services. However, a lawyer may pay for advertising and for the expenses of a lawyer referral service and may refer clients to another lawyer or a nonlawyer professional under certain circumstances. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(e).

A lawyer may not—to secure employment—pay, give, advance, or offer to pay, give, or advance anything of value to a prospective client, except for actual litigation expenses and other amounts allowed under rule 1.08(d) or ordinary social hospitality of nominal value. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(f).

Rule 7.03 does not prohibit communications authorized by law, such as notice to class members in class action litigation. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(g).

Filing Requirements: Except for communications that are exempt under rule 7.05 (see below), a lawyer must file certain materials with the State Bar's Advertising Review Committee no later than ten days after the date of dissemination of an advertisement of legal services or ten days after the date of a solicitation communication sent by any means. The materials required to be filed are a copy of the advertisement or solicitation communication (including packaging if applicable) in the form in which it appeared or will appear on dissemination; a completed lawyer advertising and solicitation communication application; and payment of the required fee. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(a). If the same form solicitation letter is sent to several persons, only a representative sample of the letter and accompanying envelope need be filed. Tex. Disciplinary Rules Prof'l Conduct R. 7.04 cmt. 2.

There is a specific procedure for preapproval of advertisements and solicitation communications by the Advertising Review Committee. A lawyer seeking preapproval may submit the material specified in rule 7.04(a) to the committee not fewer than thirty days before the date of first dissemination. In the case of an advertisement or solicitation communication that has not yet been produced, the documentation will consist of a proposed text, production script, or other description, including details about the illustrations, actions, events, scenes, and background sounds that will be depicted. A finding of noncompliance by the committee is not binding in a disciplinary proceeding, but a finding of compliance is binding in the submitting lawyer's favor as to all materials submit-

ted for preapproval if the lawyer fairly and accurately described the advertisement or solicitation communication that was later produced. A finding of compliance is admissible evidence if offered by a party. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(c).

If, based on filings, the committee reasonably believes a lawyer disseminated a communication that violates rule 7.01, 7.02, or 7.03 or otherwise engaged in conduct that raises a substantial question about the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, the committee must report the lawyer to the appropriate disciplinary authority. Tex. Disciplinary Rules Prof'l Conduct R. 7.04 cmt. 1.

If requested by the Advertising Review Committee, a lawyer must promptly submit information to substantiate statements or representations made or implied in an advertisement or solicitation communication. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b). This provision does not apply to communications not substantially motivated by pecuniary gain. Tex. Disciplinary Rules Prof'l Conduct R. 7.04 cmt. 3.

Exemptions from Filing Requirements: Certain types of communications, unless they fail to comply with rules 7.01, 7.02, and 7.03, are exempt from the filing requirements. These communications are described in detail in rule 7.05 and include certain communications of a bona fide nonprofit legal aid organization; certain information and links posted on a law firm website; listings in a regularly published law list; announcement cards stating new or changed associations, new offices, or similar changes relating to a lawyer or law firm, and business cards; professional newsletters and solicitation communications sent to certain types of recipients; certain communications in social media or other media that do not expressly offer legal services; certain advertisements that identify a lawyer or a firm as a contributor or sponsor of a charitable, community, or public interest program, activity, or event; and communications that contain only certain basic types of information about the lawyer or the firm. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.05.

Communications not substantially motivated by pecuniary gain need not be filed. Tex. Disciplinary Rules Prof'l Conduct R. 7.05 cmt. 1.

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

Jurisdiction: Rule 8.05 designates who will be subject to discipline by the State Bar of Texas for violation of the Texas advertising guidelines. In certain cases, an attorney

admitted in Texas may be disciplined for advertisements made in other jurisdictions. Tex. Disciplinary Rules Prof'l Conduct R. 8.05.

§ 1.16:3 Television Advertising

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

§ 1.17 Attorney as Witness

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

> (a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case;
>
> (4) the lawyer is a party to the action and is appearing pro se; or
>
> (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to

furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

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

However, disqualification is a severe remedy. *In re Sanders*, 153 S.W.3d 54, 57 (Tex. 2004) (orig. proceeding). "Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice" to merit disqualification. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding). Because of the severity of the remedy, courts must adhere to an exacting standard so as to discourage the use of a motion to disqualify as a dilatory trial tactic. *In re Butler*, 987 S.W.2d 221, 224 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). The party requesting disqualification must demonstrate that the opposing lawyer's dual role as attorney and witness will cause the party actual prejudice. *Ayres v. Canales*, 790 S.W.2d 554, 558 (Tex. 1990) (orig. proceeding); *see also In re Frost*, No. 12-08-00154-CV, 2008 WL 2122597 (Tex. App.—Tyler May 21, 2008, orig. proceeding) (mem. op.). Finally, a lawyer should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness. Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10.

[Sections 1.18 through 1.20 are reserved for expansion.]

IV. Professional Malpractice

§ 1.21 Nature of Legal Malpractice Action

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

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

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

§ 1.22 Elements of Legal Malpractice

§ 1.22:1 Attorney-Client Relationship and Duty

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

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

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

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

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

COMMENT: There is a conflict of authority regarding the enforceability of a provision in a legal services contract requiring the arbitration of a malpractice claim. Several cases approve enforcement of such arbitration clauses. *See In re Pham*, 314 S.W.3d 520, 526 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 268 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Henry v. Gonzalez*, 18 S.W.3d 684, 691–92 (Tex. App.—San Antonio 2000, pet. dism'd). *But see In re Godt*, 28 S.W.3d 732, 738–39 (Tex. App.—Corpus Christi–Edinburg 2000, orig. proceeding), which holds to the contrary. See also Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. Tex. L. Rev. 625 (1997). In *In re Pham*, 314 S.W.3d at 526, the Houston court of appeals said that the public policy arguments against enforcement of such clauses are best directed to the legislature.

§ 1.22:2 Negligent Breach of Duty

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

Good-Faith Errors in Judgment: The "error in judgment" rule has been substantially rewritten in *Cosgrove v. Grimes*, 774 S.W.2d 662, 664–65 (Tex. 1989). Cosgrove initially retained an attorney (Bass) to sue for a personal injury claim arising from an automobile accident. Bass left town and, according to Cosgrove, told Cosgrove he had turned the case over to attorney Grimes. However, Grimes testified that he first heard of

the case when Cosgrove came to his office a mere five days before the statute of limitations was to have expired. Cosgrove gave Grimes the information about the accident, including its location and the person to sue (one Timothy Purnell). Grimes testified that he found Cosgrove to be an intelligent man on whom he could rely for the basic facts. Suit was filed on the basis of the information. It later was discovered that Purnell was the passenger, not the driver, and that the petition stated the wrong location of the accident. Both the decision of the court of appeals (*Cosgrove v. Grimes*, 757 S.W.2d 508, 510–11 (Tex. App.—Houston [1st Dist.] 1988)) and that of the supreme court detail the application of the error-in-judgment rule.

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

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

1. Violating a disciplinary rule prohibiting receiving compensation from anyone other than one's client. *State v. Baker*, 539 S.W.2d 367, 375 (Tex. App.—Austin 1976, writ ref'd n.r.e.), *disapproved on other grounds*, *Cosgrove*, 774 S.W.2d at 665.

2. Violating disciplinary rules against commingling. *Archer v. State*, 548 S.W.2d 71, 74 (Tex. App.—El Paso 1977, writ ref'd n.r.e.).

3. Making false statements that suit had been filed and failing to file suit before the running of the statute of limitations. *Hicks v. State*, 422 S.W.2d 539, 542 (Tex. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.), *disapproved on other grounds*, *Cosgrove*, 774 S.W.2d at 665.

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

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

Cosgrove, 774 S.W.2d at 664–65.

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

§ 1.22:3 Proximate Cause

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

A client who claims that the attorney's malpractice caused loss of the cause of action must prove that the initial suit would have been successful but for the attorney's negli-

gence and must show the amount that could have been collected on a successful judgment. *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

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

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

§ 1.22:4 Client Must Be Damaged

Amount of Damages: Another essential element is that the client must sustain damages as a result of the attorney's negligence. *Fireman's Fund American Insurance Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67, 69 (Tex. App.—Tyler 1975, writ ref'd n.r.e.).

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

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

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

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

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

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

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

§ 1.22:5 Additional Meritorious Action

In addition to establishing the defendant-attorney's primary negligence, the plaintiff-client must often prove an additional meritorious lawsuit in a legal malpractice action to establish that he or she would have prevailed in the suit that is the subject of the malpractice action. The plaintiff-client must establish that the underlying cause of action

was meritorious, that it would have resulted in a favorable judgment but for the attorney's negligence, and that the judgment could have been collected. *Lynch v. Munson*, 61 S.W. 140, 142 (Tex. App.—1901, no writ).

§ 1.22:6 Breach-of-Contract Action

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

§ 1.23 Who Can Sue for Legal Malpractice

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

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

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

§ 1.23:2 Privity Generally Required

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

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

In *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999), the court held that, although persons not in privity with an attorney cannot sue the attorney for legal malpractice, a nonclient may sue an attorney for negligent misrepresentation without regard to the nonclient's lack of privity with the attorney.

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

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

§ 1.24 Defenses to Legal Malpractice

§ 1.24:1 Statutes of Limitation

In Texas, malpractice claims are tort actions governed by the two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.003. If the suit is brought on a legitimate breach-of-contract theory based on a contractual relationship, it is governed by the four-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.051. However, malpractice actions have been barred by the two-year statute even though the pleadings were couched in breach-of-contract language and filed within four years of the alleged malpractice. *See Woodburn v. Turley*, 625 F.2d 589 (5th Cir. 1980); *Gabel v. Sandoval*, 648 S.W.2d 398, 399 (Tex. App.—San Antonio 1983, writ dism'd); *Citizens State Bank of Dickinson v. Shapiro*, 575 S.W.2d 375, 386–87 (Tex. App.—Tyler 1978, writ ref'd n.r.e.). Where limitations had run on the malpractice claim but not on the suit for breach of fiduciary duty, the court had discretion to dismiss both claims if it believed that the client would not have succeeded on the claim for breach of fiduciary duty. *Webb v. Crawley*, 590 S.W.3d 570 (Tex. App.—Beaumont 2019, no pet.).

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

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

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

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

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

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

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

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

of the second cause of action depends on the outcome of the first. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

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

§ 1.24:2 Good-Faith Defense

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

§ 1.24:3 Satisfaction

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

§ 1.24:4 Other Defenses

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

A client's agreement to hold the attorney harmless for any potential liability is not a defense to a malpractice action. An attorney is generally prohibited from obtaining an

agreement attempting to limit liability for legal malpractice. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(g).

§ 1.25 Potential Areas for Legal Liability

§ 1.25:1 Attorney's Fees

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

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

An Arkansas court upheld a malpractice judgment resulting from an attorney's failure in a divorce action to advise the wife of the consequences of executing a property settlement without obtaining a lien on the husband's property. She had no security for payments due under the settlement agreement, and the attorney was held liable for payments on which the husband defaulted. *Rhine v. Haley*, 378 S.W.2d 655 (Ark. 1964).

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

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

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

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

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

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

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

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

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

§ 1.25:5 Failure to Convey Settlement Offer to Client

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

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

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

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

§ 1.25:7 Inappropriate Relationships with Clients

The attorney who engages in sexual misconduct with a client is inviting disaster. The only reported Texas case involving sexual misconduct by a lawyer is *Kahlig v. Boyd*, 980 S.W.2d 685 (Tex. App.—San Antonio 1998, pet. denied). Client, Kahlig, brought suit against his former attorney, Boyd, based on fraud and a claim for deceptive trade practices, after the client discovered that the attorney was having an affair with Kahlig's current wife during a custody case with a former wife. The trial court held that the attorney's behavior did not constitute fraud or a deceptive trade practice. The court of appeals agreed, stating that "while we have determined that Boyd's conduct does not give rise to a legal remedy under the theories presented at trial under current Texas law, substantial questions remain about the ethical propriety of Boyd's conduct. The proper forum to determine these ethical issues is the State Bar of Texas Grievance Committee." *See Kahlig*, 980 S.W.2d at 691. The attorney was sanctioned by the Committee.

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

§ 1.26 Procedures to Help Avoid Malpractice Actions

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

§ 1.26:1 Calendaring System

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

§ 1.26:2 Nonengagement Letters

Attorneys should always write nonengagement letters when they decline or withdraw from employment and should keep a permanent file of these letters. This practice can eliminate many potential malpractice actions based on claims that an attorney failed to pursue a claim for a client. See form 2-3 and the practice notes in section 2.2 in this manual.

§ 1.26:3 File Retention

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

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

§ 1.26:4 Problems When Firms Break Up

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

§ 1.26:5 Supervision of Support Staff and New Associates

Attorneys need to supervise their support staff and new associates closely. If, for example, a law clerk arrives at the wrong answer to an important question, the attorney is the one who will take the wrong action and face a possible malpractice suit. Clerks should be told to document their research so that its accuracy can be verified, and new secretaries should be responsible for filing petitions only when the attorney is certain that they know where and by when to file them. In short, all personnel must know both substantively and procedurally what their jobs require. Careful screening and interviewing of applicants can help, of course, as can hiring only professional secretaries and paralegals. Instruction and training of support staff in the area of security and confidentiality of client information is critical.

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

§ 1.26:6 Avoiding Overload

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

§ 1.27 Standard of Care for Specialists

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

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

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

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

The case involved a maritime law specialist.

§ 1.28 Standard of Care for Court-Appointed Representatives

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

§ 1.29 Attorney Professional Liability Insurance

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

Insured means the insured named in the policy, any past or present partner, officer, director, member of a professional association, stockholder, employee, independent contractor, or of counsel as respects professional services rendered on behalf of the

named insured. Attorneys who retire from the named insured are also covered. Coverage is available for members of prior law firms and predecessor firms.

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

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

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

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

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

[Section 1.30 is reserved for expansion.]

V. Ineffective Assistance of Counsel

§ 1.31 Right to Effective Assistance of Counsel

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

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

§ 1.32 Standard for Determining Effective Assistance

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

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

Strickland, 466 U.S. at 687.

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

§ 1.33 Proof of Ineffective Assistance

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

In *Bermea v. Texas Department of Family & Protective Services*, 265 S.W.3d 34, 43 (Tex. App.—Houston [1st Dist.] 2008, pet. denied), the court of appeals held that the failure to file a statement of the point or points on which a party intends to appeal constitutes deficient conduct by the attorney, which satisfies the first prong of the test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). However, the second prong of the *Strickland* test requires a showing that the results of the proceedings would have been different if the party had effective counsel.

§ 1.34 Presumptions against Ineffective Assistance

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

[Sections 1.35 through 1.40 are reserved for expansion.]

VI. Texas Deceptive Trade Practices–Consumer Protection Act Liability

§ 1.41 Application of Act to Legal Services

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

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

§ 1.42 Statute of Limitations

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

[Sections 1.43 through 1.50 are reserved for expansion.]

VII. Grievances

§ 1.51 Grievance Procedure

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

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

The chief disciplinary counsel shall within thirty days examine each grievance received to determine whether it constitutes an inquiry, a complaint, or a discretionary referral. If the grievance is determined to constitute a complaint, the attorney (respondent) shall be provided a copy of the complaint with notice to respond in writing to the allegations in the complaint. The attorney shall deliver the response to both the office of the chief disciplinary counsel and the complainant within thirty days after receipt of the notice. *See* Tex. Rules Disciplinary P. R. 2.10. Failure to respond to a complaint is a separate violation of the disciplinary rules. Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a)(8). For example, an attorney's failure to respond to four disciplinary complaints warranted disbarment. *Rangel v. State Bar of Texas*, 898 S.W.2d 1, 3–4 (Tex. App.—San Antonio 1995, no writ).

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

On investigation, if the chief disciplinary counsel determines that just cause does not exist to proceed on the complaint, the chief disciplinary counsel shall place the complaint on a summary disposition panel docket, which may be conducted by teleconference. At the summary disposition panel docket, the chief disciplinary counsel will present the complaint together with any information, documents, evidence, and argu-

ment deemed necessary and appropriate by the chief disciplinary counsel, without the presence of the complainant or respondent. The summary disposition panel shall determine whether the complaint should be dismissed or should proceed. If the panel dismisses the complaint, both the complainant and respondent will be notified. There is no appeal from a determination by the summary disposition panel. All complaints presented to the summary disposition panel and not dismissed will proceed in accordance with rules 2.14 and 2.15. The fact that a complaint was placed on the summary disposition panel docket and not dismissed is wholly inadmissible for any purpose in the instant or any subsequent disciplinary proceeding or disciplinary action. Tex. Rules Disciplinary P. R. 2.13.

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

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

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

The respondent or the commission may appeal the judgment of the evidentiary panel to the Board of Disciplinary Appeals. Tex. Rules Disciplinary P. R. 2.23. An appeal from the decision of the Board of Disciplinary Appeals on an evidentiary proceeding is to the

Supreme Court of Texas in accordance with Tex. Rules Disciplinary P. R. 7.11. Tex. Rules Disciplinary P. R. 2.27. If the complaint is heard in a district court, the judgment may be appealed as in civil cases generally. Tex. Rules Disciplinary P. R. 3.15.

[Sections 1.52 through 1.60 are reserved for expansion.]

VIII. Useful Websites

§ 1.61 Useful Websites

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

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

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

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

Texas Code of Ethics and Professional Responsibility for Legal Assistants (§ 1.7)
https://txpd.org/ethics-pages/professional-ethics-and-the-paralegal/

Chapter 2

Attorney-Client Relationship and Communications

§ 2.1 Communications about Legal Consequences 57

§ 2.2 Initial Consultation 57

§ 2.3 Attorney's Fees 58

§ 2.4 Tax Deduction for Attorney's Fees 58

§ 2.5 Death of Client 59

§ 2.6 Limited Representation by Attorney 59

§ 2.7 Arbitration Provisions in Employment Contract 60

§ 2.8 Client Information 61

§ 2.8:1 Gathering Information 61

§ 2.8:2 Information Regarding Property 61

§ 2.8:3 Information Regarding Taxes 61

§ 2.8:4 Social Security and Driver's License Numbers 62

§ 2.8:5 Requirement to Report Party's Current Address 63

§ 2.8:6 Duty to Maintain Confidences and Secrets of Clients 63

§ 2.8:7 Health Insurance Portability and Accountability Act (HIPAA) 66

§ 2.8:8 Interception of Communications 66

§ 2.9 Requirement to Report Child Abuse—Inapplicability of Attorney-Client Privilege 72

§ 2.10 Cloud Computing 75

§ 2.11 Client with Diminished Capacity 76

§ 2.12 Useful Websites 77

Chapter 2

Attorney-Client Relationship and Communications

§ 2.1 Communications about Legal Consequences

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

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

Further guidance concerns the adequacy of communication between lawyer and client under varying circumstances. Tex. Disciplinary Rules Prof'l Conduct R. 1.03 cmt. Comment 5 concerns communication with a client with diminished capacity, a topic discussed in section 2.11 below.

§ 2.2 Initial Consultation

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

A fee agreement for the initial consultation can eliminate uncertainty by clearly defining the nature of the first meeting and stating what conditions must be satisfied if there will be a continuing attorney-client relationship. The agreement should require a fee for

the initial conference and clearly state that a separate written agreement will be required as evidence of the subsequent employment.

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

§ 2.3 Attorney's Fees

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

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

§ 2.4 Tax Deduction for Attorney's Fees

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

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

§ 2.5 Death of Client

An attorney-client relationship terminates on the death of the client. However, when property issues remain, the attorney may still act on behalf of the client. *Murphy v. Murphy*, 21 S.W.3d 797, 798 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (per curiam). There is no reported case regarding whether an attorney may continue acting on behalf of a client in a suit affecting the parent-child relationship.

§ 2.6 Limited Representation by Attorney

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

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

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

A party is not entitled to "hybrid representation" by being simultaneously self-represented and represented by an attorney. *In re S.V.*, 599 S.W.3d 25, 44 (Tex. App.—Dallas 2017, pet. denied).

§ 2.7 Arbitration Provisions in Employment Contract

Agreements to arbitrate fee disputes between lawyers and clients have been encouraged by bar associations for years. *See* ABA Model Rules of Arbitration (1995). Comment 19 to rule 1.04 endorses the arbitration of fee disputes and states: "If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it." Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 19.

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

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

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

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

When the attorney and client agree to arbitrate and the agreement encompasses the claims asserted, the trial court must compel arbitration and stay litigation pending arbitration. *See* Tex. Civ. Prac. & Rem. Code § 171.021; *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305 (Tex. 2006). However, unconscionable contracts, whether relating to arbitration or not, are not enforceable under Texas law. *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008). "The determination that a contract or term is or is not unconscionable is made in light of its setting, purpose, and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules

as to contractual capacity, fraud, and other invalidating causes; the policy overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy." *In re Poly-America*, 262 S.W.3d at 348–49 (quoting *Restatement (Second) of Contracts* § 208 cmt. a (1979)).

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

§ 2.8 Client Information

§ 2.8:1 Gathering Information

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

§ 2.8:2 Information Regarding Property

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

§ 2.8:3 Information Regarding Taxes

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

data necessary to assist the court in determining tax consequences resulting from the decision to divorce.

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

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

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

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

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

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

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

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

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

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

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

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

A lawyer may reveal confidential information under the following conditions:

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

2. When the client consents after consultation.

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

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

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

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

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

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

9. To secure legal advice about the lawyer's compliance with the Texas Disciplinary Rules of Professional Conduct.

10. When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

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

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

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

In all other situations, the attorney's obligation is to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action. Tex. Disciplinary Rules Prof'l Conduct R. 1.05 cmt. 18. If the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property

of another, the attorney is not required to reveal preventive information but may do so. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.05(c)(7), (c)(8).

Comment 14 to rule 1.05 notes the following:

> Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

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

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

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

Other rules, including rules 1.07, 1.12, 1.16, and 2.02, permit or require a lawyer to disclose information relating to the representation, and other statutory provisions or other law may obligate a lawyer to give information about a client. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.05 cmts. 17, 22.

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

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

Regulations under the Health Insurance Portability and Accountability Act (HIPAA), promulgated by the federal health and human services department, extend the data security obligations of health-care providers and insurers to a broad class of businesses that can include lawyers and law firms. Texas businesses must "implement and maintain reasonable procedures, including taking any appropriate corrective action, to protect from unlawful use or disclosure any sensitive personal information collected or maintained by the business in the regular course of business." Tex. Bus. & Com. Code § 521.052(a). In addition to items such as Social Security numbers, driver's license numbers, account numbers, birth dates, and the identity of immediate relatives, "sensitive personal information" includes the physical or mental health or condition of the individual, the provision of health care to the individual, and payment for the provision of health care to the individual. Tex. Bus. & Com. Code § 521.002(a)(2)(B). The law also requires notification in the event of a breach of security of computerized data. Such notification is required when sensitive personal data "was, or is reasonably believed to have been, acquired by an unauthorized person." Tex. Bus. & Com. Code § 521.053(b). Lawyers and law firms could be subject to the Texas Medical Records Privacy Act, chapter 181 of the Texas Health and Safety Code, as a "covered entity" if they merely come "into possession" of protected health information. *See* Tex. Health & Safety Code § 181.001(b)(2)(B). These rules require planning and implementation of security procedures to protect personal health information as well as actions that must be taken in the event of a breach of security.

§ 2.8:8 Interception of Communications

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

What issues touch on lawyers' recording their own conversations with third parties? Texas lawyers are governed by Ethics Committee Opinion 575, which states that undisclosed recordings may be made by a lawyer, but only if the following qualifications are met. First, a lawyer should make an undisclosed recording of a telephone conversation involving a client only if there is a legitimate reason to make the recording in terms of protection of the legitimate interests of the client or of the lawyer. Second, a lawyer should not record a telephone conversation with a client unless the lawyer takes appropriate steps consistent with the requirements to safeguard confidential information that may be included in the recording. Third, in view of the requirement that a lawyer not be involved in the commission of a serious crime, a lawyer should not make an undisclosed recording of a telephone conversation if the conversation proposed to be recorded by the lawyer is subject to other laws (for instance, the laws of another state) that make such a recording a serious criminal offense. Finally, regardless of whether the client is involved in the telephone conversation or has consented to the recording, the lawyer may not record a telephone conversation if making such a recording would be contrary to a representation made by the lawyer to any person. *See* Tex. Comm. on Prof'l Ethics, Op. 575 (2006) (overruling Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 392 (1978), and Tex. Comm. on Prof'l Ethics, Op. 514 (1996)).

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

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

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

18 U.S.C. § 2510(1).

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

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

18 U.S.C. § 2510(2).

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

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

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

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

The circuit courts that have considered the application of title III to interspousal wiretaps have split on the issue. The Fifth Circuit has made a distinction between the placing of a tapping device on the telephone within the marital home by one of the spouses

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

> Justice Brandeis aptly described the "evil" of wiretapping in his dissenting opinion to *Olmstead v. United States*, 277 U.S. 438, 475–476, 48 S. Ct. 564, 571, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting): "The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him."

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

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

One Texas appellate court has determined that the federal wiretap statutes do prohibit one spouse from taping the other spouse's conversations and that admission of the tapes

into evidence was reversible error. *Turner v. PV International Corp.*, 765 S.W.2d 455, 470 (Tex. App.—Dallas 1988), *writ denied per curiam*, 778 S.W.2d 865 (Tex. 1989). The Texas Supreme Court was careful to note, however, that it was neither approving nor disapproving the appellate court's ruling on the admissibility of the tape-recorded conversations.

The Second Circuit has inquired into an alleged interception of a communication between a parent and a child. In *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), the court noted that it was required to consider the extent to which the federal wiretap statutes were applicable to interspousal wiretaps used in preparation for divorce litigation. It also noted that it was a case of first impression in the Second Circuit although the Fifth Circuit had considered the question in *Simpson* and the Sixth Circuit in *Jones*. The lawsuit was predicated on allegations that the husband had intercepted and recorded telephone conversations between the wife and their daughter. The wife alleged that the husband had taught their son to activate the recording device whenever his mother called. No outside telephone calls were recorded, and the taping device was placed on the father's telephone, rather than on the mother's. The court also noted by way of footnote that the father was enjoined by court order from remaining in the same room with his children when they spoke to their mother by phone. Nevertheless, the court concluded that the facts differed from those in *Jones* and in *Schrimsher*, which were criminal, rather than civil, proceedings in which the defendants had invaded the privacy of innumerable persons, both known and unknown, by virtue of unrestricted telephone wiretaps. The court determined that the facts did not give rise to coverage by the federal statutes. *Anonymous*, 558 F.2d at 679.

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

With regard to the telephone taping of conversations between the children and the other parent, the question of consent must be addressed. The federal statute provides an explicit exception for interceptions that are consented to in advance by one of the parties to the intercepted conversation. 18 U.S.C. § 2511(2)(d). Arguably, a parent (and/or de facto custodian) of the minor children would have an absolute right to consent to the

taping on behalf of the children, who, at their young and tender age, were incapable of offering their own consent. Powers of consent, exercised for the purpose of protecting one's children, would be an absolute bar to the application of the federal statutes. The issue of parental consent was raised by the father in *Anonymous*, 558 F.2d at 679–80, but was not reached by the court.

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

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

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

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

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

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

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

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

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

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

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

Section 261.101 of the Texas Family Code provides:

(a) A person having reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.

(b) If a professional has reasonable cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has reasonable cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

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

(1) another child; or

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

(c) The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, an

> employee or member of a board that licenses or certifies a professional, and an employee of a clinic or health care facility that provides reproductive services.
>
> (d) Unless waived in writing by the person making the report, the identity of an individual making a report under this chapter is confidential and may be disclosed only:
>
> (1) as provided by Section 261.201; or
>
> (2) to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

Tex. Fam. Code § 261.101.

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

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

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

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

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

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

§ 2.10 Cloud Computing

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

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

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

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

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

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

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

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

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

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

§ 2.11 Client with Diminished Capacity

If a client appears to suffer from diminished capacity, the lawyer should communicate with any legal representative of the client and seek to maintain reasonable communication with the client insofar as possible. Even if the client suffers from diminished capacity, it may be possible to maintain some aspects of a normal attorney-client relationship, and the client may have the ability to understand, deliberate on, and reach conclusions about some matters affecting his own well-being. Tex. Disciplinary Rules Prof'l Conduct R. 1.03 cmt. 5.

When a client's capacity to make adequately considered decisions in connection with the representation is diminished—whether because of minority, mental impairment, or another reason—the lawyer shall maintain a normal attorney-client relationship with

the client insofar as reasonably possible. Tex. Disciplinary Rules Prof'l Conduct R. 1.16(a).

Under certain circumstances, the lawyer may take protective action regarding such a client and in doing so may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.16(b), (c).

§ 2.12 Useful Websites

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

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

Chapter 3

Divorce Pleadings

I. Suit

§ 3.1 General 83
§ 3.2 Caption 84
§ 3.3 Citation 84
§ 3.4 Long-Arm Jurisdiction 89
§ 3.5 Jury Trial 93
§ 3.6 Trial before Associate Judge 94
§ 3.7 Pleadings Generally 95
§ 3.8 Protective Order Statement 96
§ 3.9 Special Exceptions 96
§ 3.10 Notice of Nonsuit and Dismissal for Want of Prosecution 97
§ 3.11 Respondent's Pleadings Generally 99
§ 3.12 Special Appearance 99
§ 3.13 Plea in Abatement 102
§ 3.14 Respondent's Answer 104
§ 3.15 Inmate's Participation at Trial 107
§ 3.16 Standing Orders 108
§ 3.17 Temporary Orders 108

II. Dissolution of Marriage

§ 3.21 Grounds 108
§ 3.22 Residence Requirements 110
§ 3.23 Waiting Period 112
§ 3.24 Remarriage 113
§ 3.25 Change of Name 113
§ 3.26 Spousal Maintenance 113

§ 3.27 Informal Marriage 114
§ 3.28 Putative Marriage 116
§ 3.29 Multiple Marriages 117

III. Division of Property

§ 3.31 General Rule of Property Division 118
§ 3.32 Separate Property 120
§ 3.33 Community Property 122
§ 3.34 Community Property Acquired While Domiciled outside Texas 123
§ 3.35 Separate-Property Divestiture 123
§ 3.36 Reimbursement 124
§ 3.37 Proportional Ownership of Property by Marital Estates 126
§ 3.38 Reconstituted Community Estate 126
§ 3.39 Frozen Embryos 127

IV. Parent-Child Relationship

§ 3.41 Best Interest of Child 127
§ 3.42 Mandatory Joinder of Suit Affecting Parent-Child Relationship in Divorce Suit 128
§ 3.43 Continuing Jurisdiction 130
§ 3.44 Denial of Paternity 130
§ 3.45 Conservatorship and Support 130
§ 3.46 Health and Dental Insurance Information 130
§ 3.47 Interview with Child 131
§ 3.48 Jury Questions 131
§ 3.49 Long-Arm Jurisdiction 132
§ 3.50 Uniform Child Custody Jurisdiction and Enforcement Act 133

V. Additional Causes of Action

§ 3.61 General 136

§ 3.62 Assault 137
§ 3.63 Intentional Infliction of Emotional Distress 138
§ 3.64 Interference with Possessory Interest in Child. 139
§ 3.65 Negligent Torts 140
§ 3.66 Actual Fraud. 141
§ 3.67 Fraud on Community 144
§ 3.68 Conversion 146
§ 3.69 Cotenant 148
§ 3.70 Orders against Financial Institution 150
§ 3.71 Disregarding Corporate Fiction 151
§ 3.72 Parentage 153
§ 3.73 Invasion of Privacy 154
§ 3.74 Uniform Fraudulent Transfer Act 156
§ 3.75 Third-Party Trustee 159
§ 3.76 Breach-of-Contract and Rescission Claims 162

VI. Intervenor's Pleadings

§ 3.81 Intervention Generally 163
§ 3.82 Conservatorship 163
§ 3.83 Attorney's Fees 164
§ 3.84 General Creditor. 164

VII. Useful Websites

§ 3.91 Useful Websites 164

Chapter 3

Divorce Pleadings

I. Suit

§ 3.1 General

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

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

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

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

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

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

§ 3.2 Caption

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

§ 3.3 Citation

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

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

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

5. any guardian of the person of the child;

6. any guardian of the estate of the child;

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

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

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

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

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

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

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

Tex. Fam. Code § 102.009(a).

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

Unless the citation or a court order otherwise directs, the citation must be served by (1) delivering to the defendant, in person, a copy of the citation (showing the delivery date) and of the petition or (2) mailing to the defendant by registered or certified mail, return receipt requested, a copy of the citation and of the petition. Tex. R. Civ. P. 106(a).

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

The return of service must meet the requirements of rule 107 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 107. Rule 107 requires that the "return, together with any document to which it is attached," include several specific pieces of information, including a description of what was served, the date and time the process was received for service, and the person or entity served. Tex. R. Civ. P. 107(b)(3)–(5). There are no presumptions in favor of valid issuance, service, and return of citation in the face of a writ of error attack on a default judgment. *Primate Construction, Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam). The return of service is prima facie evidence of how service was performed. *Creaven*, 551 S.W.3d at 871. A court should give a return of service a fair, reasonable, and natural construction as to its plain intent and meaning. *Mandel v. Lewisville ISD*, 445 S.W.3d 469, 475 (Tex. App.—Fort Worth 2014, pet. denied). As long as the record as a whole—including the petition, citation, and return—shows that the citation was served on the defendant, service of process will not be invalidated. *Williams v. Williams*, 150 S.W.3d 436, 444 (Tex. App.—Austin 2004, pet. denied); *see also In re S.C.*, No. 02-15-00191-CV, 2015 WL 9435937, at *2

(Tex. App.—Fort Worth Dec. 23, 2015, no pet.) (mem. op.) (fair and reasonable construction of return of service combined with attached citation and certified mail return receipt containing wife's undisputed signature is that wife was served with citation).

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

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

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

COMMENT: The amendment to rule 106 of the Texas Rules of Civil Procedure effective January 1, 2021, replaced the requirement of an affidavit with that of a statement sworn before a notary or made under penalty of perjury.

For a default judgment to be sustained based on substituted service, the burden is on the plaintiff to prove that the defendant was served in the manner required by the applicable statute. Service of process must be performed in strict compliance with the appropriate statutory provisions to support a default judgment. Strict compliance is especially important when substituted service under rule 106 is involved. *In re C.L.W.*, 485 S.W.3d at 540–41. When a trial court orders substituted service under rule 106, the only authority for the substituted service is the order itself. As a result, any deviation from the trial court's order necessitates a reversal of the default judgment based on service. *Creaven*, 551 S.W.3d at 870.

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

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

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

If the petitioner or the petitioner's attorney of record makes an oath that no child presently under eighteen years of age was born or adopted by the spouses and that no appreciable amount of property was accumulated by the spouses during the marriage, the court may dispense with the appointment of an attorney ad litem. In a case in which citation was by publication, a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the suit as a part of the record. Tex. Fam. Code § 6.409(e).

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

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

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

§ 3.4 Long-Arm Jurisdiction

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

On the other hand, a spousal support order may be rendered against a nonresident obligor only if the court has personal jurisdiction over that party. Tex. Fam. Code § 8.051.

Personal jurisdiction, unlike subject-matter jurisdiction, can be conferred by consent or waiver. Personal service is always necessary if a judgment in personam is to be rendered against a nonresident. *In re A.B.*, 207 S.W.3d 434 (Tex. App.—Dallas 2006, no pet.); *see Estin v. Estin*, 334 U.S. 541 (1948). The impact of this restriction of the trial court's jurisdiction is mitigated by the expansive long-arm statute contained in Tex. Fam. Code § 6.305.

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

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

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

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

The Family Code does not define the term *last marital residence*, and case law interpreting section 6.305(a)(1) is sparse. *Goodenbour*, 64 S.W.3d at 76. The last marital residence requires more than one spouse's occasional visits with the partner and the

children at the other spouse's residence during marital separation. The last marital residence implies "a permanent place of abode by the spouses." *Cossey v. Cossey*, 602 S.W.2d 591, 595 (Tex. App.—Waco 1980, no writ). Evidence that the couple had no intention of separating when the residence was acquired was one of three facts that the trial court found established the parties' last marital residence, along with the fact that the husband had visited the wife in the Texas residence and had paid her money each month to pay the expenses of that residence. *Aduli v. Aduli*, 368 S.W.3d 805, 815 (Tex. App.—Houston [1st Dist.] 2012, no pet.). One court has held that marital cohabitation in Texas from November to February was sufficient to create a last marital residence, bringing the nonresident spouse within Texas long-arm jurisdiction. *Scott v. Scott*, 554 S.W.2d 274, 277 (Tex. App.—Houston [1st Dist.] 1977, no writ). *See also Nieto v. Nieto*, No. 04-11-00807-CV, 2013 WL 1850780 (Tex. App.—San Antonio May 1, 2013, pet. denied) (mem. op.) (affirming San Antonio as parties' residence for at least six months prior to divorce based on parties' owning marital residence and conducting business there).

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

Once the long-arm statute is satisfied, the court must next consider whether the exercise of personal jurisdiction over the respondent comports with federal due process. *Goodenbour*, 64 S.W.3d at 78. Federal due process protects a person's liberty interest from being subject to binding judgments in a forum with which he has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Under the federal constitutional test of due process, a state may assert personal jurisdiction over a nonresident defendant only if the defendant has purposefully established minimum contacts with the forum state and the exercise of jurisdiction comports with

traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476; *see also TeleVentures, Inc. v. International Game Technology*, 12 S.W.3d 900,.907 (Tex. App.—Austin 2000, pet. denied). Central to the issue of due process "is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Burger King*, 471 U.S. at 474.

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

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

Once it is determined that the defendant had sufficient minimum contacts with Texas, the court should next turn to whether the exercise of jurisdiction in Texas is reasonable. To determine whether jurisdiction is reasonable, the court evaluates the following factors: (1) the burden on the defendant, (2) Texas's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Goodenbour*, 64 S.W.3d at 80 (citing *Burger King*, 471 U.S. at 477).

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

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

§ 3.5 Jury Trial

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

joint managing conservator has the exclusive right to designate the primary residence of the child and determinations regarding geographic restrictions on primary residence. Tex. Fam. Code § 105.002(c)(2).

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

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

§ 3.6 Trial before Associate Judge

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

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

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

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

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

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

§ 3.7 Pleadings Generally

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

If the parties are parents of a child not under the continuing jurisdiction of any other court under Family Code section 155.001, the divorce suit must include a suit affecting the parent-child relationship. Tex. Fam. Code § 6.406(b). The petition must state whether there are children born or adopted of the marriage who are under eighteen years of age or otherwise entitled to support under Family Code chapter 154. Tex. Fam.

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

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

§ 3.8 Protective Order Statement

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

§ 3.9 Special Exceptions

Either party may file special exceptions directed at the other party's pleadings. A special exception must not only point out the particular pleading excepted to but must also intelligibly and with particularity point out the defect, omission, obscurity, duplicity,

generality, or other insufficiency. Tex. R. Civ. P. 91. The purpose of special exceptions is to furnish the adverse party a medium by which to force clarification of pleadings if they are not clear or sufficiently specific. *Villarreal v. Martinez*, 834 S.W.2d 450, 451 (Tex. App.—Corpus Christi–Edinburg 1992, no writ). Special exceptions should be filed, a hearing set, and a ruling obtained either that the petition is sufficient as it stands or that the language excepted to should be stricken. *See Brooks v. Housing Authority of City of El Paso*, 926 S.W.2d 316, 322 (Tex. App.—El Paso 1996, no writ).

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

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

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

§ 3.10 Notice of Nonsuit and Dismissal for Want of Prosecution

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

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

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

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

Want of Prosecution: A matter may be dismissed for want of prosecution. In reviewing a dismissal for want of prosecution the court applies an abuse of discretion standard.

A trial judge may dismiss a case for want of prosecution under rule 165a of the Texas Rules of Civil Procedure for failure to appear or failure to comply with supreme court time standards. Abuse of discretion exists if a party has diligently attempted to respond to a trial court's notice of dismissal and the court still dismisses the matter. A court's not acting on an indigent inmate's motion for appointment of counsel, for bench warrant, or to conduct the hearing by telephone conference or other means is an abuse of discretion. *In re Marriage of Bolton*, 256 S.W.3d 832 (Tex. App.—Dallas 2008, no pet.); *Reese v. Reese*, 256 S.W.3d 898 (Tex. App.—Dallas 2008, no pet.).

§ 3.11 Respondent's Pleadings Generally

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

§ 3.12 Special Appearance

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

The special appearance may be made by the respondent in person or by attorney. The basis for the special appearance is that "such party or property is not amenable to process issued by the courts of this State." Tex. R. Civ. P. 120a(1). The special appearance must be made by a sworn motion filed before any other plea, including a motion to transfer venue, a pleading, an answer, a motion, or special exceptions to the petition. Tex. R. Civ. P. 120a(1). However, an unverified special appearance may be amended to cure the defect, even after the trial court has overruled it, as long as the amendment is filed before the defendant enters a general appearance. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 322–23 (Tex. 1998). Other pleadings may be contained in the same instrument or filed after the filing of a special appearance but not before. Tex. R. Civ. P. 120a(1). It is not necessary for the answer and other motions filed in the same instrument to contain "subject to" language. *See Dawson-Austin*, 968 S.W.2d at 323. Any motion to challenge the jurisdiction shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. Tex. R. Civ. P. 120a(2). A

defendant, however, does not waive his special appearance by using the discovery process to seek information pertaining to the merits of the case. *Case v. Grammar*, 31 S.W.3d 304, 311 (Tex. App.—San Antonio 2000, no pet.).

COMMENT: Every attempt should be made to negate all claims of jurisdiction of the court that are set out in the petitioner's pleadings. For example, the special appearance should assert that the respondent is not a resident of the state of Texas and that the specific requirements of Family Code section 6.305 or 102.011 that were relied on by the petitioner are not satisfied. The special appearance should further assert that the assumption of jurisdiction over the respondent would offend the traditional notions of fair play and substantial justice and that the respondent has had insufficient contacts with Texas to warrant an assumption of jurisdiction.

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

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

In a suit brought under the Family Code, an order overruling a special appearance is interlocutory and not appealable. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(7). Because section 51.014(a)(7) precludes interlocutory appeal, denial of a special appearance in a family law case is subject to mandamus review. *Knight Corp. v. Knight*, 367 S.W.3d 715, 723 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding); *In re*

J.W.L., 291 S.W.3d 79, 83 (Tex. App.—Fort Worth 2009, orig. proceeding [mand. denied]). In non-family law suits, however—in which the order is appealable—a writ of mandamus will not issue for the trial court's denial of a special appearance. *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994) (orig. proceeding); *see also Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (orig. proceeding) (per curiam).

If the objection to jurisdiction is overruled, the respondent may thereafter appear generally for any purpose and present his defense to the case on the merits without waiver of the objection to jurisdiction. Tex. R. Civ. P. 120a(4). When a trial court rules on a special appearance, the losing party should request findings of fact. *See* Tex. R. Civ. P. 296; *Goodenbour v. Goodenbour*, 64 S.W.3d 69, 75 (Tex. App.—Austin 2001, pet. denied).

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

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

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

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

§ 3.13 Plea in Abatement

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

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

Pleading: The plea in abatement should contain both pertinent facts and conclusions of law regarding the "dominant" jurisdiction of a particular court for a plea on that

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

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

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

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

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

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

met and the later court had actually acquired "dominant" jurisdiction by being the first court with jurisdiction under section 6.301.

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

Estoppel: A party who files a counterpetition seeking affirmative relief is estopped from asserting that the county in which he had first filed has dominant jurisdiction. *Bonacci v. Bonacci*, 420 S.W.3d 294 (Tex. App.—El Paso 2013, pet. denied), *cert. denied*, 135 S. Ct. 678 (2014).

§ 3.14 Respondent's Answer

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

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

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

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

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

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

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

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

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

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

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

A pleading shall state as a counterclaim any claim within the jurisdiction of the court not the subject of a pending action that at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Tex. R. Civ. P.

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

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

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

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

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

§ 3.15 Inmate's Participation at Trial

Although an inmate does not have an absolute right to appear personally in court in civil proceedings, he cannot be denied access to the courts simply because he is incarcerated. *See In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003). The right of a prisoner to have access to the court entails not so much his personal presence as the opportunity to present evidence or contradict the evidence of the opposing party. *In re R.C.R.*, 230 S.W.3d 423, 426 (Tex. App.—Fort Worth 2007, no pet.). When the trial judge determines an inmate should not be allowed to appear personally, the inmate should be allowed to proceed by affidavit, deposition, telephone, or other effective means. *In re Marriage of Bolton*, 256 S.W.3d 832 (Tex. App.—Dallas 2008, no pet.). A trial court abuses its discretion if it effectively bars the inmate from presenting his case. *Gamboa v. Alecio*, 604 S.W.3d 513, 516 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (trial court abused its discretion and "essentially closed the court's doors to [inmate spouse]" in dismissing divorce action for want of prosecution when inmate spouse had requested

to appear telephonically through affidavit, provided proper phone number, and provided proposed divorce decree); *Armstrong v. Randle*, 881 S.W.2d 53, 57 (Tex. App.—Texarkana 1994, writ denied). In order to attend trial, the inmate must request a bench warrant. Texas courts consider a number of factors when ruling on a motion for a bench warrant, including (1) the cost and inconvenience of transporting the inmate to the courtroom; (2) the security risk the inmate presents to the court and the public; (3) whether the inmate's claims are substantial; (4) whether the matter's resolution can reasonably be delayed until the inmate's release; (5) whether the inmate can and will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone, or some other means; (6) whether the inmate's presence is important in judging his demeanor and credibility; (7) whether the trial is to the court or a jury; and (8) the inmate's probability of success on the merits. *See In re Z.L.T.*, 124 S.W.3d 163; *In re A.W.*, 302 S.W.3d 925, 929 (Tex. App.—Dallas 2010, no pet.).

§ 3.16 Standing Orders

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

§ 3.17 Temporary Orders

Temporary orders are discussed in chapter 4 of this manual.

[Sections 3.18 through 3.20 are reserved for expansion.]

II. Dissolution of Marriage

§ 3.21 Grounds

The Family Code assigns the divorce-ground determination to the discretion of the trial court. *Portillo v. Portillo*, No. 02-14-00124-CV, 2016 WL 1601113, at *4 (Tex. App.—

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

Efforts to prevent a court from granting a divorce on religious grounds have not been successful. A trial court has subject-matter jurisdiction to dissolve a Christian marriage. Regardless of how a couple views their union—whether they see it primarily as religious or secular—the state governs all legal aspects of the union. *Waite v. Waite*, 150 S.W.3d 797, 802 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). The U.S. Supreme Court's opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), does not either directly or by implication recognize what would effectively be an affirmative constitutional right of one spouse to compel an unwilling other spouse to remain married, in derogation of both the other spouse's liberty and state divorce laws. *Lecuona v. Lecuona*, No. 03-17-00138-CV, 2018 WL 2994587, at *1 (Tex. App.—Austin June 15, 2018, pet. denied) (mem. op.).

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

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

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

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

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

§ 3.22 Residence Requirements

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

A domiciliary does not lose his domicile if he is absent from Texas for military service or other public service of the state or nation or while accompanying his spouse who is on such service. Tex. Fam. Code § 6.303. Although a military husband who had designated Texas as his residence and his family, who last resided in Bexar County, Texas, before his assignment to Germany, were stationed in Germany for a number of years at the time the husband filed for divorce in Bexar County, the husband was considered to be domiciled in Texas under section 6.303. *Vatcher v. Vatcher*, No. 04-12-00821-CV,

2014 WL 60917, at *2 (Tex. App.—San Antonio Jan. 8, 2014, no pet.) (mem. op.). One not previously a resident of Texas who is serving in the armed forces of the United States and has been stationed at one or more military installations in Texas for at least the last six months and at a military installation in a Texas county for at least the last ninety days, or who is accompanying his spouse during the spouse's military service in those locations and for those periods, is considered to have been a domiciliary of Texas and a resident of the county for those periods for the purpose of bringing a divorce suit. Tex. Fam. Code § 6.304. However, a military husband did not become a domiciliary of Texas while he was temporarily stationed in San Antonio for military training but never returned to Texas despite wife's claims that he changed his residence to Texas on military documents and that he intended to return to Texas once he retired. Mere intent to return is insufficient without an accompanying act to demonstrate that intent. *In re Green*, 385 S.W.3d 665, 670 (Tex. App.—San Antonio 2012, orig. proceeding).

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

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

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

proceeding). To establish domicile there must be more than mere physical presence in a particular place; there must be an intention to establish a permanent home. *Skubal*, 584 S.W.2d at 46.

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

§ 3.23 Waiting Period

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

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

§ 3.24 Remarriage

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

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

§ 3.25 Change of Name

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

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

§ 3.26 Spousal Maintenance

Texas courts may order spousal maintenance at the time of divorce only if the spouse seeking maintenance will lack sufficient property, including his separate property, on dissolution of the marriage to provide for his minimum reasonable needs and if certain

other conditions are met. See section 23.9 in this manual for a discussion of spousal maintenance.

§ 3.27 Informal Marriage

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

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

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

An agreement to be informally married, like any ultimate fact, may be established by direct or circumstantial evidence. Evidence of holding out must be particularly convincing to be probative of an agreement to be married. Occasional informal references to another as their spouse will not prove an agreement to be married. Circumstantial evi-

dence can entirely fail to overcome direct evidence from both members of the alleged marriage that there is no agreement to be married. *Assoun v. Gustafson*, 493 S.W.3d 156, 160 (Tex. App.—Dallas 2016, pet. denied). Raising a family together may be evidence of an agreement to be married. *See Brooks v. Hancock*, 256 S.W. 296, 297 (Tex. App.—Texarkana 1923, no writ). Establishment of joint charge accounts naming the parties as spouses may also be evidence that the parties agreed to be married. *See Rosales v. Rosales*, 377 S.W.2d 661, 664 (Tex. App.—Corpus Christi–Edinburg 1964, no writ). The filing of joint tax returns is also considered evidence that the parties were married. *Day v. Day*, 421 S.W.2d 703, 705 (Tex. App.—Austin 1967, no writ). Another widely accepted situation that constitutes legally sufficient evidence of an informal marriage is the joint acquisition of property or the signing of secured transactions between the litigants. *See Rodriguez v. Avalos*, 567 S.W.2d 85, 86–87 (Tex. App.—El Paso 1978, no writ).

Representations made to governmental entities regarding marital status do not estop a party from later claiming in an unrelated suit the existence or nonexistence of an informal marriage, but trial courts may properly consider such representations as evidence either supporting or refuting a claim of informal marriage. *Leyendecker v. Uribe*, No. 04-17-00163-CV, 2018 WL 442724, at *5 (Tex. App.—San Antonio Jan. 17, 2018, pet. denied) (mem. op.). Similarly, evidence of a joint tax return for only one year of an eleven-year relationship was insufficient to establish an informal marriage. *In re N.A.F.*, No. 05-17-00470-CV, 2019 WL 516715, at *5 (Tex. App.—Dallas Feb. 11, 2019, no pet.) (mem. op.).

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

The statutory requirement of "represented to others" is synonymous with the judicial requirement of "holding out to the public." "Holding out" may be established by the conduct and actions of the parties. Spoken words are not necessary to establish representation to others. *Eris v. Phares*, 39 S.W.3d 708, 714–15 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). An occasional reference to a cohabitant as that person's spouse, standing alone, will not substantiate or prove a tacit agreement to be married

without corroborative evidence. *Russell v. Russell*, 865 S.W.2d 929, 932 (Tex. 1993). A couple must have a reputation in the general community of being married. *Small v. McMaster*, 352 S.W.3d 280, 285 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). An occasional introduction as spouses does not establish the element of holding out. *Winfield v. Renfro*, 821 S.W.2d 640, 651 (Tex. App.—Houston [1st Dist.] 1991, writ denied). By contrast, where the parties lived together almost thirty years, they had three children, and numerous witnesses testified that they held themselves out as married and wife never corrected husband when he introduced her as his wife, the evidence supported a finding of informal marriage. *In re A.D.J.*, No. 05-17-01437-CV, 2019 WL 1467962, at *5–6 (Tex. App.—Dallas Apr. 3, 2019, no pet.) (mem. op.).

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

A claim of informal marriage must be brought before the second anniversary of the date on which the parties separated and ceased living together or it is rebuttably presumed that the parties did not enter into an agreement to be married. Tex. Fam. Code § 2.401(b).

§ 3.28 Putative Marriage

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

When a legally married couple gets divorced, the Family Code gives the court the discretion to "order a division of the estate of the parties in a manner that the court deems

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

If the relationship is merely meretricious, however, neither one of the individuals has a good-faith belief that they are entering into a marital relationship; therefore, there is no innocent party in need of equitable protection under the law. Thus, when a meretricious relationship ends, a party has an interest in only the property that he separately purchased and acquired an interest in through an express trust, a resulting trust, or the existence of a partnership. *See Faglie v. Williams*, 569 S.W.2d 557, 566 (Tex. App.—Austin 1978, writ ref'd n.r.e.); *Hyman v. Hyman*, 275 S.W.2d 149, 151 (Tex. App.—Amarillo 1954, writ ref'd n.r.e.); *see also Hayworth v. Williams*, 102 Tex. 308, 116 S.W. 43, 46 (1909). In all other situations, the courts have refused to award anything to a pretended wife, who knows the nature of the relationship in which she is involved. *See Lawson v. Lawson*, 30 Tex. App. 43, 69 S.W. 246, 247 (1902, writ ref'd). Normally, in meretricious relationships, "the courts will leave the parties as they find them, on the same principle that they refuse to enforce any other contract which by reason of its objects, or the nature of the consideration upon which it rests, is violative of law or against public policy." *Lawson*, 69 S.W. at 247; *see also Meador v. Ivy*, 390 S.W.2d 391, 394 (Tex. App.—San Antonio 1965, no writ).

§ 3.29 Multiple Marriages

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

[Section 3.30 is reserved for expansion.]

III. Division of Property

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

§ 3.31 General Rule of Property Division

In a divorce decree, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. Tex. Fam. Code § 7.001. A trial court has wide discretion in dividing the estate of the parties, and that division should be corrected on appeal only when an abuse of discretion has been shown. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981). The community property of the marital estate need not be equally divided. *Murff*, 615 S.W.2d at 699. If a trial court chooses to divide the marital estate unequally, there must be some reasonable basis for doing so. *Howe v. Howe*, 551 S.W.3d 236, 253 (Tex. App.—El Paso 2018, no pet.). The trial court may consider such factors as the spouses' capacities and abilities, benefits that the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property. *Murff*, 615 S.W.2d at 699.

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

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

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

own name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 6.708(c).

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

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

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

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

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

§ 3.32 Separate Property

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

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

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

The spouse claiming certain property as "separate" must trace and clearly identify the property claimed to be separate. Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. *Zagorski v. Zagorski*, 116 S.W.3d 309, 316 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Once property is established as separate property, it remains separate property regardless of any mutations or changes in form; its separate character is not altered by the sale, exchange, or substitution of the property. *Barras v. Barras*, 396 S.W.3d 154, 167 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Any doubt as to the character of property should be resolved in favor of the community estate. *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App.—Fort Worth 2004, no pet.).

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

A spouse's separate property includes "recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage." Tex. Fam. Code § 3.001(3). In addition to the statutory exception for loss of earning capacity, courts have treated amounts recovered for medical expenses as community property. *See Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972). To the extent that the marital partnership has incurred medical or other expenses and has lost wages, both spouses have been damaged by the injury to the spouse, and both spouses have a claim against the wrongdoer. The recovery, therefore, is community in charac-

ter. *Graham*, 488 S.W.2d at 396. In contrast, amounts recovered for disfigurement, past and future mental anguish, and past and future physical pain and suffering are considered separate property. *Harrell v. Hochderffer*, 345 S.W.3d 652, 657 (Tex. App.—Austin 2011, no pet.).

When a spouse receives a personal-injury settlement from a lawsuit during marriage, some of which could be separate property and some of which could be community property, it is that spouse's burden to demonstrate which portion of the settlement is his separate property. Clear and convincing evidence showing that the recovery is solely for the personal injury of a particular spouse is necessary to overcome the presumption that the settlement proceeds represent community property. *Harrell*, 345 S.W.3d at 657.

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

§ 3.33 Community Property

Community property consists of the property, other than separate property, acquired by either spouse during marriage. Tex. Fam. Code § 3.002. Property possessed by either spouse during or on dissolution of marriage is presumed to be community property unless there is clear and convincing evidence that it is separate property. Tex. Fam. Code § 3.003. Any doubt as to the character of property should be resolved in favor of the community estate. *Sink v. Sink*, 364 S.W.3d 340, 345 (Tex. App.—Dallas 2012, no pet.). In the context of a divorce proceeding, characterization of property is determined by the time and circumstances of its acquisition. *Rivera v. Hernandez*, 441 S.W.3d 413, 420 (Tex. App.—El Paso 2014, pet. denied). Spouses may agree in writing that all or part of the separate property that either or both of them own is converted to community property. Tex. Const. art. XVI, § 15; Tex. Fam. Code § 4.202. One court found that property transferred to both spouses during marriage for a ten-dollar consideration was community property because the husband offered no evidence to rebut the presumption that the consideration was community property. *Saldana v. Saldana*, 791 S.W.2d 316,

320 (Tex. App.—Corpus Christi–Edinburg 1990, no writ). If a church is substantially involved in facilitating the collection of funds from its congregants for the benefit of a minister under a regularly conducted program, those contributions are income and community property to the minister and not gifts and separate property. *West v. West*, No. 01-14-00350-CV, 2016 WL 1719328, at *7 (Tex. App.—Houston [1st Dist.] Apr. 28, 2016, no pet.) (mem. op.). If a party lists an asset as community property in the party's inventory and appraisement, the court may find the asset to be community property, even if the record title to the asset is in the name of the party's adult child. *Willis v. Willis*, 533 S.W.3d 547, 553 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

§ 3.34 Community Property Acquired While Domiciled outside Texas

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

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

§ 3.35 Separate-Property Divestiture

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

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

§ 3.36 Reimbursement

In a decree of divorce, the court must determine the rights of both spouses in a claim for reimbursement as provided by Family Code chapter 3, subchapter E, and apply equitable principles to determine whether to recognize the claim after taking into account all the relative circumstances of the spouses and to order a division of the claim for reimbursement, if appropriate, in a manner the court considers just and right, having due regard for the rights of each party and any children of the marriage. Tex. Fam. Code § 7.007.

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

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

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

A claim for reimbursement is to be resolved by using equitable principles, including the principle that claims for reimbursement may be offset against each other when appropriate. Tex. Fam. Code § 3.402(b). Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate, except that the separate estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate estate against contributions made by the community estate to the separate estate. Tex. Fam. Code § 3.402(c).

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

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

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

Reimbursement may not be claimed for (1) the payment by one party of child support, alimony, or spousal maintenance during the marriage; (2) payments by one spouse for the living expenses of the other spouse or the other spouse's child; (3) contributions of property of a nominal value; (4) the payment of a liability of a nominal amount; or (5)

the payment of a student loan owed by a spouse. Tex. Fam. Code § 3.409. A claim for reimbursement cannot be made when community funds pay a community obligation. *Dyer v. Dyer*, No. 03-16-00753-CV, 2018 WL 2994439, at *5 (Tex. App.—Austin June 15, 2018, no pet.) (mem. op.).

A claim for reimbursement does not create an ownership interest in property but, rather, creates a claim against the property of the benefited estate by the contributing estate. The claim does not mature until dissolution of the marriage or the death of either spouse. Tex. Fam. Code § 3.404(b).

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

§ 3.37 Proportional Ownership of Property by Marital Estates

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

§ 3.38 Reconstituted Community Estate

On a finding that a spouse has committed actual or constructive fraud on the community, the court must calculate the value by which the community estate was depleted as a result of the fraud and calculate the amount of the reconstituted estate, which is the

total value of the community estate that would exist if an actual or constructive fraud on the community had not occurred. Then the court must divide the value of the reconstituted estate between the parties in a manner the court deems just and right. The court may grant any legal or equitable relief necessary to accomplish a just and right division, including awarding to the wronged spouse an appropriate share of the community estate remaining after the fraud on the community, awarding a money judgment in favor of the wronged spouse against the spouse who committed the fraud, or awarding to the wronged spouse both a money judgment and an appropriate share of the community estate. Tex. Fam. Code § 7.009.

§ 3.39 Frozen Embryos

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

[Section 3.40 is reserved for expansion.]

IV. Parent-Child Relationship

§ 3.41 Best Interest of Child

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

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

If the parties to the divorce are parents of a child, and the child is not under the continuing jurisdiction of another court as provided by chapter 155 of the Texas Family Code, the divorce suit must include a suit affecting the parent-child relationship (SAPCR). Tex. Fam. Code § 6.406(b); *In re Morales*, 968 S.W.2d 508, 511 (Tex. App.—Corpus Christi–Edinburg 1998, no pet.). Thus, every divorce involving a minor child of the parties must include a SAPCR as a second cause of action. A trial court may not sever a SAPCR from a divorce. *In re B.T.G.*, 494 S.W.3d 839, 843 (Tex. App.—Dallas 2016, no pet.). Similarly, a trial court may not properly sever property division from a divorce action. *In re B.T.G.*, 494 S.W.3d at 842. These rules apply even if the parties have no assets. *See In re B.T.G.*, 494 S.W.3d at 841.

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

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

Similarly, the court's authority to resolve all custody and visitation issues in controversy between the parties may be restricted because another state is the "home state" of

the child, even if the Texas court has the requisite, albeit subordinate, jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (chapter 152 of the Texas Family Code). In *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005), the parents had moved from Texas and lived with their then-only child in another state for more than six months, thereby establishing it as the child's "home state." The mother returned to Texas with that child and gave birth to a second child. She then filed for divorce and for custody of and child support for both children. The Texas Supreme Court reversed the trial and appellate courts' determination that Texas had custody jurisdiction over both children. The court held that the explicit terms of the UCCJEA, in effect in both states, mandate that the home state has jurisdictional priority regarding the father's subsequent custody suit for the first child, which prevails over the "significant-connection" jurisdiction of Texas; Texas has jurisdictional priority regarding custody of the second child.

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

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

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

§ 3.43 Continuing Jurisdiction

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

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

§ 3.44 Denial of Paternity

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

§ 3.45 Conservatorship and Support

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

§ 3.46 Health and Dental Insurance Information

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

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

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

§ 3.47 Interview with Child

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

§ 3.48 Jury Questions

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

In a jury trial in a suit affecting the parent-child relationship, a party is entitled to a jury verdict on (1) the appointment of a sole managing conservator; (2) the appointment of joint managing conservators; (3) the appointment of a possessory conservator; (4) the determination of which joint managing conservator has the exclusive right to designate the child's primary residence; (5) the determination of whether to impose a restriction on the geographic area in which a sole or joint managing conservator may designate the residence; and (6) the determination of that geographic area, if a restriction is imposed. The court may not contravene a jury verdict on any of these issues. Tex. Fam. Code § 105.002(c)(1). The court may not submit to the jury questions on the issues of (1) support under Family Code chapter 154 or 159; (2) a specific term or condition of possession of or access to the child; or (3) any right or duty of a conservator, other than which joint managing conservator has the exclusive right to designate the primary residence of the child and determinations concerning geographic restrictions on the primary residence. Tex. Fam. Code § 105.002(c)(2).

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

§ 3.49 Long-Arm Jurisdiction

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

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

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

Tex. Fam. Code § 102.011(b).

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

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

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

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

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

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

§ 3.50 Uniform Child Custody Jurisdiction and Enforcement Act

In a suit affecting the parent-child relationship, the court may exercise status or subject-matter jurisdiction over the suit under Family Code sections 152.001 through 152.317 (known as the Uniform Child Custody Jurisdiction and Enforcement Act or UCCJEA).

Tex. Fam. Code § 102.011(a). Note, however, that the filing of a divorce requires the joinder of the suit affecting parent-child relationship and will force the suit affecting the parent-child relationship to be tried in the same cause and location as the divorce. See section 3.42 above.

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

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

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

Exercise of Jurisdiction: If all contestants reside in Texas at the commencement of the divorce proceeding and the child is present with the parties, Texas may then proceed to exercise jurisdiction over the title 1 aspect of the divorce and the title 5 aspect of the

suit affecting the parent-child relationship. Under the UCCJEA, the determination is based on where the child lives, and the child's physical presence is the "central factor" in making that determination. *C.H. v. S.L.*, No. 02-16-00386-CV, 2018 WL 4925318, at *5 (Tex. App.—Fort Worth Oct. 11, 2018, no pet.) (mem. op.).

In *Villarreal v. Villarreal*, No. 04-15-00551-CV, 2016 WL 4124067 (Tex. App.—San Antonio Aug. 3, 2016, no pet.) (mem. op.), the petitioner filed a divorce, coupled with a suit affecting the parent-child relationship, in state district court. When the trial court entered an order of conditional dismissal for failure to pay court costs, the petitioner filed a petition for divorce in a tribal court. The state district court case was never dismissed, nor was it stayed. The appellate court held that the Indian Child Welfare Act was not applicable to a custody case within a divorce proceeding. Accordingly, the appellate court held that the Indian tribe within which the tribal court was located should be treated as a state of the United States under the UCCJEA. Because Texas was the home state of the children when the petitioner filed the divorce in state district court, the trial court had jurisdiction to make the initial child custody determination. *Villarreal*, 2016 WL 4124067, at *3.

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

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

[Sections 3.51 through 3.60 are reserved for expansion.]

V. Additional Causes of Action

§ 3.61 General

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

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

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

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

Pleadings must give fair notice of the claim involved to the opposing party. *See* Tex. R. Civ. P. 45(b), 47(a). Even when not raised by the pleadings, if issues are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Tex. R. Civ. P. 67; *Gamboa v. Gamboa*, 383 S.W.3d 263, 271 (Tex. App.—San Antonio 2012, no pet.). Trial by consent is intended to cover only the

exceptional case in which it clearly appears from the record as a whole that the parties tried the unpleaded issue; it should be applied with care and is not intended to establish a general rule of practice. *Guillory v. Boykins,* 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.). To determine whether an issue was tried by consent, the appellate court examines the record not for evidence pertaining to the issue, but rather for evidence that the issue was actually tried. *Guillory*, 442 S.W.3d at 690. A party's unpleaded issue may be deemed tried by consent when evidence on the issue is developed under circumstances indicating both parties understood the issue was present in the case and the other party failed to make an appropriate complaint. *Prize Energy Resources, L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 567 (Tex. App.—San Antonio 2011, no pet.). When evidence relevant to both a pleaded and an unpleaded issue has been admitted without objection, the doctrine of trial by consent should generally not be applied. *Johnston v. McKinney American, Inc.*, 9 S.W.3d 271, 281 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

§ 3.62 Assault

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

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

Tex. Penal Code § 22.01(a).

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

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

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

Damages: In cases of willful battery, damages for mental suffering are recoverable, with or without actual physical injury. *Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627, 630 (Tex. 1967). A petitioner may also recover exemplary damages if the trier of fact finds that the respondent acted in a malicious, willful, or wanton manner. *Lubbock Bail Bond v. Joshua*, 416 S.W.2d 523, 525–26 (Tex. App.—Amarillo 1967, no writ).

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

§ 3.63 Intentional Infliction of Emotional Distress

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

1. the defendant acted intentionally or recklessly,
2. the conduct was extreme and outrageous,
3. the actions of the defendant caused the plaintiff emotional distress, and
4. the emotional distress suffered by the plaintiff was severe.

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

The tort of intentional infliction of emotional distress is available only in those situations in which severe emotional distress is the intended consequence or primary risk of the actor's conduct. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 67

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

§ 3.64 Interference with Possessory Interest in Child

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

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

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

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

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

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

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

Texas recognizes a cause of action for intentional infliction of emotional distress but does not recognize an independent cause of action for negligent infliction of emotional distress within the context of a parental kidnapping case. *Weirich v. Weirich*, 796 S.W.2d 513, 515–16 (Tex. App.—San Antonio 1990), *rev'd on other grounds*, 833 S.W.2d 942 (Tex. 1992).

§ 3.65 Negligent Torts

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

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

Negligent Interference with Familial Relations: Texas does not recognize an independent cause of action for negligent interference with familial relations. *Helena Laboratories Corp. v. Snyder*, 886 S.W.2d 767, 768 (Tex. 1994) (per curiam). *Helena Laboratories* involved a cause of action against the employer of the plaintiffs' respective spouses, who were having an extramarital affair. The plaintiffs maintained that the employer negligently interfered with their familial relations by failing to take action to prevent the affair between their spouses. The plaintiffs argued that the employer had a duty to use reasonable means at its disposal to prevent any partner, vice principal, or employee from improperly using his position with the employer to work a tortious inva-

sion of legally protected family interests. *See Snyder v. Helena Laboratories, Inc.*, 877 S.W.2d 35, 37 (Tex. App.—Beaumont), *rev'd*, 886 S.W.2d 767 (Tex. 1994). The supreme court disagreed, holding that the plaintiffs essentially alleged a cause of action for alienation of affection, which is barred by Family Code section 1.107. *Helena Laboratories*, 886 S.W.2d at 768 (citing repealed section 4.06 of the Family Code, now Tex. Fam. Code § 1.107).

§ 3.66 Actual Fraud

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

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

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

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

1. the defendant failed to disclose facts to the plaintiff;
2. the defendant had a duty to disclose those facts;
3. the facts were material;

4. the defendant knew the plaintiff was ignorant of the facts and the plaintiff did not have an equal opportunity to discover the facts;

5. the defendant was deliberately silent when it had a duty to speak;

6. by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting;

7. the plaintiff relied on the defendant's nondisclosure; and

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

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

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

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

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

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

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

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

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

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

§ 3.67 Fraud on Community

In the absence of fraud on the rights of the other spouse, a spouse has the right to control and dispose of community property subject to his sole management. Each spouse owns an undivided one-half interest in all community assets and funds regardless of which spouse has management and control. *Massey v. Massey*, 807 S.W.2d 391, 401 (Tex. App.—Houston [1st Dist.] 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993). The managing spouse may make moderate gifts for just causes to persons outside the community. *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist.] 1987, no writ). Factors to be considered in determining the fairness of such a gift, transfer, or expenditure are—

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

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

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

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

las 1986, writ dism'd); *Spruill v. Spruill*, 624 S.W.2d 694 (Tex. App.—El Paso 1981, writ dism'd)).

The breach of a legal or equitable duty that violates the fiduciary relationship existing between spouses is termed *fraud on the community*, a judicially created concept based on the theory of constructive fraud. Any such conduct in the marital relationship is termed fraud on the community because, although not actually fraudulent, it has all the consequences and legal effects of actual fraud in that such conduct tends to deceive the other spouse or violate confidences that exist as a result of the marriage. *In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.—Amarillo 1994, no writ).

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

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

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

Although marriage may bring about a fiduciary relationship, such a relationship terminates in a contested divorce when the spouses each have independent attorneys and financial advisers. *Parker v. Parker*, 897 S.W.2d 918, 924 (Tex. App.—Fort Worth 1995, writ denied). *But see Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (fiduciary duty does not expire on filing of divorce). Courts have recognized fraud on the community when the wrongful disposition of community property occurred during the divorce. *Miller*, 2018 WL 3151241, at *11.

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

§ 3.68 Conversion

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

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

There must be an intent on the part of the defendant to assert some right in the property. Because *wrongful* intent is not essential, however, one may not escape liability by showing that he acted in good faith or under a mistaken belief about his rights. *McVea v. Verkins*, 587 S.W.2d 526, 531 (Tex. App.—Corpus Christi–Edinburg 1979, no writ). It is not necessary that the property be applied to the use of the wrongdoer or even to that of a third person. The controlling factor is the owner's loss and not the benefit to the wrongdoer. *American Surety Co. v. Hill County*, 254 S.W. 241, 246 (Tex. App.—Dallas 1923), *aff'd*, 267 S.W. 265 (Tex. Comm'n App. 1924, judgm't adopted). Conversion may also be direct or constructive. *McVea*, 587 S.W.2d at 530.

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

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

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

Damages: The measure of damages for conversion is the value of the property converted at the time of the conversion, with legal interest. If the conversion is attended with fraud, a willful wrong, or gross negligence, however, and the property converted is of changing or fluctuating value, the measure of damages is the highest market value of the property between the date of conversion and the filing of the suit. If the damages are definitely determinable, interest is recoverable as a matter of right from the date of the injury or loss. *Imperial Sugar Co. v. Torrans*, 604 S.W.2d 73, 74 (Tex. 1980) (per curiam). Additionally, a party requesting the return of converted property may recover money damages for the loss of use of the property during the period of detention. *Adam*, 564 S.W.2d at 155.

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

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

§ 3.69 Cotenant

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

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

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

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

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

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

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

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

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

§ 3.70 Orders against Financial Institution

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

Obtaining a temporary injunction against a third party in a divorce proceeding requires a supporting affidavit. Tex. R. Civ. P. 682. Each order granting an injunction and every restraining order must set forth the reason for its issuance, be specific in its terms, and describe in reasonable detail and not by reference to the pleadings or other documents

the act or acts sought to be restrained. The restraining order or injunction binds only the parties to the action; their officers, agents, servants, employees and attorneys; and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Tex. R. Civ. P. 683.

Additionally, and contrary to the Family Code's provisions, a temporary restraining order or temporary injunction against a third party to a divorce proceeding requires the posting of a bond with two or more good and sufficient sureties as security if the order or injunction is dissolved in whole or in part. Tex. R. Civ. P. 684.

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

§ 3.71 Disregarding Corporate Fiction

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

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

In certain defined circumstances, the courts will disregard the corporate fiction under either the doctrine of alter ego or another means of piercing the corporate veil. These

doctrines are not substantive causes of action. *See In re Starflite Management Group, Inc.*, 162 S.W.3d 409, 414 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam). Rather, such doctrines are more in the nature of a remedy and operate to enlarge the potential sources for recovery.

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

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

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

A corporate veil may be pierced on the basis of alter ego only in extraordinary circumstances. If an individual controls and manages a corporation in such a manner that its affairs are indistinguishable from the individual's personal affairs and it has thus become inseparable from the individual, alter ego may be available to pierce the corpo-

rate veil. Such a situation may not be inferred simply because a person is a major stockholder or even the sole stockholder of the corporation. *Keith v. Woodul*, 616 S.W.2d 375, 377 (Tex. App.—Texarkana 1981, no writ). There must be such unity between the individual and the corporation that the separateness of the individual from the corporation has ceased to exist. *Humphrey v. Humphrey*, 593 S.W.2d 824, 826 (Tex. App.—Houston [14th Dist.] 1980, writ dism'd). Additionally, the party seeking relief must be able to demonstrate that the spouse's inappropriate use of the corporation resulted in damage to the community estate that cannot be remedied by reimbursement. *Lifshutz*, 61 S.W.3d at 517; *Boyo v. Boyo*, 196 S.W.3d 409 (Tex. App.—Beaumont 2006, no pet.).

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

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

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

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

§ 3.72 Parentage

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

§ 3.73 Invasion of Privacy

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

The right of privacy has been defined as the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. *Billings*, 489 S.W.2d at 859; *see also Moore v. Charles B. Pierce Film Enterprises*, 589 S.W.2d 489, 490 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.).

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

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

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

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

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

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

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

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

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

Family Law Application: It is not uncommon for a party in a family law case to wiretap, audiotape, or videotape the party's spouse, the spouse's significant other, or their children. This area is fraught with exposure to civil and criminal liability for both the client and the attorney. The attorney should review (1) title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, codified at title 18 of the United States Code sections 2510 through 2521; (2) Texas Penal Code article 16.02; (3) Texas Code of Criminal Procedure article 18.20; and (4) Texas Civil Practice and Remedies Code chapter 123. In summary, any use of an electronic, mechanical, or other device to intentionally intercept a wire, oral, or electronic communication or to use or disclose such interception is prohibited. Some commentators have opined that it is unlawful for attorneys to even listen to a tape given to them by a client. Generally, the interception is legal if one party to the communication has consented and both parties are located in Texas. See **www.rcfp.org/reporters-recording-guide/** for the laws in other jurisdictions regarding the taping of telephone conversations. A continuing controversy exists about whether one spouse has immunity to intercept the other spouse's

communications if they reside in the same home. At least two Texas appellate courts have held that there is no immunity and that interspousal interceptions violate both federal and Texas statutes. *Collins v. Collins*, 904 S.W.2d 792, 796–97 (Tex. App.—Houston [1st Dist.] 1995), *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996); *Turner v. PV International Corp.*, 765 S.W.2d 455, 470 (Tex. App.—Dallas 1988), *writ denied per curiam*, 778 S.W.2d 865 (Tex. 1989). See the discussion at section 2.8:8 in this manual.

There are no federal or state statutes that regulate video surveillance. However, if the tape has audio, the same rules detailed above probably apply. Additionally, there may be a common-law right of recovery for willful invasion of privacy or intentional infliction of emotional distress. *See Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993) (citing *Billings*, 489 S.W.2d at 860–61).

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

§ 3.74 Uniform Fraudulent Transfer Act

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

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

Transfer Made without Receiving Reasonably Equivalent Value: A transfer made or obligation incurred by a debtor is fraudulent if he made the transfer or incurred the

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

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

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

Transfers falling under section 24.005 may be challenged by a creditor whose claim arose before or within a reasonable time after the transfer. Tex. Bus. & Com. Code § 24.005(a). Transfers falling under section 24.006 may be challenged only by a creditor whose claim arose before the transfer. Tex. Bus. & Com. Code § 24.006. Because a

spouse's community-property rights are vested when property is acquired, it would seem that a spouse challenging a transfer of community property would be a present creditor and could challenge both section 24.005 and 24.006 transfers.

Creditor: A "creditor" is a person, including a spouse, who has a claim. Tex. Bus. & Com. Code § 24.002(4). Such a claim may presumably be a spouse's interest in the marital estate. *See* Tex. Bus. & Com. Code § 24.002(3). Although the definition of "creditor" in the Act includes a spouse who has a claim for property fraudulently transferred by the other spouse, the transfer must be made to intentionally defraud the spouse, cause the transferor to become insolvent, or leave the transferor with "unreasonably small" assets or debts beyond his ability to pay. In the absence of such evidence, the Act does not apply. *Thomas v. Casale*, 924 S.W.2d 433, 437 (Tex. App.—Fort Worth 1996, writ denied).

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

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

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

A cause of action *not* on behalf of a spouse, minor, or ward with respect to a fraudulent transfer or obligation is extinguished unless brought (1) under section 24.005(a)(1)

within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant; (2) under section 24.005(a)(2) or 24.006(a) within four years after the transfer was made or the obligation was incurred; or (3) under section 24.006(b) within one year after the transfer was made. Tex. Bus. & Com. Code § 24.010(a).

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

§ 3.75 Third-Party Trustee

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

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

unjust enrichment, and equitable title will rest with the party furnishing the consideration. *Nolana Development Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984).

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

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

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

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

A resulting trust can also arise if a grantor, without consideration, conveys property to a grantee under circumstances that do not constitute a gift. Under such circumstances, equity presumes an intention of the parties that the beneficial title is to remain in the

grantor and that the grantee holds the property for the grantor's benefit. *Murphy v. Johnson*, 439 S.W.2d 440, 444 (Tex. App.—Houston [1st Dist.] 1969, no writ); *Hereford Land Co.*, 387 S.W.2d at 775. However, a presumption of gift arises in such a situation if the conveyance is by a parent to a child or similar grantee. *See Somer v. Bogart*, 749 S.W.2d 202, 204 (Tex. App.—Dallas), *writ denied per curiam*, 762 S.W.2d 577 (Tex. 1988).

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

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

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

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

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

The burden of proof rests on the party who pleads a resulting trust. Proof of a resulting or constructive trust must be clear, certain, and conclusive. *Uriarte*, 606 S.W.2d at 24. If a transfer of property is made to one person and another person seeks to enforce a resulting trust in his favor on the ground that he paid the purchase price, the person alleging the resulting trust has the burden of proving by clear and convincing evidence that he paid the purchase price. *Carson v. White*, 456 S.W.2d 212, 215 (Tex. App.—San Antonio 1970, writ ref'd n.r.e.).

Statute of Limitations: The statute of limitations begins to run only from the date of repudiation by the trustee. *See Sohio Petroleum Co. v. Jurek*, 248 S.W.2d 294, 297 (Tex. App.—Fort Worth 1952, writ ref'd n.r.e.). A beneficiary of a resulting trust is not barred from enforcing the trust merely by the lapse of time. It is only when the trustee under a resulting trust repudiates the trust to the beneficiary's knowledge that the beneficiary may be barred by laches from enforcing the trust. *Atkins*, 467 S.W.2d at 501.

If the trustee of a resulting trust in breach of the trust transfers trust property to a bona fide purchaser, however, the transferee takes the property free of the resulting trust. *Equitable Trust*, 644 S.W.2d at 52.

§ 3.76 Breach-of-Contract and Rescission Claims

Generally, in Texas, courts interpret premarital agreements like other written contracts. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d 119, 122 (Tex. 2018). A party who entered into a premarital agreement or other property agreement may sue for breach of contract against the spouse if the spouse fails to satisfy the terms of the agreement. *See In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 123.

A party may also seek rescission of the agreement if the agreement provides that a breach of a term would nullify the entire agreement and result in property distribution under the normal rules. *See In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 123–24. Rescission is not a separate cause of action; it "is an equitable remedy that extinguishes legally valid contracts that must be set aside because of fraud, mistake, or other reasons in order to avoid unjust enrichment." *In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 125 (J. Lehrman concurring, quoting *Cantu v. Guerra & Moore, Ltd.*, 328 S.W.3d 1, 8 (Tex. App.—San Antonio 2009, no pet.)). Rescission is typically available

as a substitute for monetary damages when such damages would be inadequate. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 125 (J. Lehrman concurring, citing *Lauret v. Meritage Homes of Texas, LLC*, 455 S.W.3d 695, 700 (Tex. App.—Austin 2014, no pet.)). A petition for rescission of the agreement can trigger penalty clauses in an agreement set up to discourage a party from seeking to invalidate the agreement, even if pleaded as alternative relief and even if the other party has breached the contract. *See In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 124–25. Texas law disfavors equitable exceptions to the enforcement of contracts as written. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 124. Courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained. *In re Marriage of I.C. & Q.C.*, 551 S.W.3d at 124.

[Sections 3.77 through 3.80 are reserved for expansion.]

VI. Intervenor's Pleadings

§ 3.81 Intervention Generally

Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party. Tex. R. Civ. P. 60. Filing, notice, and service on other parties are controlled by the general provisions in rules 21 and 21a.

§ 3.82 Conservatorship

Although a grandparent or other person may not file an original suit requesting possessory conservatorship, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit affecting the parent-child relationship filed by a person authorized to do so under Family Code chapter 102 if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 102.004(b). Intervention in a suit affecting the parent-child relationship is discussed in section 44.8 in this manual. For discussion of who may file an original suit, see chapter 40.

§ 3.83 Attorney's Fees

An attorney may seek to recover attorney's fees by intervening in the title 1 or title 5 suit. See section 20.32 in this manual.

§ 3.84 General Creditor

Third parties, creditors, or other persons asserting a claim against the petitioner or the respondent may intervene in the suit. *See* Tex. R. Civ. P. 60.

[Sections 3.85 through 3.90 are reserved for expansion.]

VII. Useful Websites

§ 3.91 Useful Websites

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

State-by-state guide to taping phone calls and in-person conversations (§ 3.73)
www.rcfp.org/reporters-recording-guide/

Chapter 4

Divorce—Temporary Orders

§ 4.1 Temporary Orders Generally 167

§ 4.2 Temporary Restraining Orders and Temporary Injunctions 170

§ 4.3 Extension and Expiration of Temporary Restraining Order 173

§ 4.4 Hearing on Temporary Injunction 174

§ 4.5 Dissolution or Modification of Temporary Restraining Order 174

§ 4.6 Form and Scope of Injunction or Restraining Order 174

§ 4.7 Bond 175

§ 4.8 Contempt Punishment for Disobedience 175

§ 4.9 Temporary Support of Spouse 176

§ 4.10 Transfer of Property and Incurring of Debt Pending Decree 176

§ 4.11 Inventory and Appraisement 176

§ 4.12 Interim Attorney's Fees and Expenses 177

§ 4.13 Other Temporary Orders 177

§ 4.14 Associate Judge 178

§ 4.15 Motion to Modify Temporary Orders 179

§ 4.16 Motion to Extend Temporary Orders 179

§ 4.17 Orders Protecting against Family Violence 180

§ 4.18 Temporary Orders Pending Appeal 180

Chapter 4

Divorce—Temporary Orders

§ 4.1 Temporary Orders Generally

If the domicile and residency requirements are not met, any temporary orders the court renders will fail an appellate challenge. Section 6.301 of the Texas Family Code provides that a suit for divorce may not be maintained in Texas unless at the time the suit is filed either the petitioner or the respondent has been (1) a domiciliary of Texas for the preceding six-month period and (2) a resident of the county in which the suit is filed for the preceding ninety-day period. *See* Tex. Fam. Code § 6.301.

Numerous courts have held that Code section 6.301 is not jurisdictional, but it controls a petitioner's right to sue for divorce; in other words, it is a mandatory requirement that cannot be waived. *In re Paul*, No. 10-16-00004-CV, 2016 WL 2609599, at *2 (Tex. App.—Waco May 5, 2016, orig. proceeding) (mem. op.). Because section 6.301 is mandatory and cannot be waived, if a court abuses its discretion in determining that the ninety-day residency requirement was met, any judgment, including temporary orders, the court renders would eventually be reversed. To avoid the waste of public and private resources invested into the proceedings, an appellate court may grant a petition for mandamus that effectively vacates all the trial court's findings and temporary orders. *See In re Paul*, 2016 WL 2609599, at *4.

Property and Parties: During the pendency of a suit for divorce, the parties may request many types of relief relating to the property of the parties and protection of the parties from the court, and the court may grant such relief as deemed equitable and necessary. On the motion of a party or on the court's own motion after notice and hearing, the court may render an appropriate order, including:

1. Temporary injunctions for the preservation of assets and protection of the parties.
2. Temporary orders for spousal support.
3. Temporary orders for the payment of community debt.
4. Orders for interim attorney's fees and expenses.

5. Discovery orders and an order setting the deadline for the filing of the parties' sworn inventories.

6. Orders for appraisal of assets.

See Tex. Fam. Code § 6.502(a).

Children: In a suit affecting the parent-child relationship, the court may make or modify a temporary order for the safety and welfare of the child, including orders—

1. for the temporary conservatorship of the child,

2. for the temporary support of the child,

3. restraining a party from disturbing the peace of the child or another party,

4. prohibiting a person from removing the child beyond a geographical area identified by the court, or

5. for payment of reasonable attorney's fees and expenses.

Tex. Fam. Code § 105.001(a).

In addition, the court may make orders for—

1. psychological evaluation of the parties, relative to the issues of conservatorship and possession of the children (*see* Tex. R. Civ. P. 204.4);

2. preparation of a child custody evaluation relative to the issues of conservatorship of, possession of, and access to the children (*see* Tex. Fam. Code § 107.103); and

3. appointments of representatives for children in a conservatorship dispute (*see* Tex. Fam. Code § 107.001 *et seq.*).

An order may not be entered for temporary conservatorship of a child (except in an emergency order sought by a governmental entity under chapter 262), for temporary support of a child, or for payment of reasonable attorney's fees and expenses, except after notice and hearing. Tex. Fam. Code § 105.001(b), (h). Absent a finding supported by evidence that the safety and welfare of a child will be significantly impaired by the appointment of a parent as the child's managing conservator, the parent's decision regarding whether the child will have any contact with third parties is a fundamental right of a parent, and it is unconstitutional for the trial court to enter temporary orders appointing third parties as temporary possessory conservators. *In re Aubin*, 29 S.W.3d 199, 203–04 (Tex. App.—Beaumont 2000, orig. proceeding).

A temporary order in a suit affecting the parent-child relationship rendered in accordance with Family Code section 105.001 is not required to include a temporary parenting plan. The court may not require the submission of a temporary parenting plan in any case or by local rule or practice. Tex. Fam. Code § 153.602.

Child Custody Evaluation: In a suit affecting the parent-child relationship, the court may order the preparation of a child custody evaluation regarding (1) the circumstances and conditions of the child, a party to the suit, and, if appropriate, the residence of any person requesting conservatorship of, possession of, or access to the child and (2) any issue or question relating to the suit at the request of the court before or during the evaluation process. Tex. Fam. Code § 107.103(a).

Child custody evaluations are discussed in section 40.19 in this manual.

Parent Education and Family Stabilization Course: In a suit affecting the parent-child relationship, the court may order the parties to attend a parent education and family stabilization course if the court determines that the order is in the best interest of the child. Tex. Fam. Code § 105.009(a). For additional information on this topic, see section 40.24 in this manual.

Counseling: While a divorce suit is pending, the court may, in its discretion, direct the parties to counsel with a person named by the court. Tex. Fam. Code § 6.505(a). If the parties ordered to counseling are the parents of a child under eighteen years of age, the counseling shall include counseling on issues that confront children who are the subject of a suit affecting the parent-child relationship. Tex. Fam. Code § 6.505(e).

Mental Health Evaluation: Additionally a party may request mental health evaluations of the parties, relative to the issues of conservatorship and access to children. *See* Tex. R. Civ. P. 204.4. For additional information on discovery, see chapter 5 of this manual.

Appointments in Suits Affecting the Parent-Child Relationship: In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint one of the following: an amicus attorney, an attorney ad litem, or a guardian ad litem. Tex. Fam. Code § 107.021(a). For additional information on such appointments, see chapter 13 of this manual.

Appeal of Temporary Orders: An order issued under Family Code chapter 6, subchapter F, except an order appointing a receiver, is not subject to interlocutory appeal.

Tex. Fam. Code § 6.507. Temporary orders in suits affecting the parent-child relationship entered under section 105.001 are not subject to interlocutory appeal. Tex. Fam. Code § 105.001(e). Matters relating to receiverships and injunctions against third parties have special rules and, in certain instances, can be appealed. *See Querner v. Querner*, 668 S.W.2d 801, 802 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (per curiam). Since temporary orders are not subject to an interlocutory appeal, mandamus is an appropriate remedy when a court abuses its discretion. *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (orig. proceeding) (per curiam); *In re Cooper*, 333 S.W.3d 656 (Tex. App.—Dallas 2009, orig, proceeding); *In re Lemons*, 47 S.W.3d 202, 203–04 (Tex. App.—Beaumont 2001, orig. proceeding) (per curiam). For additional information on mandamus issues, see chapter 27 of this manual.

Transfer: During the transfer of a suit affecting the parent-child relationship from a court with continuing, exclusive jurisdiction, the transferring court retains jurisdiction to render temporary orders. Jurisdiction terminates when the transferee court dockets the case. Tex. Fam. Code § 155.005; *see also Bigham v. Dempster*, 901 S.W.2d 424, 430 (Tex. 1995) (orig. proceeding). The definition of "docketing" should be consistent with the purpose of expediting the transfer process. A transfer case is "docketed" when the traditional legal meaning of the event has occurred, rather than when all certified document copies have been ministerially sent (expressly by the clerk, not someone else). The jurisdiction of the court does not turn on whether, or with what diligence, a clerk performs a ministerial duty to forward court documents. *Bigham*, 901 S.W.2d at 430–31.

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

§ 4.2 Temporary Restraining Orders and Temporary Injunctions

After a suit for divorce is filed, on the motion of a party or on the court's own motion, the court may grant a temporary restraining order without notice to the adverse party for the preservation of the property and for the protection of the parties as necessary. Tex. Fam. Code § 6.501(a).

A temporary restraining order may not include a provision concerning a requirement, appointment, award, or other order listed in section 64.104 of the Texas Civil Practice and Remedies Code (concerning receiverships) *or* include a provision that excludes a spouse from occupying the residence where that spouse is living (except as provided in

a protective order under title 4), prohibits a party from spending funds for reasonable and necessary living expenses, or prohibits a party from engaging in acts reasonable and necessary to conduct that party's usual business and occupation. Tex. Fam. Code § 6.501(b). Only in the context of a temporary ex parte protective order under Family Code section 83.006 may the court exclude a spouse from the marital residence. *See* Tex. Fam. Code § 83.006. For additional information about protective orders, see chapter 17 of this manual.

COMMENT: Although not mandated by statute, many courts have local rules requiring that restraining orders be mutual, restraining both the petitioner and the respondent from the enumerated acts pending a hearing. Because these requirements vary by county, and even by court within the same county, the local rules should be checked before a temporary restraining order is requested.

A temporary restraining order or temporary injunction may be granted in a divorce case without an affidavit or verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result before notice and hearing. Tex. Fam. Code § 6.503(a)(1).

Temporary restraining orders may likewise be issued without notice and hearing in suits affecting the parent-child relationship restraining any party from disturbing the peace of the child or another party or prohibiting a person from removing the child beyond a geographical area identified by the court. Tex. Fam. Code § 105.001(a)(3), (a)(4), (b).

A temporary restraining order or temporary injunction need not define the injury, state why it is irreparable, state why the order was granted without notice, or include an order setting the cause for trial on the merits with respect to the ultimate relief sought and in most situations may be granted without an affidavit or verified pleading. Tex. Fam. Code §§ 6.503(a), 105.001(b). However, a verified pleading or an affidavit in accordance with the Texas Rules of Civil Procedure is required to obtain an order attaching the body of a child, taking a child into the possession of the court or of a person designated by the court, or excluding a parent from possession of or access to a child. Tex. Fam. Code § 105.001(c). A parent's rights to the companionship, care, custody, and management of a child are constitutional interests far more precious than any property right, and the trial court must strictly comply with the Family Code when restricting a parent's access to the child. *In re Barrera*, No. 03-18-00271-CV, 2018 WL 1916023, at *2 (Tex. App.—Austin Apr. 23, 2018, orig. proceeding) (mem. op.).

A typical temporary injunction can result in a criminal violation of federal law by a person subject to the injunction who possesses firearms or ammunition. If applicable, the federal law makes it unlawful for the person to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(g). The statute applies to a person who is subject to a court order that—

1. was issued after a hearing of which the person received actual notice and at which the person had an opportunity to participate;

2. restrains the person from harassing, stalking, or threatening an intimate partner of the person or a child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

3. either includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child *or* by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

18 U.S.C. § 922(g)(8).

While a suit for dissolution of a marriage is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may render an appropriate order, including the granting of a temporary injunction for the preservation of the property and protection of the parties as deemed necessary and equitable, including prohibiting an act described in Family Code section 6.501(a). Tex. Fam. Code § 6.502(a)(9). Section 6.501(a), dealing with temporary restraining orders in divorce proceedings, authorizes orders prohibiting one or both parties from threatening the other, by telephone or in writing, to take unlawful action against any person, intending by this action to annoy or alarm the other; intentionally, knowingly, or recklessly causing bodily injury to the other or to a child of either party; or threatening the other or a child of either party with imminent bodily injury. Tex. Fam. Code § 6.501(a)(2), (a)(4), (a)(5). The federal firearms and ammunition possession prohibition can apply to a person who is the subject of a Texas temporary injunction including any of those prohibitions. *United States v. Emerson*, 270 F.3d 203, 263–64 (5th Cir. 2001). The temporary injunction must still meet the standards of section 922(g)(8). Section 922(g)(8)(A) requires an actual hearing with prior notice and an opportunity to participate, and section 922(g)(8)(C)(ii) requires that the order "explicitly" prohibit the use (actual, threatened,

or attempted) of physical force that would reasonably be expected to cause bodily injury. *Emerson*, 270 F.3d at 261–62. Texas law regarding these temporary injunctions meets the general minimum standards for the application of section 922(g)(8)(C)(ii). *Emerson*, 270 F.3d at 262.

While a suit for a qualified domestic relations order or similar order (QDRO) for spousal maintenance or child support is pending, on a party's motion or the court's own motion and after notice and hearing, the court may render an appropriate order for the preservation of the pension, retirement plan, or other employee benefits and protection of the parties as the court considers necessary. Such an order may include the granting of a temporary restraining order and temporary injunction and is not subject to interlocutory appeal. Tex. Fam. Code §§ 8.353, 157.503. See chapter 25 of this manual for a discussion of the use of QDROs for spousal maintenance or child support.

A temporary injunction prohibiting allegedly defamatory speech is an unconstitutional prior restraint. *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (per curiam). Although a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint on free speech, an injunction prohibiting future speech based on that adjudication is an infringement on free-speech rights. *Kinney v. Barnes*, 443 S.W.3d 87, 101 (Tex. 2014).

A court may not prohibit a person from executing a new will or a codicil to an existing will or from revoking an existing will or codicil in whole or in part. Any part of a court order that purports to do so is void. Tex. Est. Code § 253.001.

§ 4.3 Extension and Expiration of Temporary Restraining Order

Every temporary restraining order granted without notice shall expire, by its terms, within such time after signing, not to exceed fourteen days, as the court fixes. Before the temporary restraining order expires, the court for good cause shown may extend the order for a like period. Also, if the party against whom the order is directed consents, the order may be extended for a longer period. The reasons for any extension must be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. Tex. R. Civ. P. 680. Thus, if service on the respondent or the person sought to be restrained is not had within fourteen days of the date of the signing of the restraining order, the order will ordinarily expire by operation of law, unless the court has fixed an earlier date for its expiration.

§ 4.4 Hearing on Temporary Injunction

If a temporary restraining order is granted without notice, the application for a temporary injunction shall be set for a hearing at the earliest possible date and takes precedence over all matters except older matters of the same character. Tex. R. Civ. P. 680.

Every restraining order must include an order setting a certain date for hearing on the temporary or permanent injunction sought. When the application for a temporary injunction comes on for a hearing, the party who obtained the restraining order shall proceed with the application for temporary injunction and, if he does not do so, the court will dissolve the temporary restraining order. Tex. R. Civ. P. 680.

§ 4.5 Dissolution or Modification of Temporary Restraining Order

On two days' notice to the party who obtained the temporary restraining order without notice (or on such shorter notice to that party as the court may prescribe), the adverse party may appear and move for dissolution or modification of the temporary restraining order. In that event, the court will hear and determine the motion as expeditiously as the ends of justice require. Tex. R. Civ. P. 680.

§ 4.6 Form and Scope of Injunction or Restraining Order

Every order granting an injunction and every restraining order—

1. must state the order is necessary and equitable (*see* Tex. Fam. Code §§ 6.501, 6.502);
2. must set forth the reasons for its issuance;
3. must be specific in its terms;
4. must describe in reasonable detail (not by reference to the complaint or other document) the act or acts sought to be restrained; and
5. is binding only on the parties to the action; on their officers, agents, servants, employees, and attorneys; and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Tex. R. Civ. P. 683.

Every temporary restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought. Tex. R. Civ. P. 680. Every order granting a temporary injunction must contain an order setting the cause for trial on the merits with respect to the ultimate relief sought. Tex. R. Civ. P. 683. However, the Family Code provides that temporary injunctions issued under section 105.001 or sections 6.501 through 6.507 need not include an order setting the cause for trial on the merits with respect to the ultimate relief requested. *See* Tex. Fam. Code §§ 6.503(a)(2)(C), 105.001(b)(3).

§ 4.7 Bond

Before the issuance of a temporary restraining order or temporary injunction, the applicant ordinarily must execute and file with the clerk a bond to the adverse party. Tex. R. Civ. P. 684.

In a suit for divorce, however, the court may dispense with the issuance of a bond between the spouses in connection with temporary orders for the protection of the parties and their property. Tex. Fam. Code § 6.503(b); Tex. R. Civ. P. 693a.

The court also may dispense with the necessity of a bond in connection with temporary orders in behalf of the child. Tex. Fam. Code § 105.001(d).

The Texas Family Code does *not* create a statutory exception to the bond requirement for nonparties to a family law case as it does for parties pursuant to Code sections 6.503(b) and 105.001(d).

§ 4.8 Contempt Punishment for Disobedience

The violation of any temporary restraining order, temporary injunction, or other temporary order is punishable as contempt. Tex. Fam. Code §§ 6.506, 105.001(f). However, use of the phrases "intent to obstruct the authority of the Court" and "in a manner that the Court deems just and right" in a temporary order stated in the exact terms of section 6.501(a)(6) (formerly section 3.58(a)(6)) was found too vague to support enforcement by contempt. *Ex parte Higginbotham*, 768 S.W.2d 4, 5 (Tex. App.—Fort Worth 1989, orig. proceeding).

See chapters 31 through 34 of this manual for discussions of contempt powers and procedures.

§ 4.9 Temporary Support of Spouse

While a suit for divorce is pending, on the motion of a party or on the court's own motion and after notice and hearing, the court may order payments to be made for the support of either spouse until a final decree is entered, including pending appeal. Tex. Fam. Code §§ 6.502(a)(2), 6.709(a)(1). *See generally Herschberg v. Herschberg*, 994 S.W.2d 273 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.); *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App.—Texarkana 1996, writ denied). The temporary support order must be based on evidence that such support is necessary and equitable. *Ex parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993) (orig. proceeding). However, the trustee of a spendthrift trust may not be ordered to make mandatory distributions to the spouse of a beneficiary as temporary spousal support. *In re BancorpSouth Bank*, No. 05-14-00294-CV, 2014 WL 1477746, at *3 (Tex. App.—Dallas Apr. 14, 2014, orig. proceeding) (mem. op.).

§ 4.10 Transfer of Property and Incurring of Debt Pending Decree

A court may grant temporary restraining orders or temporary injunctions prohibiting a party from transferring property of either or both parties. Tex. Fam. Code §§ 6.501(a)(6), 6.502(a)(9).

A transfer of real or personal community property or a debt incurred by a spouse while a divorce suit is pending that subjects the other spouse or the community property to liability is void with respect to the other spouse if the transfer was made or the debt was incurred with the intent to injure the rights of the other spouse. Tex. Fam. Code § 6.707(a). A transfer or debt is not void if the person dealing with the transferor or debtor spouse did not have notice of the intent to injure the rights of the other spouse. Tex. Fam. Code § 6.707(b); *see Thomas v. Casale*, 924 S.W.2d 433, 437–38 (Tex. App.—Fort Worth 1996, writ denied) (wife did not establish that husband's paramour knew about husband's intent to defraud community estate).

§ 4.11 Inventory and Appraisement

While a divorce suit is pending and on a party's motion or on the court's own motion after notice and hearing, the court may render an order requiring each party to file a sworn inventory and appraisement of the real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities. Tex. Fam. Code § 6.502(a)(1). See chapter 7 of this manual for a discussion of inventory and appraisement.

§ 4.12 Interim Attorney's Fees and Expenses

While a suit for divorce is pending, on the motion of a party or on the court's own motion after notice and hearing, the court may order payment of reasonable attorney's fees and expenses. Tex. Fam. Code §§ 6.502(a)(4), 105.001(a)(5). The court must give notice and an opportunity to participate in an adversarial hearing before awarding interim fees against such party. *Post v. Garza*, 867 S.W.2d 88, 90 (Tex. App.—Corpus Christi–Edinburg 1993, orig. proceeding). The trial court has broad, though not unlimited, discretion in making temporary orders for attorney's fees during the course of divorce proceedings, and the trial court's order will not be disturbed absent an abuse of that discretion. *Herschberg v. Herschberg*, 994 S.W.2d 273, 277–78 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.).

Payment of the interim attorney's fees and expenses is enforceable by contempt and by imprisonment if the fees are characterized as spousal or child support. Tex. Fam. Code §§ 6.506, 105.001(f); *In re Bielefeld*, 143 S.W.3d 924, 928–29 (Tex. App.—Fort Worth 2004, orig. proceeding). The procedure for enforcement of an order by a motion for contempt is described in chapter 33 of this manual.

In *Baluch v. O'Donnell*, 763 S.W.2d 8, 10–11 (Tex. App.—Dallas 1988, orig. proceeding), the trial court was directed to set aside its order for sanctions under Tex. R. Civ. P. 215, entered for violation of an order to pay interim attorney's fees that were unrelated to discovery. *Baluch* was found inapplicable, however, in *Shirley v. Montgomery*, 768 S.W.2d 430, 433 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding), in which payment had been ordered made to the child's guardian ad litem as security for costs and in which the evidence showed that the order was to allow the ad litem to conduct discovery. In *TransAmerican Natural Gas Corp. v. Mancias*, 877 S.W.2d 840, 844 (Tex. App.—Corpus Christi–Edinburg 1994, orig. proceeding), the court interpreted Texas Rule of Civil Procedure 143 to apply only to costs already accrued and disallowed a deposit for costs to be accrued in the future. In *Saxton v. Daggett*, 864 S.W.2d 729, 734–36 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding), the court discussed sanctions imposed for failure to pay interim attorney's fees.

§ 4.13 Other Temporary Orders

For a discussion of other items of ancillary relief that may be sought, through the appointment of a master in chancery, an auditor, a receiver, or a mental health evaluator, see chapter 8 of this manual.

§ 4.14 Associate Judge

The judge of a court having jurisdiction of suits under title 1, 4, or 5 or chapter 45 of the Family Code may appoint a full-time or part-time associate judge if the commissioners court of a county in which the court has jurisdiction has authorized employment of an associate judge. Tex. Fam. Code § 201.001(a). The judge may refer to the associate judge any aspect of a suit involving a matter in the court's jurisdiction under title 1, 4, or 5 or chapter 45, including any matter ancillary to the suit. Tex. Fam. Code § 201.005(a).

Except as limited by the order of referral, an associate judge has the power to render and sign a temporary order, and such an order constitutes an order of the referring court. Tex. Fam. Code § 201.007(a), (c).

Hearing before Judge: Any party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request not later than the third working day after the date the party receives notice of the substance of (1) the associate judge's report or (2) the rendering of the temporary order, if the request concerns a temporary order rendered by an associate judge. Tex. Fam. Code § 201.015(a). In calculating the period, the first day is excluded and the last day is included. *See* Tex. Gov't Code § 311.014; *Peacock v. Humble*, 933 S.W.2d 341, 342 (Tex. App.—Austin 1996, orig. proceeding) (per curiam).

Caveat: Tex. Fam. Code § 201.015(a) does not apply if the case is heard by a master in a court designated under Tex. Gov't Code § 23.001 as a juvenile court. The Government Code does not provide for a mandatory de novo hearing of a master's recommendation. *In re Smith*, 260 S.W.3d 568 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

A request for a de novo hearing must specify the issues that will be presented to the referring court. Tex. Fam. Code § 201.015(b). Notice must be given to opposing counsel. Tex. Fam. Code § 201.015(d). The referring court, after notice to the parties, must hold the de novo hearing within thirty days of the filing of the initial request. Tex. Fam. Code § 201.015(f). However, a referring court's failure to hold a de novo hearing within thirty days, as required by the Family Code, does not deprive the referring court of jurisdiction. *See Lopez v. Lopez*, 995 S.W.2d 896, 897 (Tex. App.—El Paso 1999, no pet.).

Pending a de novo hearing before the referring court, a proposed order of the associate judge is in full force and effect and is enforceable as an order of the referring court,

except for an order providing for the appointment of a receiver. Tex. Fam. Code § 201.013(a). Once a de novo hearing is conducted and a final order is issued, the associate judge's proposed order no longer has any effect. *In re I.D.Z.*, 602 S.W.3d 1, 8 (Tex. App.—El Paso 2020, no pet.). Section 201.013(c) concerns orders by an associate judge for the temporary detention or incarceration of a witness or party. *See* Tex. Fam. Code § 201.013(c).

§ 4.15 Motion to Modify Temporary Orders

A motion to modify temporary orders may be filed at any time during the pendency of a suit. *See* Tex. Fam. Code §§ 6.501(a), 6.502(a), 6.505(a), 105.001(a). Unless presented during a hearing or trial, any pleading, plea, motion, or application to the court for an order, whether in the form of a motion, plea, or other form of request, shall be filed with the court clerk in writing, shall state the grounds therefor, shall set forth the relief or order sought, shall be at the same time served on all other parties, and shall be noted on the court's docket. An application to the court for an order and notice of any hearing on the request that is not presented during a hearing or trial shall be served on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by the Texas Rules of Civil Procedure or shortened by the court. Tex. R. Civ. P. 21(b).

Pursuant to section 105.001(a) of the Family Code, before modifying a temporary order, a court must consider whether the requested modification is necessary for "the safety and welfare" of the child. *In re McPeak*, 525 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (citing *In re Casanova*, No. 05-14-01166-CV, 2014 WL 6486127, at *3 (Tex. App.—Dallas Nov. 20, 2014, orig. proceeding) (mem. op.)). A party who seeks to modify *temporary* orders, not *final* orders, is not required to file an affidavit that complies with Family Code section 156.102, as section 156.102 applies only to a modification of final orders. *McPeak*, 525 S.W.3d at 314.

COMMENT: Some courts greatly restrict the ability to modify temporary orders, requiring affidavits to support a request before granting a hearing. Before filing a motion to modify temporary orders, the attorney should check the local rules of the county and the policy of the particular court.

§ 4.16 Motion to Extend Temporary Orders

A temporary order may be extended on written motion of any party. *See* Tex. Fam. Code §§ 6.501(a), 6.502(a), 105.001(a). The most common request for extension of

temporary orders is to extend financial support beyond the period originally specified by the court order.

If the request for an extension pertains to a restraining order or injunction, the Texas Rules of Civil Procedure generally apply. *See* Tex. R. Civ. P. 680.

§ 4.17 Orders Protecting against Family Violence

On the motion of a party to a suit for divorce, the court may render a protective order as provided by Family Code title 4, subtitle B. Tex. Fam. Code § 6.504. If the application for protective order is filed as a motion in a divorce suit, notice is given in the same manner as in any other motion. Tex. Fam. Code § 82.043(e). Such an order must be a separate document entitled "PROTECTIVE ORDER." Tex. Fam. Code § 85.004. Protective orders are discussed in chapter 17 of this manual.

§ 4.18 Temporary Orders Pending Appeal

In a suit for dissolution of marriage, on the motion of a party or on the court's own motion and after notice and hearing, the court may render a temporary order as considered equitable and necessary for the preservation of the property and for the protection of the parties during an appeal. In addition to other matters, an order may require the support of either spouse, require the payment of reasonable and necessary attorney's fees and expenses, appoint a receiver for the preservation and protection of the parties' property, award one spouse exclusive occupancy of the parties' residence pending the appeal, enjoin a party from dissipating or transferring the property awarded to the other party in the trial court's property division, or suspend the operation of all or part of the property division that is being appealed. Tex. Fam. Code § 6.709(a).

A motion seeking an original temporary order under section 6.709 may be filed before trial and may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(h). The trial court retains jurisdiction to conduct a hearing and sign an original temporary order until the sixtieth day after the date any eligible party has filed a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(i). The trial court retains jurisdiction to modify and enforce a temporary order unless the appellate court, on a proper showing, supersedes the trial court's order. Tex. Fam. Code § 6.709(j).

On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the preservation of the property or for the protection of the parties during the appeal. Tex. Fam. Code § 6.709(k). A party may seek review of the trial court's temporary order by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case, proper assignment in the party's brief, or petition for writ of mandamus. Tex. Fam. Code § 6.709(*l*). A temporary order rendered under section 6.709 is not subject to interlocutory appeal. Tex. Fam. Code § 6.709(m).

A temporary order pending appeal enjoining a party from dissipating or transferring the property awarded to the other party in the trial court's property division may be rendered without the issuance of a bond between the spouses or an affidavit or a verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result. The temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. The temporary order may not prohibit a party's use, transfer, conveyance, or dissipation of the property awarded to the other party in the trial court's property division if the use, transfer, conveyance, or dissipation of the property is for the purpose of suspending the enforcement of the property division that is the subject of the appeal. Tex. Fam. Code § 6.709(b).

A temporary order that suspends the operation of all or part of the property division that is the subject of the appeal may not be rendered unless the trial court takes reasonable steps to ensure that the party awarded property in the trial court's property division is protected from the other party's dissipation or transfer of that property. Tex. Fam. Code § 6.709(c). In considering a party's request to suspend the enforcement of the property division, the trial court shall consider whether any relief granted under section 6.709(a) is adequate to protect the party's interest in the property awarded to the party or the party who was not awarded the property should also be required to provide security for the appeal in addition to any relief granted under section 6.709(a). Tex. Fam. Code § 6.709(d).

If the trial court determines that the party awarded the property can be adequately protected from the other party's dissipation of assets during the appeal only if the other party provides security for the appeal, the trial court shall set the appropriate amount of security, taking into consideration any relief granted under section 6.709(a) and the

amount of security that the other party would otherwise have to provide by law if relief under section 6.709(a) was not granted. Tex. Fam. Code § 6.709(e).

In rendering a temporary order that suspends enforcement of all or part of the property division, the trial court may grant any relief under section 6.709(a), in addition to requiring the party who was not awarded the property to post security for that part of the property division to be suspended. The trial court may require that the party who was not awarded the property post all or only part of the security that would otherwise be required by law. Tex. Fam. Code § 6.709(f).

Section 6.709 does not prevent a party who was not awarded the property from exercising that party's right to suspend the enforcement of the property division as provided by law. Tex. Fam. Code § 6.709(g).

Similarly, the court may make any order necessary to preserve and protect the safety and welfare of a child. In addition to other matters, the court may appoint temporary conservators for the child and provide for possession of the child, make orders for temporary support, enter restraining orders, prohibit a person from removing the child beyond a certain geographical area, require payment of reasonable and necessary attorney's fees and expenses, or suspend the operation of the order or judgment that is being appealed. Tex. Fam. Code § 109.001(a). An award of appellate attorney's fees in a suit affecting the parent-child relationship is not required to be conditioned on a successful appeal. *In re Mansour*, 360 S.W.3d 103, 108–09 (Tex. App.—San Antonio 2020, orig. proceeding); *In re Jafarzadeh*, No. 05-14-01576-CV, 2015 WL 72693, at *2 (Tex. App.—Dallas Jan. 2, 2015, orig. proceeding) (mem. op.).

A temporary order pending appeal enjoining a party from molesting or disturbing the peace of the child or another party may be rendered without the issuance of a bond between the parties or an affidavit or a verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result. The temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. Tex. Fam. Code § 109.001(b).

A motion seeking an original temporary order under section 109.001 may be filed before trial and may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.001(b–1). The trial court retains jurisdiction to conduct a hearing and sign a temporary order until the sixtieth day after the date any eligible party has filed a

notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.001(b–2).

The trial court also retains jurisdiction to modify and enforce a temporary order unless the appellate court, on a proper showing, supersedes the court's order. Tex. Fam. Code § 109.001(b–3). On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the safety and welfare of the child. Tex. Fam. Code § 109.001(b–4).

The temporary orders rendered by the trial court pending appeal are not subject to interlocutory appeal. Tex. Fam. Code § 109.001(c). A party may seek review of the trial court's temporary order under section 109.001 by petition for writ of mandamus or proper assignment in the party's brief. Tex. Fam. Code § 109.001(b–5).

Chapter 5
Discovery

I. Discovery in General

§ 5.1 Forms of Discovery Generally 189
§ 5.2 Discovery Control Plan 189
§ 5.3 Modification of Discovery Procedures 192
§ 5.4 Certificate for Discovery Motions 193
§ 5.5 Signature Required 193
§ 5.6 Filing, Retention, and Service of Discovery Materials 194
§ 5.7 Orders for Protection from Discovery 194
§ 5.8 Discovery from Nonparties 195
§ 5.9 Discovery of Customer Records from Financial Institution 197
§ 5.10 Mandamus as Remedy 198

II. Scope of Discovery

§ 5.21 Scope of Discovery Generally 199
§ 5.22 Documents and Tangible Things 200
§ 5.22:1 Documents and Tangible Things Generally 200
§ 5.22:2 Medical Records and Authorizations 201
§ 5.22:3 Mental Health Records 201
§ 5.22:4 Health Insurance Portability and Accountability Act . . . 203
§ 5.22:5 Substance Use Disorder Patient Records 206
§ 5.23 Potential Parties and Witnesses 209
§ 5.24 Testifying and Consulting Experts 209
§ 5.25 Witness Statements 211
§ 5.26 Other Topics of Discovery 211
§ 5.27 Work Product 211
§ 5.28 Privileged Matters 212

§ 5.29 Waiving Objections to Discovery or Assertions of Privilege. 215

III. Written Discovery

§ 5.40 Written Discovery Defined. 216
§ 5.41 Requests for Disclosure—Suits Filed before January 1, 2021 217
§ 5.42 Required Disclosures—Suits Filed on or after January 1, 2021. 219
§ 5.43 Requests for Production and Inspection of Documents and Tangible Things 224
§ 5.44 Request or Motion for Entry on Property. 226
§ 5.45 Interrogatories to Parties. 227
§ 5.46 Requests for Admissions 229
§ 5.47 Responses and Objections to Written Discovery 230
§ 5.48 Amending or Supplementing Responses to Written Discovery 233
§ 5.49 Effect of Failure to Timely Respond 234

IV. Discovery Regarding Testifying Experts

§ 5.61 Permitted Means of Discovery 235
§ 5.62 Designation of Experts 236
§ 5.63 Depositions 236
§ 5.64 Reports of Experts 237
§ 5.65 Protected Communications, Expert Reports, and Disclosures 237
§ 5.66 Amendment and Supplementation of Discovery 238

V. Mental or Physical Examinations

§ 5.71 Motion and Order for Mental or Physical Examination. 238
§ 5.72 Cases Arising under Title 2 or Title 5 of Family Code 239
§ 5.73 No Examination 239
§ 5.74 Selection and Report of Examining Professional. 239

VI. Depositions

§ 5.81 Oral Depositions 240

§ 5.82 Compelling Appearance; Production of Documents and Things at Oral Deposition 242

§ 5.83 Written Questions at Oral Deposition 243

§ 5.84 Conduct and Objections during Oral Deposition 243

§ 5.85 Hearing on Objection or Privilege 244

§ 5.86 Nonstenographic Recording; Deposition by Telephone 244

§ 5.87 Depositions on Written Questions 245

§ 5.88 Depositions in Foreign Jurisdictions 246

§ 5.89 Depositions before Suit or to Investigate Claims 246

§ 5.90 Signing, Certification, and Use of Depositions 247

§ 5.91 Amending or Supplementing Deposition Testimony 248

VII. Subpoenas

§ 5.101 Subpoenas 248

§ 5.102 Enforcement of Subpoenas 250

VIII. Abuse of Discovery and Sanctions

§ 5.111 Motion for Sanctions or Order Compelling Discovery 251

§ 5.112 Failure to Comply with Order or Discovery Request 252

§ 5.113 Abuse of Discovery Process 255

§ 5.114 Failure to Comply with Rule 198 256

§ 5.115 Failure to Attend or Serve Subpoena 256

§ 5.116 False Certification 256

Chapter 5

Discovery

I. Discovery in General

Amendments to the Texas Rules of Civil Procedure effective for suits filed on or after January 1, 2021, alter several aspects of discovery practice in those cases. *See* Texas Supreme Court, *Final Approval of Amendments to Texas Rules of Civil Procedure 47, 99, 169, 190, 192, 193, 194, 195, 196, 197, and 198*, Misc. Docket No. 20-9153 (Dec. 23, 2020), 84 Tex. B.J. 149 (2021). Where they differ, both pre- and post-amendment procedures are addressed in these practice notes.

§ 5.1 Forms of Discovery Generally

The permissible forms of discovery are (1) requests for disclosure (for suits filed before January 1, 2021) or required disclosures (for suits filed on or after January 1, 2021), (2) requests for production and inspection of documents and tangible things, (3) requests and motions for entry on and examination of real property, (4) interrogatories to a party, (5) requests for admission, (6) oral or written depositions, and (7) motions for mental or physical examinations. Tex. R. Civ. P. 192.1. These forms may be combined in one document and may be taken in any order or sequence; for suits filed on or after January 1, 2021, the rules provide that a party cannot serve discovery on another party until after the other party's initial disclosures are due unless otherwise agreed to by the parties or ordered by the court. Tex. R. Civ. P. 192.2. The forms of discovery and related procedures are discussed in parts III. through VI. below.

§ 5.2 Discovery Control Plan

A discovery control plan governs all cases. A petitioner must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under level 1, 2, or 3 of rule 190. Tex. R. Civ. P. 190.1.

The initial pleading required by rule 190.1 is merely to notify the court and the other parties of the petitioner's intention and does not determine the applicable discovery level or bind the court or other parties. A petitioner's failure to include this statement is subject to special exception. *See* Tex. R. Civ. P. 190 cmt. 1.

Discovery Control Levels:

Level 1: In suits filed before January 1, 2021, level 1 applies to any suit that is governed by the expedited actions process in rule 169 and any divorce action not involving children in which a party pleads that the value of the marital estate is more than zero but $50,000 or less; for suits filed on or after January 1, 2021, the relevant maximum value of the marital estate is $250,000. Tex. R. Civ. P. 190.2(a)(2). Level 1 rules will not apply if the parties agree that level 2 rules should apply or the court orders a level 3 plan. If the filing of a pleading renders level 1 no longer applicable, the discovery period reopens, and discovery must be completed within the limitations set by level 2 or 3, whichever applies. Tex. R. Civ. P. 190.2(c).

Level 2: Level 2 applies to all other cases except level 3 cases. Tex. R. Civ. P. 190.3(a).

Level 3: Level 3 applies to those cases for which the court orders discovery conducted according to a discovery plan tailored to the circumstances of the specific suit. The court must make such an order on a party's motion and may do so on its own initiative. The parties may submit an agreed order for the court's consideration. The court should act on a party's motion or agreed order as promptly as reasonably possible. Tex. R. Civ. P. 190.4(a).

Discovery Limitations: Level 1 and level 2 cases are subject to discovery limitations provided elsewhere in the rules, as well as to additional limitations (described below) specified in rule 190. Tex. R. Civ. P. 190.2(b), 190.3(b).

A level 3 plan may address any discovery issue or matter listed in rule 166 and may change any limitation on the timing or amount of discovery provided by the discovery rules. The level 1 or level 2 limitations apply unless they are specifically changed in the court-ordered plan. Tex. R. Civ. P. 190.4(b).

Level 1: For level 1 suits filed before January 1, 2021, the discovery period begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party. Unless the total time permitted is expanded by agreement or court order, each party may have only six hours in total to examine and

cross-examine all witnesses in oral depositions. Tex. R. Civ. P. 190.2(b)(1), (b)(2) (2013).

For level 1 suits filed on or after January 1, 2021, the discovery period begins when the first initial disclosures are due and continues for 180 days. Tex. R. Civ. P. 190.2(b)(1). (Initial disclosures are due thirty days after the filing of the first answer or general appearance unless otherwise agreed by the parties or ordered by the court. Tex. R. Civ. P. 194.2(a).) Each party may have only twenty hours in total to examine and cross-examine all witnesses in oral depositions, although the court may modify the deposition hours so that no party is given unfair advantage. Tex. R. Civ. P. 190.2(b)(2).

Without regard to when the suit is filed, each party in a level 1 case may serve no more than fifteen interrogatories on any other party. Interrogatories asking only for identification or authentication of specific documents are not included in this fifteen-interrogatory limit. Each discrete subpart of an interrogatory is considered a separate interrogatory. Tex. R. Civ. P. 190.2(b)(3). A discrete subpart of an interrogatory is counted as a single interrogatory, but not every separate factual inquiry is a discrete subpart. Although not susceptible of precise definition, a discrete subpart is, in general, one that calls for information that is not logically or factually related to the primary interrogatory. Tex. R. Civ. P. 190 cmt. 3. *See In re SWEPI L.P.*, 103 S.W.3d 578, 589 (Tex. App.—San Antonio 2003, orig. proceeding) (no "discrete subparts" found where each question related to particular claim and asked plaintiff to provide certain details about facts underlying that claim and "subparts" simply identified types of facts defendant would like to have had disclosed so that it could understand parameters of claims and prepare defenses).

Any party may serve on any other party no more than fifteen written requests for production and no more than fifteen written requests for admissions. Each discrete subpart of a request for production or request for admissions is considered a separate request. Tex. R. Civ. P. 190.2(b)(4), (b)(5).

Level 2: For level 2 suits filed before January 1, 2021, discovery begins when the suit is filed and, in cases under the Family Code, continues until thirty days before the date set for trial. Tex. R. Civ. P. 190.3(b)(1) (1999).

For level 2 suits filed on or after January 1, 2021, discovery begins when the first initial disclosures are due and, in cases under the Family Code, continues until thirty days before the date set for trial. Tex. R. Civ. P. 190.3(b)(1). (Initial disclosures are due thirty

days after the filing of the first answer or general appearance unless otherwise agreed by the parties or ordered by the court. *See* Tex. R. Civ. P. 194.2(a).)

Without regard to when the suit is filed, each side in a level 2 case is limited to fifty hours of oral depositions to examine and cross-examine parties on the opposing side, those parties' experts, and persons subject to those parties' control. Each party may serve no more than twenty-five interrogatories on any other party. Interrogatories asking only for identification or authentication of specific documents are not included in this twenty-five-interrogatory limit. Each discrete subpart of an interrogatory is considered a separate interrogatory. Tex. R. Civ. P. 190.3(b)(2), (b)(3).

Level 3: A level 3 discovery control plan must include a date for trial or for a conference to determine a trial date; a discovery period for the entire case or an appropriate phase of it; appropriate limits on the amount of discovery; and deadlines for joinder, amendments or supplements to pleadings, and designation of expert witnesses. Tex. R. Civ. P. 190.4(b).

Exceptions: Rule 190 discovery limitations do not apply to discovery conducted under rule 202 (before suit) or rule 621a (after judgment), although rule 202 may not be used to circumvent rule 190. Tex. R. Civ. P. 190.6.

Modification of Discovery Control Plan: The court may modify a discovery control plan at any time and must do so when justice requires. Tex. R. Civ. P. 190.5. Rule 190.5(a) and (b) sets out the circumstances under which the court must allow additional discovery.

§ 5.3 Modification of Discovery Procedures

Except where specifically prohibited, the parties may modify the procedures and limitations of the discovery rules by agreement. An agreement of the parties is enforceable if it complies with rule 11 or, as it affects an oral deposition, if it is made a part of the deposition record. The procedures and limitations may also be modified by court order for good cause. Tex. R. Civ. P. 191.1. *See John H. Carney & Associates v. Ahmad*, No. 07-15-00252-CV, 2016 WL 368527 (Tex. App.—Amarillo Jan. 28, 2016, pet. denied) (mem. op.).

§ 5.4 Certificate for Discovery Motions

Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request stating that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and that the effort failed. Tex. R. Civ. P. 191.2. A court may hear a discovery motion or request even if the movant has failed to include a certificate of conference. The failure of a court to require the certificate of conference cannot justify mandamus relief. *Tjernagel v. Roberts*, 928 S.W.2d 297, 300–01 (Tex. App.—Amarillo 1996, orig. proceeding).

§ 5.5 Signature Required

Every disclosure, request for discovery, notice, response, and objection must be signed by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any. If the party is not represented by an attorney, the item must be signed by the party and must show the party's address, telephone number, and fax number, if any. Tex. R. Civ. P. 191.3(a).

The signature on a disclosure certifies that, to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. Tex. R. Civ. P. 191.3(b). The signature on a discovery request, notice, response, or objection certifies that, to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the item (1) is consistent with the rules and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; (2) has a good-faith factual basis; (3) is not interposed for an improper purpose; and (4) is not unreasonable or unduly burdensome or expensive. Tex. R. Civ. P. 191.3(c). If the certification required under rule 191.3 is false without substantial justification, the court may, on motion or on its own initiative, impose on the person who made the certification or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under chapter 10 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 191.3(e).

A request, notice, response, or objection that is not signed must be stricken unless it is signed promptly after the omission is brought to the attention of the party making the

request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed. Tex. R. Civ. P. 191.3(d).

§ 5.6 Filing, Retention, and Service of Discovery Materials

Filing: The following discovery materials must be filed with the court: (1) discovery requests, deposition notices, and subpoenas required to be served on *nonparties*; (2) motions and responses to motions pertaining to discovery matters; and (3) agreements concerning discovery matters, to the extent necessary to comply with rule 11. Tex. R. Civ. P. 191.4(b).

With certain exceptions, the following discovery materials must not be filed: (1) discovery requests, deposition notices, and subpoenas required to be served only on parties; (2) responses and objections to discovery requests and deposition notices; (3) documents and tangible things produced in discovery; and (4) statements prepared under rule 193.3(b) or (d). Tex. R. Civ. P. 191.4(a). However, the court may order discovery materials to be filed, a person may file discovery materials in support of or opposition to a motion or for other use in a court proceeding, and a person may file discovery materials necessary for an appellate proceeding. Tex. R. Civ. P. 191.4(c).

Retention: A person required to serve discovery materials that are not required to be filed must retain the original or an exact copy during pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless the trial court provides otherwise. Tex. R. Civ. P. 191.4(d).

COMMENT: To avoid this requirement, the practitioner should include a provision in the final order excusing each party from the obligation to retain these documents. The forms for final orders in this manual contain this provision as an option. The wise practitioner will want to omit this provision if there is a reasonable possibility of an appeal.

Service: Every disclosure, discovery request, notice, response, and objection that is required to be served on a party or person must be served on all parties of record. Tex. R. Civ. P. 191.5.

§ 5.7 Orders for Protection from Discovery

Motion: A person from whom discovery is sought, and any other person affected by the discovery, may move for an order protecting the person from such discovery. The motion must be brought within the time permitted for response to the subject discovery.

A person should not move for protection when an objection to written discovery or assertion of privilege is appropriate, although the motion does not waive the objection or assertion of privilege. A person seeking protection regarding the time or place of discovery must state a reasonable time and place for compliance. A person must comply with any part of a request from which protection is *not* sought unless it would be unreasonable under the circumstances to do so before obtaining a ruling. Tex. R. Civ. P. 192.6(a).

Order: The court may make any order necessary to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, including but not limited to the orders listed in rule 192.6(b). Tex. R. Civ. P. 192.6(b).

COMMENT: Often documents are requested in a family law case, such as a divorce, that are of a highly confidential nature. If there is a concern that documents may cause harm if improperly disclosed to third persons, a confidentiality order may be considered to prevent disclosure. *See* Tex. R. Civ. P. 192.6 (discussed above). If sensitive material will be produced in the trial, it may be preferable to enter into a confidentiality agreement with opposing counsel and to request that the court's file be sealed after trial instead of filing a formal motion for a protective order. *See* Tex. R. Civ. P. 76a. *But see* Tex. R. Civ. P. 76a(1) ("No court order or opinion issued in the adjudication of a case may be sealed."), 76a(2)(a)(3) (other documents filed in action originally arising under Family Code are exempted from requirements of rule 76a). See also forms 5-8 (confidentiality order), 26-24 (motion to seal court records), and 26-25 (order on motion to seal court records) in this manual.

§ 5.8 Discovery from Nonparties

A nonparty for purposes of discovery is defined as a person who is not a party or subject to a party's control. Tex. R. Civ. P. 205.1.

COMMENT: Depending on the facts of the case, it is possible that persons such as a party's employee, private investigator, accountant, stockbroker, expert, etc., would not be considered nonparties for purposes of discovery if they are subject to the party's control.

A party may compel discovery from nonparties without the necessity of a motion or deposition. Tex. R. Civ. P. 205.1, 205.3. A party seeking discovery by subpoena from a nonparty must serve a copy of the form of notice that the rules require for the particular

form of discovery. The party must serve this notice on the nonparty and on all other parties. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. Tex. R. Civ. P. 205.2.

A party may compel production of documents and tangible things from a nonparty by serving, a reasonable time before the response is due but no later than thirty days before the end of any applicable discovery period, the required notice and a subpoena compelling production or inspection of documents or tangible things. Tex. R. Civ. P. 205.3(a). A notice to produce documents or tangible things under rule 205.3 must be served at least ten days before the subpoena compelling production is served. Tex. R. Civ. P. 205.2.

The notice must state the person from whom production or inspection is sought, a reasonable time and place for production or inspection, and the items to be produced or inspected. Tex. R. Civ. P. 205.3(b). If a nonparty's health-care records are sought from another nonparty, the nonparty whose records are being sought must be notified of the request. Tex. R. Civ. P. 205.3(c).

The nonparty must respond to the notice and subpoena requesting production in accordance with rule 176.6. Tex. R. Civ. P. 205.3(d). The material obtained must be made available for inspection by any other party on reasonable notice, and copies must be furnished to any party at the requesting party's expense. Tex. R. Civ. P. 205.3(e). The nonparty's cost of producing records must be reimbursed by the party requesting the records from the nonparty. Tex. R. Civ. P. 205.3(f).

COMMENT: The practitioner may send the nonparty a business records affidavit or declaration for its custodian of records to complete and return with the requested records. The practitioner should include a letter asking for the execution of this affidavit or declaration to avoid having to depose the business records custodian or having to compel the testimony of the custodian at trial. In many cases the nonparty will gladly complete the affidavit or declaration to avoid further involvement in the suit. See form 5-95 in this manual. *See also* Tex. Civ. Prac. & Rem. Code § 22.004 (fees party must pay custodian of records).

The nonparty has standing to seek a protective order under rule 192.6. *See* Tex. R. Civ. P. 192.6; *In re Shell E & P, Inc.*, 179 S.W.3d 125, 130 (Tex. App.—San Antonio 2005, orig. proceeding). See also section 5.7 above.

§ 5.9 Discovery of Customer Records from Financial Institution

To obtain discovery of a record of a financial institution relating to one or more of that institution's customers, the requesting party must comply with section 59.006 of the Texas Finance Code. With some exceptions that generally will not apply to a family lawsuit, section 59.006 is the exclusive method to compel this discovery. Tex. Fin. Code § 59.006(a). Subject to these exceptions, a financial institution is required to produce a record in response to a request only if it is served with the record request not later than the twenty-fourth day before the date that compliance with the record request is required and the requesting party pays the financial institution's reasonable costs of complying with the record request before the institution complies with the request. Tex. Fin. Code § 59.006(b)(1), (b)(2). If the requesting party has not paid the financial institution's costs or posted a cost bond, the court may not order the institution to produce the record or find the institution in contempt of court for failing to produce it. Tex. Fin. Code § 59.006(b–1).

If the customer is not a party to the proceeding in which the request was issued, in addition to serving the financial institution with a record request, the requesting party must satisfy the following conditions:

1. The requesting party must give the customer a notice stating the rights of the customer under Finance Code section 59.006(e) and give the customer a copy of the request in the manner and within the time provided by Texas Rule of Civil Procedure 21a.

2. The requesting party must file a certificate of service indicating that the requesting party has given the customer both this notice and a copy of the record request.

3. The requesting party must request the customer's written consent authorizing the financial institution to comply with the record request.

Tex. Fin. Code § 59.006(c).

If the customer is not a party to the proceeding, the financial institution does not have to provide the requested records until the requesting party completes each of these steps and the financial institution receives the customer's written consent to release the record or the tribunal takes further action based on action initiated by the requesting party under section 59.006(d). Tex. Fin. Code § 59.006(b)(3).

If the customer is not a party to the proceeding and the customer does not execute a written consent on or before the date compliance is required, the requesting party may by written motion seek an in camera inspection of the requested record as its sole means of obtaining access to the requested record. In response to a motion for in camera inspection, the tribunal may inspect the requested record to determine its relevance to the matter before the tribunal. The tribunal may order redaction of portions of the records that the tribunal determines should not be produced and shall enter a protective order preventing the record that it orders produced from being disclosed to a person who is not a party to the proceeding before the tribunal and from being used by a person for any purpose other than resolving the dispute before the tribunal. Tex. Fin. Code § 59.006(d).

A customer that is a party to the proceeding bears the burden of preventing or limiting the financial institution's compliance with a record request subject to section 59.006 by seeking an appropriate remedy, including filing a motion to quash the record request or a motion for a protective order. Any motion filed shall be served on the financial institution and the requesting party before the date that compliance with the request is required. A financial institution is not liable to its customer or another person for disclosure of a record in compliance with section 59.006. Tex. Fin. Code § 59.006(e). An order to quash or for protection or other remedy entered or denied by the tribunal under section 59.006(d) or (e) is not a final order, and an interlocutory appeal may not be taken. Tex. Fin. Code § 59.006(g).

A financial institution may not be required to produce a record under section 59.006 before the later of the twenty-fourth day after the date of receipt of the record request, the fifteenth day after the date of receipt of a customer consent to disclose a record, or the fifteenth day after the date a court orders production of a record after an in camera inspection of a requested record. Tex. Fin. Code § 59.006(f).

§ 5.10 Mandamus as Remedy

A party is entitled to full, fair discovery within a reasonable period of time. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam). Mandamus is available in some circumstances to protect a party against an order compelling a response to a discovery request or to require a trial court to compel a party to respond. In the discovery context, there are at least three situations in which a remedy by appeal will be inadequate:

1. The appellate court would not be able to cure the trial court's discovery error; for example, the trial court erroneously orders the disclosure of privileged information that will materially affect the rights of the aggrieved party.

2. The party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error.

3. The trial court disallows discovery, and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make the discovery part of the record, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it.

Walker v. Packer, 827 S.W.2d 833, 843–44 (Tex. 1992, orig. proceeding).

If the discovery goes to the heart of the case there is not adequate remedy at law. *See In re Colonial Pipeline*, 968 S.W.2d at 942. Mandamus is the only remedy if a protective order shields the witnesses from deposition and thereby prevents the evidence from being part of the record. *See Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 558 (Tex. 1990) (orig. proceeding). The blanket denial of all discovery from a witness in a civil case, if that witness is also a defendant in a pending criminal case arising out of the same facts and the witness is also expected to testify in the criminal case, is subject to mandamus. *See In re R.R.*, 26 S.W.3d 569, 574 (Tex. App.—Dallas 2000, orig. proceeding). If the trial court fails to rule on discovery objections, the judge is subject to mandamus. *In re Belton*, No. 10-05-00285-CV, 2005 WL 2300366 (Tex. App.—Waco Sept. 25, 2005, orig. proceeding) (per curiam) (mem. op.).

Mandamus is discussed at length in chapter 27 of this manual.

[Sections 5.11 through 5.20 are reserved for expansion.]

II. Scope of Discovery

§ 5.21 Scope of Discovery Generally

Information is subject to discovery if it is not privileged and is relevant to the subject matter of the litigation or appears reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a). Discovery is not limited to what may be admissible at trial. Tex. R. Civ. P. 192.3(a); *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155, 160 (Tex. 1993) (orig. proceeding); *Lindsey v. O'Neill*, 689 S.W.2d 400, 402 (Tex.

1985) (orig. proceeding) (per curiam); *see also* Tex. R. Evid. 401 (definition of "relevant evidence"). The Texas Supreme Court, however, has repeatedly emphasized that discovery may not be used as a fishing expedition. Rather, requests must be reasonably tailored to include only matters relevant to the case. *In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam).

The court should limit the discovery methods permitted by the rules if it determines that the discovery sought is unreasonably cumulative or duplicative or may be obtained from another source that is more convenient, less burdensome, or less expensive, or that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. Tex. R. Civ. P. 192.4. A party resisting discovery may not make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order. *In re Energas Co.*, 63 S.W.3d 50, 54 (Tex. App.—Amarillo 2001, orig. proceeding).

§ 5.22 Documents and Tangible Things

§ 5.22:1 Documents and Tangible Things Generally

A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control. Tex. R. Civ. P. 192.3(b).

"Possession, custody, or control of an item" means that the person either has physical possession of the item or has a right to possession that is equal to or superior to that of the person who has physical possession. Tex. R. Civ. P. 192.7(b); *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *7 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.) (objection that information sought is equally available is invalid objection; discovery request ensures that parties have same basic documents and allows party to activate automatic authentication rights provided by rule 193.7). A party's mere access to the relevant item does not constitute "physical

possession" under this definition if the item is owned or otherwise controlled by someone else. *In re Kuntz*, 124 S.W.3d 179, 184 (Tex. 2003) (orig. proceeding).

§ 5.22:2 Medical Records and Authorizations

Records related to physical, mental, or emotional condition may be admissible under the provisions of rules 509(e)(4) and 510(d)(5) of the Texas Rules of Evidence, as construed by the Texas Supreme Court. *R.K. v. Ramirez*, 887 S.W.2d 836, 842–43 (Tex. 1994) (orig. proceeding). The rules provide that a privilege does not apply to a communication or record relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies on the condition as a part of the party's claim or defense. Tex. R. Evid. 509(e)(4), 510(d)(5). The records sought must be relevant to the condition at issue, and the condition must be relied on as part of a party's claim or defense, "meaning that the condition itself is a fact that carries some legal significance." *R.K.*, 887 S.W.2d at 843. The court must ensure that the need for the information is not outweighed by legitimate privacy interests protected by the privilege; the exception to the privilege does not extend to information about a nonparty patient who is or may be a consulting or testifying expert in the suit. Tex. R. Evid. 509 cmt., 510 cmt. See also section 5.28 below.

The test is not simply whether the condition is relevant, because any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist. *See In re Morgan*, 507 S.W.3d 400, 404 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding). The test is not satisfied if the patient's condition is merely an evidentiary or intermediate issue of fact, rather than an ultimate issue for a claim or defense, or if the condition is merely tangential to a claim rather than central to it. *R.K.*, 887 S.W.2d at 843.

§ 5.22:3 Mental Health Records

Chapter 611 of the Texas Health and Safety Code governs the confidentiality of mental health records and their disclosure. A parent's right of access to a child's psychological records is not absolute. Although Family Code section 153.073 grants a parent who is divorced and who has been named a conservator the same rights of access to a child's psychological records as a parent who is not divorced, this right is subject to the provisions of chapter 611 of the Texas Health and Safety Code. *Abrams v. Jones*, 35 S.W.3d 620, 624 (Tex. 2000).

Communications between a patient and a professional, as well as records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential. Tex. Health & Safety Code § 611.002(a). A "professional" is a person authorized to practice medicine in any state or nation; a person licensed or certified by Texas to diagnose, evaluate, or treat any mental or emotional condition or disorder; or a person the patient reasonably believes is authorized, licensed, or certified as provided by Health and Safety Code section 611.001(2). Tex. Health & Safety Code § 611.001(2). Confidential communications or records may not be disclosed except as provided by Health and Safety Code section 611.004 or 611.0045. Tex. Health & Safety Code § 611.002(b). The privilege of confidentiality may be claimed by—

1. the patient;
2. if acting on the patient's behalf, a person who has the written consent of the patient, a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs;
3. if acting on the patient's behalf, the patient's representative if the patient is deceased; or
4. the professional, on behalf of the patient.

See Tex. Health & Safety Code § 611.003(a); *see also* Tex. Health & Safety Code § 611.004(a)(4), (a)(5).

A professional may disclose confidential information only in the limited circumstances set forth in Health and Safety Code section 611.004. *See* Tex. Health & Safety Code § 611.004. No exception to confidentiality under section 611.004 may be construed to create an independent duty or requirement to disclose the confidential information to which the exception applies. Tex. Health & Safety Code § 611.002(b–1). A professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health. Tex. Health & Safety Code § 611.0045(b). A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. This restriction does not apply to, among others, a person who has the written consent of the patient, or a parent if the patient is a minor, if the person is acting on the patient's behalf. Tex. Health & Safety Code § 611.004(d). A mental health professional is not required to provide access to a child's confidential records if a parent who requests them is not acting on behalf of the child. *Abrams*, 35 S.W.3d at 625–26. When a parent *is* acting on behalf of a child, the question that then

arises is whether, under section 611.0045(b), a professional may nevertheless deny access to a portion of a child's records if their release would be harmful to the patient's physical, mental, or emotional health. *Abrams*, 35 S.W.3d at 626.

A person aggrieved by the improper disclosure of or failure to disclose confidential communications or records in violation of Health and Safety Code chapter 611 may petition the district court of the county in which the person resides for appropriate relief, including injunctive relief. A person may petition a district court of Travis County if the person is not a resident of Texas. Tex. Health & Safety Code § 611.005(a). In a suit contesting the denial of access under Health and Safety Code section 611.0045, the burden of proving that the denial was proper is on the professional who denied the access. Tex. Health & Safety Code § 611.005(b); *see also Abrams*, 35 S.W.3d at 627 (citing Health and Safety Code section 611.0045(b)). The aggrieved person also has a civil cause for damages. Tex. Health & Safety Code § 611.005(c). In addition, a parent denied access to a child's records has judicial recourse and may petition a district court for appropriate relief. *Abrams*, 35 S.W.3d at 626–27 (citing Health and Safety Code section 611.0045(a)).

§ 5.22:4 Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104–191, 110 Stat. 1936 (1996), went into effect on April 14, 2001, with compliance required of all health plans by April 14, 2004. *See* 45 C.F.R. § 164.534.

Under HIPAA, a "covered entity" means a health plan, a health-care clearinghouse, and a health-care provider who transmits any health information in electronic form in connection with a transaction covered by 45 C.F.R. subchapter C. "Health-care provider" means a provider of medical or health services and any other person or organization that furnishes, bills, or is paid for health care in the normal course of business. "Health information" means any information, including genetic information, whether oral or recorded in any form or medium, that (1) is created or received by a health-care provider, health plan, public health authority, employer, life insurer, school, university, or health-care clearing house and (2) relates to the past, present, or future physical or mental health or condition of an individual, to the provision of health care to an individual, or to the past, present, or future payment for the provision of health care to an individual. 45 C.F.R. § 160.103.

"Individually identifiable health information" is information that is a subset of health information, including demographic information that is collected from the individual,

(1) that is created or received by a health-care provider, health plan, employer, or health-care clearinghouse; (2) that relates to the past, present, or future physical or mental health of an individual, to the provision of health care to an individual, or to the past, present, or future payment for the provision of health care to an individual; and (3) that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual. "Protected health information" means individually identifiable health information that is transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form or medium. However, protected health information excludes individually identifiable health information in education records covered by the Family Educational Rights and Privacy Act, records described at 20 U.S.C. § 1232g(a)(4)(B)(iv), and employment records held by a covered entity in its role as employer. 45 C.F.R. § 160.103.

45 C.F.R. § 164.508 permits disclosure of protected health information when a covered entity obtains or receives a valid authorization. A valid authorization must contain at least the following core elements:

1. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
2. The name or other specific identification of the person(s) or class of persons authorized to make the requested use or disclosure.
3. The name or other specific identification of the person(s) or class of persons to whom the covered entity may make the requested use or disclosure.
4. A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
5. An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure.
6. The signature of the individual and the date. If the authorization is signed by a personal representative of the individual, a description of the representative's authority to act for the individual must also be provided.

45 C.F.R. § 164.508(c)(1).

The authorization must contain statements adequate to place the individual on notice of (1) the individual's right to revoke the authorization in writing, (2) the ability or inabil-

ity to condition treatment on the authorization if the covered entity is requesting the authorization, and (3) the potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by the rule. 45 C.F.R. § 164.508(c)(2).

The authorization must be written in plain language. 45 C.F.R. § 164.508(c)(3).

A personal representative must attach legal documentation that permits him to act on the patient's behalf. *See* 45 C.F.R. § 164.508(c)(1)(vi).

COMMENT: A personal representative for a child is a parent, a guardian, or someone legally acting as a parent or guardian with authority to make health-care decisions on behalf of the minor. A personal representative for an adult or an emancipated minor is a person with a medical power of attorney or a health-care proxy or who has been given authority under a court order or has been appointed a legal guardian. A patient's lawyer may never be the patient's personal representative for HIPAA privacy purposes.

Generally stated, there are three ways to obtain copies of a person's individually identifiable health information from a covered entity: (1) the patient may personally request the information, (2) the patient may sign an authorization in favor of a third party that contains prescribed statements and information, and (3) the party seeking the information may obtain an order made in a judicial or administrative proceeding pursuant to 45 C.F.R. § 164.512(e).

A covered entity may disclose protected health information (PHI) in the course of any judicial proceeding in response to a court order, provided the covered entity discloses only the PHI expressly authorized by the order. 45 C.F.R. § 164.512(e)(1)(i). A covered entity may also disclose PHI in response to a subpoena, discovery request, or lawful process not accompanied by a court order if the covered entity receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by that party to ensure that the individual who is the subject of the requested PHI has been given notice of the request or that the requesting party has made reasonable efforts to secure a qualified protective order that meets the requirements of 45 C.F.R. section 164.512(e)(1)(v). 45 C.F.R. § 164.512(e)(1)(ii)(A), (e)(1)(ii)(B). "Satisfactory assurance" is defined by the regulations. *See* 45 C.F.R. § 164.512(e)(1)(iii), (e)(1)(iv).

Depending on the severity of the offense, the criminal penalties for wrongful disclosure of individually identifiable health information can range from a fine of up to $50,000, imprisonment for up to one year, or both to a fine of up to $250,000, imprisonment for up to ten years, or both. The higher penalties are reserved for offenses committed with

the intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm. 42 U.S.C. § 1320d–6.

§ 5.22:5 Substance Use Disorder Patient Records

Records of the identity, diagnosis, prognosis, or treatment of any patient that are maintained in connection with the performance of any program or activity relating to substance use disorder education, prevention, training, treatment, rehabilitation, or research that is conducted, regulated, or directly or indirectly assisted by any federal department or agency are generally confidential and may be disclosed only for specified purposes. 42 U.S.C. § 290dd–2. Among the means of authorized disclosure are a written consent of the patient and a court order. The content of any record described above may be disclosed in accordance with a prior written consent of the patient but only in accordance with federal regulations. *See* 42 U.S.C. § 290dd–2(b)(1). Records may also be disclosed if authorized by an appropriate order of a court of competent jurisdiction if the order is granted after an application showing good cause. In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. On granting the order, the court, in determining the extent to which any disclosure of all or any part of the record is necessary, shall impose appropriate safeguards against unauthorized disclosure. *See* 42 U.S.C. § 290dd–2(b)(2)(C).

A written consent to a disclosure of substance use disorder patient records covered by the federal regulations must include—

1. the name of the patient;
2. the specific name or general designation of the program, entity, or individual permitted to make the disclosure;
3. how much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed;
4. the names of the individual(s) or entity(ies) to whom disclosure is to be made;
5. the purpose of the disclosure;
6. a statement that the consent is subject to revocation at any time except to the extent that the program or person that is permitted to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third-party payer;

7. the date, event, or condition on which the consent will expire if not revoked before. This date, event, or condition must ensure that the consent will last no longer than reasonably necessary to serve the purpose for which it is provided;

8. the signature of the patient and, when required for a patient who is a minor, the signature of an individual authorized to give consent under 42 C.F.R. section 2.14 or, when required for a patient who is incompetent or deceased, the signature of an individual authorized to sign under 42 C.F.R. section 2.15; and

9. the date on which the consent is signed.

42 C.F.R. § 2.31(a).

COMMENT: It may be advisable also to include in the written consent the address, Social Security number, and birth date of the patient, as well as the approximate dates of treatment. The attorney should contact the substance use disorder program administrator before preparing the consent to learn if the program requires any other specific information before it will honor the consent.

A disclosure may not be made on the basis of a consent that (1) has expired; (2) on its face substantially fails to conform to any of the requirements set forth in 42 C.F.R. section 2.31(a); (3) is known to have been revoked; or (4) is known, or through reasonable diligence could be known, by the individual or entity holding the records to be materially false. 42 C.F.R. § 2.31(b).

An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure that is sought. The application may be filed separately or as part of a pending civil action in which the applicant asserts that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of the regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny. 42 C.F.R. § 2.64(a). The patient and the person holding the records from whom disclosure is sought must be given adequate notice in a manner that does not disclose patient identifying information to other persons and an opportunity to file a written response to the application or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order. 42 C.F.R. § 2.64(b). Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers

or in some manner that ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner that meets the written consent requirements of the regulations. The proceeding may include an examination by the judge of the patient records referred to in the application. 42 C.F.R. § 2.64(c). An order under section 2.64 may be entered only if the court determines that good cause exists. To make this determination the court must find that other ways of obtaining the information are not available or would not be effective and that the public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the treatment services. 42 C.F.R. § 2.64(d).

A court order under the regulations may authorize disclosure of confidential communications made by a patient to a program in the course of diagnosis, treatment, or referral for treatment only if (1) the disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties; (2) the disclosure is necessary in connection with the investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one that directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or (3) the disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. 42 C.F.R. § 2.63(a).

An order authorizing a disclosure must (1) limit disclosure to those parts of the patient's record that are essential to fulfill the objective of the order; (2) limit disclosure to those persons whose need for information is the basis for the order; and (3) include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship, and the treatment services (for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered). 42 C.F.R. § 2.64(e). An order of a court of competent jurisdiction entered under 42 C.F.R. part 2, subpart E, to disclose confidential substance use disorder treatment records authorizes only a disclosure or use of patient information that would otherwise be prohibited by 42 U.S.C. section 290dd–2 and the regulations relating to the confidentiality of substance use disorder treatment records. The order does not compel disclosure. A subpoena or similar legal mandate must be issued to compel disclosure. The mandate may be entered at the same time as and accompany an authorizing court order entered under the regulations. 42 C.F.R. § 2.61(a).

Any person who violates any provisions of 42 U.S.C. section 290dd–2 or the regulations relating to the confidentiality of substance use disorder treatment records shall be fined in accordance with title 18 of the U.S. Code. 42 U.S.C. § 290dd–2(f); 42 C.F.R. § 2.3.

§ 5.23 Potential Parties and Witnesses

A party may obtain discovery of the name, address, and telephone number of any potential party. Tex. R. Civ. P. 192.3(i).

The same information may be obtained for persons having knowledge of relevant facts, as well as a brief statement of each such person's connection with the action. A person has knowledge of relevant facts when the person has or may have knowledge of any discoverable matter; the person need not have admissible information or personal knowledge. An expert is a "person with knowledge of relevant facts" only if the knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation. Tex. R. Civ. P. 192.3(c).

A party may obtain discovery of the name, address, and telephone number of any person expected to be called to testify at trial. This discovery does not extend to rebuttal or impeaching witnesses the necessity of whose testimony cannot be reasonably anticipated before trial. Tex. R. Civ. P. 192.3(d).

§ 5.24 Testifying and Consulting Experts

Testifying Experts: A testifying expert is an expert who may be called to testify as an expert witness at trial. Tex. R. Civ. P. 192.7(c).

If a party intends to call an expert at trial, the opposing party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert: (1) the expert's name, address, and telephone number; (2) the subject matter of expected testimony; (3) the facts known by the expert that relate to, or form the basis of, the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, regardless of when and how the factual information was acquired; (4) the mental impressions and opinions of the expert formed or made in connection with the case in which discovery is sought and any methods used to derive them; (5) evidence of bias; (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in antici-

pation of a testifying expert's testimony; and (7) the expert's current resume and bibliography. Tex. R. Civ. P. 192.3(e). Although rule 192.3(e)(5) permits discovery of bias evidence, a court generally may not require a nonparty witness to produce personal financial records and appointment books for that reason. *See In re Doctors' Hospital of Laredo*, 2 S.W.3d 504, 506–07 (Tex. App.—San Antonio 1999, orig. proceeding).

COMMENT: Certain information concerning testifying experts is subject to a request for disclosure under rule 194.2(f) (2004) for suits filed before January 1, 2021, and to required disclosure under rule 195.5(a) for suits filed on or after January 1, 2021. See the discussion at sections 5.41 and 5.42 below. Although the information listed under those rules is substantially like the items listed above from rule 192.3(e), the language is not identical, and items 6 and 7 above are subject to request for disclosure or required disclosure only for testifying experts retained by, employed by, or otherwise subject to the responding party's control. Additionally, for suits filed on or after January 1, 2021, three further items are included in required disclosure regarding those experts: (1) the expert's qualifications, including a list of all publications authored in the previous ten years; (2) unless the expert is the responding party's attorney and is testifying to attorney's fees, a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition; and (3) a statement of the compensation to be paid for the expert's study and testimony in the case. *See* Tex. R. Civ. P. 195.5(a)(4)(C)–(E).

A testifying expert may be "re-designated" as long as it is not part of a bargain between adversaries to suppress testimony or for some other improper purpose. The party may use the "re-designated" testifying expert as a consulting expert. *In re Doctors' Hospital of Laredo*, 2 S.W.3d at 506.

See section 8.71 in this manual for discussion of exclusion of expert witnesses.

Consulting Experts: A consulting expert is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial but who is not a testifying expert. Tex. R. Civ. P. 192.7(d). The identity, mental impressions, and opinions of an expert used for consultation only are not discoverable unless the consulting expert's opinions or impressions have been reviewed by a testifying expert. Tex. R. Civ. P. 192.3(e).

§ 5.25 Witness Statements

Any person may obtain, on written request, his or her own statement concerning the lawsuit that is in the possession, custody, or control of any party. A party may obtain discovery of the statement of any person with knowledge of relevant facts—a "witness statement"—regardless of when the statement was made. A witness statement is a written statement signed or otherwise adopted or approved in writing by the person making it or a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Tex. R. Civ. P. 192.3(h).

§ 5.26 Other Topics of Discovery

A party may obtain discovery of any other party's legal contentions and the factual bases for these contentions. Tex. R. Civ. P. 192.3(j). However, a marshaling of the evidence is not required for a request for disclosure (for suits filed before January 1, 2021), required disclosures (for suits filed on or after January 1, 2021), or interrogatories. Tex. R. Civ. P. 194.2(c) (2004), 194.2(b)(3), 197.1. The rules regarding requests for production do not contain any prohibition on marshalling of evidence. *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *7 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.). A party may also obtain discovery concerning indemnity and insuring agreements and settlement agreements as described in rule 192.3(f) and 192.3(g). *See* Tex. R. Civ. P. 192.3(f), (g).

§ 5.27 Work Product

Work Product Defined: The rules define the term *work product* as (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents, or (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. Tex. R. Civ. P. 192.5(a).

Protection of Work Product: Rule 192.5(b) provides two classifications for work product—core work product and other work product.

"Core work product" is defined as the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Core work product is not discoverable. Tex. R. Civ. P. 192.5(b)(1).

Any other work product is discoverable only on a showing that the party seeking discovery has substantial need of the materials in preparing the party's case and that the party is unable, without undue hardship, to obtain the substantial equivalent of the material by other means. Tex. R. Civ. P. 192.5(b)(2). If a court orders discovery of "other work product" the court must, insofar as possible, protect against disclosure of the core work product. Tex. R. Civ. P. 192.5(b)(4). It is not a violation of rule 192.5(b)(1) if ordered disclosure of "other work product" incidentally discloses by inference an attorney's mental processes that are otherwise protected under the rule. Tex. R. Civ. P. 192.5(b)(3). The privilege "is not an umbrella for protecting materials gathered in the ordinary course of business." *In re Maher*, 143 S.W.3d 907, 912 (Tex. App.—Fort Worth 2004, orig. proceeding).

An assertion that material or information is work product is an assertion of privilege. Tex. R. Civ. P. 192.5(d). See section 5.28 below.

Work Product Not Protected from Discovery: Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery: (1) information discoverable under rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under rule 166 or rule 190.4; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying facts or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in rule 503(d) of the Texas Rules of Evidence. Tex. R. Civ. P. 192.5(c); *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *6 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.).

§ 5.28 Privileged Matters

Information otherwise discoverable may be protected from disclosure by privilege. Privileges exist by way of court rules (procedural and evidentiary), statutes (including the Family Code), constitutional provisions, and case law. If not properly raised, privileges and other laws affecting discovery may be waived. See section 5.29 below. Procedures for asserting privileges to written discovery are described in section 5.47 below,

and procedures for asserting privileges during an oral deposition are discussed in section 5.84 below.

The following is a brief summary of the privileges and laws affecting discovery that are most often encountered in family law cases.

1. *Attorney Work Product Exemption.* Rule 192.5 provides for protection of certain attorney work product, which is discussed fully in section 5.27 above. Core work product (that is, the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories) is not discoverable. Tex. R. Civ. P. 192.5(b)(1).

   A request for a party to produce "a description and/or photograph of each and every exhibit that you intend to introduce in evidence" at trial was improper because it was directed at the attorney's mental process and trial strategy. *Texas Tech University Health Sciences Center v. Schild*, 828 S.W.2d 502, 503–04 (Tex. App.—El Paso 1992, orig. proceeding).

2. *Consulting Expert Privilege.* Tex. R. Civ. P. 192.3(e).

3. *Attorney-Client Privilege.* Tex. R. Evid. 503. *But see* Tex. Fam. Code § 261.101 (duty to report child abuse or neglect overrides privilege).

4. *Spousal Privilege.* Tex. R. Evid. 504. *But see, e.g.*, Tex. Fam. Code § 6.704; Tex. R. Evid. 504(a)(4)(B) (exceptions to privilege in proceedings between spouses). *See also* Tex. Code Crim. Proc. art. 38.10 (eliminating spouse's right to refuse to testify against his or her spouse in suits relating to family violence or bigamy). In addition, in actions under the Uniform Interstate Family Support Act, the spousal privilege under rule 504 of the Texas Rules of Evidence is not applicable. Tex. Fam. Code § 159.316(h).

   If the privilege is claimed, the party seeking to avoid discovery has the burden to establish by testimony or affidavit a prima facie case for the privilege. If that party has presented a prima facie case establishing that the requested information is privileged, the burden shifts to the party seeking to compel discovery to prove that an exception to the privilege applies. *In re Burdick*, No. 04-19-00833-CV, 2020 WL 1159049, at *3 (Tex. App.—San Antonio Mar. 11, 2020, orig. proceeding) (mem. op.) (text messages).

5. *Clergyman Communications Privilege.* Tex. R. Evid. 505. *But see* Tex. Fam. Code § 261.101 (duty to report child abuse or neglect overrides privilege).

6. *Trade Secrets Privilege.* Tex. R. Evid. 507.

7. *Physician-Patient Privilege.* Tex. R. Evid. 509. An exception is provided in rule 509(e)(4) of the Texas Rules of Evidence for a communication or record relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies on the condition as a part of the party's claim or defense. *See* Tex. Fam. Code § 261.101 (duty to report child abuse or neglect overrides privilege). See section 5.22 above.

8. *Mental Health Information Privilege.* Tex. R. Evid. 510. An exception to the privilege is provided in rule 510(d)(4) of the Texas Rules of Evidence for court-ordered exams and in rule 510(d)(5) for a communication or record relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies on the condition as a part of the party's claim or defense. *See also Subia v. Texas Department of Human Services*, 750 S.W.2d 827, 830–31 (Tex. App.—El Paso 1988, no writ) ("court-ordered exams" exception applies only if the person examined has "been previously informed that communications would not be privileged"). See section 5.22 above.

9. *Self-Incrimination Privilege.* U.S. Const. amend. V; Tex. Const. art. I, § 10; *see also* Tex. R. Evid. 513(c) (certain rules that apply to other privileges—that the claim of privilege is neither a proper subject of comment by the judge or counsel nor basis for an inference and that, to the extent practicable, the proceedings shall be conducted so as to facilitate the making of a claim without the jury's knowledge—do not apply to a party's claim of the privilege against self-incrimination in the present civil proceeding). A court can allow a civil jury to make a negative inference from the assertion of the privilege against self-incrimination. *Texas Department of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995).

10. *Court-Ordered Marital Counseling.* Reports and information arising from court-ordered marital counseling in divorce cases are privileged. Tex. Fam. Code § 6.705.

11. *Department of Family and Protective Services Records.* With several exceptions, including court orders or for good cause shown, adoption records kept by the Texas Department of Family and Protective Services and the district clerk are confidential. Tex. Fam. Code §§ 108.002, 162.022; *see also* Tex. Fam. Code § 261.201.

12. *Child Abuse Records.* Reports required to be filed regarding allegations of child abuse or neglect are generally confidential. Tex. Fam. Code § 261.201. However, in any proceeding regarding the abuse or neglect of a child or the cause of any abuse or neglect, evidence may not be excluded on the ground of privileged communication except in the case of communications between attorney and client. Tex. Fam. Code § 261.202.

13. *Family Code Provisions for Juvenile Proceedings.* Numerous provisions of the Family Code address immunities, confidentialities, privileges, and/or evidence in juvenile proceedings. *See, e.g.*, Tex. Fam. Code §§ 51.095, 51.13, 53.03, 54.01(g), 54.031, 54.0406(c).

14. *Family Violence.* Confidentiality is imposed under some provisions of the Family Code concerning family violence. *See, e.g.*, Tex. Fam. Code § 85.007.

15. *Expunction.* If a person is arrested and charged with a crime but the charges are dropped (and other criteria are met), the person is entitled to have the criminal charges expunged from his record. Tex. Code Crim. Proc. arts. 55.01–.06. When the order of expunction is final the records cannot be used for any purpose and the party may deny the occurrence of the arrest and the existence of the expunction order. Tex. Code Crim. Proc. art. 55.03.

16. *ADR Proceedings.* The statute providing for alternative dispute resolution procedures, including mediation, provides that communications and records involving such matters are confidential and protected from disclosure. Tex. Civ. Prac. & Rem. Code § 154.073.

17. *Collaborative Law Proceedings.* Title 1–A of the Family Code contains provisions for confidentiality and privilege for certain family law collaborative communications. *See* Tex. Fam. Code §§ 15.113–.115.

§ 5.29 Waiving Objections to Discovery or Assertions of Privilege

Objections to discovery and assertions of privilege may be waived in numerous ways, including the following:

1. Failing to timely or properly object, unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(e); *see also Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989) (failure to object to evidence controverting deemed admission). See sections 5.47 and 5.84 below for discussion of asserting privilege.

2. Obscuring the objection with numerous unfounded objections, unless the court excuses the waiver for good cause shown. Tex. R. Civ. P. 193.2(e).

3. Failing to get an agreed extension of time in writing. *See London Market Cos. v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991) (orig. proceeding) (per curiam).

4. Voluntarily disclosing a significant part of a privileged matter, which may waive the privilege. *See* Tex. R. Evid. 511; *see also Tilton v. Moyé*, 869 S.W.2d 955, 957 (Tex. 1994) (orig. proceeding); *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644, 648–49 (Tex. 1985) (orig. proceeding). If a party produces material or information without intending to waive a claim of privilege, the producing party may, within ten days (or shorter time ordered by the court) of discovering that the production was made, amend the response, identifying the material or information produced and stating the privilege. The specified material or information and any copies must be returned on receipt of the amended response, pending any ruling by the court denying the privilege. Tex. R. Civ. P. 193.3(d).

5. Using documents to refresh memory before or during deposition or trial testimony. *See, e.g., City of Denison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App.—Dallas 1986, orig. proceeding).

6. Using privileges offensively. *See Republic Insurance Co. v. Davis*, 856 S.W.2d 158, 160–64 (Tex. 1993) (orig. proceeding) (waiver applies to lawyer-client privilege); *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107–08 (Tex. 1985) (orig. proceeding).

[Sections 5.30 through 5.39 are reserved for expansion.]

III. Written Discovery

§ 5.40 Written Discovery Defined

The term *written discovery* means requests for disclosure (for suits filed before January 1, 2021) and required disclosures (for suits filed on or after that date), requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission. Tex. R. Civ. P. 192.7(a).

§ 5.41 Requests for Disclosure—Suits Filed before January 1, 2021

For suits filed before January 1, 2021, rule 194 provides for categories of discovery to which no objection can be made. Such discovery may be sought by letter request merely referencing rule 194.2 or the identifying number of the request category as set out in the rule. Tex. R. Civ. P. 194.1 (1998).

Subjects of Disclosure: The categories of items for which disclosure is mandated are listed in rule 194.2 (2004). In addition to the matters concerning testifying experts and medical records and authorizations discussed below, these include (1) the correct names of the parties to the lawsuit; (2) the names, addresses, and telephone numbers of any potential parties; (3) the legal theories and general factual bases of the responding party's claims or defenses; (4) the amount and any method of calculating economic damages; (5) the names, addresses, and telephone numbers of persons with knowledge of relevant facts and a brief statement of each person's connection with the case; (6) indemnity and insuring agreements; (7) settlement agreements; and (8) witness statements. Tex. R. Civ. P. 194.2(a)–(e), (g)–(i) (2004). In a level 1 case, in addition to the content subject to disclosure under Tex. R. Civ. P. 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Such a request for disclosure is not considered a request for production. Tex. R. Civ. P. 190.2(b)(6) (2013).

COMMENT: The requirement of a brief statement of each person's connection with the case is satisfied with a few words, such as "treating physician," "chief financial officer," "director," "Plaintiff's mother and eyewitness to accident," "social worker," "Petitioner's father," or "Petitioner's sister." *See Van Heerden v. Van Heerden*, 321 S.W.3d 869, 876 (Tex. App.—Houston [14th Dist.] 2010, no pet.). *See also* Tex. R. Civ. P. 192 cmt. 3.

Rule 194.2(c) (the legal theories and general factual bases of the responding party's claims or defenses) and rule 194.2(d) (the amount and any method of calculating economic damages) permit a party further inquiry into another party's legal theories and factual claims than is available through notice pleadings. The rules are designed to require disclosure of a party's basic assertions. Tex. R. Civ. P. 194 cmt. 2.

Through a request for disclosure under rule 194, a party may obtain disclosure of the name, address, and telephone number of any testifying expert; the subject matter on which the expert will testify; and the general substance of the expert's mental impres-

sions and opinions and a brief summary of the basis for them or, if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting that information. Tex. R. Civ. P. 194.2(f)(1)–(3) (2004). If the expert is retained by, employed by, or otherwise subject to the control of the responding party, the requesting party may also discover all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony and the expert's current resume and bibliography. Tex. R. Civ. P. 194.2(f)(4) (2004).

If a party fails to respond or timely supplement a request for disclosure to provide the party's expert's mental impressions and opinions, a brief summary of the basis for the expert's opinions, or any of the tangible information reviewed by the expert in anticipation of the expert's testimony, the testimony of the expert is automatically excluded under rule 193.6, absent a showing of good cause or lack of surprise or prejudice. *Ving-Card A.S. v. Merrimac Hospitality Systems, Inc.*, 59 S.W.3d 847, 856 (Tex. App.—Fort Worth 2001, pet. denied). *See also In re D.W.*, No. 02-13-00293-CV, 2015 WL 1262820 (Tex. App.—Fort Worth Mar. 19, 2015, no pet.) (mem. op.) (expert should not have been allowed to testify when only expert's name and subject matter of his testimony were disclosed, but not his opinions or any underlying documents he had reviewed). The burden of showing good cause or the lack of surprise or prejudice is on the party seeking to introduce the evidence. *In re M.H.*, 319 S.W.3d 137 (Tex. App.—Waco 2010, no pet.).

If damages are sought for physical or mental injury from the occurrence that is the subject of the case, the party alleging the injury must, on written request for disclosure, produce or authorize disclosure of all medical records and bills reasonably related to the injury or damages asserted. Tex. R. Civ. P. 194.2(j) (2004). The responding party must produce all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party if disclosure is requested under Tex. R. Civ. P. 194.2(k) (2004).

A party may also obtain disclosure of the name, address, and telephone number of any person who may be designated a responsible third party. Tex. R. Civ. P. 194.2(*l*) (2004).

Response: Written response must be made within thirty days after service of the request, except that a respondent served with the request before answer date has fifty days after service in which to respond. Responses regarding testifying experts are governed by rule 195. Tex. R. Civ. P. 194.3 (2004).

Production: Copies of documents and other tangible items must be served with the response unless the documents to be produced are voluminous. In that case, the responding party may state a reasonable time and place for the production of the documents, must produce the documents at the time and place stated (unless there is agreement or court order otherwise), and must provide the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 194.4 (2004).

Privilege: Any applicable privilege other than assertion of work product may be asserted using rule 193.3 procedures. *See* Tex. R. Civ. P. 194 cmt. 1. No objection or assertion of work product is permitted to a request for disclosure. Tex. R. Civ. P. 194.5 (2004).

Changed Response: A response under rule 194(c) and (d) (regarding legal theories, factual bases, and economic damages) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment. Tex. R. Civ. P. 194.6 (2004).

§ 5.42 Required Disclosures—Suits Filed on or after January 1, 2021

For suits filed on or after January 1, 2021, rule 194 provides for categories of discovery that a party must, unless otherwise agreed by the parties or ordered by the court, provide to the other parties without awaiting a discovery request. The categories of items for which disclosure is mandated are described in rules 194.2 (initial disclosures), 194.3 (testifying expert disclosures), and 194.4 (pretrial disclosures). Tex. R. Civ. P. 194.1(a). (Many of the listed items were discoverable through requests for disclosure under rule 194 before amendments to the discovery rules effective January 1, 2021. See section 5.41 above.)

If a party does not produce copies of all responsive documents, electronically stored information, and tangible things with the response, the party must state in the response a reasonable time and method for the production of the items, must produce the items at the time and in the method stated (unless there is agreement or court order otherwise), and must provide the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 194.1(b).

No objection or assertion of work product is permitted to a disclosure under rule 194. Tex. R. Civ. P. 194.5. A party may assert any applicable privileges other than work product by using rule 193.3 procedures. *See* Tex. R. Civ. P. 194 cmt. 1.

Initial Disclosures: In a suit filed on or after January 1, 2021, certain disclosures must be made by all parties before the court within thirty days after the filing of the first answer or general appearance unless a different time is set by the parties' agreement or court order. A party first served or joined after the filing of the first answer or general appearance must make those disclosures within thirty days after being served or joined unless a different time is set by agreement or court order. Tex. R. Civ. P. 194.2(a).

In addition to the matters discussed below concerning medical records and authorizations and certain documents specifically required in family law cases, these initial disclosures include—

1. the correct names of the parties to the lawsuit;
2. the names, addresses, and telephone numbers of any potential parties;
3. the legal theories and general factual bases of the responding party's claims or defenses;
4. the amount and any method of calculating economic damages;
5. the names, addresses, and telephone numbers of persons with knowledge of relevant facts and a brief statement of each person's connection with the case;
6. a copy—or a description by category and location—of all documents, electronically stored information, and tangible things the party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
7. indemnity and insuring agreements;
8. settlement agreements; and
9. witness statements.

Tex. R. Civ. P. 194.2(b)(1)–(9).

COMMENT: The requirement of a brief statement of each person's connection with the case is satisfied with a few words, such as "treating physician," "chief financial officer," "director," "Plaintiff's mother and eyewitness to accident," "social worker," "Petitioner's father," or "Petitioner's sister." *See Van Heerden v. Van Heerden*, 321 S.W.3d 869, 876 (Tex. App.—Houston [14th Dist.] 2010, no pet.). *See also* Tex. R. Civ. P. 192 cmt. 3.

Rule 194.2(b)(3) (the legal theories and general factual bases of the responding party's claims or defenses) and rule 194.2(b)(4) (the computation of damages) permit a party further inquiry into another party's legal theories and factual claims than is available through notice pleadings. The rules are designed to require disclosure of a party's basic assertions. Tex. R. Civ. P. 194 cmt. 2 (referring to these provisions by their former designations). A disclosure under one of these categories that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment. Tex. R. Civ. P. 194.6.

If damages are sought for physical or mental injury from the occurrence that is the subject of the case, the party alleging the injury must produce or authorize disclosure of all medical records and bills reasonably related to the injury or damages asserted. Tex. R. Civ. P. 194.2(b)(10). The responding party must produce all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party. Tex. R. Civ. P. 194.2(b)(11).

The party must also provide the name, address, and telephone number of any person who may be designated a responsible third party. Tex. R. Civ. P. 194.2(b)(12).

In suits for divorce or annulment or to declare a marriage void, a party must also provide to the other party the following, for the past two years or since the date of the marriage, whichever is less:

1. all deed and lien information on any real property owned and all lease information on any real property leased;

2. all statements for any pension plan, retirement plan, profit-sharing plan, employee benefit plan, and individual retirement plan;

3. all statements or policies for each current life, casualty, liability, and health insurance policy; and

4. all statements pertaining to any account at a financial institution, including banks, savings and loan institutions, credit unions, and brokerage firms.

Tex. R. Civ. P. 194.2(c)(1).

In a suit in which child or spousal support is at issue, a party must also provide to the other party—

1. information regarding all policies, statements, and the summary description of benefits for any medical and health insurance coverage that is or would be available for the child or the spouse;

2. the party's income tax returns for the previous two years or, if no return has been filed, the party's Form W-2, Form 1099, and Schedule K-1 for those years; and

3. the party's two most recent payroll check stubs.

Tex. R. Civ. P. 194.2(c)(2).

Certain procedures are exempt from the initial disclosure requirements, although the court may order the parties to make particular disclosures and set the time for disclosure. These exempt procedures include (1) an action under the Family Code filed by or against the title IV-D agency in a title IV-D case; (2) a child protection action under subtitle E of title 5 of the Family Code; (3) a protective order action under title 4 of the Family Code; and (4) other actions involving domestic violence. Tex. R. Civ. P. 194.2(d)(4)–(7).

Testifying Expert Disclosures: In a suit filed on or after January 1, 2021, a party must also disclose testifying expert information as provided by rule 195. Tex. R. Civ. P. 194.3. Unless otherwise ordered by the court, a party must furnish this information (1) with regard to all experts testifying for a party seeking affirmative relief, by ninety days before the end of the discovery period, and (2) with regard to all other experts, by sixty days before the end of the discovery period. Tex. R. Civ. P. 195.2.

The following information must be disclosed for any testifying expert:

1. the expert's name, address, and telephone number;

2. the subject matter on which the expert will testify; and

3. the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them or, if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting that information.

Tex. R. Civ. P. 195.5(a)(1)–(3).

If the testifying expert is retained by, employed by, or otherwise subject to the control of the responding party, the following must also be provided:

1. all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony;

2. the expert's current resume and bibliography;

3. the expert's qualifications, including a list of all publications authored in the previous ten years;

4. except when the expert is the responding party's attorney and is testifying to attorney's fees, a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition; and

5. a statement of the compensation to be paid for the expert's study and testimony in the case.

Tex. R. Civ. P. 195.5(a)(4).

Failure to respond or timely supplement a request for disclosure to provide the party's expert's mental impressions and opinions, a brief summary of the basis for the expert's opinions, or any of the tangible information reviewed by the expert in anticipation of the expert's testimony was held to automatically exclude the expert's testimony under rule 193.6, absent a showing of good cause or lack of surprise or prejudice. *VingCard A.S. v. Merrimac Hospitality Systems, Inc.*, 59 S.W.3d 847, 856 (Tex. App.—Fort Worth 2001, pet. denied). *See also In re D.W.*, No. 02-13-00293-CV, 2015 WL 1262820 (Tex. App.—Fort Worth Mar. 19, 2015, no pet.) (mem. op.) (expert should not have been allowed to testify when only expert's name and subject matter of his testimony were disclosed, but not his opinions or any underlying documents he had reviewed). The burden of showing good cause or the lack of surprise or prejudice is on the party seeking to introduce the evidence. *In re M.H.*, 319 S.W.3d 137 (Tex. App.—Waco 2010, no pet.).

COMMENT: Presumably, these holdings will apply to required disclosures in suits filed on or after January 1, 2021.

Pretrial Disclosures: In suits filed on or after January 1, 2021, a party must also provide to the other parties and promptly file certain information about the evidence it may present at trial other than solely for impeachment. These disclosures must be made at least thirty days before trial unless the court orders otherwise. The following information must be disclosed:

1. the name and, if not previously provided, the address and telephone number of each witness, separately identifying those the party expects to present and those it may call if the need arises; and

2. an identification of each document or other exhibits, including summaries of other evidence, separately identifying those items the party expects to offer and those it may offer if the need arises.

Tex. R. Civ. P. 194.4.

COMMENT: While a different time for the initial disclosures may be set by agreement of the parties or order of the court, the date for pretrial disclosures may be changed only by court order.

An action arising under the Family Code filed by or against the title IV-D agency in a title IV-D case is exempt from pretrial disclosure, although a court may order the parties to make particular disclosures and set the time for disclosure. Tex. R. Civ. P. 194.4(c).

§ 5.43 Requests for Production and Inspection of Documents and Tangible Things

Request: A party may serve on another party a request for production or for inspection, to inspect, sample, test, photograph, and copy documents or tangible things within the scope of discovery. The request must be served no later than thirty days before the end of the discovery period. Tex. R. Civ. P. 196.1(a). See section 5.8 above concerning requests for production from nonparties.

The request must specify the items to be produced or inspected, either by individual item or by category, and describe each item or category with reasonable particularity. The request must also specify a reasonable time and place for production. The time must be on or after the date the response is due. If the request is for sampling or testing, the means, manner, and procedure must be described with sufficient specificity to inform the producing party. Tex. R. Civ. P. 196.1(b).

If a party requests another party to produce medical or mental health records about a nonparty, the nonparty must be served with the request for production. There is an exception if the nonparty signs an effective release, the nonparty's identity will not be disclosed by production of the records, or the court orders for good cause that service is not required. Rule 196.1 does not excuse compliance with laws about the confidentiality of medical or mental health records. Tex. R. Civ. P. 196.1(c). *See In re Christus*

Health Southeast Texas, 167 S.W.3d 596, 601 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam).

Response: A response must be served on the requesting party within thirty days after service of the request, except that, in cases filed before January 1, 2021, a respondent served with a request before the date the respondent's answer is due has fifty days after service in which to respond. Tex. R. Civ. P. 196.2(a).

With respect to each item or category of items requested, the responding party must state objections and assert privileges in accordance with the rules and must state the following as appropriate: (1) that production, inspection, or other requested action will be permitted as requested; (2) that the requested items are being served with the response; (3) that production, inspection, or other requested action will take place at an alternate specified time and place; or (4) that, after a diligent search, no responsive items have been identified. Tex. R. Civ. P. 196.2(b).

See section 5.47 below for procedures for objecting to written discovery requests.

Production: Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things that are in the party's possession, custody, or control at the time and place requested or the time and place stated in the response, unless otherwise agreed or ordered, and must give the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 196.3(a). The responding party may produce copies in place of originals unless the authenticity of the original is questioned or it would be unfair in the circumstances to produce copies. A responding party who produces originals is entitled to retain the originals while the requesting party inspects and copies them. Tex. R. Civ. P. 196.3(b). The documents and tangible things must either be produced as they are kept in the usual course of business or be organized and labeled to correspond with the categories in the request. Tex. R. Civ. P. 196.3(c).

The rules do not permit the trial court to force a party to create documents that do not exist solely to comply with a request for production. *McKinney v. National Union Fire Insurance Co.*, 772 S.W.2d 72, 73 n.2 (Tex. 1989). For example, a party may not be compelled by a request for production to complete and sign consent forms permitting the release of information to the requestor since the completed, executed forms did not exist. *See In re Guzman*, 19 S.W.3d 522, 523–25 (Tex. App.—Corpus Christi–Edinburg 2000, orig. proceeding).

Other Provisions: Special rules that apply to electronic or magnetic data are provided in Tex. R. Civ. P. 196.4. Except with prior court authorization, testing, sampling,

or examination may not destroy or materially alter an item. Tex. R. Civ. P. 196.5. Unless the court orders otherwise for good cause, the responding party bears the expense of production and the requesting party bears the expense of inspecting, sampling, testing, photographing, and copying. Tex. R. Civ. P. 196.6.

§ 5.44 Request or Motion for Entry on Property

Request or Motion: A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on the property in one of two manners, depending on whether the property belongs to a party or to a nonparty. Entry may be gained by serving a request on all parties if land or property belongs to a party or by motion and notice of hearing on all parties and the nonparty if the land or property belongs to a nonparty. Service of the request or motion and hearing notice must be no later than thirty days before the end of any applicable discovery period. Tex. R. Civ. P. 196.7(a). Method of service on the nonparty is prescribed in rule 196.7(a)(2).

The request for entry on a party's property or the order for entry on a nonparty's property must state the time, place, manner, conditions, and scope of the inspection; specifically describe any desired means, manner, and procedure for testing or sampling; and designate the person who will make the inspection, testing, or sampling. Tex. R. Civ. P. 196.7(b).

Response: A response must be served on the requesting party within thirty days after service of the request, except that, in cases filed before January 1, 2021, a respondent served with a request before the date the respondent's answer is due has fifty days after service in which to respond. Tex. R. Civ. P. 196.7(c)(1). The responding party must state any objections or assertions of privilege and further state that the entry or other requested action either will be permitted as requested, will take place at an alternate specified time and place, or cannot be permitted for reasons stated in the response. Tex. R. Civ. P. 196.7(c)(2).

Order: An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object on it is relevant to the subject matter of the action. Tex. R. Civ. P. 196.7(d). Generally, good cause is shown if the movant establishes that the discovery sought is relevant and material—that is, that the information will in some way help the movant prepare or defend the case—and that the substantial equivalent of the material cannot be obtained through other means. *In re SWEPI L.P.*, 103 S.W.3d 578, 584 (Tex. App.—San Antonio 2003, orig. proceeding).

§ 5.45 Interrogatories to Parties

Interrogatories: Written interrogatories may be served on a party inquiring about any matter within the scope of discovery except for matters regarding testifying expert witnesses. An interrogatory may ask whether a party makes a specific legal or factual contention. It also may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses. However, interrogatories may not require the responding party to provide all its available proof or the proof the party intends to offer at trial. Interrogatories may ask a party to identify facts of which the party is specifically aware that the party contends establish, demonstrate, or prove specific allegations made by the party in its pleadings; such requests do not require a marshaling of evidence. *In re Sting Soccer Group, LP*, No. 05-17-00317-CV, 2017 WL 5897454, at *5 (Tex. App.—Dallas Nov. 30, 2017, orig. proceeding) (mem. op.). The interrogatories must be served no later than thirty days before the end of the discovery period. Tex. R. Civ. P. 197.1.

The number of interrogatories a party may serve is set by the discovery control plan. Under a level 1 discovery control plan, a party may serve no more than fifteen interrogatories on another party, excluding interrogatories asking a party only to identify or authenticate specific documents; in a level 2 discovery control plan, the limit is twenty-five such interrogatories. Each discrete subpart of an interrogatory is considered a separate interrogatory. Tex. R. Civ. P. 190.2(b)(3), 190.3(b)(3). A discrete subpart of an interrogatory is counted as a single interrogatory, but not every separate factual inquiry is a discrete subpart. Although not susceptible of precise definition, a discrete subpart is, in general, one that calls for information that is not logically or factually related to the primary interrogatory. Tex. R. Civ. P. 190 cmt. 3. *See In re Sting Soccer Group, LP*, 2017 WL 5897454, at *6; *In re SWEPI L.P.*, 103 S.W.3d 578, 589 (Tex. App.—San Antonio 2003, orig. proceeding) (no "discrete subparts" found where each question related to particular claim and asked plaintiff to provide certain details about facts underlying that claim and "subparts" simply identified types of facts defendant would like to have had disclosed so that it could understand parameters of claims and prepare defenses).

The number of interrogatories permitted under a level 3 discovery control plan is the same as that in a level 1, if applicable, or level 2 discovery control plan unless altered by the court in the level 3 discovery control plan. *See* Tex. R. Civ. P. 190.4(b). A party can send as many sets of interrogatories as it wishes, as long as the maximum number of interrogatories is not exceeded. *See* Tex. R. Civ. P. 190 cmt. 3. See section 5.2 above.

Response: A response must be served on the requesting party within thirty days after service of the interrogatories, except that, in cases filed before January 1, 2021, a respondent served with interrogatories before the date the respondent's answer is due has fifty days after service in which to respond. Tex. R. Civ. P. 197.2(a). Responses must include answers to the interrogatories, but objections and assertions of privilege may be included in the response or in a separate document. Tex. R. Civ. P. 197.2(b). *See also* Tex. R. Civ. P. 193.2(a), 193.3(a).

If the answer to an interrogatory may be derived or ascertained from public records or from the responding party's business records (or a compilation, abstract, or summary of the business records) and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by specifying and, if applicable, producing the records or compilation, abstract, or summary of the records. The answer must specify the records in sufficient detail to enable the requesting party to locate and identify the records as readily as can the responding party. If business records are involved, the responding party must state a reasonable time and place that the requesting party may examine the records, must produce them at that time and place unless otherwise agreed or ordered, and must provide the requesting party a reasonable opportunity to inspect them. Tex. R. Civ. P. 197.2(c).

Responses to interrogatories must be signed under oath (or pursuant to a declaration under section 132.001 of the Texas Civil Practice and Remedies Code) by the responding party—not an agent or attorney—with two exceptions. If the answers are based on information obtained from other persons, the party may so state. Additionally, the responding party is not required to sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions. Tex. R. Civ. P. 197.2(d).

See section 5.47 below for procedures for objecting to written discovery requests.

Use: Answers to interrogatories may be used only against the responding party. Tex. R. Civ. P. 197.3; *Palmer v. Espey Huston & Associates, Inc.*, 84 S.W.3d 345, 356 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied). An answer to an interrogatory inquiring about legal theories, factual bases, or economic damages that has been amended or supplemented is not admissible and may not be used for impeachment. Tex. R. Civ. P. 197.3.

§ 5.46 Requests for Admissions

Request: At any time following commencement of the action, and no later than thirty days before the end of the discovery period, a party may serve on any other party a written request to admit the truth of any matters within the scope of discovery, including statements of opinion or fact or of the application of law to fact, or the genuineness of documents served with the request or made available for inspection and copying. Each matter for which an admission is requested must be stated separately. Tex. R. Civ. P. 198.1.

Response: A response must be served on the requesting party within thirty days after service of the request, except that, in cases filed before January 1, 2021, a respondent served with a request before the date the respondent's answer is due has fifty days after service in which to respond. Tex. R. Civ. P. 198.2(a). If a response is not timely served, the request is considered admitted without the necessity of a court order. Tex. R. Civ. P. 198.2(c). Deemed admissions constitute judicial admissions, and a party may not introduce testimony to controvert them. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989).

Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons the responding party cannot admit or deny the request. A response must fairly meet the substance of the request. Qualified answers or partial denials are allowed only when good faith requires. Lack of information or knowledge is not a proper response unless it is stated that reasonable inquiry has been made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny the request. An assertion that the request presents an issue for trial is not a proper response. Tex. R. Civ. P. 198.2(b).

See section 5.47 below for procedures for objecting to written discovery requests and section 5.114 below concerning the failure to comply with rule 198.

Withdrawal or Amendment: Matters admitted under rule 198 are conclusively established as to the admitting party unless the court permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment if the admitting party shows good cause and the court finds that the parties relying on the responses and deemed admissions will not be unduly prejudiced and that the merits of the action will be promoted. Tex. R. Civ. P. 198.3.

Good cause is the threshold issue. *City of Houston v. Riner*, 896 S.W.2d 317, 319 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Boone v. Texas Employers' Insurance*

Ass'n, 790 S.W.2d 683, 688 (Tex. App.—Tyler 1990, no writ). A party can establish good cause by showing that its failure to answer was accidental or the result of mistake, rather than intentional or the result of conscious indifference. *Darr v. Altman*, 20 S.W.3d 802, 808 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Genuine confusion, rather than conscious disregard or deliberate neglect, can be good cause to authorize withdrawal or amendment of responses and deemed admissions under rule 198.3. *See Lewis v. Mundy Construction Co.*, 781 S.W.2d 333, 336 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd w.o.j.) (regarding predecessor rule 169). *But see Steffan v. Steffan*, 29 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (husband's status as pro se litigant when served with requests for admissions and his claim that he did not know or understand consequences of failing to timely answer found not to be good cause because pro se litigant must comply with applicable laws and rules of procedure and legal consequences of noncompliance were written on face of requests).

Effect: Any admission made under rule 198 is for the purpose of the pending action *only*. Tex. R. Civ. P. 198.3. *See John H. Carney & Associates v. Ahmad*, No. 07-15-00252-CV, 2016 WL 368527 (Tex. App.—Amarillo Jan. 28, 2016, pet. denied) (mem. op.).

A court is not bound by deemed admissions from requests that are "inappropriate," because they pertain to matters about which the responding party could not have any personal knowledge, or that concern matters solely within the court's discretion. *Satterfield v. Huff*, 768 S.W.2d 839, 840–41 (Tex. App.—Austin 1989, writ denied). "Deemed admissions under Rule 169 are . . . not of controlling effect in a child custody case when they conflict with an independent finding of fact as to a child's best interests." *Erwin v. Erwin*, 505 S.W.2d 370, 372 (Tex. App.—Houston [14th Dist.] 1974, no writ).

§ 5.47 Responses and Objections to Written Discovery

A party must respond to written discovery in writing within the time provided by the rules or by court order. Responses must be complete, based on all the information that is reasonably available to the responding party or the responding party's attorney at the time the response is made. All answers, objections, and other responses must be preceded by the request for disclosure or required disclosure to which they apply. Tex. R. Civ. P. 193.1.

Objections: Objections to written discovery must be made in writing and within the time for response. A party must specifically state the legal or factual basis for the objec-

tion and the extent to which compliance with the request is refused. Objections may be made in the response or in a separate document. Tex. R. Civ. P. 193.2(a). A party must comply with all requests not objected to unless it would be unreasonable under the circumstances to do so before a ruling on the objections. If an objection is made to the time or place of production, the objecting party must state a reasonable alternative and comply at that alternative time and place without further request or order. Tex. R. Civ. P. 193.2(b).

A party may object to written discovery only if a good-faith factual and legal basis for the objection exists at the time the objection is made. Tex. R. Civ. P. 193.2(c). An objection or response may be amended or supplemented to state an objection or basis that was, at the time the objection or response was first made, inapplicable or unknown after reasonable inquiry. Tex. R. Civ. P. 193.2(d).

An objection may be waived if not timely made or if obscured by numerous unfounded objections. Tex. R. Civ. P. 193.2(e).

Assertion of Privilege: A party should not *object* to a request for written discovery on the grounds of privilege; instead, the party should comply with rule 193.3(a), which outlines the procedure for preserving a privilege. Tex. R. Civ. P. 193.2(f). Material or information for which a privilege is claimed may be withheld from the response. However, the responding party must state in the response or in a separate document that responsive information or material has been withheld, the request or required disclosure to which the information or material relates, and the privilege asserted. Tex. R. Civ. P. 193.3(a). Additional information describing the withheld material and asserting specific privileges may be requested of the responding party under rule 193.3(b). *See* Tex. R. Civ. P. 193.3(b).

The Office of the Attorney General may withhold as privileged all files and records of services provided, including information concerning a custodial parent, a noncustodial parent, a child, or an alleged or presumed father. Tex. Fam. Code § 231.108; *In re Office of Attorney General*, No. 02-13-00455-CV, 2014 WL 491684 (Tex. App.—Fort Worth Feb. 6, 2014, orig. proceeding) (mem. op.).

A party may withhold a privileged communication to or from a lawyer or a lawyer's representative or a privileged document of a lawyer or a lawyer's representative without complying with rule 193.3(a) or (b) if the communication or document was created or made from the point at which a party consults a lawyer with a view to engage the

lawyer's services for the litigation in which the discovery is requested or required and if the communication or document concerns the same litigation. Tex. R. Civ. P. 193.3(c).

If a party inadvertently produces privileged material or information, the privilege is not waived if, within ten days (or a shorter time ordered by the court) after discovery of the error, the party amends the response, identifying the material or information and asserting the privilege. The identified material or information and any copies must be returned on receipt of the amended response, pending any ruling denying the privilege. Tex. R. Civ. P. 193.3(d).

Hearing: A request for a hearing on an objection or a claim of privilege must be presented at a reasonable time. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by oral testimony or by affidavits served at least seven days before the hearing. Tex. R. Civ. P. 193.4(a). The mere listing of a specific privilege in a response or a privilege log does not prove that privilege. The response and log are the vehicles by which the privilege is claimed. Proof of the facts that justify the claim of privilege is necessary. *In re Monsanto Co.*, 998 S.W.2d 917, 926 (Tex. App.—Waco 1999, orig. proceeding). To establish a prima facie case for the claim of privilege, an affidavit should set out "the factual basis for the applicability of the attorney-client and/or work product privileges to the documents at issue." *See In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 224 (Tex. 2004) (orig. proceeding) (per curiam). If the party asserting a privilege has made a prima facie case for its claim, the requesting party has the burden to point out to the court which specific documents or groups of documents it believes require inspection. Otherwise, trial judges will be required to inspect untold numbers of documents. The requesting party should be in a position to do so based on (1) the contents of the privilege log, (2) other discovery and documents, (3) discovery specifically designed to test the claim of privilege, and (4) the evidence at the hearing. *In re Monsanto Co.*, 998 S.W.2d at 925. If the court finds that an in camera review is necessary, the material must be presented in a sealed wrapper for inspection, segregated from the material for which no privilege is claimed. Tex. R. Civ. P. 193.4(a).

A party need not request a ruling on the party's own objection or assertion of privilege to preserve the objection or privilege. If the claim of privilege with regard to written discovery is overruled, the responding party has thirty days to produce the material. To the extent that the objection or claim of privilege is sustained, the responding party has no further duty to respond. Tex. R. Civ. P. 193.4(b). A party may not use material or information withheld from discovery under a claim of privilege, including a claim sus-

tained by the court, without timely amending or supplementing the party's response to that discovery. Tex. R. Civ. P. 193.4(c).

Authenticity of Documents: In most cases, production of a document in response to a written discovery request authenticates the document for use against the party producing it in any pretrial proceeding or at trial. However, after the producing party has had actual notice that the document will be used, the party can object to the authenticity of the document. The objection must be made within ten days or a longer or shorter time ordered by the court. Tex. R. Civ. P. 193.7. *But see Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117, 131 (Tex. App.—Texarkana 2008), *rev'd on other grounds*, 313 S.W.3d 837 (Tex. 2010). The objection must state the specific basis for the objection, must be either on the record or in writing, and must have a good-faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If an objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity. Tex. R. Civ. P. 193.7. Authenticity is not synonymous with admissibility.

§ 5.48 Amending or Supplementing Responses to Written Discovery

There is a duty to supplement a written discovery response if a party learns that the party's response to written discovery was incomplete or incorrect when made or that, although the response was complete and correct when made, it is no longer complete and correct. The party must amend or supplement the response regarding (1) identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses and (2) other information requested, *unless* the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. Tex. R. Civ. P. 193.5(a).

An amended or supplemental response must be made reasonably promptly after the party discovers the necessity to make such a response. Unless otherwise provided under the discovery rules, it is presumed that an amended or supplemental response that is made less than thirty days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be so verified. The failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out. Tex. R. Civ. P. 193.5(b); *see also State Farm Fire & Casualty Co. v. Morua,* 979 S.W.2d 616, 620 (Tex. 1998) (although supplemental inter-

rogatory responses must be verified, requesting party waited thirteen months before objecting to defect at trial, thereby waiving its objection).

The requirements and procedures of rule 193.5 apply to a party's duty to amend and supplement written discovery regarding a testifying expert. Tex. R. Civ. P. 195.6. The duties to designate an expert witness and make the expert available for deposition are triggered when the expert is retained, employed, or otherwise in the control of the party. Tex. R. Civ. P. 195.3(b), 195.6. The discovery rules do not prevent experts from refining calculations and perfecting reports through the time of trial. The testimony of an expert should not be barred because a change in some minor detail of the person's work was not disclosed a month before trial. The additional supplementation requirement does require that opposing parties have sufficient information about an expert's opinion to prepare a rebuttal with their own experts and cross-examination and that they be promptly and fully advised if further developments render past information incorrect or misleading. *See Exxon Corp. v. West Texas Gathering Co.*, 868 S.W.2d 299, 305 (Tex. 1993) (addressing former rule 166b(6)); *see also* Tex. R. Civ. P. 193.5, 195.6.

If the trial is reset and the discovery deadlines are governed by rule 190.3, the deadlines are reset to conform to the deadlines set out in the rule. *See* Tex. R. Civ. P. 190.3(b)(1)(A). However, by its own terms, this rule does not apply when a docket control order has been entered by the court. Tex. R. Civ. P. 190.3(a). If the court has issued a docket control order, a continuance does not reset the dates in that order. *Sprague v. Sprague*, 363 S.W.3d 788, 800 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

§ 5.49 Effect of Failure to Timely Respond

Failure to make, amend, or supplement a discovery response, including a required disclosure, will result in exclusion from evidence of the material or information not timely disclosed or the testimony of a witness not timely identified, unless the court determines that there was good cause for the failure to timely make, amend, or supplement the response or that the failure will not unfairly prejudice or unfairly surprise the other parties. Tex. R. Civ. P. 193.6(a). Lack of surprise, inadvertence of counsel, and the uniqueness of the evidence are not in themselves good cause. *Alvarado v. Farah Manufacturing Co.*, 830 S.W.2d 911, 915 (Tex. 1992); *Sprague v. Sprague*, 363 S.W.3d 788, 800 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). However, these factors, taken together or in some combination, may constitute good cause. *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992). The burden of proof on this issue is on the party seeking to introduce the evidence or call the witness. The party seeking to exclude evidence must establish that the party seeking to introduce the evidence had a duty to

produce it prior to trial. *In re E.L.A.V.*, ___ S.W.3d ___, No. 08-18-00052-CV, 2019 WL 5616970, at *3 (Tex. App.—El Paso Oct. 31, 2019, no pet.). A finding of good cause or lack of unfair surprise or unfair prejudice must be supported by the record. Tex. R. Civ. P. 193.6(b). Even if the party fails to carry the burden, the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented and to allow opposing parties to conduct discovery about any new information thus disclosed. Tex. R. Civ. P. 193.6(c). Because the exclusion of evidence under rule 193.6 is automatic and not discretionary, a trial court's imposition of the automatic exclusions mandated by the rule is not a death-penalty sanction subject to review under a *Trans-American* analysis. *Amudo v. Amudo*, No. 01-17-00318-CV, 2018 WL 3059729, at *5 (Tex. App.—Houston [1st Dist.] June 21, 2018, no pet.) (mem. op.).

Thus, the general rule is that if a party fails to timely and properly respond to or supplement a discovery request, order, or agreement, the undisclosed or improperly disclosed evidence must be excluded at trial. *Rainbo Baking Co. v. Stafford*, 787 S.W.2d 41, 41–42 (Tex. 1990) (per curiam); *Sharp v. Broadway National Bank*, 784 S.W.2d 669, 670–71 (Tex. 1990) (per curiam); *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 646 (Tex. 1989); *McKinney v. National Union Fire Insurance Co.*, 772 S.W.2d 72, 74 (Tex. 1989); *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986) (per curiam).

[Sections 5.50 through 5.60 are reserved for expansion.]

IV. Discovery Regarding Testifying Experts

§ 5.61 Permitted Means of Discovery

Any discoverable information concerning testifying expert witnesses that cannot be obtained through a request for disclosure under rule 194 (1998 & 2004) (for suits filed before January 1, 2021) or required disclosures under rule 195 (for suits filed on or after that date) (see sections 5.41 and 5.42 above) must be obtained by oral deposition or by a report prepared by the expert under rule 195. No other means of discovery regarding testifying experts is permissible. Tex. R. Civ. P. 195.1.

§ 5.62 Designation of Experts

In suits filed before January 1, 2021, a party is not required to designate expert witnesses except in response to a request for disclosure or a court order. Tex. R. Civ. P. 195.1 (1999). Unless otherwise ordered by the court, a party must furnish the information requested under rule 194.2(f) (2004) (request for disclosure of expert witnesses) by the later of the following dates: (1) thirty days after the request is served or (2) for all experts testifying for a party seeking affirmative relief (which will be virtually every party to a family law case), ninety days before the end of the discovery period, and for all other experts, sixty days before the end of the discovery period. Tex. R. Civ. P. 195.2 (1999).

In suits filed on or after January 1, 2021, a party may obtain information concerning testifying expert witnesses only through required disclosures and through depositions and reports as permitted by rule 195. Tex. R. Civ. P. 195.1. Unless otherwise ordered by the court, a party must designate testifying experts—that is, furnish the information described in rule 195.5(a) (expert disclosures)—(1) for all experts testifying for a party seeking affirmative relief (which will be virtually every party to a family law case), by ninety days before the end of the discovery period, and (2) for all other experts, by sixty days before the end of the discovery period. Tex. R. Civ. P. 195.2.

COMMENT: Remember that, barring a court order or agreement between the parties to the contrary, the discovery period in level 2 cases under the Family Code ends thirty days before the date of trial. Tex. R. Civ. P. 190.3(b)(1)(A). Therefore, for parties seeking affirmative relief, the duty to disclose testifying experts occurs no later than 120 days before trial. *See Gutierrez v. Gutierrez*, 86 S.W.3d 729, 732 (Tex. App.—El Paso 2002, no pet.) (because former wife was seeking affirmative relief by requesting attorney's fees in custody case, she was required to designate her expert ninety days before end of discovery period).

§ 5.63 Depositions

Oral Deposition: In addition to discovery under a request for disclosure or required disclosures, a party may obtain discovery about the subject matter of an expert's expected testimony, the expert's mental impressions and opinions, the facts known to the expert that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under rule 195. Tex. R. Civ. P. 195.4.

Making Expert Available for Deposition: A party seeking affirmative relief, which will likely be every party to a family law action, must make all experts retained or employed by the party or otherwise in the party's control available for depositions in the manner prescribed in rule 195.3(a). In general, the party must make the expert available reasonably promptly after the expert is designated, if a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated; if the report is produced on designation, the party need not make the expert available until reasonably promptly after all other experts have been designated. Tex. R. Civ. P. 195.3(a). A party not seeking affirmative relief must make his experts available for deposition reasonably promptly after the expert is designated and experts testifying for the other party on the same subject have been deposed. Tex. R. Civ. P. 195.3(b).

Cost of Expert Witness for Deposition Time: When a party takes the oral deposition of an expert witness retained by the opposing party, the party who retained the expert must pay all reasonable fees charged by the expert for preparing for, giving, reviewing, and correcting the deposition. Tex. R. Civ. P. 195.7.

§ 5.64 Reports of Experts

The court may order the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert reduced to tangible form and produced in addition to the deposition if they have not been recorded and reduced to tangible form. Tex. R. Civ. P. 195.5(b).

§ 5.65 Protected Communications, Expert Reports, and Disclosures

Rule 195, as amended effective for cases filed on or after January 1, 2021, provides that communications between the party's attorney and a testifying expert witness are protected from discovery, regardless of the form of the communications, except to the extent that the communications relate to compensation for the expert's study or testimony, identify facts or data that the attorney provided and the expert considered in forming the opinions to be expressed, or identify assumptions that the attorney provided and the expert relied on in forming the opinions to be expressed. Tex. R. Civ. P. 195.5(c).

A draft expert report or draft disclosure required under rule 195 is protected from discovery, regardless of the form in which the draft is recorded. Tex. R. Civ. P. 195.5(d).

§ 5.66 Amendment and Supplementation of Discovery

Written discovery regarding a testifying expert must be amended and supplemented as required by rule 193.5. If the expert witness is retained by, employed by, or otherwise under the control of a party, the party must also amend or supplement any deposition testimony or written report by the expert, but only as to the expert's mental impressions or opinions and the basis for them. Tex. R. Civ. P. 195.6.

[Sections 5.67 through 5.70 are reserved for expansion.]

V. Mental or Physical Examinations

§ 5.71 Motion and Order for Mental or Physical Examination

A party may, no later than thirty days before the end of the applicable discovery period, move for an order compelling another party to submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist or to produce for such examination a person in the other party's custody, conservatorship, or legal control. Tex. R. Civ. P. 204.1(a). The motion and notice of hearing must be served on the person to be examined and on all parties. Tex. R. Civ. P. 204.1(b). The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Tex. R. Civ. P. 204.1(d). For purposes of rule 204, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist. Tex. R. Civ. P. 204.5.

The court may issue an order for such an examination under rule 204.1 only for good cause shown and only in specified circumstances. *In re Transwestern Publishing Co., L.L.C.*, 96 S.W.3d 501, 506 (Tex. App.—Fort Worth 2002, orig. proceeding). *But see* Tex. R. Civ. P. 204.4 (mental examinations and paternity testing in cases arising under title 2 or title 5 of the Family Code). An order may be issued if the mental or physical condition, including the blood group, of a party or a person in the custody, conservatorship, or legal control of a party is in controversy. Except as provided in rule 204.4 (pertaining to suits under title 2 or title 5 of the Family Code), an examination by a psychologist may be ordered if the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. Tex. R. Civ. P. 204.1(c).

A mental examination cannot be ordered if the party is merely seeking damages for "emotional distress" typically accompanying severe physical injury. *Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex. 1988) (orig. proceeding). However, if a party intends to call a medical expert to prove an alleged mental condition, an examination is authorized. *Sherwood Lane Associates v. O'Neill*, 782 S.W.2d 942, 945 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

Rules 509 and 510 of the Texas Rules of Evidence should be taken into consideration in a proceeding under rule 204. See sections 5.22 and 5.28 above.

§ 5.72 Cases Arising under Title 2 or Title 5 of Family Code

In cases arising under title 2 or title 5 of the Family Code, on a party's or on the court's own motion, the court may appoint one or more psychologists or psychiatrists to make the appropriate mental examinations of the children the subject of the suit or any other parties, regardless of whether a psychologist or psychiatrist has been listed by any party as a testifying expert, and may appoint one or more experts qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court. Tex. R. Civ. P. 204.4. For purposes of rule 204, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist. Tex. R. Civ. P. 204.5.

§ 5.73 No Examination

If no examination is sought, the party whose condition is in controversy may not comment to the court or the jury about the party's willingness to be examined or the other party's right or failure to seek an examination. Tex. R. Civ. P. 204.3.

§ 5.74 Selection and Report of Examining Professional

Selection of the examining doctor, psychiatrist, or psychologist is generally left to the sound discretion of the court. *May v. Lawrence*, 751 S.W.2d 678, 679 (Tex. App.—Tyler 1988, orig. proceeding [leave denied]) (per curiam); *Employers Mutual Casualty Co. v. Street*, 707 S.W.2d 277, 278 (Tex. App.—Fort Worth 1986, orig. proceeding). However, it may be error for a court to refuse to order an independent examination by a doctor, psychiatrist, or psychologist if only one party's experts have had an opportunity to perform an examination. *See Sherwood Lane Associates v. O'Neill*, 782 S.W.2d 942, 945 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

Provisions regarding copies of the report of the examining physician or psychologist are contained in rule 204.2 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 204.2.

[Sections 5.75 through 5.80 are reserved for expansion.]

VI. Depositions

§ 5.81 Oral Depositions

Oral depositions are governed by rule 199. A party may depose any person or entity on oral examination before an authorized officer. The testimony, objections, and any other statements must be recorded when they are given or made. Tex. R. Civ. P. 199.1(a). Telephone depositions and deposition by remote electronic or nonstenographic means are authorized under rule 199.1(b) and (c). See the discussion in section 5.86 below.

Section III(14) of the Texas Lawyer's Creed provides that a lawyer will not arbitrarily schedule a deposition until a good-faith effort has been made to schedule it by agreement.

The total time a party is allowed to examine and cross-examine all witnesses in oral depositions is set by the discovery control plan. Under a level 1 discovery control plan, a party may have no more than six hours in a suit filed before January 1, 2021, or twenty hours in a suit filed on or after that date; in a level 2 discovery control plan, the limit is fifty hours. Tex. R. Civ. P. 190.2(b)(2), 190.3(b)(2). The number of hours permitted under a level 3 discovery control plan is the same as that in a level 1, if applicable, or level 2 discovery control plan unless altered by the court in the level 3 discovery control plan. *See* Tex. R. Civ. P. 190.4(b).

Notice: A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. The deposition may be taken outside the discovery period only if the parties agree or with leave of court. Tex. R. Civ. P. 199.2(a). Reasonable notice must be given of the identity of any nonparties who might be attending the deposition. Tex. R. Civ. P. 199.5(a)(3).

The notice must state the name of the witness, state a reasonable time and place for the deposition, and state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. Tex. R. Civ. P. 199.2(b)(1)–(3). It may include

the notice required by rule 199.1(c) concerning nonstenographic means, the notice required by rule 199.5(a)(3) about additional attendees, and a request for production. Tex. R. Civ. P. 199.2(b)(3)–(6).

If the witness named is a public or private corporation, partnership, association, governmental agency, or other organization, the notice for deposition must describe with reasonable particularity the matters on which the examination is requested. In response, the organization named in the notice must, a reasonable time before the deposition, designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify about matters that are known or reasonably available to the organization. Tex. R. Civ. P. 199.2(b)(1). A litigant seeking to depose an organization is not precluded from specifically designating the exact officer(s) of an entity who shall be deposed. *Hospital Corp. of America v. Farrar*, 733 S.W.2d 393, 395 (Tex. App.—Fort Worth 1987, orig. proceeding).

A deposition may be conducted in the county of the witness's residence; the county where the witness is employed or regularly transacts business in person; the county of the suit, if the witness is a party or a person designated by a party under rule 199.2(b)(1) for testimony on behalf of an organization; the county in which the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or any other convenient place directed by the court. Tex. R. Civ. P. 199.2(b)(2).

The notice may include a request for production of documents or tangible things within the scope of discovery that are within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with rule 205, and a designation of the materials must be included or attached to the notice. Tex. R. Civ. P. 199.2(b)(5). A nonparty for purposes of discovery is defined as a person who is not a party or subject to a party's control. Tex. R. Civ. P. 205.1. (The nonparty's response is governed by rules 176 and 205.) If the witness is a party or subject to a party's control, document requests are governed by rules 193 and 196. Tex. R. Civ. P. 199.2(b)(5).

Objection to Time or Place: A party or witness may object to the time and place designated for an oral deposition by a motion for protective order or motion to quash the notice. An objection to the time or place of the deposition filed by the third business day after service of the notice stays the oral deposition until the motion can be heard. Tex. R. Civ. P. 199.4. The trial court has broad powers and discretion to control the

time, place, and manner of taking depositions. *Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 111 (Tex. App.—Houston [14th Dist.] 1996, no writ).

Examination: The witness must stay in attendance until the deposition is begun and completed. Tex. R. Civ. P. 199.5(a)(1). Rules for attendance by telephone or other remote electronic means are provided in rule 199.5(a)(2). *See* Tex. R. Civ. P. 199.5(a)(2).

Answers must be given under oath, and the deponent may be examined and cross-examined by all parties, either orally or by written questions served in a sealed envelope on the party noticing the deposition. Tex. R. Civ. P. 199.5(b). No side may examine or cross-examine a witness for more than six hours, excluding breaks. Tex. R. Civ. P. 199.5(c).

§ 5.82 Compelling Appearance; Production of Documents and Things at Oral Deposition

A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under rule 176. If the witness is a party or subject to a party's control, however, service of the notice of oral deposition on the party's attorney is sufficient. Tex. R. Civ. P. 199.3.

A person who is properly served with a subpoena in accordance with rule 176 must comply with the command stated in the subpoena. Tex. R. Civ. P. 176.6(a). This includes attendance at the deposition and remaining at the place of the deposition until the deposition is begun and completed. Tex. R. Civ. P. 199.5(a)(1).

The subpoena may include a command for the witness to produce at the deposition designated documents or tangible things in the witness's possession, custody, or control. Tex. R. Civ. P. 176.2(b). If the subpoenaed witness is a nonparty, the request must comply with rule 205. If the witness is a party, or subject to the control of a party, the document requests for depositions are governed by rule 196. Tex. R. Civ. P. 176.3(b), 176 cmt. 2.

If the witness is a party, the subpoena may be served on the party's attorney of record in the proceeding. Tex. R. Civ. P. 176.5(a).

§ 5.83 Written Questions at Oral Deposition

Any party may, instead of attending the oral deposition, propound written questions to be asked at the oral deposition. Any such questions are to be served in a sealed envelope on the party noticing the deposition, who must deliver the written questions to the deposition officer, who must open the envelope and propound the questions to the witness. Tex. R. Civ. P. 199.5(b).

§ 5.84 Conduct and Objections during Oral Deposition

Parties and counsel are expected to be courteous and professional to one another and to the witness during the course of the deposition. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences are permitted during agreed recesses and adjournments. If the lawyers and witnesses fail to comply with this rule, the court may allow in evidence at trial the statements, objections, discussions, and other occurrences during the oral deposition that reflect on the credibility of the witness or the testimony. Tex. R. Civ. P. 199.5(d).

Objections: Objections to questions asked in the deposition are limited to "objection, leading" and "objection, form." Objections to testimony during the deposition are limited to "objection, nonresponsive." Objections not phrased in this manner are waived. All other objections need not be made or recorded during the deposition to be raised later with the court. The objecting party must clearly and concisely explain an objection if requested by the party taking the deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition. The officer taking the deposition does not rule on objections but must record them for ruling by the court. The officer must record testimony even though an objection has been made. Tex. R. Civ. P. 199.5(e).

Instruction Not to Answer: An attorney may not instruct a witness to refuse to answer questions unless it is necessary to preserve a privilege, comply with a court order or the discovery rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling regarding the suspension of the deposition. If a witness is instructed not to answer, the attorney must state on the record a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested to do so by the party who asked the question. Tex. R. Civ. P. 199.5(f).

Suspending Deposition: If the rules regarding conduct of oral depositions are being violated or the time limitations for the deposition have expired, a party or witness may suspend the deposition for the time necessary to obtain a ruling from the court. Tex. R. Civ. P. 199.5(g).

Good Faith Required: An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good-faith legal basis at the time. A good-faith factual and legal basis is required for objecting, instructing the witness not to answer, and suspending the deposition. Tex. R. Civ. P. 199.5(h).

Sanctions: See section 5.115 below regarding sanctions for the noticing party's failure to attend the deposition or serve a subpoena.

§ 5.85 Hearing on Objection or Privilege

At any reasonable time a party may request a hearing on an objection or a privilege asserted by an instruction not to answer or suspension of an oral deposition, but a party's failure to obtain a ruling before trial does not waive the objection or privilege. The party must present any evidence necessary to support the objection or privilege, either by testimony or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an in camera review is needed, the answers may be made in camera, to be transcribed and sealed if the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper. Tex. R. Civ. P. 199.6.

§ 5.86 Nonstenographic Recording; Deposition by Telephone

Nonstenographic Recording: Any party may cause a deposition on oral examination to be recorded by nonstenographic means, including videotape. However, five days' written notice must be served on the witness and all parties. The notice must state the method of nonstenographic recording and whether the deposition will also be recorded stenographically. On written notice, any other party may designate an additional method of recording the deposition, at that party's expense unless the court orders otherwise. The party requesting the nonstenographic recording is responsible for obtaining a person authorized by law to administer the oath and for ensuring that the recording will be intelligible, accurate, and trustworthy. Tex. R. Civ. P. 199.1(c). See the discussion at section 5.90 below concerning requirements of delivery, certification, and use of the nonstenographic recording.

Deposition by Telephone: A party may take a deposition by telephone or other remote electronic means on reasonable prior written notice. The deposition is considered to be taken in the district and at the place where the witness is located when answering the questions. Tex. R. Civ. P. 199.1(b).

§ 5.87 Depositions on Written Questions

A deposition on written questions may be taken of any person or entity with twenty days' written notice served on the witness and all parties. The deposition may be taken outside the discovery period only by agreement or with leave of court. Tex. R. Civ. P. 200.1(a).

Notice: The notice must comply with the requirements of rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must also comply with those requirements. The notice may also include a request for production under rule 199.2(b)(5). Tex. R. Civ. P. 200.1(b).

Questions and Objections: The direct questions to be asked must be attached to the notice. Tex. R. Civ. P. 200.3(a). Within ten days of service of the notice, any party may object to the direct questions attached to the notice and serve cross-questions on all other parties. Within five days after the cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after the redirect questions are served, any party may object to the redirect questions and serve recross questions on all other parties. Any objections to the recross questions must be served within five days after the day they are served or at the time of the deposition, whichever occurs first. Tex. R. Civ. P. 200.3(b). Objections to the form of the questions are waived if this procedure is not followed. Tex. R. Civ. P. 200.3(c).

Conducting Deposition: The person noticing the deposition provides the deposition officer with a copy of the notice and of all the questions to be asked. Tex. R. Civ. P. 200.1(a). The deposition officer must conduct the deposition at the time and place designated and record the testimony of the witness under oath in response to the questions. If necessary, the deposition officer may summon and swear an interpreter. The deposition officer must prepare, certify, and deliver the deposition transcript in accordance with rule 203 (as discussed in section 5.90 below). Tex. R. Civ. P. 200.4.

Compelling Attendance: A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under rule 176; see section 5.82 above. If the witness is a party or is retained by, employed by, or otherwise subject

to the control of a party, however, service of the deposition notice on the party's attorney has the same effect as a subpoena served on the witness. Tex. R. Civ. P. 200.2.

§ 5.88 Depositions in Foreign Jurisdictions

A party may take a deposition on oral examination or written questions of any person or entity located in another state or foreign country for use in Texas proceedings. The deposition may be taken by notice; by letter rogatory, letter of request, or other such device; by agreement of the parties; or by court order. Tex. R. Civ. P. 201.1(a).

The deposition may be taken by notice in accordance with the discovery rules as if it were taken in Texas, except that the deposition officer may be a person authorized to administer oaths in the foreign jurisdiction. Tex. R. Civ. P. 201.1(b).

Deposition by letter rogatory, letter of request, or other such device is allowed only after motion filed with the court. Tex. R. Civ. P. 201.1(c), (d). The court must set a time for objection to the form of the device, and the objecting party must object in writing served on all other parties within that time or the objection is waived. Tex. R. Civ. P. 201.1(e). Evidence obtained in response to such a device is not inadmissible merely because of formal departures from the deposition requirements of Texas discovery rules. Tex. R. Civ. P. 201.1(f).

A deposition in another jurisdiction may be taken by electronic means in accordance with rule 199. Tex. R. Civ. P. 201.1(g).

COMMENT: The mere fact that the procedure is authorized by the Texas Rules of Civil Procedure does not necessarily mean that it is permitted or recognized by the law of the state or foreign jurisdiction in which the witness is located. The parties should first determine what procedures are permitted by the jurisdiction in which the witness is located and apply the appropriate procedure. Tex. R. Civ. P. 201 cmt. 1.

§ 5.89 Depositions before Suit or to Investigate Claims

A person may petition the court for an order authorizing a deposition to be taken before the filing of a suit to perpetuate or obtain testimony for use in an anticipated suit or to investigate a potential claim or suit. Tex. R. Civ. P. 202.1. The petition and notice of the hearing must be served at least fifteen days before the date of hearing on all persons to be deposed and, if suit is anticipated, on all potential adverse parties. Tex. R. Civ. P. 202.3(a). Provisions regarding the petition, notice and service, the order, the manner of

taking such a deposition, and its permitted use are contained in rules 202.2 through 202.5. *See* Tex. R. Civ. P. 202.2–.5.

§ 5.90 Signing, Certification, and Use of Depositions

Signature by Witness: The deposition officer must provide the original deposition transcript directly to the witness to examine and sign. If the witness is represented by an attorney at the deposition, the transcript is sent to the attorney. Tex. R. Civ. P. 203.1(a). All the witness's changes to the transcript must be done in writing on a separate sheet of paper and include a reason for the change. No erasures or obliterations may be made to the original transcript. The transcript must be signed by the witness, under oath (or pursuant to a declaration under section 132.001 of the Texas Civil Practice and Remedies Code), and returned to the deposition officer within twenty days, or the witness will be deemed to have waived the right to make the changes. Tex. R. Civ. P. 203.1(b). These requirements do not apply if the signature requirement is waived by the witness and all parties, to depositions on written questions, or to nonstenographic recordings of oral depositions. Tex. R. Civ. P. 203.1(c).

Deposition Certificate: The deposition officer files a sworn deposition certificate with the court and serves a copy on all parties; the certificate must also be attached as part of the deposition transcript or nonstenographic recording. Tex. R. Civ. P. 203.2.

Originals: The original transcript is returned to the party who asked the first question; the original nonstenographic recording is returned to the party who requested it. Tex. R. Civ. P. 203.3(a). The deposition officer must serve notice of delivery on all other parties. Tex. R. Civ. P. 203.3(b).

The party who has the original transcript or recording must make it available for inspection and copying by any other party. A party or the witness may obtain a copy of the transcript or recording from the deposition officer on payment of a reasonable fee. Tex. R. Civ. P. 203.3(c).

Exhibits: On request of a party, the original documents and things produced for inspection during the witness's examination must be marked for identification by the deposition officer and annexed to the transcript or nonstenographic recording. Tex. R. Civ. P. 203.4.

Objections: A party may object to errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the officer complies

with rule 203.3 (concerning delivery) at least one day before the case is called to trial, with regard to a deposition transcript, or thirty days before the case is called to trial, with regard to a nonstenographic recording, the party must file and serve the motion to suppress before the trial begins to preserve the objections. Tex. R. Civ. P. 203.5.

Use: A nonstenographic recording, or a written transcription of all or a portion of the recording, may be used to the same extent as a stenographic deposition. However, for good cause shown, the court may require that the party seeking to use the nonstenographic record or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. Tex. R. Civ. P. 203.6(a).

All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. A deposition is admissible against a party joined after the deposition is taken if it is admissible under rule 804(b)(1) of the Texas Rules of Evidence or if the later-joined party has had a reasonable opportunity to redepose the witness but has not done so. Tex. R. Civ. P. 203.6(b). Depositions taken in other proceedings may be used as permitted by the Texas Rules of Evidence. Tex. R. Civ. P. 203.6(c); *see also* Tex. R. Evid. 801(e)(2) (prior deposition testimony of party not hearsay if offered against party), 804 (prior deposition of unavailable witness).

§ 5.91 Amending or Supplementing Deposition Testimony

If an expert witness is under a party's control, that party must amend or supplement any deposition testimony by the expert but only with regard to the expert's mental impressions or opinions and the basis for them. Tex. R. Civ. P. 195.6. This rule provides the only duty to supplement deposition testimony. *See* Tex. R. Civ. P. 193 cmt. 5.

[Sections 5.92 through 5.100 are reserved for expansion.]

VII. Subpoenas

§ 5.101 Subpoenas

A subpoena may be issued by an attorney authorized to practice in Texas, by the clerk's office, or by an officer authorized to take depositions in Texas. Tex. R. Civ. P. 176.4.

(*See* Tex. Civ. Prac. & Rem. Code § 20.001 regarding authority to take depositions.) The subpoena may be served by a sheriff or constable or any nonparty person over eighteen years of age. Tex. R. Civ. P. 176.5(a). Proof of service must be documented either by memorandum signed by the witness acknowledging acceptance of the subpoena or by a statement by the person serving, which must include the date, time, and manner of service and the name of the person served. Tex. R. Civ. P. 176.5(b).

All subpoenas must be issued in the name of "The State of Texas" and contain these elements: the style; the cause number; the court; the date of issuance; identification of the subpoenaed person; the time, place, and nature of the action required by the subpoenaed person; the name of the party causing the subpoena to be issued (and the party's attorney, if any); the text contained in rule 176.8(a); and the signature of the issuing person. Tex. R. Civ. P. 176.1.

Properly issued subpoenas are generally valid within a radius of 150 miles from the county in which the subpoenaed person resides or is served. Tex. R. Civ. P. 176.3(a). Subpoenas may be served on witnesses who reside 150 miles or less from the county in which the suit is pending or who may be found within that distance at the time of trial. Tex. Civ. Prac. & Rem. Code § 22.002. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record. Tex. R. Civ. P. 176.5(a).

A subpoena must command the person to attend and give testimony at a deposition, hearing, or trial; produce and permit inspection and copying of designated documents or tangible things in the person's possession, custody, or control; or both. Tex. R. Civ. P. 176.2. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the discovery rules. Tex. R. Civ. P. 176.3(b).

Witnesses and custodians of records are entitled to the payment of fees before they must appear to testify or produce or certify records, as applicable. A witness is entitled to $10 for each day the witness attends court. This fee includes the entitlement for travel, and the witness is not entitled to any reimbursement for mileage traveled. Tex. Civ. Prac. & Rem. Code § 22.001(a). The party who summons the witness must pay that witness's fee for one day at the time the subpoena is served on the witness. Tex. Civ. Prac. & Rem. Code § 22.001(b). Witnesses summoned by a state agency are entitled to different fees. *See* Tex. Civ. Prac. & Rem. Code § 22.003.

A custodian of records who produces or certifies a record in response to a request for production or certification of a record under a subpoena, a request for production, or

other instrument issued under the authority of a tribunal that compels production or certification of a record is entitled to $1 for production or certification of the record. If more than one record is produced or certified, the custodian of the records is entitled to only one fee under section 22.004 of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 22.004(a). Note, however, that other laws may require the payment of additional fees for the production of these records. The fee required by section 22.004 is in addition to any other fee imposed by law for the production or certification of a record. Tex. Civ. Prac. & Rem. Code § 22.004(e). The party requesting the production or certification of the records must pay the $1 fee at the time the subpoena, request, or other instrument is served. Tex. Civ. Prac. & Rem. Code § 22.004(c). If the custodian of records produces or certifies a record but is not required to appear in court, the custodian is not entitled to the $10 per day witness fee under section 22.001. Tex. Civ. Prac. & Rem. Code § 22.004(b).

A party causing a subpoena to issue must take reasonable steps to avoid undue burden and expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship. Tex. R. Civ. P. 176.7. In determining whether a deposition notice or subpoena duces tecum is unreasonable and oppressive, the following factors are relevant: (1) the quantity of materials subpoenaed, (2) the ease or difficulty of collecting and transporting the materials, (3) the length of time before the deposition, (4) the availability of the information from other sources, and (5) the relevance of the materials. *St. Luke's Episcopal Hospital v. Garcia*, 928 S.W.2d 307, 310 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding).

§ 5.102 Enforcement of Subpoenas

Failure by a subpoenaed person to obey the subpoena, without adequate excuse, may be deemed a contempt of court. (Requirements related to the response, objections, and protective orders are detailed in rule 176.6.) On a finding of contempt, the court may punish the violating party by fine, confinement, or both. Tex. R. Civ. P. 176.8(a).

Before a fine may be imposed on a person who has failed to comply with a subpoena, there must be filed an affidavit of the party requesting the subpoena, or of the attorney of record, that all fees due the witness by law were paid or tendered. Tex. R. Civ. P. 176.8(b).

[Sections 5.103 through 5.110 are reserved for expansion.]

VIII. Abuse of Discovery and Sanctions

§ 5.111 Motion for Sanctions or Order Compelling Discovery

A party may apply for sanctions, an order compelling discovery, or both on reasonable notice to other parties and to all other persons affected thereby as described below. Tex. R. Civ. P. 215.1. The imposition of an available sanction must be "just." Whether a sanction is "just" is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. The sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party. In addition, the sanction should be directed against the offender. Therefore, the trial court must attempt to determine whether the conduct in question is attributable to counsel only, to the party only, or to both. Second, for a punishment to be "just," it must not be excessive. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. Thus, the courts must first consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance and deterrence and discourage further abuse. A trial court exceeds its discretion if the sanction it imposes exceeds the purposes that discovery sanctions are intended to further. *Best Industrial Uniform Supply Co. v. Gulf Coast Alloy Welding, Inc.*, 41 S.W.3d 145, 148 (Tex. App.—Amarillo 2000, pet. denied).

Appropriate Court: An application for an order must be made to the court in which the action is pending, except in two circumstances: (1) on matters relating to the deposition of a party, an application for an order to the party may be made to the court in which the action is pending or to any district court in the district in which the deposition is being taken and (2) an application for an order related to a nonparty deponent shall be made to the court in the district in which the deposition is being taken. Tex. R. Civ. P. 215.1(a).

Motion: The party seeking discovery may move for an order compelling discovery or apply for the imposition of sanctions (without the necessity of first having obtained a court order compelling the discovery) if one of the following occurs:

1. A party or other deponent that is a corporation or other entity fails to designate a person for deposition and state the matters on which the person will testify.

2. A party, other deponent, or person designated to testify on behalf of a party or other deponent fails to appear before the officer who is to take his deposition (after being served with a proper notice) or to answer a question propounded or submitted on oral examination or written questions.

3. A party fails to serve answers or objections to properly served interrogatories, fails to answer an interrogatory, fails to serve a written response to a properly served request for inspection, or fails to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection under rule 196.

Tex. R. Civ. P. 215.1(b).

For purposes of rule 215.1, an evasive or incomplete answer is treated as a failure to answer. Tex. R. Civ. P. 215.1(c).

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. Tex. R. Civ. P. 215.1(b).

If the court denies the motion in whole or in part, it may make such discovery protective order as it would have been empowered to make on a motion under rule 192.6. Tex. R. Civ. P. 215.1(b).

Rule 215.1(d) provides for the awarding of expenses, including attorney's fees, following a hearing on a motion to compel. *See* Tex. R. Civ. P. 215.1(d).

If a party fails to comply with any person's written request for the person's own statement as provided in rule 192.3(h), the person making the request may move for an order compelling compliance and, if the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney's fees, that are reasonable in relation to the amount of work reasonably expended in obtaining the order. Tex. R. Civ. P. 215.1(e).

§ 5.112 Failure to Comply with Order or Discovery Request

Sanctions by Court in District in Which Deposition Is Taken: If a deponent fails to appear, fails to be sworn, or fails to answer after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. Tex. R. Civ. P. 215.2(a).

Sanctions by Court in Which Case Is Pending: For failure to comply with a proper discovery request or to obey an order to provide or permit discovery, the court in which the action is pending may, after notice and hearing, enter such orders "as are just." Tex. R. Civ. P. 215.2(b). The Supreme Court of Texas said in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991) (orig. proceeding):

> In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. . . .
>
> Second, just sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.

TransAmerican Natural Gas Corp., 811 S.W.2d at 917; *see In re Marriage of Mize*, 558 S.W.3d 187, 195–96 (Tex. App.—Texarkana 2018, no pet.) (when client claims Fifth Amendment privilege to questions in deposition that are not connected to criminal charges, court should try to determine if offensive conduct is attributable to party, counsel, or both and must consider lesser sanctions if appropriate). Possible sanctions include, but are not limited to—

1. an order disallowing any further discovery of any kind or of a particular kind by the disobedient party (*see Thompson v. Davis*, 901 S.W.2d 939, 940 (Tex. 1995) (orig. proceeding) (per curiam));
2. an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising the party;
3. an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
4. an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence;

5. an order striking out pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party (*see Salomon v. Lesay*, 369 S.W.3d 540, 557 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Weimer v. Weimer*, 788 S.W.2d 647, 648–50 (Tex. App.—Corpus Christi–Edinburg 1990, no writ); *Monaghan v. Crawford*, 763 S.W.2d 955, 956–59 (Tex. App.—San Antonio 1989, no writ));

6. in lieu of or in addition to any of the foregoing orders, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; and

7. when a party has failed to comply with an order under rule 204 requiring him to appear or produce another person for examination, such orders as are listed in items 1.–5. above, unless the person failing to comply shows that he is unable to appear or to produce the person for examination.

In lieu of or in addition to any of the foregoing orders, the court shall require the party failing to obey the order or the attorney advising the party, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Tex. R. Civ. P. 215.2(b).

This is a nonexclusive list of available sanctions. For example, although the rule does not specifically authorize the imposition of punitive monetary sanctions, these may be justified under the "as are just" language of the rule. *See Ismail v. Ismail*, 702 S.W.2d 216, 224–25 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) ($15,000 fine for failure to file court-ordered inventory and appraisement). Note that some courts have limited monetary sanctions available for abuse of discovery to reasonable expenses, including attorney's fees, caused by the abuse. *Clone Component Distributors of America, Inc. v. State*, 819 S.W.2d 593, 597 (Tex. App.—Dallas 1991, no writ); *Owens-Corning Fiberglas Corp. v. Caldwell*, 807 S.W.2d 413, 415 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied]). Sanctions striking a party's pleadings and deeming the party's net monthly resources to be $6,000 have been upheld. *See In re J.D.N.*, 183 S.W.3d 128 (Tex. App.—Dallas 2006, no pet.). However, there are limitations on a trial court's ability to impose sanctions; the reviewing court must consider whether (1) a direct relationship exists between the offensive conduct and the sanctions imposed and (2) the sanctions are excessive. *TransAmerican Natural Gas Corp.*, 811 S.W. 2d at 917.

The trial court must consider the availability of lesser sanctions and state a reasoned explanation as to the appropriateness of the greater sanction before imposing the death penalty sanction. An order merely listing instances where the party failed to comply with discovery orders, with no indication why the death penalty sanctions were warranted, will not be upheld. *Mullins v. Mullins*, No. 02-16-00449-CV, 2017 WL 3184676 (Tex. App.—Fort Worth July 27, 2017, no pet.) (mem. op.); *see also Young v. Young*, No. 03-14-00720-CV, 2016 WL 7339117 (Tex. App.—Austin Dec. 15, 2016, no pet.) (mem. op.).

To obtain sanctions for nonproduction of documents, the requesting party has the burden to prove that the other party has possession of the requested documents. *GTE Communications Systems Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding).

Sanctions against Nonparty: If a nonparty fails to comply with an order under rule 196.7 or rule 205.3, the court that made the order may treat the failure to obey as contempt of court. Tex. R. Civ. P. 215.2(c).

§ 5.113 Abuse of Discovery Process

The court in which an action is pending may, after notice and hearing, impose any appropriate sanction listed in paragraphs 1–5 and paragraph 8 of rule 215.2(b) if the court finds that a party is abusing the discovery process in seeking, making, or resisting discovery; that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing; or that a response or answer is unreasonably frivolous or made for purposes of delay. Tex. R. Civ. P. 215.3.

The rules permit the suspension of a deposition based on events that occur during the deposition—specifically, the expiration of time limits or violation of applicable rules governing taking depositions. Tex. R. Civ. P. 199.5(g). However, counsel for one of the parties cannot unilaterally suspend the deposition before it commences without incurring a finding of an abuse of discovery. For a deponent not wanting to be deposed, the proper avenue is to file a motion to quash. A finding of bad faith is not necessarily a factor when a trial court imposes a sanction, other than a death penalty sanction, under rule 215.2(b). *Wilson v. Shamoun & Norman, LLP*, 523 S.W.3d 222, 229–31 (Tex. App.—Dallas 2017, pet. denied).

§ 5.114 Failure to Comply with Rule 198

A party who has requested an admission under rule 198 may move to determine the sufficiency of the answer or objection. An evasive or incomplete answer may be treated as a failure to answer. The court shall order that an answer be served, unless it determines that an objection is justified. If the court determines that an answer does not comply with the requirements of rule 198, it may order either that the matter is admitted or that an amended answer be served. Rule 215.1(d) provisions apply to the award of expenses incurred for the motion. Tex. R. Civ. P. 215.4(a).

If a party proves the genuineness of a document or the truth of a matter after another party fails to admit the genuineness or truth as requested under rule 198, the proving party may apply to the court for an order for the other party to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees. The court shall order the expenses paid unless it finds that the request was held objectionable under rule 193, the admission sought was not of substantial importance, the party failing to admit had a reasonable ground to believe he might prevail on the matter, or there was other good reason for the failure to admit. Tex. R. Civ. P. 215.4(b).

§ 5.115 Failure to Attend or Serve Subpoena

If a party who gives notice of an oral deposition fails to attend and proceed and another party attends in person or by attorney, the court may order the party giving the notice to pay the other party's reasonable expenses, including attorney's fees, incurred in attending. Those expenses may also be ordered paid if a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice (for example, failure to subpoena a nonparty witness). Tex. R. Civ. P. 215.5.

In a parentage determination or child support proceeding under title 5 of the Family Code, a court or the title IV-D agency may issue an order suspending license if a parent or alleged parent has failed, after receiving appropriate notice, to comply with a subpoena. Tex. Fam. Code §§ 232.001(4), 232.003(b); *see also* Tex. Fam. Code §§ 232.004–.016.

§ 5.116 False Certification

If the certification required under rule 191.3 is false without substantial justification, the court may, on motion or on its own initiative, impose on the person who made the certi-

fication or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under chapter 10 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 191.3(e).

Chapter 6
Information Gathering and Third-Party Notices

I. Useful Websites

§ 6.1 Useful Websites 261

II. Third-Party Notices

§ 6.11 Lis Pendens 263
§ 6.12 Notice to Pension Trustees 264
§ 6.13 Information for Suits Affecting Parent-Child Relationship 264
§ 6.14 Affidavit Concerning Costs and Necessity of Services 265

Chapter 6

Information Gathering and Third-Party Notices

I. Useful Websites

§ 6.1 Useful Websites

The following is a list of websites useful to the family law practitioner:

American Academy of Matrimonial Lawyers
www.aaml.org

Car title history
www.carfax.com

Children's Health Insurance Program
www.texaschildrenshealthplan.org/

Credit report
www.equifax.com
www.experian.com
www.transunion.com

English language and translation
www.wordsmyth.net
http://translate.google.com/

Family education and advocacy
www.puttingkidsfirst.org

Internal Revenue Service
www.irs.gov

Legal resources and links
www.texasbar.com

www.texasbarpractice.com
www.texasbarcle.com
www.virtualchase.justia.com
www.findlaw.com

Maps
maps.google.com
www.mapquest.com

National Association of Bar Executives
www.nabenet.org

National Drug Code Directory
www.fda.gov/Drugs/InformationOnDrugs/ucm142438.htm

Pension Benefit Guaranty Corporation
www.pbgc.gov

Search engines, fee-based
www.accurint.com
https://legal.thomsonreuters.com/en/westlaw
www.publicdata.com

Social Security
www.ssa.gov

State Bar of Texas Family Law Section
www.sbotfam.org

Telephone taping/recording guidelines
www.rcfp.org/reporters-recording-guide

Texas Academy of Family Law Specialists
www.tafls.org

Texas Comptroller of Public Accounts
http://comptroller.texas.gov/taxinfo/proptax/

Texas courts
www.txcourts.gov

Texas legislature online
https://capitol.texas.gov/

Texas sex offender registry
www.dps.texas.gov/section/crime-records

Used car values
www.kbb.com
www.edmunds.com
www.nada.com

[Sections 6.2 through 6.10 are reserved for expansion.]

II. Third-Party Notices

§ 6.11 Lis Pendens

A lis pendens notice is filed in the real property records to give notice that there is a lawsuit pending that may affect the title to real property. The lis pendens should be filed with the office of the county clerk in each county in which any part of the affected real estate is located, and it must state the style, number, and kind of proceeding, the court in which the proceeding is pending, the names of the parties, the kind of proceeding, and a description of the property affected. Tex. Prop. Code § 12.007(a), (b).

The notice of lis pendens may be filed before service is obtained in the lawsuit. *See* Tex. Prop. Code § 13.004(a). A transfer or encumbrance of real property involved in a proceeding by a party to the proceeding to a third party who has paid a valuable consideration and who does not have actual or constructive notice of the proceeding is effective, even though the judgment is against the party transferring or encumbering the property, unless a notice of the pendency of the proceeding has been recorded and indexed under that party's name as provided in section 12.007(c) of the Texas Property Code in each county in which the property is located. Tex. Prop. Code § 13.004(b).

The lis pendens does not give notice of issues not appearing on the face of the pleadings of the case. *Kropp v. Prather*, 526 S.W.2d 283, 287 (Tex. App.—Tyler 1975, writ ref'd n.r.e.). Therefore, specific reference to the real estate should be made in the pleadings on file.

The notice of lis pendens may be signed by the party to the suit, his agent, or his attorney of record in the case. Tex. Prop. Code § 12.007(b). No later than three days after the notice is filed for record, the party filing it must serve a copy of the notice on each party to the action who has an interest in the real property. Tex. Prop. Code § 12.007(d). Because the lis pendens creates a cloud on the title to the real estate concerned, it should be released as soon as the case terminates or when the restraint on alienation is no longer needed.

Expunction: A party to the action may apply to the court to expunge the lis pendens notice. Notice of the motion to expunge must be served on each affected party at least twenty days before the hearing on the motion. Failure of the party filing the lis pendens notice for record to serve the notice required under Property Code section 12.007(d) is one of the bases on which the court may expunge the notice. Tex. Prop. Code § 12.0071. Other provisions regarding the expunction process are set out in the statute.

§ 6.12 Notice to Pension Trustees

Payment or refund by an employer or trustee under a written plan discharges that employer or trustee unless, before payment or refund is made, notice that some other person claims to be entitled to all or part of the payment or refund has been received by the employer at his principal Texas business address or by the trustee at his home office. If payment or refund is composed of stock in any corporation, the corporation must be notified at its home office. Tex. Lab. Code §§ 82.002–.004.

§ 6.13 Information for Suits Affecting Parent-Child Relationship

Certain information must be obtained to be included in the final order if the suit involves children except in a proceeding involving termination of the parent-child relationship or adoption.

A final order in a suit affecting the parent-child relationship must contain the Social Security number and driver's license number of each party to the suit, including the child, except that the child's Social Security number or driver's license number is not required if such a number has not been assigned. Tex. Fam. Code § 105.006(a)(1).

The final order must also contain each party's current residence address, mailing address, home telephone number, employer's name, employment address, and work telephone number, unless providing the information is likely to cause the child or con-

servator harassment, abuse, serious harm, or injury. Tex. Fam. Code § 105.006(a)(2), (c).

Rule 21c of the Texas Rules of Civil Procedure provides rules for filing documents that have sensitive data, which includes any part of a Social Security number or other taxpayer identification number, bank account or other financial account numbers, and other identification numbers. Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation, this information must be redacted. If the document must contain sensitive data, it should be designated as containing sensitive data if it is e-filed; if it is not e-filed, it must include, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

§ 6.14 Affidavit Concerning Costs and Necessity of Services

Section 18.001 of the Civil Practice and Remedies Code permits use of affidavits to establish reasonableness of charges and necessity of services. Unless controverted, an affidavit that the amount a person was charged for a service was reasonable at the time and place the service was provided and that the service was necessary is sufficient to support a fact finding by the judge or jury. Tex. Civ. Prac. & Rem. Code § 18.001(b). Such an affidavit can often be used to establish health-care expenses in paternity litigation and attorney's fees in all family law cases.

The affidavit must be made by the person who provided the service or by the person in charge of records showing the service provided and charge made and must include an itemized statement of the service and charge. Tex. Civ. Prac. & Rem. Code § 18.001(c).

The affidavit must be served on each other party by the earlier of (1) ninety days after the date the defendant files an answer; (2) the date the offering party must designate any expert witness under a court order; or (3) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(d). If services are provided for the first time by a provider after the answer is filed, the affidavit must be served by the earlier of (1) the date the offering party must designate any expert witness under a court order or (2) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(d–1). When the affidavit is served, notice must be filed with the clerk that the affidavit was served in accordance with section 18.001. Except as provided by the Texas Rules of Evidence, the affidavit is not required

to be filed with the clerk before the trial begins. Tex. Civ. Prac. & Rem. Code § 18.001(d–2).

The party opposing a claim in the affidavit must serve a counteraffidavit made by a person "qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." It must give reasonable notice of the basis on which the serving party intends to controvert the claim at trial, and it may not be used to controvert the causation element of the cause of action. Tex. Civ. Prac. & Rem. Code § 18.001(f).

The counteraffidavit must be served on the party or the party's attorney by the earlier of (1) 120 days after the date the defendant files its answer; (2) the date the party offering the counteraffidavit must designate expert witnesses under a court order; or (3) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(e). If service of the affidavit was made under section 18.001(d–1), the counteraffidavit must be served by the later of (1) thirty days after the affidavit was served; (2) the date the party offering the counteraffidavit must designate any expert witness under a court order; or (3) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(e–1). When the counteraffidavit is served, written notice must be filed with the clerk that the counteraffidavit was served in accordance with section 18.001. Tex. Civ. Prac. & Rem. Code § 18.001(g).

If continuing services are provided after a relevant deadline, affidavits may be supplemented on or before the sixtieth day before the trial begins, and counteraffidavits may be supplemented on or before the thirtieth day before the trial begins. Tex. Civ. Prac. & Rem. Code § 18.001(h). Deadlines may be altered by agreement of all parties or with leave of court. Tex. Civ. Prac. & Rem. Code § 18.001(i).

The affidavit or counteraffidavit must be taken before an officer with authority to administer oaths. Tex. Civ. Prac. & Rem. Code § 18.001(c)(1), (f). An unsworn declaration comporting with section 132.001 of the Civil Practice and Remedies Code may be submitted instead of an affidavit. *See* Tex. Civ. Prac. & Rem. Code § 132.001.

Chapter 7

Inventory and Appraisement

§ 7.1 Court Order 269

§ 7.2 All Property Included 270

§ 7.3 Discovery Procedures 270

§ 7.4 Judicial Admission 270

§ 7.5 Spreadsheets 272

§ 7.6 On Appeal 272

Chapter 7

Inventory and Appraisement

§ 7.1 Court Order

While a suit for dissolution of a marriage is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may grant temporary orders requiring one or both parties to prepare a sworn inventory and appraisement of the real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities. Tex. Fam. Code § 6.502(a)(1). Failure to comply with temporary orders ordering the preparation and filing of the sworn inventory and appraisement by a certain date is punishable by contempt. *See* Tex. Fam. Code § 6.506; *see also Ismail v. Ismail*, 702 S.W.2d 216, 224 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

In order for the court to determine, with some degree of accuracy, the true nature and extent of the estates of the parties (whether community or separate), an accurate inventory of all the assets and liabilities of the parties should be required by the court. Requiring an accurate inventory and appraisement will increase the probability of the court's dividing the property of the parties in a manner the court deems just and right, having due regard for the rights of each party and any children of the marriage, in accordance with section 7.001. *See* Tex. Fam. Code § 7.001. It is also helpful for each party to attach supporting documents to the party's inventory and appraisement, including financial account statements and other documents evidencing the character and value of assets and liabilities.

Additionally, an inventory and appraisement should be the starting point for the preparation of any requested findings of fact and conclusions of law concerning the characterization and value of all assets, liabilities, claims, and offsets on which disputed evidence has been presented. *See* Tex. Fam. Code § 6.711.

Local rules of the county in which the case is filed govern the form of the inventory, the degree of particularity required in its preparation, the time within which it must be filed, and the sanctions a court may impose for a party's failure to comply with those local rules.

§ 7.2 All Property Included

Notwithstanding the court's requirement of the preparation of inventories, counsel must ensure that all property is accounted for and listed in the inventory. If a party asserts the existence of property not listed in an inventory, the burden of proof lies with that party. *See Deane v. Deane*, 298 S.W.2d 282, 284 (Tex. App.—Eastland 1957, no writ). Community property not divided by the decree of divorce, whether listed on an inventory or not, is subject to postdecree division. *See* Tex. Fam. Code § 9.201 *et seq.*

Counsel should exercise caution to identify accurately the character and value of property listed in the inventory, including whether any property is of mixed character and the basis for any claim of separate property. A party's uncontroverted testimony regarding the value of her own property is sufficient to sustain a finding as to value. *See Espronceda v. Espronceda*, No. 13-15-00081-CV, 2016 WL 3225860 (Tex. App.—Corpus Christi–Edinburg June 9, 2016, no pet.) (mem. op.).

See the practice notes in chapter 3 of this manual for a discussion of the characterization and division of property.

§ 7.3 Discovery Procedures

Counsel should use all appropriate and necessary discovery procedures available for preparation of an accurate inventory. The court may require the production of books, papers, documents, and tangible things by a party. Tex. Fam. Code § 6.502(a)(3). Discovery procedures aid counsel in preparing an accurate inventory and ensure that the opposing party has been candid in disclosing all assets and liabilities of the parties. See the practice notes in chapter 5 of this manual and the rules of civil procedure discussed there.

§ 7.4 Judicial Admission

A sworn inventory and appraisement that is filed with the court constitutes a judicial admission about the characterization of the items listed and will be accepted as true and binding on the party. *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.—El Paso 1985, writ dism'd); *see also Dutton v. Dutton*, 18 S.W.3d 849, 852–53 (Tex. App.—Eastland 2000, pet. denied). If a party attempts to offer evidence about characterization of an asset contrary to a sworn inventory and appraisement filed with the court by that party, the evidence would not be admissible on proper objection, because the inventory is a judicial admission. *Roosevelt*, 699 S.W.2d at 374. In *Dutton*, the husband filed a

sworn inventory and appraisement with the trial court and listed certain real estate as community property. The husband did not introduce his inventory and appraisement into evidence. The wife filed a sworn inventory and appraisement with the trial court, listing the same real estate as her separate property. The wife's inventory and appraisement was introduced into evidence. The trial court found the real estate to be community property and awarded it all to the wife. On appeal, the husband contended that the real estate was one-half his separate property and one-half the wife's separate property. The appellate court held that the husband's inventory and appraisement, characterizing the real estate as community property, constitutes a judicial admission that bars him from asserting on appeal that the real estate is other than community property. The appellate court in *Dutton* further stated:

> Judicial admissions estop the party who made them from challenging their truth. Five conditions must occur before a party's admission is conclusive against him: (1) the declaration relied upon must have been made in the course of a judicial proceeding; (2) the declaration was contrary to an essential fact embraced in the theory of recovery or defense asserted by the party; (3) the statement was deliberate, clear, and unequivocal; (4) giving conclusive effect to the declaration would not run contrary to public policy; and (5) the declaration related to a fact upon which a judgment for the opposing party was based.

Dutton, 18 S.W.3d at 853.

The effect of a judicial admission in an inventory and appraisement can be muted when (1) a litigant pleads separate property, (2) a litigant tenders requests for admission related to a claim for separate property, (3) a litigant discloses during discovery the documentary evidence to support the claim of separate property, (4) the party opposite files responsive pleadings concerning equitable reimbursement demonstrating a recognition of a separate-property claim, (5) the litigant seeks leave of court to amend an inventory to correct an error, (6) the trial court grants leave to amend an inventory, and (7) there is no objection to the admission of contradictory evidence. *Rivera v. Hernandez*, 441 S.W.3d 413, 424 (Tex. App.—El Paso 2014, pet. denied).

However, merely asserting in a sworn inventory and appraisement that certain property is the separate property of a party is not sufficient to establish that fact. A sworn inventory is simply another form of testimony. Additional evidence is required to rebut the presumption that all property possessed by either party is community property. *Warriner v. Warriner*, 394 S.W.3d 240, 248–49 (Tex. App.—El Paso 2012, no pet.).

COMMENT: Because a sworn inventory and appraisement constitute a form of testimony, and a judicial admission if filed with the court, one should exercise caution in preparing such an inventory and appraisement. Unless otherwise required by court order or the local rules of the court, it may be prudent to submit to opposing counsel a preliminary, unsworn inventory and appraisement in the early stages of a divorce case, so that the party's inventory and appraisement may be amended, if necessary, after further information is obtained but before the party has sworn to the contents of the inventory and appraisement.

§ 7.5 Spreadsheets

It is very helpful for settlement preparation and trial presentation to convert the inventory and appraisement of both parties into either separate spreadsheets or a combined spreadsheet, showing husband's values, wife's values, and a blank column for the court to insert its values. The value assigned by the court for a particular asset or liability, to which husband and wife have assigned different values, can aid in the preparation of findings of fact and conclusions of law under Texas Family Code section 6.711.

§ 7.6 On Appeal

An appellate court may not consider an inventory and appraisement on appeal if it is not formally admitted into evidence at trial. *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508–09 (Tex. App.—Austin 1994, no writ). However, even if an inventory and appraisement is admitted into evidence at trial, the appellant should request findings of fact and conclusions of law from the trial court. Without findings of fact and conclusions of law, the appellate court cannot assess whether the property division ordered by the trial court was equal or disproportionate and, if disproportionate, which factors the trial court found to warrant such a division. *Moore v. Jordan*, No. 01-18-00547-CV, 2019 WL 5381997, at *6 (Tex. App.—Houston [1st Dist.] Oct. 22, 2019, no pet.) (mem. op.).

Chapter 8

Ancillary Motions and Proceedings

I. General Considerations

§ 8.1 Requisites of Motion; Service; Electronic Filing 277

§ 8.2 Copies of Motions 278

II. Attorneys and Judges

§ 8.11 Attorney in Charge 279

§ 8.12 Withdrawal of Attorney 279

§ 8.13 Disqualification of Attorney 281

§ 8.14 Attorney's Authority 287

§ 8.15 Motion to Recuse or Disqualify Judge 287

§ 8.16 Trial before Assigned Judge 291

§ 8.17 Associate Judge 292

III. Service of Citation

§ 8.21 Substituted Service—Rule 106 295

§ 8.22 Other Substituted Service—Rule 109a 296

§ 8.23 Amending Citation—Rule 118 296

§ 8.24 Service of Amended Petition 297

IV. Judicial Notice and Joinder of Causes

§ 8.31 Judicial Notice 297

§ 8.32 Severance 298

§ 8.33 Consolidation 298

§ 8.34 Separate Trial 299

V. Ancillary Relief

§ 8.41 Master in Chancery 300

§ 8.42 Auditor 301

§ 8.43 Receiverships 302

§ 8.44 Mental or Physical Examination 305

§ 8.45 Child Custody Evaluation 306

VI. Motions for Summary Judgment

§ 8.51 Basics of Summary Judgment 306

§ 8.51:1 Traditional Motion for Summary Judgment 306

§ 8.51:2 No-Evidence Motion for Summary Judgment 308

§ 8.52 Use of Summary Judgment to Dispute Existence of Marriage Relationship 309

§ 8.53 Marital Property Agreements 311

§ 8.53:1 Summary Judgment and Enforceability of Marital Property Agreements 311

§ 8.53:2 Types of Agreements 312

§ 8.54 Characterization of Property: Separate or Community 312

§ 8.55 Children's Issues 312

§ 8.55:1 Texas Family Code Section 153.004 312

§ 8.55:2 Mandatory Prohibition 313

§ 8.56 Other Causes of Action 313

§ 8.57 Postdecree Issues 314

§ 8.57:1 Texas Family Code Chapter 9 314

§ 8.57:2 Bill of Review 315

§ 8.58 Affidavits and Verifications 315

VII. Maintaining Suit

§ 8.61 Nonsuit 317
§ 8.62 Dismissal 317
§ 8.63 Reinstatement 318
§ 8.64 Bankruptcy 319

VIII. Witnesses

§ 8.71 Exclusion of Expert Witness 320
§ 8.72 Presence of Dog to Assist Witness 322

IX. Indigence

§ 8.81 Claiming Indigence in Trial Court 323
§ 8.82 Indigence on Appeal 324

Chapter 8

Ancillary Motions and Proceedings

Note: While this chapter discusses in general many of the motions a family law attorney will file, many of the other chapters of this manual contain specific discussion of specialized motions. Some of these include discovery motions (chapter 5), motions in limine (chapter 19), establishment of parentage (chapter 54), and motions regarding a child (chapter 56).

I. General Considerations

§ 8.1 Requisites of Motion; Service; Electronic Filing

All motions, unless made during a hearing or trial, must be filed in writing with the clerk of the court and state the grounds and relief requested. At the same time, a true copy must be served on all other parties. The motion must be noted on the docket. Tex. R. Civ. P. 21(a). Any plea or pleading mistakenly designated shall, if justice so requires, be treated by the court as if it had been properly designated. Tex. R. Civ. P. 71; *In re J.Z.P.*, 484 S.W.3d 924, 925 (Tex. 2016) (per curiam). An application for an order and notice of any hearing, not presented during a trial or hearing, must be served on all other parties not less than three days before the time specified for the hearing, unless otherwise provided by the rules or shortened by the court. Tex. R. Civ. P. 21(b). The party or attorney of record must certify compliance in writing over signature on the filed motion. Tex. R. Civ. P. 21(d).

Attorneys must electronically file documents in courts where electronic filing has been mandated. Electronic filing is not required by unrepresented parties or by attorneys practicing in courts where electronic filing is not mandated. Tex. R. Civ. P. 21(f)(1). The e-mail address of an attorney or unrepresented party who electronically files must be included on the document. Tex. R. Civ. P. 21(f)(2).

Documents are timely filed if they are filed before midnight. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider unless the document is transmitted on a Saturday, Sunday, or legal holiday,

and then it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday. If a document requires a motion and an order allowing its filing, the document is deemed filed on the date the motion is granted. Tex. R. Civ. P. 21(f)(5). If a document is untimely due to a technical failure or system outage, a party may seek appropriate relief from the court, including a reasonable extension of time to complete the filing. Tex. R. Civ. P. 21(f)(6).

An electronic document that is electronically served, filed, or issued by a court or clerk is considered signed if the document contains (1) a "/s/" and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or (2) an electronic image or scanned image of the signature. Tex. R. Civ. P. 21(f)(7).

A document filed electronically under rule 21 must be served electronically through the electronic filing manager if the e-mail address of the party or attorney to be served is on file with the electronic filing manager. If an e-mail address is not on file with the electronic filing manager or the document is not electronically filed, rule 21a allows for service by commercial delivery service, by mail, by e-mail, or by fax as well as in person. Tex. R. Civ. P. 21a(a)

Service by mail or commercial delivery service shall be complete on deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service. Service by fax is complete on receipt. Service by fax completed after 5:00 P.M. local time of the recipient is deemed served the next day. Electronic service is complete on transmission of the document to the serving party's electronic filing provider. Tex. R. Civ. P. 21a(b).

The rule also provides that whenever a party has the right or is required to do some act within a prescribed period after service of notice or other paper on him and the notice or paper is served on him by mail, three days are added to the prescribed period. Tex. R. Civ. P. 21a(c). Service may be on the party or the party's duly authorized agent or attorney of record, as the case may be. Tex. R. Civ. P. 21a(a).

§ 8.2 Copies of Motions

If there is more than one other party represented by different attorneys, one copy of the motion must be served on each attorney in charge. Tex. R. Civ. P. 21(c). A party may obtain another copy of the same pleading by paying for the copying and delivery. Tex. R. Civ. P. 21(e). If a party fails to serve on or deliver to the other parties a copy of a

motion in accordance with rules 21 and 21a, the court has discretion, after notice and hearing, to order a sanction under rule 215.2(b). Tex. R. Civ. P. 21b.

[Sections 8.3 through 8.10 are reserved for expansion.]

II. Attorneys and Judges

§ 8.11 Attorney in Charge

Any party may prosecute or defend his rights either in person or by attorney. Tex. R. Civ. P. 7. When a party first appears through an attorney, the attorney whose signature first appears on the initial pleadings for any party is the attorney in charge, unless another attorney is specifically designated in those pleadings. That attorney in charge is responsible for the suit as to that party until the designation is changed by written notice to the court and all other parties in accordance with rule 21a. All communications from the court or from other attorneys about the suit are to be sent to that attorney in charge. Tex. R. Civ. P. 8.

§ 8.12 Withdrawal of Attorney

An attorney may withdraw from representing a party only on written motion for good cause shown. Contents of the motion vary depending on whether another attorney is to be substituted. If there will be a substitution, the motion must state the substitute attorney's name, address, telephone number, fax number, and State Bar identification number; that the party approves the substitution; and that the withdrawal is not sought for delay only. If there will be no substitution, the motion must state that a copy of the motion has been delivered to the party, that the party has been notified in writing of his right to object to the motion to withdraw, whether the party consents to the motion, the party's last known address, and all pending settings and deadlines. Tex. R. Civ. P. 10.

It is an abuse of discretion if the court allows an attorney to withdraw when trial counsel has not shown that counsel had taken reasonable steps to avoid foreseeable prejudice by giving due notice or giving the client time to retain other counsel before seeking permission from the trial court to withdraw from the representation, had delivered to the client all papers and property to which the client was entitled, or had taken any other measures to mitigate the prejudice the client might suffer as a result of the withdrawal

of representation. *Caddell v. Caddell*, 597 S.W.3d 10, 13 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (court allowed withdrawal on day of trial but denied continuance).

COMMENT: It is advisable to include in this information whether discovery has been requested, whether it was responded to, and a list of any deadlines for responding to or supplementing responses to requested discovery. If these matters are not contained in the motion, the client should be informed in writing.

If the motion is granted, the withdrawing attorney shall immediately give the party written notification of any additional settings or deadlines the attorney knows about at the time of withdrawal but of which he has not notified the party. The court may impose other conditions if withdrawal is granted. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and first-class mail. If the attorney in charge withdraws and another attorney remains or is substituted, a new attorney in charge must be designated and notice given to all other parties in accordance with rule 21a. Tex. R. Civ. P. 10.

The withdrawal of an attorney from a case is governed by Tex. Disciplinary Rules Prof'l Conduct R. 1.15 (1989), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9). That rule describes several situations in which withdrawal may be permitted—for example, in which withdrawal can be accomplished without material adverse effect on the client's interests; and in which the client fails substantially to fulfill an obligation to the attorney regarding the attorney's services, including an obligation to pay the agreed fee, and has been given reasonable warning that the attorney will withdraw unless the obligation is fulfilled. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b). Even if cause exists to withdraw, the attorney must continue the representation if ordered to do so by the court. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(c). If withdrawal is granted, the attorney must take steps to a reasonably practicable extent to protect the client's interests. These steps include giving the client reasonable notice, allowing time for employment of another attorney, surrendering papers and property to which the client is entitled, and refunding any unearned advance fee payments. The attorney may keep papers relating to the client to the extent permitted by other law only if their retention will not prejudice the client in the subject matter of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d).

The client should be notified of the motion to withdraw and of the date, time, and place of any hearing in which the court is requested to take action. An order authorizing the withdrawal should be signed by the court. If the attorney fails to give notice of his

motion to withdraw and there is no evidence that the client had notice or was aware of the attorney's withdrawal, no negligence or fault is attributed to the client as cause for failure to be represented at a later hearing. *See Robinson v. Risinger*, 548 S.W.2d 762, 765 (Tex. App.—Tyler 1977, writ ref'd n.r.e.).

It is reversible error to refuse to allow withdrawal if there is a serious conflict of interest, regardless of whether the motion is tardy, the granting of the motion would cause a continuance, or the attorney is at fault for helping to create the situation. *See J.W. Hill & Sons v. Wilson*, 399 S.W.2d 152, 153–54 (Tex. App.—San Antonio 1966, writ ref'd n.r.e.) (citing previously enacted Canons of Ethics).

COMMENT: The filing of a withdrawal and substitution of an attorney may expose the new attorney to liability for the actions of all preceding attorneys. The better practice is to file an appearance and designation of lead attorney.

§ 8.13 Disqualification of Attorney

A motion to disqualify an attorney should state the reasons for disqualification, and, if the motion is based on a disciplinary rule or ethical consideration, the specific rule should be cited. After notice and hearing, an order should be entered reflecting the court's ruling. *See generally In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341 (5th Cir. 1981).

Disciplinary Rules Provide Guidelines: The Texas Disciplinary Rules of Professional Conduct provide guidelines for a court to review when making its determination regarding disqualification. *See In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998) (orig. proceeding). In spite of the fact that "the disciplinary rules are merely guidelines—not controlling standards—for disqualification motions," *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (per curiam), "it would be injudicious for this court to employ a rule of disqualification that could not be reconciled with the Texas Rules of Professional Conduct." *Ayres v. Canales*, 790 S.W.2d 554, 556 n.2 (Tex. 1990) (orig. proceeding). Because the comments to the rules illustrate and explain applications of the rules, they, in addition to case law and the rules themselves, are relevant. *In re Robinson*, 90 S.W.3d 921, 925 (Tex. App.—San Antonio 2002, orig. proceeding); *see also* Tex. Disciplinary Rules Prof'l Conduct preamble ¶¶ 7, 10. The Texas Supreme Court has disqualified counsel based on rule 1.09 (*see In re Epic Holdings*, 985 S.W.2d at 52), even absent a disciplinary violation (*see National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996) (orig. proceeding), discussed in *In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998) (orig. proceeding)).

Disqualification is a severe remedy. *See Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding); *NCNB Texas National Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding). The courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory trial tactic. *See Spears*, 797 S.W.2d at 656. The reviewing court must determine whether the trial court abused its discretion in disqualifying or refusing to disqualify a party's counsel. *See Henderson v. Floyd*, 891 S.W.2d 252, 253 (Tex. 1995) (orig. proceeding) (per curiam). The injury to the legal profession from representation of a party by a lawyer who should have been disqualified is presumed harmful. *See In re Epic Holdings*, 985 S.W.2d at 54; *National Medical Enterprises*, 924 S.W.2d at 133.

Motion to Disqualify Must Be Timely Made: A party who fails to file its motion to disqualify opposing counsel in a timely manner waives the complaint, unless reasonable explanation is given. *See In re Users System Services, Inc.*, 22 S.W.3d 331, 337 (Tex. 1999) (orig. proceeding) (explanation given for seven-month delay); *In re Epic Holdings*, 985 S.W.2d at 52; *see also In re Taylor*, 67 S.W.3d 530, 534 (Tex. App.—Waco 2002, orig. proceeding) (motion to disqualify filed approximately two months after divorce filed not untimely).

Attorney as Fact Witness: To prevent such misuse of the rule, the trial court should require the party seeking disqualification to demonstrate actual prejudice to itself resulting from the opposing attorney's service in the dual roles. *See Ayres*, 790 S.W.2d at 558 (citing Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10). Under rule 3.08, the moving party must also present evidence that the testimony of the attorney is "necessary" and that it goes to an "essential fact" of the nonmovant's case. *See In re A.M.*, 974 S.W.2d 857, 864 (Tex. App.—San Antonio 1998, no pet.); *see also Gilbert McClure Enterprises v. Burnett*, 735 S.W.2d 309, 311 (Tex. App.—Dallas 1987, orig. proceeding) (stating disqualification not appropriate under this rule when opposing counsel merely announces intention to call attorney as fact witness; there must be genuine need for attorney's testimony that is material to opponent's client). Further, if the attorney *promptly* notifies opposing counsel of his dual role and advises him that disqualification would work a substantial hardship on his client, he may serve as counsel. *See In re A.M.*, 974 S.W.2d at 864; *Ayres*, 790 S.W.2d at 557.

Rule 3.08 does not prohibit the attorney who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 8. Accordingly, an attorney who is disqualified from representation at trial can continue to participate in the client's case until trial commences; he may continue to assist in pretrial matters such as drafting pleadings, engag-

ing in settlement negotiations, and assisting in trial strategy. *See Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422 (Tex. 1996). To minimize the possibility of unfair prejudice to an opposing party, the rule only prohibits any testifying lawyer who could not serve as an advocate from taking an active role before the tribunal in the presentation of the matter. *In re Bahn*, 13 S.W.3d 865, 873 (Tex. App.—Fort Worth 2000, orig. proceeding).

Finally, the testifying attorney's law firm can continue to represent the client even though the attorney will testify, as long as the client gives informed consent. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 8; *see also Anderson Producing*, 929 S.W.2d at 424; *Spears*, 797 S.W.2d at 658. The issue of informed consent is not a matter to be decided by the court at a disqualification hearing but is a matter to be decided between the client and the attorneys. *See Anderson Producing*, 929 S.W.2d at 424; *see also* Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10 ("[A] lawyer should not seek to disqualify an opposing lawyer under this Rule merely because the opposing lawyer's dual roles *may* involve an improper conflict of interest with respect to the opposing lawyer's client, for that is a matter to be resolved between lawyer and client or in a subsequent disciplinary proceeding." (emphasis added)).

Representation of Another Party in Matter Adverse to Former Client: Disciplinary rule 1.09 prohibits a lawyer, without the consent of his former client, from representing another party in a matter adverse to the former client if the lawyer represented the former client in the same matter or a substantially related matter. Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a)(3); *In re Cap Rock Electric Co-op, Inc.*, 35 S.W.3d 222, 230 (Tex. App.—Texarkana 2000, orig. proceeding). Rule 1.09(b) prohibits all lawyers in a firm from representing a client that any one of them could not represent because of rule 1.09(a). Tex. Disciplinary Rules Prof'l Conduct R. 1.09(b); *In re Epic Holdings*, 985 S.W.2d at 52. (Rule 6.05 provides exceptions to the conflicts-of-interest provisions in rule 1.09 for nonprofit and limited pro bono legal services. *See* Tex. Disciplinary Rules Prof'l Conduct R. 6.05.)

It is not necessary to show that a lawyer personally and substantially participated in the matter. *Henderson*, 891 S.W.2d at 254. A conclusive presumption arises that lawyers in the same law firm share confidential secrets, and members of a law firm cannot disavow access to confidential information of any one attorney's client. *See In re Epic Holdings*, 985 S.W.2d at 49; *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295, 300–301 (Tex. App.—Dallas 1988, orig. proceeding) (erection of Chinese wall did not rebut presumption of shared confidences). The reason for this presumption is that it would always be virtually impossible for a former client to prove that attorneys in the

same firm had not shared confidences. *In re Epic Holdings*, 985 S.W.2d at 49; *National Medical Enterprises*, 924 S.W.2d at 131; *Henderson*, 891 S.W.2d at 254. In addition, the presumption helps guard the integrity of the legal practice by removing undue suspicion that clients' interests are not being fully protected. *In re Epic Holdings*, 985 S.W.2d at 49.

The movant for disqualification must establish a substantial relationship between the two representations. *NCNB Texas National Bank*, 765 S.W.2d at 400; *In re Cap Rock*, 35 S.W.3d at 230. Two matters are "substantially related" within the meaning of rule 1.09 when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar. *In re Epic Holdings*, 985 S.W.2d at 51.

The movant need not prove an actual disclosure of confidences. The issue is the existence of a genuine threat of disclosure because of the similarity of the matters. *In re Epic Holdings*, 985 S.W.2d at 51; *see also Henderson*, 891 S.W.2d at 253–54.

Where knowledge of a client's confidences has been only imputed to an attorney, that attorney's departure from a firm will normally remove the imputation of knowledge, and the attorney is free to undertake representation adverse to that client. Tex. Disciplinary Rules Prof'l Conduct R. 1.09 cmt. 7. Comment 7, however, should not be interpreted to suddenly permit the use of confidential information to the disadvantage of a former client in violation of rule 1.05(b)(3) after an attorney departs from a firm. *Pollard v. Merkel*, 114 S.W.3d 695, 701 (Tex. App.—Dallas 2003, pet. denied) (trial court abused discretion when it failed to disqualify wife's attorney after she revealed information learned from husband's former lawyer and wife's attorney's former employer in her opening argument to jury).

For additional case law on attorney representation of another party in a matter adverse to a former client, see *In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

Joint Defense: An attorney has a duty under a joint-defense agreement to protect the codefendant's confidences. *See National Medical Enterprises*, 924 S.W.2d at 129–32. A written joint-defense agreement is not necessary. Participation in a joint defense could be cause for counsel's disqualification. This determination is in keeping with the joint-defense privilege found in rule 503(b)(1)(C) of the Texas Rules of Evidence, which does not require that written agreement exist in order for confidential communications to be protected under the rule. *See In re Skiles*, 102 S.W.3d 323, 326 (Tex.

App.—Beaumont 2003, orig. proceeding) (per curiam); *see also* Tex. R. Evid. 503(b)(1)(C).

Legal Assistant Who Has Worked for Opposing Counsel: The presumption that a legal assistant obtained confidential information is not rebuttable; the presumption that information was shared with a new employer may be overcome. In this regard, the courts have recognized a distinction between lawyers and nonlawyers. The courts were motivated to create this distinction by a concern that the mobility of a nonlawyer could be unduly restricted.

The only way the rebuttable presumption can be overcome is (1) to instruct the legal assistant "not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former employer's representation" and (2) to "take other reasonable steps to ensure that the paralegal does not work in connection with matters on which the paralegal worked during the prior employment, absent client consent." These precautions minimize the danger that a legal assistant will convey inappropriate information, even inadvertently. *In re American Home Products Corp.*, 985 S.W.2d 68, 74–75 (Tex. 1998) (orig. proceeding) (disqualification of firm required because plaintiffs did not rebut presumption that legal assistant shared confidential information received while previously working on underlying litigation at opposing counsel's firm with members of their firm); *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 467–68 (Tex. 1994) (orig. proceeding) (per curiam) (law firm disqualified because it temporarily employed legal secretary who had previously worked for opposing counsel); *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994) (orig. proceeding) (paralegal or legal assistant who has worked on case "must be subject to . . . a conclusive presumption that confidences and secrets were imparted").

Receipt of Privileged Documents: To determine whether an attorney who received an opponent's privileged documents by means other than discovery should be disqualified, the trial court should consider—

1. whether the attorney knew or should have known that the material was privileged;
2. the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
3. the extent to which the attorney reviews and digests the privileged information;
4. the significance of the privileged information—the extent to which its dis-

closure may prejudice the movant's claim or defense and the extent to which return of the documents will mitigate that prejudice;

5. the extent to which the movant may be at fault for the unauthorized disclosure; and
6. the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

In re Meador, 968 S.W.2d at 351–52; *In re Marketing Investors Corp.*, 80 S.W.3d 44, 51 (Tex. App.—Dallas 1998, orig. proceeding) (trial court abused discretion in not disqualifying attorney for not returning privileged documents).

Anticontact Rule: Rule 4.02(a) prohibits a lawyer from initiating or even orchestrating through another individual any contact with a represented person unless that person's attorney consents to the contact. Tex. Disciplinary Rules Prof'l Conduct R. 4.02(a). This rule does not apply, however, when the represented person is seeking a second opinion from another lawyer. Tex. Disciplinary Rules Prof'l Conduct R. 4.02(d).

Any person represented by counsel may terminate that representation. When this occurs, the lawyer is free to communicate with the now-unrepresented person within the guidelines of rule 4.03. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.03. However, the communicating attorney is obligated to resist the temptation to give advice in this situation, other than to advise the unrepresented party to obtain independent counsel. *See* Tex. Comm. on Professional Ethics, Op. 461 (1989); Tex. Disciplinary Rules Prof'l Conduct R. 4.03 cmt. 1; Barbara Hanson Nellermoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 St. Mary's L.J. 443, 496 (1997).

As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether he has been informed of the discharge. The communicating lawyer may also choose to inform the person that he does not wish to communicate further until he gets another lawyer. *See In re News America Publishing, Inc.*, 974 S.W.2d 97, 103 (Tex. App.—San Antonio 1998, orig. proceeding) (trial court abused discretion in not disqualifying law firm for violating anticontact rule).

Collaborative Agreement: A final basis of disqualification of an attorney exists when a collaborative law agreement has been entered into by the parties. With a few

exceptions, a collaborative lawyer and a lawyer in a firm with which the collaborative lawyer is associated are disqualified from appearing in court to represent a party in a proceeding related to the collaborative family law matter. This disqualification generally does not apply to the lawyer's making a request that the court approve an agreement resulting from the collaborative family law process or his seeking or defending an emergency order to protect a party or family. *See* Tex. Fam. Code §§ 15.106–.108.

§ 8.14 Attorney's Authority

If a party files a sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, the attorney for the other party will be cited to appear before the court and show his authority to act. Notice of the motion must be served on the challenged attorney at least ten days before the hearing. The burden of proof is on the challenged attorney to show sufficient authority to prosecute or defend the suit. If he fails to do so, the court shall refuse to permit him to appear in the case and shall strike the pleadings if no one authorized to prosecute or defend the suit appears. The motion may be heard any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing. Tex. R. Civ. P. 12.

§ 8.15 Motion to Recuse or Disqualify Judge

Rule 18a governs motions to recuse or disqualify a trial court judge. *See* Tex. R. Civ. P. 18a.

A motion to recuse is to be filed as soon as practicable after the movant knows of the ground stated in the motion and must be filed at least ten days before the date set for trial or hearing unless, before that day, the movant neither knew nor reasonably should have known that the judge would preside at the trial or hearing or that the ground stated in the motion existed. Tex. R. Civ. P. 18a(b)(1); *see Byars v. Evans*, No. 07-14-00064-CV, 2016 WL 105671, at *3–4 (Tex. App.—Amarillo Jan. 8, 2016, no pet.) (mem. op.). A motion to disqualify should be filed as soon as practicable after the movant knows of the ground stated in the motion. Tex. R. Civ. P. 18a(b)(2).

The motion must state one or more of the grounds for removal listed in rule 18b and may not be based solely on the judge's rulings in the case. It must be verified and must state the grounds with particularity. The motion is to be made on personal knowledge and must set forth facts that would be admissible in evidence and that, if proved, would

be sufficient to justify removal, provided that facts may be stated on information and belief if the basis for the belief is specifically stated. Tex. R. Civ. P. 18a(a).

A party may waive recusal if it is not raised in a proper motion. *McElwee v. McElwee*, 911 S.W.2d 182, 185–86 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111, 114 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). The procedural requirements for recusal set out in rule 18a of the Texas Rules of Civil Procedure are mandatory, and a party who fails to follow these requirements waives his right to complain of a judge's failure to recuse himself. *Pena v. Pena*, 986 S.W.2d 696, 701 (Tex. App.—Corpus Christi–Edinburg 1998), *pet. denied per curiam*, 8 S.W.3d 639 (Tex. 1999).

Any party may file a response before the motion is heard, but the judge should not file a response. Tex. R. Civ. P. 18a(c). A party who files a motion or response must serve a copy on every other party; the method of service must be the same as the method of filing, if possible. Tex. R. Civ. P. 18a(d). The clerk of the court must immediately deliver a copy of the motion or response to the judge and to the presiding judge of the administrative judicial district (the regional presiding judge). Tex. R. Civ. P. 18a(e)(1).

Within three business days after the motion is filed, and regardless of whether the motion complies with the rule, the judge shall either recuse or disqualify himself or refer the motion to the regional presiding judge. Tex. R. Civ. P. 18a(f)(1). When the judge signs an order of recusal or referral, the clerk must immediately deliver a copy to the regional presiding judge. Tex. R. Civ. P. 18a(e)(2). If the motion was filed before evidence has been offered at trial, the judge may take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record. Tex. R. Civ. P. 18a(f)(2)(A). If the motion was filed after evidence has been offered, the judge may proceed, subject to stay by the regional presiding judge. Tex. R. Civ. P. 18a(f)(2)(B). If the judge fails to comply with a duty imposed by rule 18a, the movant may notify the regional presiding judge. Tex. R. Civ. P. 18a(f)(3).

The regional presiding judge must rule on a referred motion or assign a judge to rule. The ruling must be by written order. A motion to recuse that does not comply with rule 18a may be denied without an oral hearing, but a motion to disqualify may not be denied on the ground that it was not filed or served in compliance with the rule. Interim or ancillary orders in the pending case may be issued. Discovery may not be required of the respondent judge except on order of the regional presiding judge or assigned judge. The motion must be heard as soon as practicable and may be heard immediately after it is referred. Notice of the hearing must be given to all parties. The hearing may be con-

ducted by telephone on the record, and documents submitted by fax or e-mail may be considered. If the motion is granted, the regional presiding judge must transfer the case to another court or assign another judge to the case. Tex. R. Civ. P. 18a(g).

After notice and hearing, the judge who hears the motion may order the party or attorney who filed the motion, or both, to pay the reasonable attorney's fees and expenses incurred by other parties if the judge finds that the motion was groundless and filed in bad faith or for the purpose of harassment or that it was clearly brought for unnecessary delay and without sufficient cause. Tex. R. Civ. P. 18a(h).

A "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court or statutory county court judge by the same party in a case. Tex. Civ. Prac. & Rem. Code § 30.016(a); *see Gonzalez v. Guilbot*, 315 S.W.3d 533, 541 (Tex. 2010) (text of statute does not mean third recusal motion against same judge).

A judge who declines recusal after a tertiary recusal motion is filed shall comply with applicable rules of procedure for recusal and disqualification, except that the judge shall continue to preside over the case, sign orders in the case, and move the case to final disposition as though a tertiary recusal motion had not been filed. Tex. Civ. Prac. & Rem. Code § 30.016(b).

A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and that party's attorney are jointly and severally liable for the award of fees and costs, which must be paid before the thirty-first day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded. Tex. Civ. Prac. & Rem. Code § 30.016(c).

The denial of a tertiary recusal motion is reviewable only on appeal from final judgment. Tex. Civ. Prac. & Rem. Code § 30.016(d). If a tertiary recusal motion is finally sustained, the new judge assigned to the case shall vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion. Tex. Civ. Prac. & Rem. Code § 30.016(e).

Denial of a motion to recuse may be reviewed only for abuse of discretion on appeal from the final judgment, but an order granting the motion is final and not reviewable by any means. An order granting or denying a motion to disqualify may be reviewed by mandamus and may be appealed. Tex. R. Civ. P. 18a(j).

The Texas Constitution prescribes disqualification if a judge has an interest, is related to a party within the third degree of consanguinity or affinity, or has previously been an attorney in the case. *See* Tex. Const. art. V, § 11. The Texas Government Code prescribes disqualification if the judge is related to either party within the third degree of consanguinity or affinity, as determined under Government Code chapter 573. *See* Tex. Gov't Code § 21.005.

The Texas Rules of Civil Procedure provide that a judge must disqualify himself in all proceedings in which he has served as an attorney in the matter in controversy or an attorney with whom he previously practiced law served during their association as an attorney concerning the matter, or if the judge knows that he has an interest in the subject matter in controversy either individually or as a fiduciary, or if either of the parties may be related to him by affinity or consanguinity within the third degree. Tex. R. Civ. P. 18b(a). A judge must recuse himself in proceedings in which (1) his impartiality might reasonably be questioned; (2) he has a personal bias or prejudice concerning the subject matter or a party or has personal knowledge of disputed evidentiary facts concerning the proceeding; (3) he or an attorney with whom he previously practiced has been a material witness concerning the proceeding; (4) he participated in the matter in controversy as attorney, adviser, or material witness or expressed an opinion concerning its merits while a government attorney; (5) he knows that he (individually or as a fiduciary) or his spouse or minor child living in his household has a financial interest in the subject matter or in a party or has any other interest that could be substantially affected by the outcome of the proceeding; (6) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, is a party or an officer, director, or trustee of a party, is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding, or is to the judge's knowledge likely to be a material witness in the proceeding; or (7) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is an attorney in the proceeding. Tex. R. Civ. P. 18b(b).

Rule 16 of the Texas Rules of Appellate Procedure covers recusal or disqualification of appellate judges. *See* Tex. R. App. P. 16. A motion must be filed promptly after the filing party has reason to believe the justice or judge should not participate in deciding the case. Tex. R. App. P. 16.3(a). The justice must either recuse himself or certify the matter to the entire court for consideration, during which the challenged justice shall not sit. Tex. R. App. P. 16.3(b). An order of recusal is not appealable; a denial of a recusal motion is appealable. Tex. R. App. P. 16.3(c).

A justice or judge must recuse on grounds provided in the Texas Rules of Civil Procedure, as well as in a proceeding that presents a material issue that the justice or judge participated in deciding while serving on another court in which the proceeding was pending. Tex. R. App. P. 16.2.

§ 8.16 Trial before Assigned Judge

The Court Administration Act, chapter 74 of the Government Code, divides the state into nine administrative judicial regions and empowers the presiding judge of each region to assign visiting judges to the courts in the region. *See* Tex. Gov't Code ch. 74; *In re Canales*, 52 S.W.3d 698, 701 (Tex. 2001) (orig. proceeding). Section 74.053 of the Act allows the parties to a civil case to object to an assigned judge and sets out the procedure for doing so:

(a) When a judge is assigned to a trial court under this chapter:

(1) the order of assignment must state whether the judge is an active, former, retired, or senior judge; and

(2) the presiding judge shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or part by the assigned judge.

(b) If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d), each party to the case is only entitled to one objection under this section for that case.

(c) An objection under this section must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier. The presiding judge may extend the time to file an objection under this section on written motion by a party who demonstrates good cause.

(d) An assigned judge or justice who was defeated in the last primary or general election for which the judge or justice was a candidate for the judicial office held by the judge or justice may not sit in a case if either party objects to the judge or justice.

(e) An active judge assigned under this chapter is not subject to an objection.

(f) For purposes of this section, notice of an assignment may be given and an objection to an assignment may be filed by electronic mail.

(g) In this section, "party" includes multiple parties aligned in a case as determined by the presiding judge.

Tex. Gov't Code § 74.053. *See also Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436 (Tex. 1997) (orig. proceeding).

A party may not object to an assigned judge before the assignment is made, and a pro forma blanket objection in the party's initial pleading is not sufficient. *In re Carnera*, No. 05-16-00055-CV, 2016 WL 323654, at *2 (Tex. App.—Dallas Jan. 27, 2016, orig. proceeding) (mem. op.).

If an objection is timely, the assigned judge's disqualification is automatic. Tex. Gov't Code § 74.053(b). When an assigned judge overrules a timely objection to his assignment, all of the judge's subsequent orders are void, and the objecting party is entitled to mandamus relief. *In re Canales*, 52 S.W.3d at 701.

The assigned judge must have a valid assignment. When an assigned judge's action exceeds the scope of the assignment, the judgment is void. *Ex parte Eastland*, 811 S.W.2d 571, 572 (Tex. 1991) (orig. proceeding) (per curiam); *In re B.F.B.*, 241 S.W.3d 643, 647 (Tex. App.—Texarkana 2007, no pet.) (after denying motion to recuse, assigned judge went forward with trial on merits although assignment order limited assignment "for the purpose of the assigned judge hearing a Motion to Recuse").

§ 8.17 Associate Judge

The judge of a court having jurisdiction of suits under title 1, 4, or 5 or chapter 45 of the Texas Family Code may appoint a full-time or part-time associate judge if the commissioners court of a county in which the court has jurisdiction has authorized employment of an associate judge. Tex. Fam. Code § 201.001(a). The judge may refer to the associate judge any aspect of a suit involving a matter in the court's jurisdiction under title 1, 4, or 5 or chapter 45, including any matter ancillary to the suit. Tex. Fam. Code § 201.005(a).

A party must file an objection to an associate judge hearing a trial on the merits or presiding at a jury trial not later than the tenth day after the date the party receives notice

that the associate judge will hear the trial. If an objection is filed, the referring court must hear the trial on the merits or preside at a jury trial. Tex. Fam. Code § 201.005(c).

Hearing before Judge: Any party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request not later than the third working day after the date the party receives notice of the substance of (1) the associate judge's report or (2) the rendering of the temporary order, if the request concerns a temporary order rendered by an associate judge appointed under subchapter A, chapter 201, of the Family Code. Tex. Fam. Code § 201.015(a). Request for a de novo hearing under subchapter B of chapter 201 of the Family Code (title IV-D associate judges) must be filed not later than the third working day after the associate judge signs the proposed order or judgment. Tex. Fam. Code § 201.1042(b). *See In re R.A.O.*, 561 S.W.3d 704, 710 (Tex. App.—Houston [14th Dist.] 2018, no pet.). In calculating the period, the Code Construction Act rather than rule 4 of the Texas Rules of Civil Procedure applies in cases involving the appeal of an associate judge's report. *See Peacock v. Humble*, 933 S.W.2d 341, 343 (Tex. App.—Austin 1996, orig. proceeding) (per curiam). In calculating the period under the applicable Code Construction Act provisions, the first day is excluded, and the last day is included. Tex. Gov't Code § 311.014. The right to a de novo hearing before the referring court may be waived. However, any waiver must be made in writing or on the record before the start of a hearing by an associate judge. Tex. Fam. Code § 201.015(g); *see In re J.A.P.*, 510 S.W.3d 722, 724 (Tex. App.—San Antonio 2016, no pet.) (nothing in record indicated right to de novo hearing was waived before start of hearing, and waiver of any objection to associate judge hearing case was not waiver of de novo hearing).

A request for a de novo hearing must specify the issues that will be presented to the referring court. Tex. Fam. Code § 201.015(b). Notice must be given to the opposing attorney. Tex. Fam. Code § 201.015(d). The referring court, after notice to the parties, must hold the de novo hearing within thirty days of the filing of the initial request. Tex. Fam. Code § 201.015(f). The requirement of a de novo hearing within thirty days is not jurisdictional and does not prohibit a referring court from conducting such a hearing more than thirty days after the filing of the request. *See Harrell v. Harrell*, 986 S.W.2d 629, 631 (Tex. App.—El Paso 1998, no pet.). Even if timely filed, if the notice of appeal did not contain the appealing party's objections to any specific findings or conclusions, that party is not entitled to a de novo hearing of the appeal of the associate judge's recommendation. *In re E.M.*, 54 S.W.3d 849, 851–52 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.) (party not entitled to de novo hearing because his request, though timely filed, failed to state specific findings or conclusions of associate

judge to which he objected); *In re H.F.*, No. 02-16-00347-CV, 2016 WL 6706324 (Tex. App.—Fort Worth Nov. 14, 2016, orig. proceeding) (mem. op.).

At the de novo hearing the parties may present witnesses and the referring court may also consider the record from the hearing before the associate judge. Tex. Fam. Code § 201.015(c); *In re N.V.*, 554 S.W.3d 217, 221 (Tex. App.—Amarillo 2018, pet. denied). The court may not limit the evidence at the de novo hearing to only the transcript of the hearing in front of the associate judge. The referring court must hold a hearing in which the parties may present witnesses, should they choose to do so. *In re R.R.*, 537 S.W.3d 621, 624 (Tex. App.—Austin 2017, orig. proceeding). If a jury trial was waived at the trial in front of the associate judge the court may, but is not required to, grant a jury trial at the de novo hearing. *In re A.L.M.-F.*, 593 S.W.3d 271 (Tex. 2019).

Except as provided by Family Code section 201.007(c) (default, agreed, or temporary orders or final order where notice, appearance, or right to de novo hearing is waived), if a request for a de novo hearing before the referring court is not timely filed, the proposed order or judgment of the associate judge becomes the order or judgment of the referring court only on the referring court's signing the proposed order or judgment. Tex. Fam. Code § 201.013(b); *see also* Tex. Fam. Code § 201.007(c). If the record does not reflect that the waiver of the de novo hearing was signed before the hearing in front of the associate judge, the report of the associate judge is not a rendition for purposes of preventing a nonsuit of the case. *Alwazzan v. Alwazzan*, 596 S.W.3d 789, 804 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). Pending a de novo hearing before the referring court, a proposed order or judgment of the associate judge is in full force and effect and is enforceable as an order or judgment of the referring court, except for an order providing for the appointment of a receiver. Tex. Fam. Code § 201.013(a). Section 201.013(c) concerns orders by an associate judge for the temporary detention or incarceration of a witness or party. *See* Tex. Fam. Code § 201.013(c). A party's failure to request, or a party's waiver of the right to request, a de novo hearing before the referring court does not deprive the party of the right to appeal to or seek other relief from an appellate court. Tex. Fam. Code § 201.016(a).

The denial of relief to a party after a de novo hearing under section 201.015 or a party's waiver of the right to a de novo hearing before the referring court does not affect a party's right to file a motion for new trial, motion for judgment notwithstanding the verdict, or other posttrial motion. A party may not demand a second jury in a de novo hearing before the referring court if the associate judge's proposed order or judgment resulted from a jury trial. Tex. Fam. Code § 201.015(h), (i).

[Sections 8.18 through 8.20 are reserved for expansion.]

III. Service of Citation

§ 8.21 Substituted Service—Rule 106

If personal service, service by registered mail, or service by certified mail has been unsuccessful, substituted service may be allowed. The record must show strict compliance with the rules governing service of process. *See Primate Construction, Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam); *Singh v. Gill*, No. 05-19-01146-CV, 2021 WL 194114, at *3 (Tex. App.—Dallas Jan. 20, 2021, no pet. h.) (mem. op.). A statement—sworn to before a notary or made under penalty of perjury—must be attached to a motion for substituted service listing any location where the defendant can probably be found and stating specific facts showing that service has been unsuccessfully attempted by personal delivery or by registered or certified mail at this location. An affidavit must "positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge." *In re M.M.M.A.*, 583 S.W.3d 632, 636 (Tex. App.—El Paso 2018, no pet.). The court may then authorize service by leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement or in any other manner, including electronically by social media, e-mail, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice. Tex. R. Civ. P. 106(b). In determining whether to permit electronic service of process, a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology. Tex. R. Civ. P. 106 cmt.

COMMENT: The amendment to rule 106 of the Texas Rules of Civil Procedure effective January 1, 2021, replaced the requirement of an affidavit with that of a statement sworn before a notary or made under penalty of perjury.

The object of process is to give a person to be affected by a judgment notice and an opportunity to defend. Whether due process of law has been accorded depends on whether or not the form of service is reasonably calculated to give the defendant actual notice and an opportunity to be heard. *See Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 146–48 (1951). An officer's affidavit stating that service has been "difficult or impracti-

cal" is not sufficient to sustain the granting of a motion for substituted service. *Stylemark Construction, Inc. v. Spies*, 612 S.W.2d 654, 656–57 (Tex. App.—Houston [14th Dist.] 1981, no writ); *see also Harrison v. Dallas Court Reporting College*, 589 S.W.2d 813, 815–16 (Tex. App.—Dallas 1979, no writ) (sheriff's affidavit stating that he had "made several attempts" to serve defendant but not showing how many attempts or at what time they were made was insufficient to establish that personal service was impractical; therefore, substituted service was unauthorized, and no personal jurisdiction over defendant was acquired). *See also Cancino v. Cancino*, No. 03-14-00115-CV, 2016 WL 234514 (Tex. App.—Austin Jan. 13, 2016, no pet.) (mem. op.). An affidavit showing three attempts at service to an address where the appellant's car was present and a young woman told the process server the appellant was not home was held to be sufficient to sustain service under rule 106. *In re C.L.W.*, 485 S.W.3d 537, 542 (Tex. App.—San Antonio 2015, no pet.).

§ 8.22 Other Substituted Service—Rule 109a

The court may, on motion, prescribe a different method of substituted service whenever citation by publication is authorized. Tex. R. Civ. P. 109a. (Regarding citation by publication, see Tex. R. Civ. P. 109; Tex. Fam. Code §§ 3.305, 6.409, 102.010; Tex. Civ. Prac. & Rem. Code § 17.032.) To prescribe a different method of substituted service, the court must find and recite in its order that the prescribed method would be as likely as publication to give the defendant actual notice. The officer's return shall state particularly the manner in which service is accomplished, and any return receipt or other evidence showing the result of service must be attached. The defendant's failure to respond shall not render the service invalid. If the defendant does not appear, provisions of rule 244, which require appointment of an attorney to defend the suit on the defendant's behalf and a statement of evidence approved and signed by the judge, apply; rule 329, which deals with motions for new trials and judgments following citation by publication, also applies. Tex. R. Civ. P. 109a; *see* Tex. R. Civ. P. 244, 329.

§ 8.23 Amending Citation—Rule 118

If there is a defect in the process or proof of service, a motion may be brought to amend the process or proof of service. At any time in its discretion and on such notice and terms as it deems just, the court may allow any process or proof of service to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. Tex. R. Civ. P. 118. Amending a proof of service after a motion for new trial is filed does not have the effect of restarting

the appellate timetable. *In re Spinks*, No. 04-19-00785-CV, 2020 WL 86214, at *3 (Tex. App.—San Antonio Jan. 8, 2020, no pet.) (mem. op.).

§ 8.24 Service of Amended Petition

When a petition is amended to ask for more onerous relief, the amended petition may be served under rule 21a of the Texas Rules of Civil Procedure. *In re E.A.*, 287 S.W.3d 1, 4 (Tex. 2009).

[Sections 8.25 through 8.30 are reserved for expansion.]

IV. Judicial Notice and Joinder of Causes

§ 8.31 Judicial Notice

Rule 203 of the Texas Rules of Evidence provides a method by which a party may request the trial court to determine the law of a foreign country. The requesting party must give notice in the pleadings or by other reasonable written notice and, at least thirty days before trial, provide all parties copies of any written materials or sources intended for use as proof of the foreign law. Tex. R. Evid. 203(a). If the materials are in a language other than English, the party intending to rely on them must supply all parties copies of both the foreign language text and the English translation. Tex. R. Evid. 203(b). (Subsections (a) and (b) of rule 203 do not apply to an action to which rule 308b of the Texas Rules of Civil Procedure (Determing the Enforceability of a Judgment or Arbitration Award Based on Foreign Law in Certain Suits under the Family Code) applies. Tex. R. Evid. 203(e).)

In determining the foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and reasonable opportunity to comment and submit additional materials. Tex. R. Evid. 203(c).

A court may on its own, or must if a party requests it and the court is supplied with the necessary information, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other U.S. state, territory, or jurisdiction and of the ordinances of Texas municipalities and counties, the contents of the *Texas Register*, and agency rules published in the Texas Administrative

Code. The court may require the requesting party to notify all other parties of the request so they may respond to it. Tex. R. Evid. 202(a), (b), (c)(1), 204(a), (b), (c)(1).

The court, not the jury, must determine the law of which it is taking judicial notice, and the court's determination must be treated as a ruling on a question of law. Tex. R. Evid. 202(e), 203(d), 204(d).

§ 8.32 Severance

Actions improperly joined may be severed. Each ground of recovery that has been improperly joined may be docketed as a separate suit between the same parties by court order on the motion of any party or on the court's own initiative. Severance may occur at any stage of the action before submission to the jury or to the court and on such terms as the court deems just. Any claim against a party may be severed. Tex. R. Civ. P. 41.

Severance is proper if a suit involves two or more separate and independent causes of action, each of which may be tried as a separate claim. *See Rose v. Baker*, 183 S.W.2d 438, 441 (Tex. 1944). Severance divides lawsuits into two or more independent causes of action, and a judgment that disposes of all parties and issues in one of the severed causes is final and appealable. *Hall v. City of Austin*, 450 S.W.2d 836, 837–38 (Tex. 1970). A trial court may not sever property issues from a cause of action for divorce. *Garrison v. Texas Commerce Bank*, 560 S.W.2d 451, 453 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). The issue of parties' property rights is part of the divorce suit itself and cannot be severed from it. *Angerstein v. Angerstein*, 389 S.W.2d 519, 520–21 (Tex. App.—Corpus Christi–Edinburg 1965, no writ). It is not error to sever a personal injury claim involving separate property issues. *See Johnson v. Johnson*, No. 09-19-00329-CV, 2021 WL 1306396, at *5–6 (Tex. App.—Beaumont Apr. 8, 2021, no pet. h.) (mem. op.). If a motion for severance is granted, an order should be entered and a new docket number assigned to the cause or causes severed.

§ 8.33 Consolidation

When actions involve a common question of law or of fact, the trial court may order a joint hearing or trial on any or all the matters, order all the actions consolidated, and make such other orders as may tend to avoid unnecessary costs or delay. Tex. R. Civ. P. 174(a); *see Alice National Bank v. Corpus Christi Bank & Trust*, 431 S.W.2d 611, 624 (Tex. App.—Corpus Christi–Edinburg 1968), *aff'd*, 444 S.W.2d 632 (Tex. 1969) (where both cases involved same subject matter and parties, motion to consolidate granted).

Because the Texas Rules of Civil Procedure provide the courts with broad discretion in the matter of consolidation, agreements of counsel to consolidate causes are not binding on the court. *Hamilton v. Hamilton*, 280 S.W.2d 588, 591 (Tex. 1955). The court's decision to consolidate causes will not be disturbed on appeal except for abuse of discretion. *See Ruthart v. First State Bank*, 431 S.W.2d 366, 368 (Tex. App.—Amarillo 1968, writ ref'd).

§ 8.34 Separate Trial

The court may, for convenience or to avoid prejudice, order a separate trial of any claim, cross-claim, counterclaim, or third-party claim or issue or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Tex. R. Civ. P. 174(b).

Rule 174(b) should not be confused with rule 41, which deals with severance. *See* Tex. R. Civ. P. 41. Severance divides a case into two or more separate and independent causes, with each cause resulting in its own final, appealable judgment. When separate trials are ordered, the lawsuit is not severed, but the court can hear and determine one or more issues without trying all controverted issues at the same hearing. Generally, until all matters are disposed of, orders entered at the conclusion of a separate trial are interlocutory and not appealable. *Hall v. City of Austin*, 450 S.W.2d 836, 838 (Tex. 1970) (per curiam); *Wright v. Payne*, No. 02-19-00147-CV, 2019 WL 6003243, at *2 (Tex. App.—Fort Worth Nov. 14, 2019, no pet.) (mem. op.).

Separate trials may be sought to avoid delay and expense. For example, in cases where resolution of one issue, such as the existence of an informal marriage, may end the entire litigation, a separate trial may be desirable. *See Chatman v. Ferd Staffel Co.*, 362 S.W.2d 173, 174 (Tex. App.—Waco 1962, writ ref'd n.r.e.) (plea of release); *Meridith v. Massie*, 173 S.W.2d 799, 800 (Tex. App.—Amarillo 1943, writ ref'd) (limitations).

The application of rule 174(b) rests in the court's discretion. *See Bolin v. Smith*, 294 S.W.2d 280, 284 (Tex. App.—Fort Worth 1956, writ ref'd n.r.e.) (court did not abuse discretion in overruling motion for separate trials). The court has a duty to order a separate trial when all the facts and circumstances of a case unquestionably require it to prevent injustice, no fact or circumstance supports a contrary conclusion, and the parties' legal rights will not be prejudiced. *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding). At the conclusion of all the separate trials, a single final judgment should be entered. This final judgment is appealable. *See Grossenbacher v. Burket*, 427 S.W.2d 595, 597 (Tex. 1968).

[Sections 8.35 through 8.40 are reserved for expansion.]

V. Ancillary Relief

§ 8.41 Master in Chancery

The court may, in exceptional cases, for good cause, appoint a master in chancery. Tex. R. Civ. P. 171. Court congestion in itself is not an exceptional circumstance that will warrant referral to a master, nor is the length of time a trial will take. *See Bell v. Bell*, 540 S.W.2d 432, 437 (Tex. App.—Houston [1st Dist.] 1976, no writ). "The 'exceptional condition' requirement of rule 171 cannot be met by showing that a case is complicated or time-consuming or that the trial court is busy." *In re King*, No. 01-13-00434-CV, 2013 WL 4007798, at *2 (Tex. App.—Houston [1st Dist.] Aug. 6, 2013, orig. proceeding) (mem. op.). Further, rule 171 states that the master shall be a citizen of Texas and not an attorney for or related to either party. The parties' consent is not required for appointment of a master. Appointment and assessment of fees for a master in chancery are within the trial court's discretion, and the court will be reversed only for clear abuse of discretion. The fact that a party requests a jury trial does not preclude appointment of a master. Either party is entitled to a jury trial after the master has filed his report. *Mann v. Mann*, 607 S.W.2d 243, 246 (Tex. 1980).

Powers and Duties: A master derives authority in each particular case from the order of appointment. *Fowzer v. Huey & Philp Hardware Co.*, 99 S.W.2d 1100, 1102 (Tex. App.—Dallas 1936, writ dism'd). This order of reference to the master may specify or limit his powers; may direct him to report only on particular issues, to do or perform particular acts, or to receive and report evidence only; and may fix the time and place for beginning and closing the hearings and for filing the master's report. Tex. R. Civ. P. 171.

Subject to the limitations and specifications in the order, the master has the power to regulate all proceedings in hearings before him and to do everything necessary or proper for the efficient performance of his duties under the order, including requiring the production of evidence on matters embraced in the reference and, unless the order specifies otherwise, ruling on the admissibility of evidence. He can examine witnesses and the parties on oath. When a party requests it, the master shall make a record of the evidence offered and excluded. The parties may procure the attendance of witnesses before the master by the usual issuance and service of process. Tex. R. Civ. P. 171.

Master's Report: In the absence of exception or objection, a master's report will be regarded as conclusive. *Richardson v. McCloskey*, 276 S.W. 680, 684–85 (Tex. Comm'n App. 1925, judgm't adopted). However, a master's report is not conclusive with respect to one not a necessary party to the suit into whose interest the master is without authority to inquire. *See generally Arlington Heights Realty Co. v. Citizens' Railway & Light Co.*, 160 S.W. 1109 (Tex. App.—Amarillo 1913, no writ). When the report is approved, it is equivalent to a special verdict of a jury and is given the force and effect of a final judgment. *Lloyds Investment Co. v. State*, 158 S.W.2d 98, 102 (Tex. App.—Galveston 1941, writ ref'd w.o.m.).

The court may also confirm, modify, correct, reject, reverse, or recommit the report after it is filed, as the court may deem proper and necessary in the particular circumstances of the case. Tex. R. Civ. P. 171. A party dissatisfied with the report has the burden to make specific objections before the report is adopted by the court. When exceptions to a master's report have been filed, the parties are entitled to present evidence on the issues specified in the objections and have the court or jury decide those issues on the basis of the evidence presented in court. Thus, on appeal, the judgment cannot be attacked on the ground that the evidence before the master was insufficient to support the master's findings. *Whitehead v. Perie*, 15 Tex. 7, 11–15 (1855); *Cameron v. Cameron*, 601 S.W.2d 814, 815 (Tex. App.—Dallas 1980, no writ).

Litigants are entitled to a trial by jury when demanded, and this right may not be denied by the court's referring the case to a master. *Garrison v. Garrison*, 568 S.W.2d 709, 710 (Tex. App.—Beaumont 1978, no writ).

§ 8.42 Auditor

When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make a report to the court as soon as possible. Tex. R. Civ. P. 172. Rule 172 does not limit the appointment to any particular types of actions. Auditors' reports have been found necessary in different types of actions involving the settling of accounts between parties, including divorce suits involving the division of community property and determination of separate property. *See, e.g., Daniel v. Daniel*, 30 S.W.2d 801 (Tex. App.—Fort Worth 1930, no writ).

Whether an auditor should be appointed is within the trial court's discretion, and its action is revised only on a showing of gross abuse. *See Padon v. Padon*, 670 S.W.2d 354, 360 (Tex. App.—San Antonio 1984, no writ). Request for an auditor must be made

in a timely fashion. *See Dudley Hodgkins Co. v. Grant*, 261 S.W.2d 229, 231 (Tex. App.—Fort Worth 1953, writ ref'd n.r.e.) (motion made after parties rested case without any reservation properly overruled).

Report: The auditor shall verify his report by affidavit stating that he has carefully examined the state of the account between the parties and that the report contains a true statement thereof, as far as the same has come within his knowledge. Exceptions to the report or any item in it must be filed within thirty days of its filing. Tex. R. Civ. P. 172.

Verified auditors' reports prepared under rule 172 are admissible in trial, notwithstanding any other evidence rule. If exceptions to the report have been filed, a party may present controverting evidence. Tex. R. Evid. 706.

§ 8.43 Receiverships

Rule 695 of the Texas Rules of Civil Procedure provides that no receiver shall be appointed without notice to take charge of property that is fixed and immovable, except when otherwise provided by statute. (See Tex. Civ. Prac. & Rem. Code ch. 64 concerning receivership.) When application for appointment of a receiver to take possession of property of this type is filed, the court shall set it down for hearing and notify the adverse party of the hearing not less than three days before it is to be held. Tex. R. Civ. P. 695.

If the defendant is a nonresident or his whereabouts are unknown, notice may be served by affixing the notice in a conspicuous manner and place on the property or in such other manner as the court may require. Tex. R. Civ. P. 695.

A receiver for property located entirely or partly in Texas is required to be a bona fide citizen and qualified voter of Texas. If this requirement is not met, his appointment is void as to property in Texas. He must maintain actual residence in Texas throughout the receivership. No party, attorney, or person interested in any way in an action for the appointment of a receiver will be qualified for the position. Tex. Civ. Prac. & Rem. Code § 64.021. The receiver must take an oath to faithfully perform his duties and post a bond. Tex. Civ. Prac. & Rem. Code §§ 64.022, 64.023. The court may dispense with a bond in a divorce case. Tex. R. Civ. P. 695a.

While a suit for divorce or annulment or to declare a marriage void is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may appoint a receiver for the preservation and protection of the property of the parties. Tex. Fam. Code § 6.502(a)(5). Such an order may also be made to preserve and protect

the parties' property during pendency of an appeal. Tex. Fam. Code § 6.709(a)(3). The trial court retains jurisdiction to enforce such an order unless the appellate court supersedes the order. Tex. Fam. Code § 6.709(b). In *Mussina v. Morton*, 657 S.W.2d 871, 874 (Tex. App.—Houston [1st Dist.] 1983, no writ), the court stated that the predecessor to these provisions, former Texas Family Code section 3.58, "is limited to an order directed to one or both 'parties', which we hold to mean 'spouses'." The pendency of a divorce does not diminish or limit a creditor's right to proceed against either or both spouses for payment of community debts incurred before the divorce decree. *Mussina*, 657 S.W.2d at 874; *Commonwealth Mortgage Corp. v. Wadkins*, 709 S.W.2d 679, 680 (Tex. App.—Houston [14th Dist.] 1985, no writ) (per curiam).

A court may not appoint a receiver for an individual on the petition of the individual. Tex. Civ. Prac. & Rem. Code § 64.002. However, nothing in section 64.002 prevents a spouse in a suit filed under title 1 or title 5 of the Family Code from having a receiver appointed over all or part of the marital estate. Tex. Civ. Prac. & Rem. Code § 64.002(c).

The appointment of a receiver transfers rights in property from the owner to the court. The receiver acts as the court's agent, and the property in the receivership remains in the custody of the law. *Texas Trunk Railway v. Lewis*, 16 S.W. 647, 648–49 (Tex. 1891). The appointment does not permanently affect the owner's rights in the property but merely preserves the status quo. The enforcement of third-party liens or other rights is suspended until their enforcement is approved by the court. *See First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 343 (Tex. 1976). The order appointing the receiver must be directly attacked in the cause in which the appointment was made, if the order is allegedly voidable. *Helton v. Kimbell*, 621 S.W.2d 675, 678 (Tex. App.—Fort Worth 1981, no writ). The trial court is authorized to order, concurrently with a divorce proceeding, a partition of a residence jointly owned by husband and wife by sale through a receiver. *Allen v. Allen*, No. 02-17-00031-CV, 2018 WL 547586, at *6 (Tex. App.—Fort Worth Jan. 25, 2018, no pet.) (mem. op.). If a homestead is sold by a receiver, the proceeds have the same protection from creditors as the homestead itself. *Delaney v. Delaney*, 562 S.W.2d 494, 495–96 (Tex. App.—Houston [14th Dist.] 1978, writ dism'd).

Although an order appointing an ancillary receiver is usually interlocutory, it is appealable. *See* Tex. Civ. Prac. & Rem. Code § 51.014; *see also* Tex. R. App. P. 28, 29. Orders under Family Code chapter 6, subchapter F, appointing a receiver are subject to interlocutory appeal, although other orders under that subchapter are not. *See* Tex. Fam. Code § 6.507.

Appointment of a receiver may amount to abuse of discretion. For example, appointing a receiver to file tax returns and to sell a residence on a contingency that may occur in the future was held an abuse of discretion in *Whitehill v. Whitehill*, 628 S.W.2d 148, 151 (Tex. App.—Houston [14th Dist.] 1982, no writ). The terms of the order appointing the receiver may not modify the terms of the decree. *Shultz v. Shultz*, No. 05-18-00876-CV, 2019 WL 2511245, at *3 (Tex. App.—Dallas June 18, 2019, no pet.) (mem. op.) (order appointing receiver allowed receiver to set price, but decree said parties must agree on price).

A receiver has derived judicial immunity for all acts done under the authority granted by the order appointing the receiver. *Logsdon v. Owens*, No. 02-15-00254-CV, 2016 WL 3197953, at *4 (Tex. App.—Fort Worth June 9, 2016, no pet.) (mem. op.). Activities protected by derived immunity are activities where the person exercised discretionary judgment comparable to a judge, as opposed to ministerial or administrative tasks. These activities involve personal deliberation, decision, or judgment. "Derived judicial immunity has been extended to court officers and appointees, including trustees and receivers, for acts they are required to do under court order or at a judge's direction." *Manning v. Jones*, No. 05-18-01140-CV, 2019 WL 6522183, at *5 (Tex. App.—Dallas Dec. 4, 2019, no pet.) (mem. op.).

Lis Pendens by Receiver: When the court appoints a receiver, the property is placed in custodia legis. *Moody v. State*, 538 S.W.2d 158, 160–61 (Tex. App.—Waco 1976, writ ref'd n.r.e.). No one has the authority, even under a prior deed of trust or execution, to sell property held in custodia legis by a duly appointed receiver, unless the sale is authorized by the court in which the receivership is pending. *Vallone*, 533 S.W.2d at 341. Compliance with statutes modifying the common law of lis pendens (old Tex. Rev. Civ. Stat. arts. 6640–6642, now repealed and replaced with Tex. Prop. Code § 12.007) is not required to prevent lands in receivership from being acquired under attempted sales by third parties acting under powers not conferred or approved by the court having custody of the property. Nor do such statutes have the intent or effect of ousting courts of their exclusive custody and jurisdiction of receivership property or of creating innocent purchasers of such property without court approval when the receiver does not file a lis pendens notice. However, to lessen controversy and inconvenience, the recommended practice is to file a notice of receivership and designation of the land and litigants in the deed or lis pendens records of the county or counties wherein the property is located. *Vallone*, 533 S.W.2d at 343.

Receiver's Sales Report and Confirmation: A receiver may sell or transfer estate property only with court approval on terms specified by the court. *Mergenthaler Lino-*

type Co. v. McClure, 16 S.W.2d 280, 282 (Tex. Comm'n App. 1929, judgm't affirmed). The rules of equity govern all matters relating to receivers. Tex. Civ. Prac. & Rem. Code § 64.004. In conformity with the rules of equity, before a receiver's sale is approved there should be an application for sale pertaining to a specific buyer, notice to all interested parties, and a hearing conducted on the sale. *See Harrington v. Schuble*, 608 S.W.2d 253, 256 (Tex. App.—Houston [14th Dist.] 1980, no writ).

In a receivership proceeding regarding sale of a homestead, an application for sale, complete with definite terms, price, and parties, should be filed. After sufficient notice has been given to all interested parties, a hearing should be held on the application, with a court order of approval or disapproval of the sale following the hearing. After reasonable notice to all interested parties, the report of the approved sale should be filed, and, before the distribution of any funds, the sale should be confirmed to ensure that it complied with the original approved order and to authorize the distribution of proceeds. Finally, customary and reasonable expenses should be paid. *Harrington*, 608 S.W.2d at 256–57.

Final Accounting and Discharge: On completing his duties, the receiver should file an accounting with the court and apply for an order discharging him and directing the disposition of the funds or property in his custody. The accounting should be sufficiently detailed to allow the parties to the action to determine whether to object to the receiver's stewardship of the estate. *See Mid-Continent Supply Co. v. Conway*, 240 S.W.2d 796, 808 (Tex. App.—Texarkana 1951, writ ref'd n.r.e.).

§ 8.44 Mental or Physical Examination

No later than thirty days before the end of the applicable discovery period, a party may move for an order compelling another party or a child the subject of the suit to submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist. Tex. R. Civ. P. 204.1(a). The motion and notice of hearing must be served on the person to be examined and on all parties. Tex. R. Civ. P. 204.1(b). The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Tex. R. Civ. P. 204.1(d).

The court may issue an order for such an examination under rule 204.1 only for good cause shown and only in specified circumstances. Tex. R. Civ. P. 204.1(c). In cases arising under title 2 and title 5 of the Family Code, the court may on its own motion or on the motion of a party appoint a psychologist or psychiatrist to make a mental examina-

tion of the children who are the subject of the suit or of any other parties. Tex. R. Civ. P. 204.4(a). The court may also appoint an expert who is qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests. Tex. R. Civ. P. 204.4(b).

Selection of the examining doctor, psychiatrist, or psychologist is generally left to the discretion of the court. *May v. Lawrence*, 751 S.W.2d 678, 679 (Tex. App.—Tyler 1988, orig. proceeding [leave denied]) (per curiam); *Employers Mutual Casualty Co. v. Street*, 707 S.W.2d 277, 278 (Tex. App.—Fort Worth 1986, orig. proceeding). However, it may be error for a court to refuse to order an independent examination by a doctor, psychiatrist, or psychologist if only one party's experts have had an opportunity to perform an examination. *See Sherwood Lane Associates v. O'Neill*, 782 S.W.2d 942, 945 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

§ 8.45 Child Custody Evaluation

In a suit affecting the parent-child relationship, the court may order the preparation of a child custody evaluation regarding (1) the circumstances and conditions of the child, a party to the suit, and, if appropriate, the residence of any person requesting conservatorship of, possession of, or access to the child and (2) any issue or question relating to the suit at the request of the court before or during the evaluation process. Tex. Fam. Code § 107.103(a).

Child custody evaluations are discussed in section 40.19 in this manual.

[Sections 8.46 through 8.50 are reserved for expansion.]

VI. Motions for Summary Judgment

§ 8.51 Basics of Summary Judgment

Two types of motions for summary judgment may be filed: a traditional motion for summary judgment and a no-evidence motion for summary judgment.

§ 8.51:1 Traditional Motion for Summary Judgment

In General: A court may render a summary judgment only if the pleadings, depositions, admissions, and affidavits show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c). The movant has the burden of demonstrating the lack of any genuine issues of material fact. The court must take all evidence favoring the nonmovant as true, must indulge every reasonable inference therefrom in favor of the nonmovant, and must resolve any doubts in the nonmovant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

A defendant who moves for a traditional summary judgment assumes the burden of showing as a matter of law that the plaintiff has no cause of action against the defendant. *Citizens First National Bank v. Cinco Exploration Co.*, 540 S.W.2d 292, 294 (Tex. 1976). Traditional summary judgment for a defendant is proper only if the defendant negates at least one element of each of the plaintiff's theories of recovery or pleads and conclusively establishes each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

The court may grant a motion for summary judgment that shows that the nonmovant has no viable cause of action or defense based on the nonmovant's pleadings. *See, e.g., National Union Fire Insurance Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) (per curiam). In this type of motion, the court must allow the nonmovant adequate opportunity to plead a viable cause of action. *See In re B.I.V.*, 870 S.W.2d 12, 13–14 (Tex. 1994) (per curiam).

Requirements: The motion must be in writing. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 677 (Tex. 1979). It may be filed at any time after the adverse party answers the lawsuit or, in the case of a defendant, at any time. Tex. R. Civ. P. 166a(a), (b). The motion must state the specific grounds on which it is made. *McConnell v. Southside ISD*, 858 S.W.2d 337, 341 (Tex. 1993). A trial court may not grant a summary judgment for more relief than was requested in the motion. *See Science Spectrum, Inc.*, 941 S.W.2d at 912. The trial court shall render summary judgment based on the pleadings on file at the time of the hearing if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c). A party may file an amended pleading during the pendency of the summary judgment. *See Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 825–26 (Tex. App.—Dallas 1992, writ denied). The trial court must accept an amendment unless the opposing party objects to the amendment and (1) the party demonstrates surprise or prejudice or (2) the amendment asserts a new cause of action or defense and thus is prejudicial on its face. *Herschberg v. Herschberg*, No. 13-19-00045-CV, 2020 WL 6788938, at *4 (Tex. App.—Corpus Christi–Edinburg Nov. 19, 2020, no pet.) (mem. op.). For the order to be final, as opposed to being merely a partial summary judgment, the motion must

ask the court to dispose of all issues and all parties. *See Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276–77 (Tex. 1996). On appeal, the summary judgment may not be affirmed on a ground not presented to the trial court in the motion. *Haase v. Glazner*, 62 S.W.3d 795, 799–800 (Tex. 2001); *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993).

§ 8.51:2 No-Evidence Motion for Summary Judgment

A court may grant a no-evidence motion for summary judgment if the movant can show that an adequate time for discovery has passed and the nonmovant has no evidence to support one or more essential elements of his claim or defense. Tex. R. Civ. P. 166a(i).

Burden of Proof: A party seeking a no-evidence summary judgment must assert that no evidence exists as to one or more of the essential elements of the nonmovant's claims on which it would have the burden of proof at trial. *Holmstrom v. Lee*, 26 S.W.3d 526, 530 (Tex. App.—Austin 2000, no pet.). Once the movant specifies the elements on which there is no evidence, the burden shifts to the nonmovant to raise a fact issue on the challenged elements. The nonmovant is not required to marshal its proof, but it must point out evidence that raises a fact issue. *See* Tex. R. Civ. P. 166a cmt.

To raise a genuine issue of material fact, the nonmovant must set forth more than a scintilla of probative evidence as to an essential element of the nonmovant's claim or defense on which the nonmovant would have the burden of proof at trial. *See* Tex. R. Civ. P. 166a(i); *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

When a nonmovant presents summary judgment evidence in response to a no-evidence motion, that party must specifically identify the supporting proof it seeks to have considered by the trial court. General citation to voluminous records is not a proper response to a no-evidence motion for summary judgment, and the trial court is not required to search the record for evidence raising a material fact issue without more specific guidance from the nonmovant. *In re A.J.L.*, No. 14-16-00834-CV, 2017 WL 4844479, at *4 (Tex. App.—Houston [14th Dist.] Oct. 26, 2017, no pet.) (mem. op.).

Conclusory declarations are not competent summary judgment proof. *See* Tex. R. Civ. P. 166a(f); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (affidavits consisting of conclusions do not raise genuine issue of material fact; facts must be stated with sufficient specificity to allow perjury to be assigned to false representations); *Tran v.*

Ngo, No. 01-17-00138-CV, 2018 WL 4126577, at *3 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.) (mem. op.).

If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists. *Havner*, 953 S.W.2d at 711. Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of fact, and the legal effect is that there is no evidence. *Jackson v. Fiesta Mart*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

If the nonmovant fails to present evidence raising a genuine issue of material fact as to the challenged element, the trial court must grant the motion. Tex. R. Civ. P. 166a(i). A no-evidence summary judgment is essentially a directed verdict granted before trial, to which is applied a legal sufficiency standard of review. *Jackson*, 979 S.W.2d at 70.

Requirements: Like the traditional motion for summary judgment, the no-evidence motion must be in writing. Unlike the traditional motion, it does not require supporting evidence. The no-evidence motion should not be filed until after an "adequate time for discovery" has passed. *See* Tex. R. Civ. P. 166a(i).

§ 8.52 Use of Summary Judgment to Dispute Existence of Marriage Relationship

Summary judgment may be used to dispose of a divorce action entirely if the existence of the marriage relationship is disputed at the outset. If a party alleges an informal marriage, the party must allege that (1) the parties agreed to be married, (2) after the agreement, they lived together in Texas as spouses, and (3) after the agreement, they represented to others in Texas that they were married. Tex. Fam. Code § 2.401(a)(2). Although the elements may occur at different times, there is no informal marriage until all three exist. *Flores v. Flores*, 847 S.W.2d 648, 650 (Tex. App.—Waco 1993, writ denied) (per curiam); *Winfield v. Renfro*, 821 S.W.2d 640, 646 (Tex. App.—Houston [1st Dist.] 1991, writ denied). In a traditional motion for summary judgment, a movant respondent would need to disprove at least one element of informal marriage. In a no-evidence motion for summary judgment, a movant respondent need only assert that an adequate time for discovery has passed and that the petitioner has no evidence to support one or more essential elements of informal marriage.

Agreement to Be Married: To prove the first element of an informal marriage, there must be evidence of a present agreement between the parties to be married. *Shelton v. Belknap*, 282 S.W.2d 682, 684 (Tex. 1955); *In re Marriage of Caldwell-Bays & Bays*, No. 13-20-00202-CV, 2021 WL 3777143, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 26, 2021, pet. filed) (mem. op.) (wife's testimony that there was agreement to be married raises fact issue). Proof of cohabitation and representations to others that the couple is married may constitute circumstantial evidence of an agreement to be married. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993).

Cohabitation: Subsequent to an agreement to be married, the couple must live together in Texas as spouses. Tex. Fam. Code § 2.401(a)(2). This has been interpreted to mean that the couple must live together under the same roof, maintain a household, and otherwise conduct themselves as spouses. *See Grimsby v. Reib*, 153 S.W. 1124, 1129–30 (Tex. 1913); *Claveria v. Estate of Claveria*, 597 S.W.2d 434, 438 (Tex. App.—Dallas 1980), *rev'd on other grounds*, 615 S.W.2d 164 (Tex. 1981).

"Cohabitation" does not encompass mere frequent overnight visits or even a storage of personal property at the home in question. *Allen v. Allen*, 966 S.W.2d 658, 661 (Tex. App.—San Antonio 1998, pet. denied). Further, living together as spouses involves more than merely having sexual relations with one another. *See Ex parte Threet*, 333 S.W.2d 361, 364 (Tex. 1960) (orig. proceeding).

Purchasing property and executing secured transactions jointly (*see Rodriguez v. Avalos*, 567 S.W.2d 85, 86 (Tex. App.—El Paso 1978, no writ)) and filing joint tax returns (*see Day v. Day*, 421 S.W.2d 703, 705 (Tex. App.—Austin 1967, no writ)) are examples of the type of evidence to which Texas courts look to determine whether a couple is functioning as spouses for purposes of establishing an informal marriage. The designation of one member of the couple as the beneficiary of the other member's life insurance policy is also relevant evidence. *See Grigsby v. Grigsby*, 757 S.W.2d 163, 164 (Tex. App.—San Antonio 1988, no writ); *Ortiz v. Santa Rosa Medical Center*, 702 S.W.2d 701, 704 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). On the other hand, evidence that a party insisted with the Texas Health and Human Services and federal agencies that she was not married is evidence the parties are not married. *See In re Marriage of Mohamed*, No. 14-18-01029-CV, 2021 WL 3629245, at *8 (Tex. App.—Houston [14th Dist.] Aug. 17, 2021, no pet. h.) (mem. op.).

"Holding Out" Requirement: The final element in proving an informal marriage is that after agreeing to be married, the couple represented to others, in Texas, that they are married. Tex. Fam. Code § 2.401(a)(2). This element is commonly referred to as

"holding out." The Texas Supreme Court has stated that under Texas law "there can be no secret common law marriage." *Ex parte Threet*, 333 S.W.2d at 364–65. Consequently, evidence of a casual holding out, such as occasional introductions in public as spouses, will not suffice to establish this element. *Flores*, 847 S.W.2d at 653; *Winfield*, 821 S.W.2d at 651. If a couple's agreement to be married is shared only with close relatives or friends, while the couple acts to conceal the agreement from the community at large, no informal marriage exists. *Winfield*, 821 S.W.2d at 649–50.

COMMENT: If a party prevails on a motion for summary judgment related to the existence of the marriage relationship, the rest of the issues related to the divorce action become moot. Issues may still exist regarding children. It may be wise to sever these issues out if there are children involved. Additionally, if the motion for summary judgment will dispose of all issues of the cause, attorney's fees should be pleaded in the motion and included in the order granting summary judgment; otherwise, they are waived. A motion for summary judgment that is intended to dispose of all issues does just that—disposes of all issues related to the divorce, including attorney's fees. Accordingly, the moving party must attach summary judgment evidence regarding attorney's fees in the form of an affidavit, usually with the attorney's invoices attached.

§ 8.53 Marital Property Agreements

§ 8.53:1 Summary Judgment and Enforceability of Marital Property Agreements

Summary judgment may also be used to determine the enforceability of marital property agreements. Often parties enter into marital property agreements to simplify matters in the event of a dissolution of their marriage. This "simplification" can be defeated if one party decides to challenge the enforceability of a marital property agreement. A divorce that should have been clear-cut can become even more complex than if the parties had not entered into an agreement at all. To limit the damage brought on by a challenge to a marital property agreement, a motion for partial summary judgment may be filed. However, if a motion for partial summary judgment is granted on the enforceability of a marital property agreement, the case is not necessarily disposed of in its entirety. The actual interpretation of the agreement and division of the estate still remains. Additionally, if children are involved, there may be additional litigation, even if the motion for partial summary judgment is granted.

§ 8.53:2 Types of Agreements

Three types of marital property agreements are sanctioned by the Texas Family Code: (1) premarital agreements (including property agreements affirming premarital agreements), (2) partition or exchange agreements, and (3) agreements to convert separate property to community property. For a discussion of the enforceability of these agreements, see the practice notes in chapter 63 of this manual.

§ 8.54 Characterization of Property: Separate or Community

A spouse's separate property consists of (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during the marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during the marriage, except any recovery for loss of earning capacity during marriage. Tex. Fam. Code § 3.001. Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. Tex. Fam. Code § 3.003(a).

COMMENT: If there is a dispute between the parties as to the separate character of certain items of property, a motion for partial summary judgment may be in order to establish the separate nature of that property. However, if a motion for partial summary judgment regarding alleged separate property is not granted, that does not mean that the property is not separate property. It merely means that there may not be enough summary judgment evidence to prove as a matter of law that it is, in fact, separate property. The burden for a motion for partial summary judgment is not exactly the same as the burden for proving the separate character of certain property. If there is a fact issue to be determined, the trier of fact may still consider character on final hearing. This type of motion is most helpful if the court makes a specific ruling that property is either community or separate.

§ 8.55 Children's Issues

§ 8.55:1 Texas Family Code Section 153.004

Most children's issues cannot be determined by summary judgment practice. However, Texas Family Code section 153.004 provides:

> (a) In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of

abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.

(b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child . . . .

Tex. Fam. Code § 153.004(a), (b).

§ 8.55:2 Mandatory Prohibition

Texas Family Code section 153.004 sets out the criteria to determine whether a mandatory prohibition is warranted against the appointment of parents as joint managing conservators, if credible evidence is introduced that one of them has a "history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child." *See* Tex. Fam. Code § 153.004(b).

COMMENT: Filing a summary judgment motion based on this provision of the Family Code can eliminate the option of joint managing conservators. However, it does not provide a complete solution to the issue of conservatorship, because as it currently stands, an abusive parent may still theoretically be appointed sole managing conservator of a child. However, if the client is a primary parent for the children and a battered spouse, the provisions of section 153.004(d) work in the client's favor.

§ 8.56 Other Causes of Action

Other causes of action that may be included against a spouse or third party in a divorce are (1) assault or intentional infliction of emotional distress, (2) fraud/conversion, (3) transmitting sexual disease, (4) invasion of privacy by unlawful interception of oral or electronic communication, (5) tortious interference with business relations, (6) wrongful interference with an existing contract, (7) interference with custody, (8) parentage action if someone other than a spouse is alleged to be the biological father of a child born during the marriage, (9) cause of action alleging third-party corporation to be alter ego of respondent, (10) request for relief from third-party cotenant, (11) request for relief from third party for fraudulent transfer, (12) request to void fraudulent obligation to third party, (13) request for relief from third-party trustee, and (14) civil conspiracy.

See sections 3.61 through 3.75 in this manual. A party is not entitled to final judgment on a summary judgment unless the summary judgment disposes of all claims. *Philips v. McNease*, 467 S.W.3d 688, 694 (Tex. App.—Houston [14th Dist.] 2015, no pet.). A declaratory judgment may also be sought. See section 61.10 in this manual.

To the extent that a party would be entitled to summary judgment on any of these causes of action outside the divorce context, a spouse should also be entitled, at the very least, to summary judgment on the issue of liability. That is, if a party can establish each element of its claim as a matter of law, that party is entitled to summary judgment relief. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986) (per curiam); *Fry v. Commission for Lawyer Discipline*, 979 S.W.2d 331, 334 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

COMMENT: As to causes of action that apply to third parties, there should be no question that summary judgment would be available if a party can prove judgment as a matter of law. This applies to third-party defendants as well. That is, a third-party defendant is entitled to summary judgment on its defenses, as in any other case.

Damages: In *Schlueter v. Schlueter*, the supreme court held that fraud on the community is a factor for division of the community estate, but that it was not an independent tort cause of action between spouses for damages to the community estate. *Schlueter v. Schlueter*, 975 S.W.2d 584, 587–89 (Tex. 1998); *see* Tex. Fam. Code § 7.009. If the damages are unliquidated (not yet determined or calculated), the court may grant an interlocutory summary judgment on liability and hold a hearing on damages. Tex. R. Civ. P. 166a(a). *But see State v. Roberts*, 882 S.W.2d 512, 514 (Tex. App.—Austin 1994, no writ) (summary judgment rarely appropriate in cases regarding unliquidated damages).

COMMENT: If summary judgment is filed on claims where damages cannot be addressed, the motion should be based solely on the issue of liability.

§ 8.57 Postdecree Issues

§ 8.57:1 Texas Family Code Chapter 9

Chapter 9 of the Texas Family Code governs postdecree proceedings. The types of litigation that may be dealt with include a postdecree division of property and dispositions of undivided beneficial interests. With regard to both of these issues, the same summary judgment tools can be used to determine the character of the property as are used in pre-

decree cases. Once character of the property is determined, a just and equal division can be achieved concerning community property. If the property is the separate property of either of the parties, it is not subject to division by the court.

§ 8.57:2 Bill of Review

A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. *Transworld Financial Services Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987). The bill of review is discussed in section 61.1 in this manual.

§ 8.58 Affidavits and Verifications

If a motion or pleading includes facts that are outside the record of the case, it may be necessary for the filing party to verify the facts by sworn proof. Depending on the type of pleading, this proof may be accomplished either by verification of the pleading or by attachment of an affidavit as an exhibit to the pleading.

A verification is a witnessed or notarized statement at the end of a pleading in which either the client or the attorney swears that the statements in the pleading are true and correct.

An affidavit is a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office. Tex. Gov't Code § 312.011(1); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 645–46 (Tex. 1995) (orig. proceeding). An affidavit must show that it is made by a person who is of sound mind, over the age of eighteen years, and competent to testify. *See* Tex. R. Evid. 601.

An affidavit must positively and unequivocally represent that the facts disclosed in the affidavit are true and within the affiant's personal knowledge. *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994) (orig. proceeding) (per curiam); *see also* Tex. R. Evid. 602. Any qualification of the affiant's personal knowledge renders the affidavit legally invalid. *Humphreys*, 888 S.W.2d at 470 (statements based on knowledge affiant learned through inquiry are not based on personal knowledge). The affidavit must also show how the affiant became familiar with these facts. *Jordan v. Geigy Pharmaceuticals*, 848 S.W.2d 176, 181 (Tex. App.—Fort Worth 1992, no writ); *Fair Woman, Inc. v. Transland Management Corp.*, 766 S.W.2d 323, 323 (Tex. App.—Dallas 1989, no writ). Unless authorized by statute, an affidavit is insufficient unless the allegations

contained in it are direct and unequivocal and perjury can be assigned upon it. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). Statements as to the affiant's state of mind cannot be readily controverted. *Beaumont Enterprise & Journal v. Smith*, 687 S.W.2d 729, 730 (Tex. 1985). An affidavit must set forth facts, not legal conclusions; in other words, it may not contain information that is a unilateral and subjective determination of the facts or an opinion about those facts. *Querner Truck Lines v. Alta Verde Industries*, 747 S.W.2d 464, 468 (Tex. App.—San Antonio 1988, no writ). A legal conclusion in an affidavit is insufficient to raise an issue of fact in response to a motion for summary judgment. *Mercer v. Daoran Corp.*, 676 S.W.2d 580, 583 (Tex. 1984); *Hidalgo v. Surety Savings & Loan Ass'n*, 487 S.W.2d 702, 703 (Tex. 1972) (per curiam).

Under certain specific statutes or rules, some affidavits may be based on "knowledge and belief." *See* Tex. Fam. Code § 153.432(c) (grandparent's affidavit alleging that denial of possession or access would significantly impair child's physical health or emotional well-being); Tex. Fam. Code § 156.006(b–1) (affidavit alleging that temporary order is necessary because child's present circumstances would significantly impair child's physical health or emotional well-being (personal knowledge or belief based on representations of person with personal knowledge)); Tex. R. Civ. P. 18a(a) (motion to recuse); Tex. R. Civ. P. 93(8), (13), (15) (certain verified denials). An affidavit may not be based on "knowledge and belief" except in these limited circumstances. *See Burke v. Satterfield*, 525 S.W.2d 950, 954–55 (Tex. 1975); *Wimmer v. Hanna Prime, Inc.*, No. 05-08-01323, 2009 WL 3838867 (Tex. App.—Dallas Nov. 18, 2009, no pet.) (mem. op.).

Unsworn Declarations: In many circumstances, an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law. This provision does not apply to an oath of office or an oath required to be taken before a specified official other than a notary public. Such an unsworn declaration must be in writing and subscribed by the person making the declaration as true under penalty of perjury, and it must include a prescribed jurat. Tex. Civ. Prac. & Rem. Code § 132.001.

This provision does not apply to a waiver of the issuance or service of citation in a suit for dissolution of marriage, a suit for change of name of a child, or a suit affecting the parent-child relationship. These waivers must be sworn before a notary public who is not an attorney in the suit unless the party executing the waiver is incarcerated. Tex. Fam. Code §§ 6.4035(c), 45.0031, 102.0091. This provision also does not apply in cer-

tain other circumstances specified in Tex. Civ. Prac. & Rem. Code § 132.001(b) or to acknowledgments.

[Sections 8.59 and 8.60 are reserved for expansion.]

VII. Maintaining Suit

§ 8.61 Nonsuit

At any time before a party finishes presenting his evidence, that party may dismiss or nonsuit his case. Notice should be served in accordance with rule 21a of the Texas Rules of Civil Procedure without necessity of a court order. The dismissal does not prejudice an adverse party's right to pursue that party's claims and has no effect on any pending motions for sanctions, attorney's fees, or costs. Tex. R. Civ. P. 162; *In re M.B.D.*, No. 09-18-00278-CV, 2020 WL 1879474, at *2 (Tex. App.—Beaumont Apr. 16, 2020, no pet.) (mem. op.).

If the record does not reflect that the waiver of a de novo hearing was signed before a hearing in front of an associate judge, the report of the associate judge is not a rendition for purposes of preventing a nonsuit of the case. *Alwazzan v. Alwazzan*, 596 S.W.3d 789, 804 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

§ 8.62 Dismissal

Rule 165a of the Texas Rules of Civil Procedure provides a procedure for dismissal for want of prosecution that is cumulative of the rules and laws governing any other procedures available to the parties in such cases. Tex. R. Civ. P. 165a(4).

A case may be dismissed for want of prosecution under rule 165a on failure of any party seeking affirmative relief to appear for any hearing or trial of which he had notice. Notice of intention to dismiss must be sent by the clerk to each attorney of record and to each party not represented by an attorney. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall render a pretrial order assigning a trial date for the case and setting deadlines for the joining of new parties, all discovery, the filing of all pleadings, the making of a response or supplemental responses to discovery, and other pretrial matters. The case may be continued

thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal must be given as provided in rule 306a of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 306a. Failure to mail notices as required by rule 165a does not affect any of the periods mentioned in rule 306a except as provided in that rule. Tex. R. Civ. P. 165a(1).

Any case not disposed of within the time standards promulgated by the supreme court under its administrative rules may be placed on a dismissal docket. Tex. R. Civ. P. 165a(2).

If one party dies before the divorce is granted, the case should be dismissed, including claims by third parties. *Whatley v. Bacon*, 649 S.W.2d 297, 299 (Tex. 1983) (orig. proceeding); *Janner v. Richardson*, 414 S.W.3d 857, 858 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see Garrison v. Texas Commerce Bank*, 560 S.W.2d 451, 453 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). However, if judgment has been rendered the court may proceed to enter the decree. *Dunn v. Dunn*, 439 S.W.2d 830, 833 (Tex. 1969).

§ 8.63 Reinstatement

One whose suit has been dismissed for want of prosecution may appeal to the equitable powers of the court to have the judgment set aside and the case reinstated for cause. The court must balance the equities in each case in making its determination. *Moody & Tips Lumber Co. v. South Dallas Bank & Trust Co.*, 246 S.W.2d 263, 265 (Tex. App.—Dallas 1952, writ dism'd). Granting or refusing the motion for reinstatement rests in the sound discretion of the trial court, subject to review for abuse of discretion. *Moss v. State*, 361 S.W.2d 408, 409 (Tex. App.—Eastland 1962, no writ).

Under rule 165a(3), to reinstate a case, a verified motion setting forth the grounds shall be filed within thirty days after the signing of the order of dismissal for want of prosecution or within the period prescribed by rule 306a. *See* Tex. R. Civ. P. 306a.

The clerk shall deliver a copy of the motion to the judge, who shall set a hearing as soon as possible. Tex. R. Civ. P. 165a(3). The failure of the court to hold a hearing on a timely filed and properly verified motion is an abuse of discretion. *Bonifazi v. Birch*, No. 09-14-00136-CV, 2015 WL 8476572, at *2 (Tex. App.—Beaumont Dec. 10, 2015, no pet.) (mem. op.).

If the motion for reinstatement is not decided by written order within seventy-five days after the judgment is signed or within such other time as allowed by rule 306(a), the

motion is deemed overruled by operation of law. If the motion to reinstate is timely filed, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until thirty days after all timely filed motions are overruled either by written and signed order or by operation of law, whichever occurs first. Tex. R. Civ. P. 165a(3).

The court shall reinstate the case on finding after hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to accident or mistake or that the failure has been otherwise reasonably explained. Tex. R. Civ. P. 165a(3).

The reinstatement procedure is cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedure and timetable apply to all dismissals for want of prosecution, including cases dismissed under the court's inherent power, whether or not a motion to dismiss has been filed. Tex. R. Civ. P. 165a(4). *See Martin v. Sanders*, No. 01-18-00726-CV, 2019 WL 2750598, at *4 (Tex. App.—Houston [1st Dist.] July 2, 2019, no pet.) (mem. op.) (court abused discretion in not reinstating case when attorney forgot to attend hearing because he had been witness giving deposition in federal case on day before and had gone back to deposition instead of going to hearing).

§ 8.64 Bankruptcy

The filing of a bankruptcy petition automatically stays any judicial, administrative, or other action or proceeding against a debtor and his property. *See* 11 U.S.C. § 362(a). The stay applies automatically, regardless of whether a party to the stayed action or the court in which the action is filed learns of the bankruptcy before taking action against the debtor. The stay specifically applies to divorce proceedings, at least to the extent they seek to divide the marital estate. The stay abates any judicial proceeding against the debtor and, until lifted or modified, deprives state courts of jurisdiction over the debtor and his property. Any action taken in violation of the stay is void, not merely voidable. *Adeleye v. Driscal*, 544 S.W.3d 467, 473–74 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Federal law contains exceptions to the automatic stay rule that affect family law cases. Those exceptions include the commencement or continuation of a civil action or proceeding (1) for the establishment of paternity; (2) for the establishment or modification of an order for domestic support obligations; (3) concerning child custody or visitation; (4) for the dissolution of a marriage, except to the extent that such proceeding seeks to

determine the division of property that is property of the estate; or (5) regarding domestic violence. 11 U.S.C. § 362(b)(2)(A).

The filing of the petition also does not operate as a stay (1) of the collection of a domestic support obligation from property that is not property of the estate; (2) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute; (3) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under state law, as specified in section 466(a)(16) of the Social Security Act; (4) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act; (5) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous state law; or (6) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act. 11 U.S.C. § 362(b)(2)(B)–(G).

[Sections 8.65 through 8.70 are reserved for expansion.]

VIII. Witnesses

§ 8.71 Exclusion of Expert Witness

Under Tex. R. Evid. 702, the trial court determines the qualifications of an expert witness and whether the expert's opinion is admissible into evidence. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

An expert witness may testify regarding scientific, technical, or other specialized matters if the expert is qualified, the expert's opinion is relevant, the opinion is reliable, and the opinion is based on a reliable foundation. Tex. R. Evid. 702; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *Robinson*, 923 S.W.2d at 556. An expert may satisfy the requisites of one test but fail in others, making the expert's testimony inadmissible.

Robinson provides a list of nonexclusive factors that may be considered in making the threshold determination of admissibility under rule 702: (1) the extent to which the theory has been or can be tested, (2) the extent to which the technique relies on the subjective interpretation of the expert, (3) whether the theory has been subjected to peer review and/or publication, (4) the technique's potential rate of error, (5) whether the

theory or technique has been generally accepted as valid by the relevant scientific community, and (6) the nonjudicial uses that have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

However, the supreme court has recognized that the *Robinson*-factor analysis may not be the appropriate test for all experts—indeed, the *Robinson*-factor analysis does not properly measure the reliability of "nonscientific" experts who testify based on training or experience. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). The *Gammill* court held that in cases where the *Robinson*-factor analysis is inappropriate, trial courts may apply the "analytical gap" test: expert testimony is unreliable if "there is simply too great an analytical gap between the data and the opinion proffered." *Gammill*, 972 S.W.2d at 727. In making this determination the court should consider whether the expert's field is legitimate, whether the subject matter of the expert's testimony falls within the scope of that field, and whether the expert's testimony properly relies on the principles in the expert's field. *In re J.R.*, 501 S.W.3d 738, 748 (Tex. App.—Waco 2016, no pet.). Further, the expert must show a connection between the data relied on and the opinion offered. *Southwestern Energy Production Co. v. Berry-Helfand*, 491 S.W.3d 699, 717 (Tex. 2016).

It has been held that evaluation of an expert's reliability need not rely solely on either the *Robinson* factors or the analytical gap analysis, but that a hybrid evaluation of all available factors may be appropriate in some cases. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 639–40 (Tex. 2009).

When expert testimony is involved, courts must rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which the expert applied the principles and methodologies to reach the conclusions. *Whirlpool Corp.*, 298 S.W.3d at 637; *see Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). Conclusory or speculative opinion testimony is not relevant evidence because it does not tend to make the existence of material facts more probable or less probable. *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004); *see* Tex. R. Evid. 401. An expert's opinion might be unreliable, for example, if it is based on assumed facts that vary from the actual facts, *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995), and in that instance it is not probative evidence. *Whirlpool Corp.*, 298 S.W.3d at 637. Likewise, expert testimony is unreliable if it fails to rule out other plausible causes. *Robinson*, 923 S.W.2d at 559; *Merrill Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997).

To object to an expert, the party should make a written pretrial objection to the admissibility of the expert's opinion pursuant to Tex. R. Evid. 104(a). The motion must identify each expert and the opinion or conclusion that it seeks to exclude and should allege that the expert is not qualified to give the opinion, the subject of the testimony is not specialized knowledge, the opinion of the expert is not reliable, or the opinion of the expert is not relevant. *See Gammill*, 972 S.W.2d 713.

The trial court has the discretion to determine if a hearing will be held or if the matter will be decided by submission. *Piro v. Sarofim*, 80 S.W.3d 717, 720 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Once a party objects to the expert's testimony, the party sponsoring the expert bears the burden of responding to each objection and showing by a preponderance of the evidence that the testimony is admissible. *Robinson*, 953 S.W.2d at 557.

COMMENT: It is good practice (and many courts require) that the objection be filed well in advance of the trial and not at the time the expert is called to testify.

§ 8.72 Presence of Dog to Assist Witness

Any party may petition the court in which a proceeding will be held for an order authorizing a qualified facility dog or qualified therapy dog to be present with a witness who is testifying before the court in person or by closed-circuit video teleconferencing. The party must petition for the order not later than the fourteenth day before the date of the court proceeding. Tex. Gov't Code § 21.012(b), (e).

The strict requirements for a dog to be considered a qualified facility dog or qualified therapy dog are set forth in the statute. *See* Tex. Gov't Code § 21.012(a).

The court may enter an order authorizing such a dog to accompany a witness testifying at the court proceeding if the presence of the dog will assist the witness in providing testimony and the party seeking the order provides proof of liability insurance coverage in effect for the dog. Tex. Gov't Code § 21.012(c).

A handler trained to manage the dog must accompany the dog, and the court may impose restrictions on the presence of the dog and issue instructions to the jury, as applicable, regarding the dog's presence. Tex. Gov't Code § 21.012(d), (f).

[Sections 8.73 through 8.80 are reserved for expansion.]

IX. Indigence

§ 8.81 Claiming Indigence in Trial Court

Rule 145 of the Texas Rules of Civil Procedure provides rules under which a party may proceed without paying costs, meaning any fee charged by the court or an officer of the court, including filing fees, fees for issuance and service of process, fees for copies, fees for a court-appointed professional, and fees charged by the clerk or court reporter for preparation of the appellate record. *See* Tex. R. Civ. P. 145(a).

A party who cannot afford payment of court costs must file the Statement of Inability to Afford Payment of Court Costs approved by the Texas Supreme Court or another sworn document containing the same information. The statement must be signed before a notary or made under penalty of perjury. Tex. R. Civ. P. 145(b).

The court clerk must make the statement available to any person for free without request. The clerk may return a statement for correction only if it is not sworn—not for failure to attach evidence or any other reason. After the sworn statement is filed, the clerk must docket the case, issue citation, and provide any other service that is ordinarily provided to a party. Tex. R. Civ. P. 145(c).

The declarant—the person filing the statement—should submit with the statement any available evidence of the declarant's inability to afford payment of costs. An attachment that demonstrates any of the following is prima facie evidence: (1) that the declarant or the declarant's dependent receives benefits from a means-tested government entitlement program; (2) that the declarant is being represented by an attorney providing legal services through a provider funded by the Texas Access to Justice Foundation or the Legal Services Corporation or through a nonprofit providing civil legal services to those meeting certain poverty standards; or (3) that the declarant has applied for free legal services through a provider described in (2) and was found financially eligible but was declined representation. Tex. R. Civ. P. 145(b), (d).

A motion to require the declarant to pay costs must meet certain requirements. A motion filed by the clerk, the court reporter, or a party must contain sworn evidence—not merely allegations—that the statement was materially false when made or that, because of changed circumstances, it is no longer true. The court on its own may require the declarant to prove the inability to afford costs if evidence comes before the court that the declarant may be able to afford costs or when an officer or professional must be appointed in the case. Tex. R. Civ. P. 145(e).

Before the declarant may be required to pay costs, certain procedural requirements must be satisfied. There must be an oral evidentiary hearing, with ten days' notice to the declarant, either written and served in accordance with rule 21a or given in open court. At the hearing, the burden is on the declarant to prove the inability to afford costs. An order requiring payment of costs must be supported by detailed findings that the declarant can afford to pay costs. The court may order that the declarant pay part of the costs or pay in installments, but the court may not delay the case if payment is made in installments. An order requiring the declarant to pay costs must contain, in conspicuous type, a prescribed notice of the right to appeal. Tex. R. Civ. P. 145(f).

Only the declarant may challenge a trial court order under rule 145. On this challenge, accomplished by motion filed in the court of appeals, filing fees may not be charged. The motion must be filed within ten days after the trial court's order is signed, although the court of appeals may extend the deadline by fifteen days for good cause demonstrated in writing. Tex. R. Civ. P. 145(g)(1)–(2).

After the motion challenging the trial court's order is filed, the court of appeals must promptly send notice to the trial court clerk and the court reporter requesting preparation of the record of all trial court proceedings on the indigence claim. The court may set a deadline for filing the record, which must be provided without charge. The court of appeals must rule on the motion as early as practicable. Tex. R. Civ. P. 145(g)(3)–(4).

The trial court judgment may not require the declarant to pay costs—and a provision in the judgment purporting to do so is void—unless the court has issued an order that complies with rule 145(f) or the declarant has obtained a monetary recovery and the court orders the recovery to be applied toward payment of costs. Tex. R. Civ. P. 145(h).

When the declarant requests preparation of the reporter's record, the court must designate the portions of the record to be transcribed. Tex. R. Civ. P. 145(i).

Provisions in the Family Code for the appointment of counsel for indigent parents in a suit for termination or appointment of a conservator brought by a governmental entity are discussed in sections 13.3 and 50.31 of this manual.

§ 8.82 Indigence on Appeal

Rule 20.1 of the Texas Rules of Appellate Procedure provides rules under which indigent parties may proceed without payment of filing fees in the appellate court. *See* Tex. R. App. P. 20.1. A determination of indigence in the trial court carries forward to appeal in all cases, and there are also some other circumstances in which a party may be

allowed to proceed in the appellate court without paying filing fees. The provisions of rule 20.1 regarding appellate filing fees, as well as further requirements regarding provision of the appellate record, are discussed in section 26.18 of this manual.

Chapter 9
Child Support

I. Basic Principles

§ 9.1 Support of Child 331
§ 9.2 Who May Be Ordered to Pay 333
§ 9.3 Manner of Payment 334
§ 9.4 Place of Payment 334
§ 9.5 Payments by Trust 335
§ 9.6 Termination of Duty of Support 336
§ 9.7 Retroactive Child Support 337
§ 9.8 Child Support for Disabled Child 338
§ 9.9 Acceleration of Unpaid Child Support Obligation on Death of Obligor 340
§ 9.10 Provision of Support If Obligor Dies 341
§ 9.11 Payments in Excess of Court-Ordered Amount 341

II. Child Support Guidelines

§ 9.21 Net Resources Defined 342
§ 9.22 Imputation of Income 345
§ 9.23 Self-Employment Income 345
§ 9.24 Intentional Unemployment or Underemployment 346
§ 9.25 Deemed Income 347
§ 9.26 Minimum Wage Presumed 348
§ 9.27 Net Resources of New Spouse 348
§ 9.28 Child Support Received by Obligor Included 349
§ 9.29 Application of Guidelines 349
§ 9.30 Additional Factors 349
§ 9.31 Guidelines for Net Resources of $9,200 or Less 351

§ 9.32 Guidelines for Net Resources of More Than $9,200 352
§ 9.33 Reduction as Number of Eligible Children Decreases 353
§ 9.34 Guidelines for Children in More Than One Household 353
§ 9.35 Findings of Fact in Child Support Order 354
§ 9.36 Agreement Concerning Support 355
§ 9.37 Application of Guidelines to Children of Certain Obligors 356

III. Medical Support and Dental Support

§ 9.41 Medical Support Order 357
§ 9.42 Dental Support Order 360
§ 9.43 Qualified Medical Child Support Order 362
§ 9.44 Claims Made by Custodial Parent 365
§ 9.45 Notice to Employer 365
§ 9.46 Duties of Employer 366
§ 9.47 Failure to Provide Health Insurance or Dental Insurance 367
§ 9.48 Cancellation or Elimination of Coverage 368
§ 9.49 Continuation Coverage 368
§ 9.50 Support Order Not Qualified 368

IV. Child Support Registry

§ 9.51 Local Child Support Registry 368

V. Child Support Review Process

§ 9.55 Child Support Review Process 369

VI. Withholding from Earnings

§ 9.61 Withholding Order Required 370
§ 9.62 Withholding for Arrearages 371
§ 9.63 Maximum Amount to Be Withheld 372
§ 9.64 Limitations 372

§ 9.65 Contents of Withholding Order or Writ 372
§ 9.66 Forms for Income Withholding 372
§ 9.67 Request for Order or Writ of Withholding 373
§ 9.68 Employer's Request for Hearing 374
§ 9.69 Notice of Application for Judicial Writ of Withholding 374
§ 9.70 Requirements of Notice of Application for Judicial Writ of Withholding 374
§ 9.71 Delivery of Notice 375
§ 9.72 Motion to Stay Issuance of Writ 375
§ 9.73 Request for Issuance and Delivery of Writ 376
§ 9.74 Issuance and Delivery of Writ 376
§ 9.75 Contents of Writ 376
§ 9.76 Issuance of Judicial Writ to Later Employer 376
§ 9.77 Parties' Agreement about Amount or Duration of Withholding 377
§ 9.78 Delivery of Order Reducing or Terminating Withholding 377
§ 9.79 Order for Withholding for Costs and Fees 378
§ 9.80 Qualified Domestic Relations Order for Collection of Support 378

VII. Useful Websites

§ 9.81 Useful Websites 378

Chapter 9

Child Support

I. Basic Principles

§ 9.1 Support of Child

The court may order either or both parents to support a child in the manner specified by the order until the child is eighteen years of age or until graduation from high school, whichever occurs later; until the child is emancipated through marriage, through removal of the disabilities of minority by court order, or by other operation of law; until the death of the child; or, if the child is disabled, for an indefinite period. Tex. Fam. Code § 154.001(a). The court may also order the payment of support by a financially able person whose parental rights have been terminated with respect to a child who is in substitute care for whom the Texas Department of Family and Protective Services has been appointed managing conservator, a child for a reason described by Code section 161.001(b)(1)(T)(iv) or (b)(1)(U) (concerning sexual assault of the other parent), or a child who was conceived as a direct result of conduct that constitutes an offense under section 21.02, 22.011, 22.021, or 25.02 of the Texas Penal Code. *See* Tex. Fam. Code § 154.001(a–1). Family Code section 154.001 does not mandate that a parent have possession of the child in order to be entitled to receive child support. *Duran v. Garcia*, 224 S.W.3d 309 (Tex. App.—El Paso 2005, no pet.).

If the child is enrolled in an accredited secondary school in a program leading toward a high school diploma under chapter 25 of the Texas Education Code, enrolled in courses for joint high school and junior college credit under section 130.008 of the Texas Education Code, or enrolled on a full-time basis in a private secondary school in a program leading toward a high school diploma, and is complying with the relevant minimum attendance requirements, the court may render an original support order or modify an existing order providing child support past the eighteenth birthday of the child. Tex. Fam. Code § 154.002(a). The request for a support order through high school graduation may be filed before or after the child's eighteenth birthday. Tex. Fam. Code

§ 154.002(b). The request may be made in an original suit seeking child support or a motion to modify a previous decree ordering support. *Crocker v. Attorney General*, 3 S.W.3d 650, 652–53 (Tex. App.—Austin 1999, no pet.).

The order for periodic support may provide that payments continue through the end of the month in which the child graduates. Tex. Fam. Code § 154.002(c).

With respect to "minimum attendance requirements," report cards showing multiple absences, without indicating which were unexcused, and reflecting that the child received credit and grades for the period in issue were not evidence that the child failed to meet the minimum attendance requirements. *Roberts v. Swain*, No. 01-13-00801-CV, 2014 WL 1912678, at *2 (Tex. App.—Houston [1st Dist.] May 13, 2014, no pet.) (mem. op.). Partially relying on section 25.092(a) of the Texas Education Code, which permits a child to receive credit or a final grade only if he has attended 90 percent of the classes offered, the Beaumont court of appeals affirmed a decision to terminate the obligor's child support obligation where the child was enrolled in online courses but not participating. *In re B.Y.*, No. 09-19-00255-CV, 2020 WL 5240456, at *6–7 (Tex. App.—Beaumont Sept. 3, 2020, no pet. h.) (mem. op.).

With respect to "accredited secondary school," the child may be enrolled in an alternative educational program outside the secondary school system but one adapted to the child's needs as long as any course credit earned under such alternative program may be applied to the gaining of a diploma from an accredited secondary school. *In re Frost,* 815 S.W.2d 890, 892–93 (Tex. App.—Amarillo 1991, no writ); *see also Ewing v. Holt*, 835 S.W.2d 274, 275 (Tex. App.—Fort Worth 1992, no writ) (intent of legislature in allowing for child support after child's eighteenth birthday was "to require a father to aid in the support of his child, even if that child is over the age of eighteen, so long as that child was actively participating in studies which would lead to a high school diploma").

A court may not render an order that conditions the right of a conservator to possession of or access to a child on the payment of child support. Tex. Fam. Code § 153.001(b). In addition, the court may not condition the duty to pay child support on whether a possessory conservator is given possession of or access to a child. Tex. Fam. Code § 154.011. Likewise, an order that relieves the obligor of his or her duty to pay child support until such time as the child resumes visitation with that parent is void as against public policy. *In re A.N.H.*, 70 S.W.3d 918, 920 (Tex. App.—Amarillo 2002, no pet.).

§ 9.2 Who May Be Ordered to Pay

Only parents (or certain persons whose parental rights have been terminated) may be required to pay child support. *See* Tex. Fam. Code § 154.001. Grandparents may not be required to pay child support, even if they have intervened in the case and have been appointed possessory conservators. *Blalock v. Blalock*, 559 S.W.2d 442, 443 (Tex. App.—Houston [14th Dist.] 1977, no writ). Further, the doctrine of equitable adoption is inapplicable in the child support context. One who has acted as a parent, even if for many years, does not fit within the strict definition of a parent under the Family Code and cannot be held liable for the support of a child. *In re M.L.P.J.*, 16 S.W.3d 45, 47–48 (Tex. App.—Eastland 2000, pet. denied). However, although Texas does not recognize equitable adoption, a party may be liable for child support under an implied contract. *See In re Marriage of Eilers*, 205 S.W.3d 637 (Tex. App.—Waco 2006, pet. denied). In *Eilers*, because the parties took custody of a child and, along with the mother, executed a "Power of Attorney Delegating Parental Authority," the court found the existence of a contract and ordered the husband to pay the amount of support required by the child support guidelines to fulfill his contractual obligation.

While the Family Code does authorize a court to order either parent or both to support a child, the court may not order a sole managing conservator to pay child support to the possessory conservator. *See Peterson v. Office of the Attorney General*, 990 S.W.2d 830, 833 (Tex. App.—Fort Worth 1999, no pet.); *Lueg v. Lueg*, 976 S.W.2d 308, 313 (Tex. App.—Corpus Christi–Edinburg 1998, pet. denied). However, when joint managing conservators are named, the parent who has the exclusive right to determine the primary residence of the child may be ordered to pay support to the parent with an expanded possession order to ensure that the child has "adequate resources" at both residences. *In re A.R.W.*, No. 05-18-00201-CV, 2019 WL 6317870, at *9–10 (Tex. App.—Dallas Nov. 26, 2019, no pet.) (mem. op.); *see also S.L. v. S.L.*, No. 02-19-00017-CV, 2020 WL 4360448, at *3–5 (Tex. App.—Fort Worth July 30, 2020, no pet.) (mem. op.).

If parties are made joint managing conservators, there is no requirement in the Family Code for a reciprocal support order. *Carson v. Hathaway*, 997 S.W.2d 760, 761 (Tex. App.—El Paso 1999, no pet.).

A court may order both a mother and a biological father to pay support, including retroactive support, to a third-party adjudicated father, and there is no prohibition against the payment of retroactive support to someone other than the mother of the child. *In re A.L.H.*, No. 11-19-00003-CV, 2020 WL 1809363, at *2 (Tex. App.—Eastland Apr. 9, 2020, pet. denied) (mem. op.).

§ 9.3 Manner of Payment

The court may order that child support be paid by periodic payments; a lump-sum payment; an annuity purchase; the setting aside of property to be administered for the support of the child as specified in the order; pension, retirement, or other employee benefits in accordance with an enforceable qualified domestic relations order or similar order under Family Code subchapter J, chapter 157; or any combination of periodic payments, lump-sum payments, annuity purchases, or setting aside of property. Tex. Fam. Code § 154.003.

If the court orders the obligor to make a one-time lump-sum payment, calculated simply by multiplying the monthly support award by the number of months until the child reaches majority, a discount rate must be applied to arrive at the present value of the future payments. *In re Gonzalez*, 993 S.W.2d 147, 160 (Tex. App.—San Antonio 1999, no pet.). The court may require the obligor to pay a lump-sum child support amount into a trust for the benefit of the child. *In re Gonzalez,* 993 S.W.2d at 161. It is also permissible for the court to order that a portion of the monthly support amount be paid into a joint account, to be used for purposes specific to the care and welfare of the child, with any amounts remaining on the termination of the support order to be paid to the child. *Bailey v. Bailey*, 987 S.W.2d 206, 209 (Tex. App.—Amarillo 1999, no pet.).

A court-ordered obligation to pay a minor child's school tuition is an obligation to pay child support and is intended to fulfill an obligation directly to the child. Thus, like any child support order, it can be modified. *In re H.L.B.*, No. 05-18-01061-CV, 2020 WL 104623, at *3–4 (Tex. App.—Dallas Jan. 9, 2020, no pet.) (mem. op.).

The court did not abuse its discretion in awarding an incarcerated obligor's share of the equity in the couple's home as a lump-sum child support payment to satisfy his child support obligation, where the father would not be up for parole before his child support obligation expired. *Tran v. Nguyen*, 480 S.W.3d 119, 129 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

§ 9.4 Place of Payment

The court shall order the payment of child support to the state disbursement unit. Tex. Fam. Code §§ 154.004(a), 234.007. A trial court cannot order the state disbursement unit to remit payments to an individual or entity other than the obligee. *In re B.N.A.*, 278 S.W.3d 530 (Tex. App.—Dallas 2009, no pet.); *In re C.J.M.S.*, 269 S.W.3d 206 (Tex. App.—Dallas 2008, pet. denied); *In re A.B.*, 267 S.W.3d 564 (Tex. App.—Dallas

2008, no pet.). In a title IV-D case, the court or the title IV-D agency shall order that income withheld for child support be paid to the state disbursement unit of Texas or, if appropriate, to the state disbursement unit of another state. Tex. Fam. Code § 154.004(b).

COMMENT: A child support obligor who has been ordered to pay through the state disbursement unit or other registry should be strongly advised to make payments to the proper place and not directly to the obligee. Payments should be properly identified, including the names of the obligor and obligee, the cause number, the Office of Attorney General case number, if applicable, and the name of the county if payment is through the state disbursement unit. The obligor should further be advised to keep an accurate record and proof of any offsets or credits to which he may be entitled.

The petitioner must file with the court clerk a record of support (see form 9-18 in this manual) at the time an order for child support, medical support, and dental support is filed of record. Tex. Fam. Code § 105.008(a). The record of support is a form promulgated by the Texas Office of the Attorney General, and its use guarantees that the local registry and the state disbursement unit receive the information necessary to accurately process support payments. If the form includes an option for a party to apply for title IV-D child support services, the party or authorized representative must sign it. Tex. Fam. Code § 105.008(b).

If an obligor is ordered to pay an obligee both spousal maintenance under Family Code chapter 8 and child support under chapter 154, the court must order payment of the maintenance to the state disbursement unit. Tex. Fam. Code § 8.062.

§ 9.5 Payments by Trust

The court may order the trustees of a spendthrift or other trust to make disbursements for the support of a child to the extent the trustees are required to make payments to a beneficiary who is required to make child support payments. If disbursement of the assets of the trust is discretionary, the court may order child support payments from the income of the trust but not from the principal. Tex. Fam. Code § 154.005. The court may *not* order trustees to pay child support directly to a child support obligee without imposing that obligation on the beneficiary-parent. It is only when the parent is first obligated to pay an amount of child support that the court may order a third party to make disbursements directly to the child support obligee. *Kolpack v. Torres*, 829 S.W.2d 913, 915–16 (Tex. App.—Corpus Christi–Edinburg 1992, writ denied).

§ 9.6 Termination of Duty of Support

Unless otherwise agreed in writing or expressly provided in the order, the child support order terminates on the marriage of the child, the removal of the child's disabilities for general purposes, the death of the child, a finding by the court that the child is eighteen years of age or older and has failed to comply with the enrollment or attendance requirements described by Family Code section 154.002(a), the issuance under Family Code section 161.005(h) of an order terminating the parent-child relationship between the obligor and the child based on the results of genetic testing that exclude the obligor as the child's genetic father, or the date on which a child who has enlisted in the armed forces of the United States begins active service as defined by section 101 of title 10 of the United States Code. Tex. Fam. Code § 154.006(a).

Unless a nonparent or agency has been appointed conservator of the child under Family Code chapter 153, the order for current child support terminates on the marriage or remarriage of the obligor and obligee to each other. Tex. Fam. Code § 154.006(b).

If the child support order has not terminated, the support obligation continues beyond the death of the obligee on an order of the court directing that any current support, including amounts collected but not disbursed and any subsequent payments for current support, be paid proportionately for the benefit of each surviving child named in the support order, instead of passing to the estate of the obligee. The order shall direct payment be made to (1) a person, other than a parent, who is appointed managing conservator of the child; (2) a person, including the obligor, who has assumed actual care, control, and possession of the child, in the absence of an appointed managing conservator or guardian; (3) the county clerk acting as custodian of an account for the child, under chapter 1355 of the Estates Code; (4) a guardian of the child appointed under title 3 of the Estates Code; or (5) the surviving child, if the child is an adult or has otherwise had the disabilities of minority removed. Tex. Fam. Code § 154.013.

If the obligor is not in arrears and the support obligation has terminated, an obligee shall return to the obligor a child support payment made by the obligor that exceeds the amount of ordered support, regardless of whether the payment was made before, on, or after the date the child support obligation terminated. An obligor may file a suit to recover such a payment. If the court finds that the obligee failed to return such a payment, the court must order the obligee to pay the obligor's attorney's fees and costs in addition to the amount of support paid after the order terminated. The court may waive the payment of the attorney's fees and costs for good cause shown, if the court states the reasons supporting that finding. Tex. Fam. Code § 154.012.

§ 9.7 Retroactive Child Support

The court may order a parent to pay retroactive child support if the parent has not previously been ordered to pay support for the child and was not a party to a suit in which support was ordered, except that the court may order a parent subject to a previous support order to pay retroactive support if (1) the previous order terminated as a result of the marriage or remarriage of the child's parents, (2) the parents separated after the marriage or remarriage, and (3) a new support order is sought after the date of separation. Tex. Fam. Code § 154.009(a), (d).

In ordering retroactive child support, the court shall apply the child support guidelines. Tex. Fam. Code §§ 154.009(b), 154.131(a). The court must consider the net resources of the obligor during the relevant period and whether (1) the mother of the child had attempted to notify the obligor of his paternity or probable paternity, (2) the obligor knew of his paternity or probable paternity, (3) the order for retroactive support will impose an undue financial hardship on the obligor or the obligor's family, and (4) the obligor has provided actual support and other necessaries before the action was filed. Tex. Fam. Code § 154.131(b).

An agreement between the parties concerning support or purporting to settle support obligations does not reduce or terminate the amount of retroactive support the title IV-D agency can request unless the title IV-D agency is a party to an agreement. Tex. Fam. Code § 154.009(c). In addition, a parent's voluntary but sporadic payment of support before the entry of a court order does not preclude the trial court from exercising its discretion to award retroactive child support, and the court is not required to credit the full amount of past financial support the parent claims to have provided. *Bunts v. Williams*, No. 01-17-00643-CV, 2019 WL 2220109, at *10 (Tex. App.—Houston [1st Dist.] May 23, 2019, no pet.) (mem. op.).

It is presumed that a court order limiting the amount of retroactive support to an amount not exceeding the total amount that would have been due for the four years preceding the filing date of the petition for support is reasonable and in the best interest of the child. The presumption may be rebutted by evidence that the obligor (1) knew or should have known that he was the child's father and (2) sought to avoid the establishment of a support obligation to the child. Tex. Fam. Code § 154.131(c)–(d); *see In re S.C.B.*, 581 S.W.3d 434 (Tex. App.—El Paso 2019, no pet.) (fact that father knew about twelve-year-old child since child's birth insufficient to rebut presumption without proof that he also sought to avoid child support obligation). An order so limiting the amount of retroactive support does not constitute a variance from the mandatory guidelines requiring

specific findings of the court. Tex. Fam. Code § 154.131(e). *But see In re B.R.*, 327 S.W.3d 208 (Tex. App.—San Antonio 2010, no pet.) (section 154.131(c)'s presumption applies only when trial court limits amount of retroactive child support to amount not exceeding support that would have been due for preceding four years and does not prohibit court from awarding amount greater than four years of retroactive child support; if court does not limit retroactive support to amount equal to four years of child support, section 154.131(c) presumption is not triggered and does not apply).

In *Kebodeaux v. Kebodeaux*, the trial court erred in including support that accrued after the child turned eighteen and graduated from high school. The appellate court also held that a petitioner should specifically plead for retroactive child support to provide fair notice but did not set aside the award, finding that the parties tried the issue by consent. *Kebodeaux v. Kebodeaux*, No. 04-20-00147-CV, 2021 WL 3639814, at *3–6 (Tex. App.—San Antonio Aug. 18, 2021, no pet. h.) (mem. op.).

A court retains jurisdiction to render an order for retroactive child support in a suit if a petition requesting retroactive child support is filed not later than the fourth anniversary of the date of the child's eighteenth birthday. Tex. Fam. Code § 154.131(f).

§ 9.8 Child Support for Disabled Child

An "adult child" is a child eighteen years of age or older. Tex. Fam. Code § 154.301(1). The court may order either or both parents to provide for the support of a child for an indefinite period and may determine the rights and duties of the parents if the court finds that the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support and that the disability exists, or the cause of the disability is known to exist, on or before the eighteenth birthday of the child. Tex. Fam. Code § 154.302(a); *see, e.g., Canales v. Paxton*, No. 03-19-00259-CV, 2020 WL 5884123, at *5 (Tex. App.—Austin Sept. 30, 2020, no pet. h.) (mem. op.) (statute is not void for vagueness even though terms such as "disability" are not defined, nor are there guidelines or criteria for courts to apply); *In re V.R.J.*, No. 04-19-00348-CV, 2020 WL 2543316, at *5 (Tex. App.—San Antonio May 20, 2020, no pet.) (mem. op.) (Social Security Administration's require-ments for adult disability benefits are not analogous with standards set out in Family Code, which does not require showing of inability to engage in *any* substantial gainful activity, that disability is medically determinable, or that it will persist for specific length of time); *In re T.A.N.*, No. 07-08-0483-CV, 2010 WL 58334 (Tex. App.—Amarillo Jan. 8, 2010, no pet.) (mem. op.) (finding sufficient evidence that adult child needs substantial care and personal supervision and noting that substantial care is

not same as continuous care); *In re M.W.T.*, 12 S.W.3d 598, 605 (Tex. App.—San Antonio 2000, pet. denied) (finding that uncontrollable anger rendered adult child disabled and incapable of self-maintenance). *But see In re J.M.C.*, 395 S.W.3d 839, 846 (Tex. App.—Tyler 2013, no pet.) (denying petition for adult child support for legally blind adult who did not need substantial care or personal supervision in daily activities).

The court shall designate a parent of the child or another person who has physical custody or guardianship of the child under a court order to receive support for the child. The court may designate a child who is eighteen years of age or older to receive the support directly. Tex. Fam. Code § 154.302(b). If the court finds that a special needs trust is appropriate for the benefit of the adult disabled child, the court may designate the trustee of the special needs trust to receive support for the child.

Except in a title IV-D case, a court ordering support for an adult child with a disability may designate a special needs trust and order support be paid directly to the trust for the benefit of the adult child. The court may not order the support be paid to the state disbursement unit. Tex. Fam. Code § 154.302(c).

A suit for the support of a disabled child may be filed only by a parent of the child; another person who has physical custody or guardianship of the child under a court order; or the child, if the child is eighteen years of age or older, does not have a mental disability, and is determined by the court to be capable of managing the child's financial affairs. Tex. Fam. Code § 154.303(a); *In re C.J.N.-S.*, 540 S.W.3d 589 (Tex. 2018) (mother had standing to seek adult disabled child support from father even though mother did not live with child).

The suit may be filed regardless of the age of the child. Tex. Fam. Code § 154.305(a)(1). The cause of action may be assigned to the IV-D agency, pursuant to an application for financial assistance or child support services under Code section 231.104 or in the provision of child support enforcement services under Code section 159.307; however, it may not be assigned to any other entity or person. *See* Tex. Fam. Code § 154.303(b).

In determining the amount of support to be paid after a child's eighteenth birthday, the specific terms and conditions of that support, and the rights and duties of both parents with respect to the support of the child, the court shall determine and give special consideration to any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability; whether the parent pays for or will pay

for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child; the financial resources available to both parents for the support, care, and supervision of the adult child; and any other financial resources or other resources or programs available for the support, care, and supervision of the adult child. Tex. Fam. Code § 154.306; *see In re N.E.C.*, No. 05-18-01156-CV, 2020 WL 3286522 (Tex. App.—Dallas June 18, 2020, pet. denied) (mem. op.) (factors discussed).

§ 9.9 Acceleration of Unpaid Child Support Obligation on Death of Obligor

Any remaining unpaid balance of a child support obligation becomes payable when the obligor dies. Tex. Fam. Code § 154.015(b).

The court of continuing jurisdiction shall determine the amount of the unpaid child support obligation. All relevant factors must be considered in determining the amount of the unpaid obligation, including the present value of the total amount of monthly periodic child support payments, health insurance premiums, and dental insurance premiums payable for the child's benefit between the month in which the obligor dies and the month the child becomes eighteen years of age, based on the amounts of support and cost of insurance ordered at the time the obligor dies; in the case of a disabled child, an amount to be determined under Family Code section 154.306; the nature and amount of any benefit to which the child would be entitled as a result of the obligor's death, including life insurance proceeds, annuity payments, trust distributions, Social Security death benefits, and retirement survivor benefits; and any other financial resource available for the child's support. Tex. Fam. Code § 154.015(c).

If, after considering all the relevant factors, the court finds that the child support obligation has been satisfied, the court shall render an order terminating the obligation. If the court finds the obligation is not satisfied, the court shall render a judgment in the obligee's favor, for the child's benefit, for the amount of the unpaid obligation. The order must designate the obligee constructive trustee for the child's benefit of any money received in satisfaction of the judgment. Tex. Fam. Code § 154.015(d).

The obligee has a claim for the unpaid child support obligation against the obligor's estate on the child's behalf and may present that claim as provided in the Texas Estates Code. Tex. Fam. Code § 154.015(e). If money paid to the obligee for the child's benefit exceeds the amount of the unpaid child support obligation remaining when the obligor dies, the obligee must hold the excess amount as constructive trustee for the benefit of

the obligor's estate until the obligee delivers the excess amount to the legal representative of the estate. Tex. Fam. Code § 154.015(f).

COMMENT: For a discussion of several unanswered questions regarding the implementation of this statute, see Marilyn Shell & Georganna L. Simpson, *Dealing with the Death of a Parent: Family Code §§ 154.015 and 154.016*, Winter 2007 Family Law Section Report.

§ 9.10 Provision of Support If Obligor Dies

The court may order a child support obligor to obtain and maintain a life insurance policy, including a decreasing term life insurance policy, that will establish an insurance-funded trust or an annuity payable to the obligee for the child's benefit that will satisfy the support obligation under the child support order if the obligor dies. Tex. Fam. Code § 154.016(a).

In determining the nature and extent of the support obligation in the event of the obligor's death, the court shall consider all relevant factors, including the present value of the total amount of child support payments, health insurance premiums, and dental insurance premiums payable for the child's benefit from the time the order is rendered until the month in which the child becomes eighteen years of age, based on the amount of the support and the cost of insurance ordered to be paid. In the case of a disabled child, the court shall consider an amount to be determined by the court under Family Code section 154.306. Tex. Fam. Code § 154.016(b).

On its own or the obligee's motion, the court may require the obligor to provide satisfactory proof verifying compliance with the order for life insurance. Tex. Fam. Code § 154.016(c).

§ 9.11 Payments in Excess of Court-Ordered Amount

If a child support agency or registry receives from an obligor who is not in arrears a child support payment in an amount that exceeds the court-ordered amount, the agency or registry shall give effect to any expressed intent of the obligor for the application of the amount that exceeds the court-ordered amount. If the obligor does not express an intent for the application of the amount paid in excess of the court-ordered amount, the agency or registry shall credit the excess to the obligor's future child support obligation and disburse the excess to the obligee, unless the obligee is a recipient of public assistance under chapter 31 of the Human Resources Code. Tex. Fam. Code § 154.014.

Likewise, when an obligee receives excess child support payments from an obligor, the trial court shall give effect to any expressed intent of the obligor to determine proper application of the excess amount. *In re B.S.H.*, 308 S.W.3d 76 (Tex. App.—Fort Worth 2009, no pet.) (per curiam) (trial court properly refused to apply excess payments to future obligations, finding that they were voluntary payments intended to avoid costs of modifying decree and to meet current needs of child); *see also Troiani v. Troiani*, No. 13-18-00271-CV, 2019 WL 5444407, at *9–10 (Tex. App.—Corpus Christi–Edinburg Oct. 24, 2019, no pet.) (mem. op.) (payments of private school tuition not excess child support payments to be credited against obligor's future child support obligation where child support obligation had not terminated and obligor had not expressed intent for any overpayments to offset his future child support obligation).

[Sections 9.12 through 9.20 are reserved for expansion.]

II. Child Support Guidelines

§ 9.21 Net Resources Defined

The court shall calculate net resources for the purpose of determining child support liability as follows. Resources include 100 percent of all wage and salary income and other compensation for personal services (including commissions, overtime pay, tips, and bonuses); interest, dividends, and royalty income; self-employment income; net rental income (defined as rent after deducting operating expenses and mortgage payments but not including noncash items such as depreciation); and all other income actually being received, including severance pay, retirement benefits, pensions, trust income, annuities, capital gains, Social Security benefits other than supplemental security income, United States Department of Veterans Affairs disability benefits other than non–service-connected disability benefits (as defined by 38 U.S.C. § 101(17)), unemployment benefits, disability and workers' compensation benefits, interest income from notes regardless of the source, gifts and prizes, spousal maintenance, and alimony. Tex. Fam. Code § 154.062(a), (b).

All receipts of money that are not specifically excluded by section 154.062(c), whether nonrecurring or periodic, whether derived from the obligor's capital or labor or from that of others, must be included in the definition of "resources." *Tobias v. Marks*, No. 03-20-00127-CV, 2021 WL 3868760, at *5–6 (Tex. App.—Austin Aug. 31, 2021, pet. denied) (mem. op.) (income includes regularly recurring income received, not lump-

sum inheritances); *Daves v. McKnight*, No. 14-20-00101-CV, 2021 WL 3672787, at *3 (Tex. App.—Houston [14th Dist.] Aug. 19, 2021, no pet. h.) (mem. op.) (employer-paid insurance premiums should not be considered in calculating net resources); *In re C.E.A.Q.*, No. 09-19-00037-CV, 2020 WL 5240458, at *2–4 (Tex. App.—Beaumont Sept. 3, 2020, pet. denied) (mem. op.) (trial court properly included disabled veteran's benefits and social security disability benefits); *In re P.C.S.*, 320 S.W.3d 525, 537 (Tex. App.—Dallas 2010, pet. denied) (cash inheritance from third party paid to obligor in two payments is "resource" for purpose of calculating monthly child support obligation). *See also In re Marriage of Tuttle*, 602 S.W.3d 9, 14–16 (Tex. App.—Amarillo 2020, pet. denied) (undistributed retained earnings in subchapter S corporation owned by obligor may be considered when calculating child support obligation, depending on variety of factors set out in opinion; assessing whether retained earnings should be included in support equation differs little from assessing parent's earning potential); *In re K.M.B.*, 606 S.W.3d 889, 897–98 (Tex. App.—Dallas 2020, no pet.) (military allowances for housing and subsistence correctly included in monthly net resources even though not defined as income for federal income tax purposes); *In re A.M.P.*, 368 S.W.3d 842, 848–49 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (when calculating net resources, court should have included advance on inheritance, as it was gift and not loan); *Koenig v. DeBerry*, No. 03-09-00252-CV, 2010 WL 1009170 (Tex. App.—Austin Mar. 17, 2010, no pet.) (mem. op.) (trial court properly considered early withdrawal from father's retirement account in its determination of net resources); *In re J.D.D.*, 242 S.W.3d 916, 922 (Tex. App.—Dallas 2008, pet. denied); *In re S.B.C.*, 952 S.W.2d 15, 18 (Tex. App.—San Antonio 1997, no writ) (latter two holding that duty to pay support is not limited to obligor's ability to pay from current earnings but also extends to his or her financial ability to pay from any and all sources that might be available); *Swaab v. Swaab*, 282 S.W.3d 519 (Tex. App.—Houston [14th Dist.] 2008, review dism'd w.o.j.) (given obligor's undisputed fluctuation in earnings, trial court did not abuse its discretion in averaging net resources over ten-year period to determine his approximate net monthly resources); *Stucki v. Stucki*, 222 S.W.3d 116 (Tex. App.—Tyler 2006, no pet.) (court abused its discretion by not considering one-time $20,000 bonus as part of obligor's net resources for purposes of determining child support); *Knight v. Knight*, 131 S.W.3d 535, 540 (Tex. App.—El Paso 2004, no pet.) (trial court did not abuse its discretion in basing child support on obligor's income from prior year when no evidence of current income was offered); *Norris v. Norris*, 56 S.W.3d 333, 341–42 (Tex. App.—El Paso 2001, no pet.) (if obligor's income fluctuates, it is proper to base order on average amount of monthly net resources over a two-year period). *But see In re P.C.S.*, 320 S.W.3d at 540 (benefits of employment—personal use of company truck and monthly

health insurance premium paid for family—not includable in net resources but rather subject to consideration in deviating from guidelines under section 154.123).

Texas courts are split on the appropriate treatment of annuity income in calculating net resources and whether there should be a differentiation between the portion of the annuity related to interest income and the portion representing a return of principal. Section 154.062 of the Texas Family Code defines net resources to include "all other income actually being received, including . . . annuities" but also provides that net resources do not include a return of principal or capital. *See* Tex. Fam. Code § 154.062(b)(5), (c)(1); *compare Mansfield v. Mansfield*, No. 04-18-00551-CV, 2019 WL 6138984, at *3 (Tex. App.—San Antonio Nov. 20, 2019, pet. denied) (mem. op.) (obligor's monthly settlement annuity should be included in calculating net resources; statute draws no distinction between settlement annuity and any other type of annuity), *with In re A.A.G.*, 303 S.W.3d 739 (Tex. App.—Waco 2009, no pet.) (portion of structured settlement annuity attributable to interest—but not portion representing a return of principal—should be considered in calculating net resources).

In *Powell v. Swanson*, 893 S.W.2d 161, 163–64 (Tex. App.—Houston [1st Dist.] 1995, no writ), the court's calculation of an obligor's net resources by dividing in half the adjusted gross income as stated on his jointly filed federal tax return was found arbitrary and an abuse of discretion.

Resources do not include return of principal or capital, accounts receivable, benefits paid in accordance with the Temporary Assistance for Needy Families program or another federal public assistance program, or payments for foster care of a child. Tex. Fam. Code § 154.062(c).

The court shall deduct the following items from resources to determine the net resources available for child support: Social Security taxes, federal income tax based on the tax rate for a single person claiming one personal exemption and the standard deduction, state income tax, union dues, and expenses for the cost of health insurance, dental insurance, or cash medical support for the obligor's child ordered by the court under Code sections 154.182 and 154.1825; if the obligor does not pay Social Security taxes, the court shall also deduct contributions to a nondiscretionary retirement plan (a plan to which the obligor is required to contribute as a condition of employment). Tex. Fam. Code § 154.062(d), (f). In calculating the amount of the deduction for health-care or dental coverage for a child, if the obligor has other minor dependents covered under the same health or dental insurance plan, the court must divide the total cost to the obli-

gor for the insurance by the total number of minor dependents, including the child, covered under the plan. Tex. Fam. Code § 154.062(e).

There is no legal presumption that an inmate has no assets. *See Koenig v. DeBerry*, 2010 WL 1009170, at *5 (support set on earnings from year prior to incarceration, which could be satisfied from withdrawals from retirement account).

§ 9.22 Imputation of Income

When applying the support guidelines, the court must rely to the extent possible on evidence of the obligor's resources, as defined by Family Code section 154.062(b). Tex. Fam. Code § 154.0655(a), (b).

In the absence of evidence of the party's resources, the court must consider certain relevant background circumstances regarding the obligor. These include the obligor's assets, residence, employment, earnings history, job skills, educational attainment, literacy, age, health, criminal history, barriers to employment, and record of seeking work. They also include job opportunities and the prevailing wage in the obligor's community and whether there are employers willing to hire the obligor. Tex. Fam. Code § 154.0655(c).

§ 9.23 Self-Employment Income

Income, whether positive or negative, from self-employment includes benefits allocated to an individual from a business or undertaking in the form of a proprietorship, partnership, joint venture, close corporation, agency, or independent contractor, less ordinary and necessary expenses required to produce that income. In its discretion, the court may exclude from self-employment income amounts allowable under federal income tax law as depreciation, tax credits, or any other business expenses shown by the evidence to be inappropriate in making the determination of income available for the purpose of calculating child support. Tex. Fam. Code § 154.065. *See In re Marriage of Tuttle*, 602 S.W.3d 9, 14–16 (Tex. App.—Amarillo 2020, no pet.) (undistributed retained earnings in subchapter S corporation owned by obligor may be considered when calculating child support obligation, depending on variety of factors set out in opinion; assessing whether retained earnings should be included in support equation differs little from assessing parent's earning potential); *In re S.M.H.*, No. 07-18-00148-CV, 2019 WL 5799983, at *3–4 (Tex. App.—Amarillo Nov. 6, 2019, pet. denied) (mem. op.) (court is not bound by federal income tax law regarding deductible expenses and could reasonably conclude that tax deductions are not necessary expenses).

§ 9.24 Intentional Unemployment or Underemployment

If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor. Tex. Fam. Code § 154.066(a); s*ee In re Davis*, 30 S.W.3d 609, 616 (Tex. App.—Texarkana 2000, no pet.). In determining whether an obligor is intentionally unemployed or underemployed, the court may consider evidence that the obligor is a veteran (as defined by 38 U.S.C. § 101(2)) who is seeking or has been awarded VA disability benefits (as defined by 38 U.S.C. § 101(16)) or non–service-connected disability pension benefits (as defined by 38 U.S.C. § 101(17)). Tex. Fam. Code § 154.066(b). The court may not consider incarceration as intentional unemployment or under-employment in establishing or modifying a support order. Tex. Fam. Code § 154.066(c).

In addition, in setting an appropriate support award, the court is not limited to the obligor's ability to pay from current earnings; rather it extends to the obligor's financial ability to pay from any and all available sources. *Garner v. Garner*, 200 S.W.3d 303 (Tex. App.—Dallas 2006, no pet.). In *Garner*, the court considered prior employment, along with the fact that the obligor received payment for expenses as a member of a singing group. *See also In re A.B.A.T.W.*, 266 S.W.3d 580 (Tex. App.—Dallas 2008, no pet.).

A parent who is qualified to obtain gainful employment cannot evade his support obligation by voluntarily remaining unemployed. *Giangrosso v. Crosley*, 840 S.W.2d 765, 770 (Tex. App.—Houston [1st Dist.] 1992, no writ). In one case the court found the obligor's testimony that he thought self-employment would be "more lucrative" and that he did not foresee a decrease in his earnings was sufficient to base the award on actual earnings rather than earning potential. *McGuire v. McGuire*, 4 S.W.3d 382, 388 (Tex. App.—Houston [1st Dist.] 1999, no pet.). *But see Terry v. Terry*, 920 S.W.2d 423, 426–27 (Tex. App.—Houston [1st Dist.] 1996, no writ) (finding that obligor intentionally unemployed based on educational background); *In re Striegler*, 915 S.W.2d 629, 639–40 (Tex. App.—Amarillo 1996, writ denied) (finding that to avoid paying child support obligor intentionally engaged in activities that did not produce income when he could have been gainfully employed elsewhere).

The trial court is not required to find that voluntary unemployment is for the primary purpose of avoiding a child support obligation before setting support based on the obligor's earning potential. *Iliff v. Iliff*, 339 S.W.3d 74, 80 (Tex. 2011). However, it is not enough to simply show that the obligor is failing to maximize his potential. The obligee

must show that the actual earnings of the obligor are "significantly less" than his earnings potential. *Trumbull v. Trumbull*, 397 S.W.3d 317, 321 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *In re J.D.A.*, No. 05-17-00053-CV, 2017 WL 6503094, at *3 (Tex. App.—Dallas Dec. 1, 2017, no pet.) (mem. op.) (once obligor offers proof of current wages, obligee must demonstrate obligor is intentionally unemployed or underemployed in order to receive child support computed on earning potential). There is no presumption that simply because a parent is no longer as lucratively employed as he was during the marriage, he is intentionally underemployed or unemployed. The requisite intent or lack thereof, however, may be inferred from such circumstances as the parent's education, economic adversities and business reversals, business background, and earning potential. *Reddick v. Reddick*, 450 S.W.3d 182 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Hardin v. Hardin*, 161 S.W.3d 14 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App.—El Paso 2003, pet. denied); *In re Davis*, 30 S.W.3d at 616–17; *see also Warren v. Warren*, No. 04-18-00195-CV, 2019 WL 1923236, at *2 (Tex. App.—San Antonio May 1, 2019, no pet.) (mem. op.) (mother found intentionally underemployed when she failed to renew her teaching license because it was not her "path goal"); *Udobong v. Udobong*, No. 14-16-00856-CV, 2018 WL 6424677, at *6 (Tex. App.—Houston [14th Dist.] Dec. 6, 2018, pet. denied) (mem. op.) (father's argument that inability to gain more lucrative employment resulted from family violence protective order insufficient to rebut claim of intentional underemployment); *In re I.Z.K.*, No. 04-16-00830-CV, 2018 WL 1176646, at *4 (Tex. App.—San Antonio Mar. 7, 2018, no pet.) (mem. op.) (absent actual evidence, mere speculation father could work as percussionist insufficient to show intentional underemployment).

At the same time, the court must keep in mind a parent's right to pursue his or her own happiness. *In re E.A.S.*, 123 S.W.3d at 570; *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App.—Tyler 1997, no pet.).

§ 9.25 Deemed Income

To determine the net resources available for child support, the court may assign a reasonable amount of deemed income attributable to assets that do not currently produce income. The court shall also consider whether certain property that is not producing income can be liquidated without an unreasonable financial sacrifice because of cyclical or other market conditions. If there is no effective market for the property, the carrying costs of such an investment, including property taxes and note payments, shall be

offset against the income attributed to the property. Tex. Fam. Code § 154.067(a). *See Matthews v. Northrup*, No. 01-09-00063-CV, 2010 WL 2133910 (Tex. App.—Houston [1st Dist.] May 27, 2010, pet. denied) (mem. op.) (father's income from family partnership allocated to him for federal income tax reporting purposes but not actually distributed to him properly considered "deemed income" to be considered in determining child support obligation); *In re Driver*, 895 S.W.2d 875, 877 (Tex. App.—Texarkana 1995, no writ).

The court may assign a reasonable amount of deemed income to income-producing assets that a party has voluntarily transferred or on which earnings have intentionally been reduced. Tex. Fam. Code § 154.067(b).

§ 9.26 Minimum Wage Presumed

In the absence of evidence of a party's resources, as defined by Family Code section 154.062(b), the court shall presume that the party has income equal to the federal minimum wage for a forty-hour week to which the support guidelines may be applied. The presumption does not apply if the court finds that the party is subject to an order of confinement that exceeds ninety days and is incarcerated in a local, state, or federal jail or prison when the court makes the income determination. Tex. Fam. Code § 154.068. The court is permitted to presume, in the absence of proof otherwise, that an obligor has earned minimum wage from the time of his child's birth. *In re M.M.*, 980 S.W.2d 699, 700 (Tex. App.—San Antonio 1998, no pet.).

§ 9.27 Net Resources of New Spouse

The court may not add any portion of the net resources of a spouse to the net resources of an obligor or obligee to calculate the amount of child support to be ordered. The court may not subtract the needs of a spouse, or of a dependent of a spouse, from the net resources of the obligor or obligee. Tex. Fam. Code § 154.069; *see Starck v. Nelson*, 878 S.W.2d 302, 305–06 (Tex. App.—Corpus Christi–Edinburg 1994, no writ) (trial court erred in considering income of obligor's wife for purpose of deviating from guidelines). *See In re Knott*, 118 S.W.3d 899 (Tex. App.—Texarkana 2003, no pet.) (trial court erred by adding new spouse's income to obligor's to determine obligor's net resources, particularly when new spouse's investment income was her separate property under terms of premarital agreement). *See also Koenig v. DeBerry*, No. 03-09-00252-CV, 2010 WL 1009170 (Tex. App.—Austin Mar. 17, 2010, no pet.) (mem. op.) (retirement funds subject to father's sole management, control, and disposition were

properly considered in determining his child support obligation); *In re J.C.K.*, 143 S.W.3d 131 (Tex. App.—Waco 2004, no pet.) (trial court erred in including income generated by community property subject to sole management and control of obligor's spouse in calculating obligor's net resources).

§ 9.28 Child Support Received by Obligor Included

In a situation involving multiple households due child support, child support received by an obligor shall be added to the obligor's net resources to compute the net resources before determining the child support credit or applying the percentages in the multiple household table. Tex. Fam. Code § 154.070.

§ 9.29 Application of Guidelines

The child support guidelines in the Family Code are intended to guide the court in determining an equitable amount of child support. Tex. Fam. Code § 154.121. The amount of a periodic child support payment established by the child support guidelines in effect at the time of the hearing is presumed to be reasonable. An order of support conforming to the guidelines is presumed to be in the best interest of the child. Tex. Fam. Code § 154.122(a). An automatic increase for future child support payments is an abuse of discretion. *Starck v. Nelson*, 878 S.W.2d 302, 307 (Tex. App.—Corpus Christi–Edinburg 1994, no writ). A court, however, may determine that the application of the guidelines would be unjust or inappropriate under the circumstances. Tex. Fam. Code § 154.122(b).

§ 9.30 Additional Factors

The trial court is accorded broad discretion in setting child support payments, and, absent a clear abuse of discretion, the trial court's order will not be disturbed on appeal. *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.); *In re Davis*, 30 S.W.3d 609, 616 (Tex. App.—Texarkana 2000, no pet.). The court may order periodic child support payments in an amount other than that established by the guidelines if the evidence rebuts the presumption that application of the guidelines is in the best interests of the child and justifies a variance from the guidelines. The court may also refuse to award child support to the custodial parent based on the other parent's demonstrated inability to earn a living wage. *O'Carolan v. Hopper*, 71 S.W.3d 529, 533 (Tex. App.—Austin 2002, no pet.).

It is an abuse of discretion for the court to enter a child support order when there is no evidence to support its findings concerning the obligor's net resources. *In re C.H.C.*, 396 S.W.3d 33, 56 (Tex. App.—Dallas 2013, no pet.) (court relied on testimony regarding earnings from pretrial hearing, but transcript of testimony was not authenticated or entered into evidence during trial). In *In re T.M.*, No. 02-19-00114-CV, 2019 WL 4010226 (Tex. App.—Fort Worth Aug. 20, 2019, pet. denied) (mem. op.), the parent's income was deemed to be $8,550 based on available information and because the parent failed to comply with discovery requests.

In determining whether application of the guidelines would be unjust or inappropriate under the circumstances, the court shall consider evidence of all relevant factors, including the age and needs of the child; the ability of the parents to contribute to the support of the child; any financial resources available for the support of the child; the amount of time of possession of and access to a child; the amount of the obligee's net resources, including the earning potential of the obligee if the actual income of the obligee is significantly less than what the obligee could earn because the obligee is intentionally unemployed or underemployed and including an increase or decrease in the income of the obligee or income that may be attributed to the property and assets of the obligee; child care expenses incurred by either party to maintain gainful employment; whether either party has the managing conservatorship or actual physical custody of another child; the amount of alimony or spousal maintenance actually and currently being paid or received by a party; the expenses for a son or daughter for education beyond secondary school; whether the obligor or obligee has an automobile, housing, or other benefits furnished by his or her employer, another person, or a business entity; the amount of other deductions from the wage or salary income and from other compensation for personal services of the parties; provision for health-care insurance and payment of uninsured medical expenses; special or extraordinary educational, health-care, or other expenses of the parties or of the child; the cost of travel in order to exercise possession of and access to a child; positive or negative cash flow from any real and personal property and assets, including a business and investments; debts or debt service assumed by either party; and any other reason consistent with the best interests of the child, taking into consideration the circumstances of the parents. Tex. Fam. Code § 154.123. The list of evidentiary factors provided in the Family Code is not exhaustive. A court may reasonably consider any factor it deems relevant. *Sanchez v. Sanchez*, 915 S.W.2d 99, 102–03 (Tex. App.—San Antonio 1996, no writ). In *Goyal v. Hora*, No. 03-19-00868-CV, 2021 WL 2149628, at *2–4 (Tex. App.—Austin May 27, 2021, no pet. h.) (mem. op.), and *Klages v. Klages*, No. 03-20-00086-CV, 2021 WL 2604064, at *3–5 (Tex. App.—Austin June 25, 2021, no pet. h.) (mem. op.), the courts discussed the

factors considered, including the fact that the noncustodial parent was not consistently exercising periods of possession.

§ 9.31 Guidelines for Net Resources of $9,200 or Less

The Family Code guidelines for the support of a child are specifically designed to apply to situations in which the obligor's monthly net resources are not greater than a prescribed amount that is published by the title IV-D agency in the *Texas Register*. *See* Tex. Fam. Code § 154.125(a). The amount is to be adjusted for inflation every six years. Tex. Fam. Code § 154.125(a–1). The adjustment to the current amount, $9,200, took effect September 1, 2019.

One set of guidelines applies if the obligor's monthly net resources are not greater than $9,200 and are equal to or greater than $1,000. Another set of guidelines applies if the obligor's monthly net resources are less than $1,000.

If the obligor's monthly net resources are at least $1,000 but not greater than $9,200, the court shall presumptively apply the following schedule in rendering the child support order:

CHILD SUPPORT GUIDELINES BASED ON THE MONTHLY NET RESOURCES OF THE OBLIGOR:

1 child	20% of obligor's net resources
2 children	25% of obligor's net resources
3 children	30% of obligor's net resources
4 children	35% of obligor's net resources
5 children	40% of obligor's net resources
6+ children	Not less than the amount for 5 children

Tex. Fam. Code § 154.125(b).

If the obligor's monthly net resources are less than $1,000, the court shall presumptively apply the following schedule in rendering the child support order:

LOW-INCOME CHILD SUPPORT GUIDELINES BASED ON THE MONTHLY NET RESOURCES OF THE OBLIGOR:

1 child	15% of obligor's net resources
2 children	20% of obligor's net resources
3 children	25% of obligor's net resources
4 children	30% of obligor's net resources
5 children	35% of obligor's net resources
6+ children	Not less than the amount for 5 children

Tex. Fam. Code § 154.125(c).

§ 9.32 Guidelines for Net Resources of More Than $9,200

If the obligor's net resources exceed $9,200 per month, the court shall presumptively apply the percentage guidelines to the first $9,200 of the obligor's net resources. Without further reference to the percentage recommended by the guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child. Tex. Fam. Code § 154.126(a). If the court orders additional child support beyond the presumptive amount, the court must make written findings regarding the specific reasons for deviating from the guidelines. *See* Tex. Fam. Code § 154.130. While the findings are required when the amount of child support is set or modified by the court, the court need not make specific findings on the "needs of the child" when a motion to modify is denied. *In re J.A.H.*, 311 S.W.3d 536, 543 (Tex. App.—El Paso 2009, no pet.). The following reasons have been found sufficient: best interests of the child, age and needs of the child, financial resources available for the support of the child, the child's special and extraordinary expenses (for example, a bodyguard), and positive cash flow from the obligor's assets. *See In re Gonzalez*, 993 S.W.2d 147 (Tex. App.—San Antonio 1999, no pet.).

"Needs of the child" is not defined by statute, nor has the supreme court provided a comprehensive definition. The term *needs* includes more than bare necessities but is not to be determined based on the lifestyle of the family. *See Rodriguez v. Rodriguez*, 860 S.W.2d 414, 418. n.3 (Tex. 1993); *In re K.F.*, No. 02-18-00187-CV, 2018 WL 6816119, at *5 (Tex. App.—Fort Worth Dec. 27, 2018, pet. denied) (mem. op.) (children's monthly expenses and proven needs are not same thing). Further, the managing conservator is in the best position to explain the child's needs, and expert testimony is generally not required. *See In re Gonzalez*, 993 S.W.2d at 159–60; *see also McCain v. McCain*, 980 S.W.2d 800, 802 (Tex. App.—Fort Worth 1998, no pet.); *Scott v. Younts*, 926 S.W.2d 415, 420–21 (Tex. App.—Corpus Christi–Edinburg 1996, writ denied). The court is not limited to considering only the needs of the child at the time of the order; estimates and projections of future expenses and needs of the children are as relevant and probative as past and current expenses and needs. *Zajac v. Penkava*, 924 S.W.2d 405, 408–09 (Tex. App.—San Antonio 1996, no writ).

The proper calculation of a child support order that exceeds the presumptive amount established for the first $9,200 of the obligor's net resources requires that the entire amount of the presumptive award be subtracted from the proven total needs of the child. After the presumptive award is subtracted, the court shall allocate between the

parties the responsibility to meet the additional needs of the child according to the circumstances of the parties. However, in no event may the obligor be required to pay more child support than the greater of the presumptive amount or the amount equal to 100 percent of the proven needs of the child. Tex. Fam. Code § 154.126(b).

The dollar amount is to be adjusted for inflation every six years. Tex. Fam. Code § 154.125(a–1). The adjustment to $9,200 took effect September 1, 2019.

§ 9.33 Reduction as Number of Eligible Children Decreases

A child support order for more than one child shall provide that, on the termination of support for a child, the level of support for the remaining child or children is in accordance with the child support guidelines. A child support order is in compliance with this requirement if the order contains a provision that specifies the events, including a child's reaching the age of eighteen years or otherwise having the disabilities of minority removed, that have the effect of terminating the obligor's support obligation for that child and the reduced total amount that the obligor is required to pay each month after the occurrence of such an event. Tex. Fam. Code § 154.127.

§ 9.34 Guidelines for Children in More Than One Household

Different rules apply if the obligor has children in more than one household. In such a situation, the court may determine the child support amount for the children before the court by applying the percentages in the table below to the obligor's net resources.

If the obligor's monthly net resources are $9,200 or less but at least $1,000:

MULTIPLE FAMILY ADJUSTED GUIDELINES
(% OF NET RESOURCES)

Number of other children for whom the obligor has a duty of support	Number of children before the court						
	1	2	3	4	5	6	7
0	20.00	25.00	30.00	35.00	40.00	40.00	40.00
1	17.50	22.50	27.38	32.20	37.33	37.71	38.00
2	16.00	20.63	25.20	30.33	35.43	36.00	36.44
3	14.75	19.00	24.00	29.00	34.00	34.67	35.20
4	13.60	18.33	23.14	28.00	32.89	33.60	34.18
5	13.33	17.86	22.50	27.22	32.00	32.73	33.33
6	13.14	17.50	22.00	26.60	31.27	32.00	32.62
7	13.00	17.22	21.60	26.09	30.67	31.38	32.00

Tex. Fam. Code § 154.129(a).

If the obligor's monthly net resources are less than $1,000:

LOW-INCOME MULTIPLE FAMILY ADJUSTED GUIDELINES
(% OF NET RESOURCES)

Number of other children for whom the obligor has a duty of support	Number of children before the court						
	1	2	3	4	5	6	7
0	15.00	20.00	25.00	30.00	35.00	35.00	35.00
1	13.50	18.33	23.13	27.90	32.96	33.25	33.47
2	12.50	17.00	21.50	26.50	31.50	31.94	32.28
3	11.63	15.80	20.63	25.50	30.41	30.92	31.33
4	10.80	15.33	20.00	24.75	29.56	30.10	30.55
5	10.63	15.00	19.53	24.17	28.88	29.43	29.90
6	10.50	14.75	19.17	23.70	28.32	28.88	29.35
7	10.41	14.56	18.88	23.32	27.85	28.40	28.88

Tex. Fam. Code § 154.129(b).

The provisions for "multiple households" refer to households in which some of the obligor's children are not before the court. The provisions do **not** apply if the "multiple households" involve the split possession of children between mother and father and all children are before the court. *In re S.M.*, 616 S.W.3d 53, 57 (Tex. App.—Tyler 2020, no pet. h.).

§ 9.35 Findings of Fact in Child Support Order

In rendering an order of child support, the court must make certain findings if a party files a written request with the court before the final order is signed, but not later than twenty days after the date of rendition of the order, a party makes an oral request in open court during the hearing, or the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines under Code section 154.125 or 154.129, as applicable. Tex. Fam. Code § 154.130(a); *see In re Marriage of Butts*, 444 S.W.3d 147, 154 (Tex. App.—Houston [14th Dist.] 2014, no pet.). If findings are required, the court shall state whether the application of the guidelines will be unjust or inappropriate and shall state the following in the child support order:

1. The net resources of the obligor per month are $_____.
2. The net resources of the obligee per month are $_____.
3. The percentage applied to the obligor's net resources for child support is _____ percent.

4. If applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount computed by applying the percentage guidelines under Code section 154.125 or 154.129, as applicable.

Tex. Fam. Code § 154.130(b).

Findings as to the obligee's net resources are required only if evidence of the obligee's monthly net resources has been offered. Tex. Fam. Code § 154.130(c).

The court must respond to a timely request for an explanation of any variance from the guidelines, and the failure of the court to justify such variance constitutes reversible error. *See Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam) (obligor has right to demand specific findings of court for deviation from guidelines); *Hanna v. Hanna*, 813 S.W.2d 626, 627–28 (Tex. App.—Houston [1st Dist.] 1991, no writ) (failure of court to make specific findings requested by obligee constituted reversible error); *Haney v. Haney*, 834 S.W.2d 490, 491 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (though not in order, findings of court recorded on docket sheet satisfy requirements of law); *see also Morris v. Morris*, 757 S.W.2d 466, 467 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

COMMENT: Unless it is very clear that the child support ordered by the court does not vary from the amount computed by applying the percentage guidelines, the complaining party should make a request at the hearing or within twenty days of the rendition of the order. The statute appears to provide that the twenty-day time limit does not apply if there is a variation from the child support guidelines. *See* Tex. Fam. Code § 154.130(a); *see also Tenery*, 932 S.W.2d at 29 (findings of fact requested pursuant to rule 296 held to be timely when record revealed clear variation from guidelines). However, since a prematurely filed request for findings of fact and conclusions of law does not render them ineffective, out of an abundance of caution, the best practice would be to make all requests for findings of fact in child support cases within twenty days of the rendition of the order. *See* Tex. R. Civ. P. 306c (prematurely filed requests for findings of fact and conclusions of law shall not be held ineffective and shall be deemed to have been filed on date of, but subsequent to, time of signing of judgment).

§ 9.36 Agreement Concerning Support

The parties may enter into a written agreement containing provisions for support of the child and for modification of the agreement, including variations from the child support guidelines. If the court finds that the agreement is in the child's best interests, the court

shall render an order in accordance with the agreement. Terms of the agreement pertaining to child support in the order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as a contract. If the court finds the agreement is not in the child's best interests, the court may request the parties to submit a revised agreement or the court may render an order for the support of the child. Tex. Fam. Code § 154.124.

§ 9.37 Application of Guidelines to Children of Certain Obligors

In applying the child support guidelines for an obligor who has a disability and is required to pay support for a child who receives benefits as a result of the obligor's disability, the court shall subtract the amount or value of those benefits from the amount of child support that would be ordered under the guidelines. Tex. Fam. Code § 154.132; *In re D.T.S.*, No. 05-12-00110-CV, 2013 WL 4082302 (Tex. App.—Dallas Aug. 13, 2013, no pet.) (mem. op.); *In re G.L.S.*, 185 S.W.3d 56 (Tex. App.—San Antonio 2005, no pet.). This provision, however, does not require the trial court to order an obligee to reimburse the obligor for child support payments previously made once the children receive a lump-sum disability award covering the same period. *In re H.J.W.*, 302 S.W.3d 511, 512 (Tex. App.—Dallas 2009, no pet.). In *Reyes v. Gonzales*, 22 S.W.3d 516, 519–20 (Tex. App.—El Paso 2000, pet. denied), the court held that the obligor's Supplemental Security Income (SSI) disability benefits could not be considered in the calculation of his net resources for purposes of determining his child support obligation. However, in an enforcement proceeding in which child support arrearages had been assigned to the state when the children received public assistance, the obligor's Social Security disability benefits, which had been paid to the children, could not be credited against his child support arrearages. *In re K.E.T.*, 974 S.W.2d 760, 762 (Tex. App.—San Antonio 1998, no pet.). A lump-sum payment for disability benefits paid to the obligor's children can be credited against both his child support arrears and his future child support obligation. *In re R.D.E.*, 627 S.W.3d 798, 801–02 (Tex. App.—Corpus Christi–Edinburg 2021, pet. denied).

Although the trial court is specifically required by section 154.132 to deduct the amount of disability payments the children receive from the amount of child support due under the guidelines, there is no similar provision relating to an amount ordered for medical support. *In re H.J.W.*, 302 S.W.3d at 514 (trial court was not required to abate obligation to pay medical support in light of disability payments paid to children).

In applying the child support guidelines for an obligor who is receiving Social Security old age benefits and who is required to pay support for a child who receives benefits as

a result of the obligor's receipt of old age benefits, the court shall subtract the amount or value of the benefits paid the child from the amount of child support that would be ordered under the guidelines. Tex. Fam. Code § 154.133.

[Sections 9.38 through 9.40 are reserved for expansion.]

III. Medical Support and Dental Support

§ 9.41 Medical Support Order

The court shall render an order for the medical support of the child in a proceeding in which periodic payments are ordered under chapter 154 or modified under chapter 156; any other suit affecting the parent-child relationship in which the court determines that medical support of the child must be established, modified, or clarified; or, a proceeding under chapter 159. Tex. Fam. Code § 154.181(a); *see* Tex. Fam. Code § 154.008. This medical support, including the costs of health insurance coverage or cash medical support, is in addition to the amount that the obligor is required to pay for child support under the guidelines; is a child support obligation; and may be enforced by any means available for the enforcement of a child support obligation, including withholding from earnings. Tex. Fam. Code § 154.183(a). As additional support, the court shall allocate between the parties, according to their circumstances, the reasonable and necessary health-care expenses, including vision and dental expenses, of the child that are not reimbursed by insurance or are not otherwise covered by ordered cash medical support, as well as insurance deductibles or copayments paid by either party for the child. Tex. Fam. Code § 154.183(c).

Before a hearing on temporary orders or a final order, if no hearing on temporary orders is held, the court shall require the parties to disclose the following information in a pleading or other statement: (1) if private health insurance is in effect for the child, the identity of the insurance company, the policy number, which parent is responsible for payment of the premium, whether insurance is provided through a parent's employment, and the cost of the premium or (2) if private health insurance is not in effect, whether (a) the child is receiving medical assistance under chapter 32, Human Resources Code (Medicaid program); (b) the child is receiving health benefits under chapter 62, Health and Safety Code (Children's Health Insurance Program (CHIP)), and the cost of any premium; and (c) either parent has access to private health insurance "at reasonable cost" to the obligor. Tex. Fam. Code § 154.181(b).

"Reasonable cost" means the cost of health insurance coverage for a child that does not exceed 9 percent of the obligor's annual resources, as described by section 154.062(b), if the obligor is responsible under a medical support order for the cost of health insurance coverage for only one child. If the obligor is responsible under a medical support order for the cost of health insurance coverage for more than one child, "reasonable cost" means the total cost of health insurance coverage for all children for whom the obligor is responsible under a medical support order that does not exceed 9 percent of the obligor's annual resources, as described by section 154.062(b). Tex. Fam. Code § 154.181(e).

In rendering temporary orders, except for good cause shown, the court shall order that any health insurance in effect for the child continue in effect until the rendition of a final order, except that the court may not require continuation of any health insurance that is not available at a reasonable cost to the obligor. If no health insurance is in effect for the child or the insurance in effect is not available at reasonable cost to the obligor, the court shall, except for good cause shown, order coverage for the child, as provided under section 154.182. Tex. Fam. Code § 154.181(c).

On rendering a final order, the court shall make specific findings with respect to the manner in which health-care coverage is to be provided for the child, in accordance with the priorities identified in section 154.182, and, except for good cause shown or on agreement of the parties, require the parent ordered to provide health-care coverage to produce evidence to the court's satisfaction that the parent has applied for or secured health insurance or has otherwise taken necessary action to provide insurance, as ordered. Tex. Fam. Code § 154.181(d).

In ordering a parent to provide health-care coverage for the child, the court shall consider the cost, accessibility, and quality of health insurance coverage available to the parties and shall give priority to health insurance coverage available through the employment of one of the parties if the coverage is available at a reasonable cost to the obligor. Tex. Fam. Code § 154.182(a). "Accessibility" means the extent to which health insurance coverage for a child provides for the availability of medical care within a reasonable traveling distance and time from the child's primary residence, as determined by the court. Tex. Fam. Code § 154.182(c)(1).

Unless a party shows good cause why a particular order would not be in the best interests of the child, the court shall render its order in accordance with the following priorities:

1. If health insurance is available for the child at reasonable cost through a parent's employment or membership in a union, trade association, or other organization, the court shall order that parent to include the child in the parent's health insurance. Tex. Fam. Code § 154.182(b)(1).

2. If health insurance is not available for the child through a parent's employment or membership at reasonable cost but is available to a parent at a reasonable cost from another source, including the program under section 154.1826 to provide health insurance in title IV-D cases, the court may order that parent to provide health insurance for the child. Tex. Fam. Code § 154.182(b)(2).

3. If health insurance coverage is not available through either of the above means, the court shall order the obligor to pay the obligee, in addition to child support, an amount, not to exceed 9 percent of the obligor's annual resources, as described by section 154.062(b), as cash medical support for the child. Tex. Fam. Code § 154.182(b)(3).

If the parent ordered to provide health insurance is the obligee, the court shall order the obligor to pay the obligee, as additional child support, an amount equal to the actual cost of health insurance for the child, but not to exceed a reasonable cost to the obligor. In calculating that actual cost, if the obligee has other minor dependents covered under the same health insurance plan, the court shall divide the total cost to the obligee for the insurance by the total number of minor dependents, including the child covered under the plan. Tex. Fam. Code § 154.182(b–1).

Once the court orders the obligee to provide health insurance, the court is not required to modify that order simply because the obligor later obtains health-care coverage through his employer. *In re M.M.S.*, 256 S.W.3d 470, 474 (Tex. App.—Dallas 2008, no pet.).

If the court finds that neither parent has access to private health insurance at a reasonable cost to the obligor, the court shall order the parent awarded the exclusive right to designate the child's primary residence (or, to the extent permitted by law, the other parent) to apply immediately on the child's behalf for participation in a government medical assistance program or health plan. If the child participates in such a program or plan, the court shall order cash medical support as described in item 3 above. Tex. Fam. Code § 154.182(b–2).

An order requiring the payment of cash medical support as described in item 3 above must allow the obligor to discontinue paying the cash medical support if health insurance for the child becomes available to the obligor at a reasonable cost and the obligor

enrolls the child in the insurance plan and provides the obligee and, if applicable, the title IV-D agency the information required under Code section 154.185. Tex. Fam. Code § 154.182(b–3).

The court shall order a parent providing health insurance to furnish to either the obligee, obligor, or child support agency specified information necessary to ensure health insurance coverage not later than the thirtieth day after the date the notice of rendition of the order is received. *See* Tex. Fam. Code § 154.185(a). The court shall also order a parent providing health insurance to furnish the obligor, obligee, or child support agency with additional information regarding the health insurance coverage not later than the fifteenth day after the date the information is received by the parent. Tex. Fam. Code § 154.185(b).

§ 9.42 Dental Support Order

The court shall render an order for the dental support of the child in a suit affecting the parent-child relationship or a proceeding under Family Code chapter 159 (UIFSA). Tex. Fam. Code § 154.1815(b); *see* Tex. Fam. Code § 154.008. This dental support, including the costs of dental insurance coverage, is in addition to the amount that the obligor is required to pay for child support under the guidelines; is a child support obligation; and may be enforced by any means available for the enforcement of a child support obligation, including withholding from earnings. Tex. Fam. Code § 154.183(a). As additional support, the court shall allocate between the parties, according to their circumstances, the reasonable and necessary health-care expenses, including vision and dental expenses, of the child that are not reimbursed by insurance or are not otherwise covered by ordered cash medical support, as well as insurance deductibles or copayments paid by either party for the child. Tex. Fam. Code § 154.183(c).

Before a hearing on temporary orders, or a final order if no hearing on temporary orders is held, the court shall require the parties to disclose in a pleading or other statement whether the child is covered by dental insurance and, if so, the identity of the insurer, the policy number, which parent is responsible for payment of the premium, whether the coverage is provided through a parent's employment, and the cost of the premium. If dental insurance is not in effect, the parties must disclose whether either parent has access to dental insurance "at reasonable cost" to the obligor. Tex. Fam. Code § 154.1815(c).

"Reasonable cost" means the cost of a dental insurance premium that does not exceed 1.5 percent of the obligor's annual resources, as described by section 154.062(b), if the

obligor is responsible under a dental support order for the cost of dental insurance coverage for only one child. If the obligor is responsible under a dental support order for the cost of dental insurance coverage for more than one child, "reasonable cost" means the total cost of dental insurance coverage for all children for whom the obligor is responsible under a dental support order that does not exceed 1.5 percent of the obligor's annual resources, as described by section 154.062(b). Tex. Fam. Code § 154.1815(a).

In rendering temporary orders, the court shall, except for good cause shown, order that any dental insurance coverage in effect for the child continue in effect until the rendition of a final order, except that the court may not require continuation of any dental insurance that is not available to the parent at a reasonable cost to the obligor. If no dental insurance is in effect for the child or the insurance in effect is not available at reasonable cost to the obligor, the court shall, except for good cause shown, order coverage for the child as provided under section 154.1825. Tex. Fam. Code § 154.1815(d).

On rendering a final order, the court shall make specific findings with respect to the manner in which dental insurance coverage is to be provided for the child, in accordance with the priorities identified in section 154.1825, and, except for good cause shown or on agreement of the parties, require the parent ordered to provide dental insurance coverage to produce evidence to the court's satisfaction that the parent has applied for or secured dental insurance or has otherwise taken necessary action to provide insurance, as ordered. Tex. Fam. Code § 154.1815(e).

In ordering a parent to provide dental coverage for the child, the court shall consider the cost, accessibility, and quality of dental insurance coverage available to the parties and shall give priority to dental insurance coverage available through the employment of one of the parties if the coverage is available at a reasonable cost to the obligor. Tex. Fam. Code § 154.1825(b). "Accessibility" means the extent to which dental insurance coverage for a child provides for the availability of dental care within a reasonable traveling distance and time from the child's primary residence, as determined by the court. Tex. Fam. Code § 154.1825(a)(1).

Unless a party shows good cause why a particular order would not be in the best interests of the child, the court shall render its order in accordance with the following priorities:

1. If dental insurance is available for the child at reasonable cost through a parent's employment or membership in a union, trade association, or other organi-

zation, the court shall order that parent to include the child in the parent's dental insurance. Tex. Fam. Code § 154.1825(c)(1).

2. If dental insurance is not available for the child through a parent's employment or membership at reasonable cost but is available to a parent at a reasonable cost from another source, the court may order that parent to provide dental insurance for the child. Tex. Fam. Code § 154.1825(c)(2).

If the parent ordered to provide dental insurance is the obligee, the court shall order the obligor to pay the obligee, as additional child support, an amount equal to the actual cost of dental insurance for the child, but not to exceed a reasonable cost to the obligor. In calculating that actual cost, if the obligee has other minor dependents covered under the same dental insurance plan, the court shall divide the total cost to the obligee for the insurance by the total number of minor dependents, including the child covered under the plan. Tex. Fam. Code § 154.1825(d).

The court shall order a parent providing dental insurance to furnish to either the obligee, obligor, or child support agency specified information necessary to ensure dental insurance coverage not later than the thirtieth day after the date the notice of rendition of the order is received. *See* Tex. Fam. Code § 154.185(a). The court shall also order a parent providing dental insurance to furnish the obligor, obligee, or child support agency with additional information regarding the dental insurance coverage not later than the fifteenth day after the date the information is received by the parent. Tex. Fam. Code § 154.185(b).

§ 9.43 Qualified Medical Child Support Order

The federal Employee Retirement Income Security Act (ERISA) makes provision for a qualified medical child support order. 29 U.S.C. § 1169. A group health plan that is provided by a private employer or employee organization is governed by the terms of ERISA. 29 U.S.C. § 1001. These provisions supersede any state laws that relate to such a plan. 29 U.S.C. § 1144.

A medical child support order meets the requirements of a qualified medical child support order only if that order clearly specifies the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate recipient covered by the order (except that the order may permit substitution of the name and mailing address of an official for the mailing address of any alternate recipient); a reasonable description of the type of coverage to be provided to each alternate recipient or the manner in which the type of coverage is to be determined; and the

period to which the order applies. Additionally, to be found qualified, a medical support order may not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan. 29 U.S.C. § 1169(a)(2)(A), (a)(3), (a)(4).

In 1998, Congress amended ERISA to provide that if an employer of a noncustodial parent receives a completed national medical support notice, the notice shall be deemed a qualified medical child support order. *See* Child Support Performance and Incentive Act of 1998, Pub. L. No. 105–200, 112 Stat. 645 (CSPIA). See form 9-1 in this manual for a copy of the national medical support notice, jointly promulgated by the U.S. Department of Health and Human Services and the Department of Labor and effective on March 27, 2001. Pursuant to the CSPIA, each state must enact laws to mandate the use of the national medical support notice in all title IV-D cases. In Texas, use of the form became mandatory in title IV-D cases in July 2003. The notice may also be used by a party in a case not being enforced by the title IV-D agency. Tex. Fam. Code § 154.186(b).

Any payment for benefits made by a group health plan under a medical child support order in reimbursement for expenses paid by an alternate recipient or the custodial parent or legal guardian of the alternate recipient shall be made to the alternate recipient or the alternate recipient's custodial parent or legal guardian. 29 U.S.C. § 1169(a)(8). In other words, the order may provide that the insurance company pay the benefits to the managing conservator.

Any group health plan that complies with ERISA must contain a provision for benefits in accordance with the applicable requirements of any qualified medical child support order. A qualified medical child support order is deemed to apply to each group health plan that has received the order, from which the participant or beneficiary is eligible to receive benefits, and with respect to which the order does not require the provision of any type or form of benefit or option that the plan does not otherwise provide. 29 U.S.C. § 1169(a)(1).

The following definitions apply under ERISA:

Child: The term *child* includes any child adopted by, or placed for adoption with, a participant of a group health plan. 29 U.S.C. § 1169(a)(2)(D).

Participant: The term *participant* means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan that

covers employees of that employer or members of that organization or whose beneficiaries may be eligible to receive any such benefit. 29 U.S.C. § 1002(7).

Alternate recipient: The term *alternate recipient* means any child of a participant who is recognized under a medical child support order as having a right to enrollment under a group health plan with respect to the participant. 29 U.S.C. § 1169(a)(2)(C). Note that the child, not the other parent, is the "alternate recipient."

Medical child support order: The term *medical child support order* means any judgment, decree, or order issued by a court of competent jurisdiction *or* issued through a state administrative process and having the force and effect of state law that (1) provides for child support with respect to a child of a participant under a group health plan or provides for health benefit coverage to such a child, is made in accordance with state law, and relates to benefits under the group health plan or (2) enforces a law relating to medical child support described in 42 U.S.C. section 1396g–1 with respect to a group health plan. An appropriate administrative order shall be treated as a qualifying order. 29 U.S.C. § 1169(a)(2)(B).

Qualified medical child support order: The term *qualified medical child support order* means a medical child support order that creates or recognizes the existence of an alternate recipient's right to, or assigns to an alternate recipient the right to, receive benefits for which a participant or beneficiary is eligible under a group health plan and which provides the information and meets the restrictions provided in the statute. 29 U.S.C. § 1169(a)(2)(A).

COMMENT: The federal and Texas statutes conflict very little, if at all. The careful attorney should comply with both statutes whenever possible. If the two statutes are in conflict, the attorney should comply with the federal statute.

Instructions for Completion of National Medical Support Notice: The National Medical Support Notice (NMSN) consists of Part A, which includes the Qualified Medical Child Support Order and instructions to the employer, and an Employer's Response, to be completed by the employer if enrollment is not possible. Part B includes the Medical Support Notice to Plan Administrator, with instructions, and the Plan Administrator Response, which must be returned to the sender of the NMSN within forty business days after receipt of the NMSN.

The sender of the notice must complete three blanks in the sections regarding limitations on withholding and priority of withholding. These are to be determined by the state law of the state of the obligor's principal place of employment. The first blank to

be populated is to inform the employer of the state limit on withholding if it is more restrictive than the federal Consumer Credit Protection Act. Since Texas law places no limit on the amount that an employer can withhold for court-ordered dependent insurance premiums, the federal law applies if the obligor is employed in Texas, and the blank should be completed: "the applicable Consumer Credit Protection Act %."

The second blank should be completed with the amount specified for the health insurance premium in the child support order. If the order does not specify the amount of the premium, the blank should be completed: "Not applicable."

The third blank requires the sender of the NMSN to describe the priority of withholding between court-ordered child support and dependent health insurance. For obligors employed in Texas, the blank should be completed: "Texas law requires that the employee contributions for health insurance are withheld first before withholding for cash support. If an employer is faced with two or more National Medical Support Notices and cannot comply with all of the notices, he should comply with the notices in the order in which they were first received."

COMMENT: The NMSN recognizes dental coverage as one of the coverage options that may be specified.

§ 9.44 Claims Made by Custodial Parent

Any payment for benefits made by a group health plan in accordance with a medical child support order in reimbursement for expenses paid by the child or the child's custodial parent or legal guardian shall be made to the child or the child's custodial parent or legal guardian. 29 U.S.C. § 1169(a)(8). The Texas Insurance Code also provides that group health insurance benefits for a child may be paid to the managing conservator of that child. Tex. Ins. Code § 1204.251. The Insurance Code does not require a medical child support order; it requires only a certified copy of an order appointing the managing conservator.

§ 9.45 Notice to Employer

The obligee, the obligor, or a child support agency of Texas or another state may send the employer a copy of the order requiring an employee to provide health insurance coverage or dental insurance coverage for a child or may include notice of the medical support order or dental support order in an order or writ of withholding sent to the employer in accordance with Family Code chapter 158. Tex. Fam. Code § 154.186(a).

In an appropriate title IV-D case, the title IV-D agency of Texas or another state shall send to the employer the national medical support notice required under part D, title IV, of the Federal Social Security Act (42 U.S.C. § 651 *et seq.*), as amended. The notice may be used in any other suit in which the obligor is ordered to provide health insurance coverage for a child. Tex. Fam. Code § 154.186(b).

§ 9.46 Duties of Employer

Receipt of a medical support order requiring that health insurance be provided for a child or a dental support order requiring that dental insurance be provided for a child shall be considered a change in the family circumstances of the employee or member, for health insurance purposes and dental insurance purposes, equivalent to the birth or adoption of a child. If the employee or member is eligible for dependent health coverage or dependent dental coverage, the employer shall automatically enroll the child for the first thirty-one days after the receipt of the order or notice of the medical support order or dental support order on the same terms and conditions as apply to any other dependent child. The employer shall notify the insurer of the automatic enrollment. During the thirty-one-day period, the employer and insurer shall complete all necessary forms and procedures to make the enrollment permanent or shall report the reasons the coverage cannot be made permanent. Tex. Fam. Code § 154.184.

An order or notice to an employer directing that health or dental insurance coverage be provided to a child of an employee or member is binding on a current or subsequent employer on receipt without regard to the date the order was rendered. If the employee or member is eligible for dependent health or dental coverage for the child, the employer shall immediately enroll the child in a health or dental insurance plan regardless of whether the employee is enrolled in the plan. If dependent coverage is not available to the employee or member through the employer's health or dental insurance plan or enrollment cannot be made permanent or if the employer is not responsible or otherwise liable for providing coverage, the employer shall provide notice to the sender (the person who sent the copy of the order or notice to the employer). Tex. Fam. Code § 154.187(a), (f).

If additional premiums are incurred as a result of adding the child to the health or dental insurance plan, the employer shall deduct the health or dental insurance premium from the earnings of the employee and apply the amount withheld to payment of the insurance premium. Tex. Fam. Code § 154.187(b).

An employer who has received a medical or dental child support order or notice shall provide to the sender, not later than the fortieth day after the date the employer receives the order or notice, a statement that the child has been enrolled in the employer's health or dental insurance plan or is already enrolled in another health or dental insurance plan in accordance with a previous child support or medical or dental support order to which the employee is subject or a statement that the child cannot be enrolled or cannot be permanently enrolled in the employer's health or dental insurance plan providing the reason why coverage or permanent coverage cannot be provided. Tex. Fam. Code § 154.187(c). The notice must be provided to the sender by first-class mail unless the sender is the title IV-D agency, to which the notice may be provided electronically or by first-class mail. Tex. Fam. Code § 154.187(i).

If the employee ceases employment or if the health or dental insurance coverage lapses, the employer shall provide to the sender, not later than the fifteenth day after the date of the termination of employment or the lapse of the coverage, notice of the termination or lapse and of the availability of any conversion privileges. *See* Tex. Fam. Code § 154.187(d). The notice must be provided to the sender by first-class mail unless the sender is the title IV-D agency, to which the notice may be provided electronically or by first-class mail. Tex. Fam. Code § 154.187(i).

The employer must provide the sender, on request, certain information about the available coverage. *See* Tex. Fam. Code § 154.187(e). Penalties and fines apply to an employer who fails to enroll a child, fails to withhold or remit premiums or cash medical or dental support, or discriminates in hiring or employment on the basis of a medical support order or notice. Tex. Fam. Code § 154.187(g).

An employer who receives a national medical support order under Family Code section 154.186 shall comply with the requirements of the notice. Tex. Fam. Code § 154.187(h).

§ 9.47 Failure to Provide Health Insurance or Dental Insurance

A parent ordered to provide health insurance or dental insurance or to pay the other parent additional child support for the cost of health or dental insurance who fails to do so is liable for (1) necessary medical or dental expenses of the child, without regard to whether the expenses would have been paid if health or dental insurance had been provided, and (2) the cost of health or dental insurance premiums or contributions, if any, paid on behalf of the child. Tex. Fam. Code § 154.188.

§ 9.48 Cancellation or Elimination of Coverage

Unless the employee or member ceases to be eligible for dependent coverage or the employer has eliminated dependent health coverage or dental coverage for all the employer's employees or members, the employer may not cancel or eliminate coverage of a child enrolled under Family Code title 5, chapter 154, subchapter D, until the employer is provided satisfactory written evidence that the court order or administrative order requiring the coverage is no longer in effect or that the child is enrolled in comparable health insurance coverage or will be enrolled in comparable coverage that will take effect not later than the effective date of the cancellation or elimination of the employer's coverage. Tex. Fam. Code § 154.192.

§ 9.49 Continuation Coverage

The plan sponsor of each group health plan shall provide that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled to elect, within the election period, continuation coverage under the plan. 29 U.S.C. § 1161. Relevant qualifying events include the death of the covered employee and a dependent child's ceasing to be a dependent child under the generally applicable requirements of the plan. *See* 29 U.S.C. § 1163(1), (5).

§ 9.50 Support Order Not Qualified

If a plan administrator (or equivalent) determines that a medical support order or a dental support order issued under Family Code chapter 154, subchapter D, is not qualified for enforcement under federal law, the tribunal may, on its own motion or that of a party, render an order that qualifies. The procedure for filing a motion to enforce a final order applies to a motion for a qualifying order. There is no right to a jury, and the employer or plan administrator is not a necessary party. Tex. Fam. Code § 154.193.

IV. Child Support Registry

§ 9.51 Local Child Support Registry

COMMENT: With the establishment of the state disbursement unit required by federal law (42 U.S.C. § 654b(1)), certain child support payments must be directed to that unit as provided by Family Code section 234.007(a). This includes all cases in which child

support orders were initially rendered after January 1, 1994, in which the obligor is subject to income withholding and, effective September 1, 2021, all child support even if not withheld by an employer. *See also* Tex. Fam. Code § 154.004 (place of payment). In 1999 the title IV-D agency was mandated to notify employers and obligors to redirect payments from local child support registries to the state disbursement unit. *See* Tex. Fam. Code § 234.007. However, the legislature did not repeal Family Code section 154.241, which authorizes local child support registries. Today only a handful of counties continue to operate local registries pursuant to the adoption of local rules.

The local registry is a county agency or public entity operated under the authority of a district clerk, county government, juvenile board, juvenile probation office, domestic relations office, or other county agency or public entity that serves a county or a court that has jurisdiction under Family Code title 5 and that receives and distributes child support payments, maintains records of child support payments, and maintains custody of official child support payments. Tex. Fam. Code § 101.018. A private entity may perform the duties and functions of a local registry in receiving and distributing child support payments either under contract with a county commissioners court or a domestic relations office or under an appointment by a court. Tex. Fam. Code § 154.241(g).

If a county chooses to maintain a local registry, it must meet the operational requirements set out in Family Code section 154.241.

[Sections 9.52 through 9.54 are reserved for expansion.]

V. Child Support Review Process

§ 9.55 Child Support Review Process

The title IV-D agency is authorized to take expedited administrative actions to establish, modify, and enforce obligations for child support, medical support, and dental support. A child support review order confirmed by a court constitutes an order of the court and is enforceable by any means available for enforcement of child support obligations. Tex. Fam. Code § 233.001. The procedures for confirmation vary according to whether the child support review order is agreed or not agreed. *See generally* Tex. Fam. Code §§ 233.001–.029.

If the child support review order is not agreed, the title IV-D agency files a petition to confirm the order. *See* Tex. Fam. Code § 233.020. A party may file a request for hear-

ing within twenty days after the petition is delivered to that party. Tex. Fam. Code § 233.023. If a request for hearing has not been timely filed, the court shall confirm and sign a nonagreed child support review order not later than the thirtieth day after the date the petition for confirmation was delivered to the last party entitled to service. Tex. Fam. Code § 233.0271. A failure of the trial court to sign the confirmation order within thirty days of service does not render the order automatically void. An affected party may seek mandamus relief if the required judicial action is not performed within the statutorily mandated period, but the trial court does not lose subject-matter jurisdiction to act. *In re J.A.C.*, 362 S.W.3d 756, 761 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

[Sections 9.56 through 9.60 are reserved for expansion.]

VI. Withholding from Earnings

§ 9.61 Withholding Order Required

In a proceeding in which periodic payments of child support are ordered, modified, or enforced, the court or title IV-D agency shall order that income be withheld from the disposable earnings of the obligor. Tex. Fam. Code § 158.001. If the court does not order income withholding, an order for support must contain a provision for income withholding to ensure that withholding may be effected if a delinquency occurs. A child support order must be construed to contain a withholding provision even if the provision has been omitted from the written order.

"Earnings" means a payment to or due an individual, regardless of the source or what the amounts are called. The term includes periodic or lump-sum payments for (1) wages, salary, compensation received as an independent contractor, overtime pay, severance pay, commission, bonus, and interest income; (2) payments made under a pension, an annuity, workers' compensation, and a disability or retirement program; (3) unemployment benefits; (4) compensation from a transportation network company as defined by section 2402.001 of the Texas Occupations Code; and (5) compensation from a person that operates a technology platform used to make deliveries to customers. Tex. Fam. Code § 101.011.

"Disposable earnings" means the part of the obligor's earnings that remain after deduction of any amount required by law to be withheld; union dues; nondiscretionary retire-

ment contributions; and medical, hospitalization, and disability insurance coverage for the obligor and the obligor's children. Tex. Fam. Code § 101.010.

While an income withholding order must be rendered in every case, the order does not necessarily have to be delivered to the obligor's employer. Except in a title IV-D case, the court may provide, for good cause or on agreement of the parties, that delivery of the order to an employer be suspended. Tex. Fam. Code § 158.002.

§ 9.62 Withholding for Arrearages

In addition to income withheld for the current support of a child, income shall be withheld from the disposable earnings of the obligor to be applied toward the liquidation of any child support arrearages, including accrued interest. The additional amount to be withheld for arrearages shall be an amount sufficient to discharge those arrearages in not more than two years or an additional 20 percent added to the amount of the current monthly support order, whichever amount will result in the arrearages being discharged in the least amount of time. Tex. Fam. Code § 158.003.

If current support is no longer owed, the court or the title IV-D agency shall order that income be withheld for arrearages, including accrued interest as provided in Family Code chapter 157, in an amount sufficient to discharge those arrearages in not more than two years. Tex. Fam. Code § 158.004.

In rendering a cumulative judgment for arrearages, the court shall order that a reasonable amount of income be withheld from the disposable earnings of the obligor to be applied toward the satisfaction of the judgment. Tex. Fam. Code § 158.005.

If the court or the title IV-D agency finds that the schedule for discharging arrearages would cause the obligor, the obligor's family, or children for whom support is due from the obligor to suffer unreasonable hardship, the court or agency may extend the payment period for a reasonable length of time. Tex. Fam. Code § 158.007. The trial court has discretion with respect to determining what constitutes "a reasonable length of time" as related to the issue of "unreasonable hardship" and must decide the issue on the basis of any particular case. *In re Chambers*, 5 S.W.3d 341, 343 (Tex. App.—Texarkana 1999, no pet.).

§ 9.63 Maximum Amount to Be Withheld

An order or writ of withholding shall direct that any employer of the obligor withhold from the obligor's disposable earnings the amount specified up to a maximum amount of 50 percent of the obligor's disposable earnings. Tex. Fam. Code § 158.009. There is not a minimum amount that the court must order paid each month on the arrearage, and a minimum payment sufficient to cover the interest accruing on the arrearage is not necessarily required. *In re Chambers*, 5 S.W.3d 341, 343 (Tex. App.—Texarkana 1999, no pet.); *see also Ruffin v. Ruffin*, 753 S.W.2d 824, 827 (Tex. App.—Houston [14th Dist.] 1988, no writ) (trial court may order up to 50 percent of obligor's disposable earnings, including disability benefits, be withheld for liquidation of child support arrearages).

§ 9.64 Limitations

An order or writ for income withholding under Family Code chapter 158 may be issued until all current support and child support arrearages, including interest, and any applicable fees and costs, including ordered attorney's fees and court costs, have been paid. Tex. Fam. Code § 158.102; *see In re Digges*, 981 S.W.2d 445, 446–47 (Tex. App.—San Antonio 1998, no pet.) (upholding constitutionality of judicial writ of withholding process set out in chapter 158). The income withholding remedy is not subject to statute-of-limitations or due-process defenses. *See In re A.D.*, 73 S.W.3d 244, 248–49 (Tex. 2002).

§ 9.65 Contents of Withholding Order or Writ

An order of withholding or writ of withholding must contain the information required by the forms prescribed by the title IV–D agency for income withholding. Tex. Fam. Code § 158.103.

§ 9.66 Forms for Income Withholding

The title IV-D agency prescribes forms as authorized by federal law in a standard format entitled "Income Withholding for Support." *See* Tex. Fam. Code § 158.106(a).

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), PL 104–193, section 324, mandated that each state title IV-D agency use a federal form promulgated by the secretary of the federal Department of Health and Human Services for interstate income withholding. *See* 42 U.S.C. § 654(9). This statutory requirement has been interpreted by the secretary of the federal Department of

Health and Human Services to apply to both title IV-D and non–title IV-D cases, in not only interstate but also intrastate withholding. The form, which may be used as a judicial withholding document, an administrative writ, or an original or amended withholding document or to terminate withholding, is published in the Texas Administrative Code, title 1, section 55.118. A copy of the form is available online at **www.acf.hhs.gov/programs/css/resource/income-withholding-for-support-form**.

COMMENT: While federal law mandates that states enact legislation requiring the use of the standard form, state law controls with respect to many of the issues surrounding the use of the form. These include the maximum amount permitted to be withheld, the priorities for withholding and allocating among multiple obligees, and state law requirements or terms that might not be specified in the federal withholding form. *See* 42 U.S.C. § 666(b)(6)(A).

§ 9.67 Request for Order or Writ of Withholding

A request for issuance of an order or judicial writ of withholding may be filed with the clerk of the court by the prosecuting attorney, the title IV-D agency, the friend of the court, a domestic relations office, the obligor, the obligee, or an attorney representing the obligor or the obligee. Tex. Fam. Code § 158.104.

On filing a request for issuance of an order or writ of withholding, the clerk of the court shall cause a certified copy of the order or writ to be delivered to the obligor's current employer or to any subsequent employer of the obligor. The clerk shall issue and deliver the certified copy of the order or writ not later than the fourth working day after the date the order is signed or the request is filed, whichever is later. An order or writ of withholding shall be delivered to the employer by first-class mail or, if requested, by certified or registered mail, return receipt requested, by electronic transmission, including electronic mail or facsimile transmission, or by service of citation to the person authorized to receive service of process for the employer in civil cases generally or to a person designated by the employer, by written notice to the clerk, to receive orders or writs of withholding. The clerk may deliver the order or writ by electronic mail if the employer has an electronic mail address; the clerk must request acknowledgment of receipt from the employer or use a system with a read receipt capability. The clerk may deliver the order or writ by facsimile transmission if the employer is able to receive documents transmitted in that manner; the clerk's facsimile machine must create a delivery confirmation report. Tex. Fam. Code § 158.105.

§ 9.68 Employer's Request for Hearing

The employer may file a motion with the court or file a request with the title IV-D agency for a hearing on the applicability of the order or writ to the employer. The motion must be filed not later than the twentieth day after the date the order or writ is delivered, and the hearing must be held not later than fifteen days after the motion or request is made. Pending further order of the court or action of the title IV-D agency, the order or writ remains binding. Tex. Fam. Code § 158.205.

§ 9.69 Notice of Application for Judicial Writ of Withholding

A notice of application for judicial writ of withholding may be filed if a delinquency occurs in child support payments in an amount equal to or greater than the total support due for one month or if income withholding was not ordered at the time child support was ordered. Tex. Fam. Code § 158.301(a).

The notice of application for judicial writ of withholding may be filed in the court of continuing jurisdiction by the title IV-D agency, the attorney representing the local domestic relations office, the attorney appointed a friend of the court as provided in Family Code chapter 202, the obligor or obligee, or a private attorney representing the obligor or obligee. Tex. Fam. Code § 158.301(b).

§ 9.70 Requirements of Notice of Application for Judicial Writ of Withholding

The notice of application for judicial writ of withholding is filed by the person, attorney, or agency seeking withholding. The notice shall be verified and (1) state the amount of monthly support due, including medical support and dental support, the amount of arrearages or anticipated arrearages, including accrued interest, and the amount of wages that will be withheld in accordance with a judicial writ of withholding; (2) state that the withholding applies to each current or subsequent employer or period of employment; (3) state that if the obligor does not contest the withholding within ten days after the date of receipt of the notice, the obligor's employer will be notified to begin the withholding; (4) describe the procedures for contesting the issuance and delivery of a writ of withholding; (5) state that if the obligor contests the withholding, the obligor will be afforded an opportunity for a hearing by the court not later than the thirtieth day after the date of receipt of the notice of contest; (6) state that the sole ground for successfully contesting the issuance of a writ of withholding is a dispute

concerning the identity of the obligor or the existence or amount of the arrearages, including accrued interest; (7) describe the actions that may be taken if the obligor contests the notice of application for a judicial writ of withholding, including the procedures for suspending issuance of a writ of withholding; and (8) include with the notice a suggested form for the motion to stay issuance and delivery of the judicial writ of withholding that the obligor may file with the clerk of the appropriate court. Tex. Fam. Code § 158.302.

§ 9.71 Delivery of Notice

A notice of application for judicial writ of withholding may be delivered to the obligor by hand delivery by a person designated by the title IV-D agency or local domestic relations office; by first-class or certified mail, return receipt requested, addressed to the obligor's last known address or place of employment; or by service of citation as in civil cases generally. Tex. Fam. Code § 158.306(a).

If the notice is delivered by mailing or hand delivery, the party who filed the notice shall file with the court a certificate stating the name, address, and date on which the mailing or hand delivery was made. Tex. Fam. Code § 158.306(b).

§ 9.72 Motion to Stay Issuance of Writ

The obligor may stay issuance of a judicial writ of withholding by filing a verified motion to stay. The motion to stay must be filed with the clerk of the court not later than the tenth day after the date the notice of application for judicial writ of withholding was received by the obligor. The grounds for filing a motion to stay issuance are limited to a dispute concerning the identity of the obligor or the existence or the amount of the arrearages. Tex. Fam. Code § 158.307.

The proper filing of a motion to stay by an obligor prohibits the clerk of the court from delivering the judicial writ of withholding to any employer of the obligor before a hearing is held. Tex. Fam. Code § 158.308.

If a motion to stay is properly filed, the court shall set a hearing on the motion and the clerk of the court shall notify the obligor, obligee, or his authorized representatives and the party who filed the application for judicial writ of withholding of the date, time, and place of the hearing. The court must hold a hearing on the motion not later than the thirtieth day after the date the motion was filed unless both the obligor and the obligee agree and waive the right to have the hearing within thirty days. On hearing, the court

shall render an order for income withholding that includes a finding of the child support arrearages, including medical support, dental support, and interest, or grant the motion to stay. Tex. Fam. Code § 158.309.

§ 9.73 Request for Issuance and Delivery of Writ

If a notice of application for judicial writ of withholding is delivered and a motion to stay is not filed within the time limits, the party who filed the notice shall file with the clerk of the court a request for issuance of the writ of withholding. Tex. Fam. Code § 158.312(a); *see In re R.G.*, 362 S.W.3d 118, 123 (Tex. App.—San Antonio 2011, pet. denied) (burden is on court to set hearing). The request must state the amount of current support, including medical support and dental support, the amount of arrearages, and the amount to be withheld from the obligor's income. The request for issuance may not be filed before the eleventh day after the date of receipt of the notice of application for judicial writ of withholding by the obligor. Tex. Fam. Code § 158.312.

§ 9.74 Issuance and Delivery of Writ

On the filing of a request for issuance of a writ of withholding, the clerk of the court shall issue the writ. The clerk shall issue and mail the writ not later than the second working day after the date the request is filed. Tex. Fam. Code § 158.313(a), (c).

§ 9.75 Contents of Writ

The judicial writ of income withholding issued by the clerk must direct that the employer or a subsequent employer withhold from the obligor's disposable income for current child support, including medical support and dental support, and child support arrearages an amount that is consistent with the provisions of Family Code chapter 158 regarding orders of withholding. Tex. Fam. Code § 158.314.

If the party who filed the notice of application for judicial writ of withholding finds that the schedule for repaying arrearages would cause the obligor, the obligor's family, or the children for whom the support is due from the obligor to suffer unreasonable hardship, the party may extend the payment period in the writ. Tex. Fam. Code § 158.315.

§ 9.76 Issuance of Judicial Writ to Later Employer

After issuance of a judicial writ of withholding by the clerk, a party authorized to file a notice of application for judicial writ of withholding may issue the judicial writ of with-

holding to a subsequent employer of the obligor by delivering a copy of the writ to the employer by certified mail. The judicial writ of withholding must include the name, address, and signature of the party and clearly indicate that the writ is being issued to a subsequent employer. The party shall file a copy of the judicial writ of withholding with the clerk not later than the third working day following delivery of the writ to the subsequent employer and pay a $15 fee. The party shall file the postal return receipt from the delivery to the subsequent employer not later than the third working day after the party receives the receipt. Tex. Fam. Code § 158.319.

COMMENT: Although the "Income Withholding for Support" form (form 9-3) indicates that the employer's name and address must be provided, it is entirely permissible to complete the form using the language "Any employer of [**name of obligor**]." Texas law provides that a withholding order is binding on an employer regardless of whether the employer is specifically named in the order or writ. Tex. Fam. Code § 158.201(b).

§ 9.77 Parties' Agreement about Amount or Duration of Withholding

An obligor and an obligee may agree on a reduction in or termination of income withholding for child support if one of the following contingencies, stated in the order, occurs: the child's eighteenth birthday or high school graduation, whichever is later; the removal of the child's disabilities of minority by marriage, court order, or other operation of law; or the child's death. The obligor and the obligee may file a notarized or acknowledged request under Family Code section 158.011 for a revised judicial writ of withholding, including the termination of withholding. The clerk shall issue and deliver to the obligor's employer a judicial writ of withholding that reflects the agreed revision or termination. Such an agreement by the parties does not modify the terms of a support order. Tex. Fam. Code § 158.402.

§ 9.78 Delivery of Order Reducing or Terminating Withholding

If a court has rendered an order that reduces the amount of child support to be withheld or that terminates withholding for child support, any person or governmental agency may deliver to the employer a certified copy of the order. There is no requirement that the court clerk deliver it. Tex. Fam. Code § 158.404. The provisions of Family Code chapter 158 regarding the liability of employers for withholding apply to an order reducing or terminating withholding. Tex. Fam. Code § 158.405.

§ 9.79 Order for Withholding for Costs and Fees

In addition to an order for income to be withheld for child support, the court may render an order that income be withheld from an obligor's disposable income toward satisfaction of any ordered attorney's fees and costs resulting from an action to enforce a child support obligation. An order of withholding for costs and fees is subordinate to an order of withholding for child support and is subject to the maximum of 50 percent allowed to be withheld from the obligor's disposable earnings. Tex. Fam. Code § 158.0051(a), (b).

COMMENT: An order for withholding of attorney's fees should not be combined with the order for child support. It should be on a separate form and should direct that payment be sent to the attorney rather than to the state disbursement unit.

§ 9.80 Qualified Domestic Relations Order for Collection of Support

A qualified domestic relations order may be used for the collection of ordered child support when a child support obligor is eligible for retirement benefits. The court that rendered an order for the payment of child support, or the court that obtains jurisdiction to enforce a child support order under chapter 159 of the Family Code, has continuing jurisdiction to render enforceable qualified domestic relations orders or similar orders (QDROs) permitting payment of pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee to satisfy amounts due under the child support order. Tex. Fam. Code § 157.501(a).

See chapter 25 of this manual for a complete discussion of the use of the QDRO for this purpose.

VII. Useful Websites

§ 9.81 Useful Websites

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

Office of Child Support Enforcement forms (§ 9.66)
www.acf.hhs.gov/programs/css/resource/income-withholding-for-support-form

Office of the Attorney General of Texas
www.texasattorneygeneral.gov

[Chapters 10 through 12 are reserved for expansion.]

Chapter 13

Court-Ordered Representatives

§ 13.1 Court-Ordered Representatives Generally 383
§ 13.2 Definitions 383
§ 13.3 Mandatory Appointment of Representatives 385
§ 13.4 Discretionary Appointment of Representatives 387
§ 13.5 Prohibited Appointment of Representatives 389
§ 13.6 Rights, Powers, and Duties of Guardian Ad Litem 389
§ 13.7 Guardian Ad Litem at Trial 391
§ 13.8 Powers and Duties of Attorney Ad Litem 391
§ 13.9 Entitlements of Attorney Ad Litem 393
§ 13.10 Substituted Judgment of Attorney for Child 393
§ 13.11 Answer and Other Pleadings 394
§ 13.12 Powers and Duties of Amicus Attorney 394
§ 13.13 Entitlements of Amicus Attorney 396
§ 13.14 Attorney Work Product and Testimony 396
§ 13.15 Fees for Representatives 396
§ 13.16 Access to Child and Information about Child 398
§ 13.17 Immunity of Ad Litems and Amicus 398
§ 13.18 Process of Appointment by Court 399
§ 13.19 Special Appointments; Immunity 400
§ 13.20 Practical Pointers 400
§ 13.21 Useful Websites 401

Chapter 13

Court-Ordered Representatives

Caveat: This chapter does not address in detail suits involving governmental agencies, although the relevant statutes are interwoven with provisions regarding such suits. An attorney in a suit brought by a governmental agency will need to refer to the statutes for additional guidelines for ad litems.

§ 13.1 Court-Ordered Representatives Generally

Appointment of a representative is considered a fundamental due-process requirement in certain family law–related proceedings. Generally, appointment of ad litems for a child and an indigent parent is mandatory in termination cases brought by the state of Texas and for respondents in certain circumstances in which citation has not been personally served. In other cases, a representative is appointed to safeguard the best interests of children involved in suits involving conservatorship, termination, or adoption. The court may appoint a representative on its own motion or on the motion of any party. *See Gonzalez v. Gonzalez*, 26 S.W.3d 657, 658 (Tex. App.—San Antonio 2000, no pet.).

§ 13.2 Definitions

Family Code section 107.001 provides the following definitions pertaining to court-ordered representation. *See* Tex. Fam. Code § 107.001.

Amicus attorney: an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child.

Attorney ad litem: an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.

Developmentally appropriate: structured to account for a child's age, level of education, cultural background, and degree of language acquisition.

Dual role: the role of an attorney who is appointed under Family Code section 107.0125 to act as both guardian ad litem and attorney ad litem for a child in a suit filed by a governmental entity.

Guardian ad litem: a person appointed to represent the best interests of a child. The term includes a volunteer advocate from a charitable organization described by subchapter C of Family Code chapter 107 who is appointed by the court as the child's guardian ad litem; a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests; an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or an attorney ad litem appointed to serve in the dual role.

Although Texas law is clear in defining the roles and responsibilities of court-ordered representatives in Texas family law cases, the definitions contained in the American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases and listed below are also helpful.

Child's attorney: A lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

Lawyer appointed as guardian ad litem: A lawyer appointed as guardian ad litem for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preference.

Sections A–1, A–2, American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases, are available at **www.americanbar.org/groups/family_law/resources/standards_of_practice_reports_recommendations.html**.

The National Association of Counsel for Children has established the NACC Recommendations for Representation of Children in Abuse and Neglect Cases, available at **www.naccchildlaw.org**.

The American Academy of Matrimonial Lawyers (AAML) has also developed guidelines based on whether a child is impaired or unimpaired. There is a rebuttable presumption that children over twelve years of age are unimpaired and children under twelve years of age are impaired. It is the child's attorney who makes this determination, not the court. Under the AAML standards, guardians ad litem do not make recom-

mendations or closing arguments. If they offer evidence or a report, they are sworn as witnesses and subject to cross-examination. *See Standards Relating to the Appointment of Counsel and Guardians Ad Litem for Children in Custody or Visitation Proceedings*, 9 J. Am. Acad. Matrim. Law. 1 (1992).

§ 13.3 Mandatory Appointment of Representatives

In a suit filed by a governmental entity for the termination of the parent-child relationship or for the appointment of a conservator, a guardian ad litem must be appointed by the court immediately after the filing of the petition but before a full adversary hearing. Tex. Fam. Code § 107.011(a). The guardian ad litem appointed for a child may be a volunteer advocate; an adult having sufficient competence, training, and expertise to represent the best interests of the child; or an attorney appointed in the dual role. Tex. Fam. Code § 107.011(b). Further provisions regarding guardian ad litem appointments are contained in Family Code section 107.011(c)–(e).

Immediately after the filing of the suit but before the full adversary hearing, the court must appoint an attorney ad litem to represent the child's interests in a suit filed by a governmental entity requesting termination or to be named a conservator of a child. Tex. Fam. Code § 107.012.

To comply with the mandatory appointment of a guardian ad litem under Family Code section 107.011 and the mandatory appointment of an attorney ad litem under Family Code section 107.012, the court may appoint an attorney to serve in the dual role. Tex. Fam. Code § 107.0125(a). Section 107.0125 contains further provisions regarding appointments in such cases.

In a suit filed by a governmental entity in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of (1) an indigent parent of a child who responds in opposition to the termination or appointment, (2) a parent served by citation by publication, (3) an alleged father who failed to register with the paternity registry and whose identity or location is unknown, and (4) an alleged father who registered with the paternity registry but on whom the petitioner's attempt to personally serve citation has been unsuccessful. Tex. Fam. Code § 107.013(a). These appointments are mandatory and must be made early in the proceeding. Otherwise, reversible error is likely to be found. *Chapman v. Chapman*, 852 S.W.2d 101, 102 (Tex. App.—Waco 1993, no writ); *Nichols v. Nichols*, 803 S.W.2d 484, 485–86 (Tex. App.—El Paso 1991, no writ). If a parent in such a suit is not represented by an attorney at the parent's

first court appearance, the court must inform the parent of the right to be represented by an attorney and, if the parent is indigent and appears in opposition to the suit, the right to an attorney ad litem appointed by the court. Tex. Fam. Code § 107.013(a–1); *In re J.F.*, 589 S.W.3d 325, 333–36 (Tex. App.—Amarillo 2019, no pet.).

If an alleged father for whom an attorney ad litem has been appointed is adjudicated to be a parent of the child and is determined by the court to be indigent, the court may appoint the attorney ad litem to continue to represent the father's interests as a parent. Tex Fam. Code § 107.0132(c).

The court must require a parent claiming indigence that would require appointment of an attorney under Family Code section 107.013(a) to file an affidavit of indigence before the court may conduct a hearing to determine the parent's indigence. The court may consider additional evidence at the hearing and, if it determines the parent is indigent, must appoint an attorney ad litem to represent the parent. Tex. Fam. Code § 107.013(d). Once the court has determined that a parent is indigent, the parent is presumed to remain indigent for the duration of the suit and any appeal unless the court, after reconsideration on the motion of the parent, the parent's attorney ad litem, or the attorney representing the governmental entity, determines that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances. Tex. Fam. Code § 107.013(e).

In certain circumstances in a suit for termination that is not filed by a governmental agency, the court must appoint an amicus attorney or an attorney ad litem under Tex. Fam. Code § 107.021(a–1). See section 13.4 below.

An attorney ad litem must be appointed to defend a suit on behalf of the defendant when service of citation has been made by publication under rule 109 of the Texas Rules of Civil Procedure and no answer or appearance has been made within the prescribed time. Tex. R. Civ. P. 244. Appointment of an attorney ad litem under rule 244 is also required when other substituted service in lieu of publication has been authorized. Tex. R. Civ. P. 109a. However, in a suit for dissolution of marriage, the court may dispense with the appointment of an attorney ad litem if the petitioner or the petitioner's attorney makes an oath that there are no children of the marriage under eighteen years of age and that the spouses accumulated no appreciable amount of property during the marriage. Tex. Fam. Code § 6.409(e).

If in a parentage suit the court denies a motion for genetic testing, a child who is a minor or is incapacitated must be represented by an amicus attorney or attorney ad litem. Tex. Fam. Code § 160.608(c).

In a parentage proceeding, the court shall appoint an amicus attorney or attorney ad litem to represent a child who is a minor or is incapacitated if the child is a party or the court finds that the interests of the child are not adequately represented. Tex. Fam. Code § 160.612(b).

The court shall appoint an amicus attorney or an attorney ad litem to represent the interest of a petitioner for removal of disabilities of minority at the hearing. Tex. Fam. Code § 31.004.

§ 13.4 Discretionary Appointment of Representatives

In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint one of the following: an amicus attorney, an attorney ad litem, or a guardian ad litem. Tex. Fam. Code § 107.021(a). Because the trial court has discretion whether to appoint an amicus attorney, such discretion also applies regarding whether to remove an amicus, absent the demonstration of some situation that would create a ministerial duty to remove that amicus attorney. *In re Burrows*, No. 06-17-00014-CV, 2017 WL 1031454 at *2 (Tex. App.—Texarkana Mar. 17, 2017, orig. proceeding) (mem. op.) (insufficient evidence of conflict that would require removal of amicus).

In a suit requesting termination of the parent-child relationship that is not filed by a governmental entity, the court shall, unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child's interests, appoint an amicus attorney or an attorney ad litem. Tex. Fam. Code § 107.021(a–1). In a termination proceeding filed by one parent against the other parent, the court must appoint either an amicus attorney or an attorney ad litem for the child absent a finding that the party seeking termination can adequately represent the minor child's interests. Failure to appoint an amicus attorney or an attorney ad litem in such a situation may be raised for the first time on appeal. *In re K.M.M.*, 326 S.W.3d 714 (Tex. App.—Amarillo 2010, no pet.).

In determining whether to make an appointment under Family Code section 107.021, the court shall give due consideration to the ability of the parties to pay reasonable fees

to the appointee and balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment. Tex. Fam. Code § 107.021(b)(1); *see Hutchins v. Donley*, No. 11-12-00204-CV, 2014 WL 2767122, at *4 (Tex. App.—Eastland June 12, 2014, no pet.) (mem. op.). The court may make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child, unless the appointment is otherwise required by the Family Code, and may not require that a person appointed serve without reasonable compensation for the services rendered by the person. Tex. Fam. Code § 107.021(b)(2), (b)(3).

The court may appoint an attorney to serve as an attorney ad litem for a person entitled to service of citation in a suit if the court finds that the person is incapacitated. The attorney ad litem shall follow the person's expressed objectives of representation and, if appropriate, refer the proceeding to the proper court for guardianship proceedings. Tex. Fam. Code § 107.010.

In a suit filed by a governmental agency under Code chapter 262, the court may appoint an attorney ad litem to represent the interests of a parent from the time the court issues a temporary restraining order or attachment of the child until the court determines whether the parent is indigent before commencement of the full adversary hearing. Tex. Fam. Code § 107.0141(a). An attorney ad litem who identifies and locates the parent shall inform the parent of the right to representation and the appointment of an attorney ad litem if the parent is indigent; help the parent make an indigence claim, if applicable; and assist the parent in preparing for the full adversary hearing. Tex. Fam. Code § 107.0141(c).

Continuing Representation after Judgment: In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an order appointing the Texas Department of Family and Protective Services as the child's managing conservator shall provide for the continuation of the appointment of the guardian ad litem or attorney ad litem for the child, or an attorney appointed to serve in the dual role, as long as the child remains in the conservatorship of the department. If both an attorney ad litem and a guardian ad litem have been appointed, the court may provide for the continuation of both appointments as long as the child remains in the conservatorship of the department. Tex. Fam. Code § 107.016(1).

Although section 107.0161 of the Texas Family Code states that the continued appointment of a guardian or attorney ad litem is discretionary for children committed to or released from the Juvenile Justice Department, since the amendment to Code section 107.016(1) makes the continuation of the appointment mandatory, section 107.0161 is no longer relevant. *See* Tex. Fam. Code § 107.0161.

In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an attorney appointed to serve as an attorney ad litem for a parent or an alleged father continues to serve in that capacity until the earliest of the date (1) the suit affecting the parent-child relationship is dismissed, (2) all appeals in relation to any final order terminating parental rights are exhausted or waived, or (3) the attorney is relieved of the attorney's duties or replaced by another attorney after a finding of good cause is rendered by the court on the record. Tex. Fam. Code § 107.016(3).

§ 13.5 Prohibited Appointment of Representatives

The court may not appoint a person to serve as an amicus attorney in a suit filed by a governmental entity. Tex. Fam. Code § 107.017. In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may not appoint an attorney to serve in the dual role or a volunteer advocate to serve as guardian ad litem for a child unless the training of the volunteer advocate is designed for participation in suits other than suits filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child. Tex. Fam. Code § 107.022.

§ 13.6 Rights, Powers, and Duties of Guardian Ad Litem

The law is clear that a guardian ad litem appointed for a child is not a party to the suit but may conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child and may obtain and review copies of the child's relevant medical, psychological, and school records. *See* Tex. Fam. Code § 107.002(a). The guardian ad litem is entitled to access to the child and to information about the child, as described in section 13.16 below.

Within a reasonable time after his appointment, the guardian ad litem must interview (1) the child in a developmentally appropriate manner, if the child is four years old or older; (2) the parties to the suit; and (3) each person who has significant knowledge of

the child's history and condition, including educators, child welfare service providers, and any foster parent of the child. The guardian ad litem must also seek to elicit the child's expressed objectives in a developmentally appropriate manner, consider the child's expressed objectives without being bound by them, encourage settlement and alternative dispute resolution, and perform any specific task the court directs. Tex. Fam. Code § 107.002(b).

The guardian ad litem is entitled to (1) receive a copy of each pleading or other paper filed in the case; (2) receive notice of each hearing in the case; (3) participate in case staffings by the Department of Family and Protective Services concerning the child; (4) attend all legal proceedings in the case but not to call or question a witness or otherwise provide legal services unless the guardian ad litem is a licensed attorney who has been appointed in the dual role; (5) review and sign, or decline to sign, an agreed order affecting the child; (6) explain the basis for opposition to the agreed order if the guardian ad litem does not agree to the terms of the proposed order; (7) have access to the child in the child's placement; (8) be consulted and provide comments on decisions regarding placement, including kinship, foster care, and adoptive placements; (9) evaluate whether the child welfare services providers are protecting the child's best interests regarding appropriate care, treatment, services, and all other foster children's rights listed in Code section 263.008; (10) receive notification regarding and an invitation to attend meetings related to the child's service plan and a copy of the plan; and (11) attend court-ordered mediation regarding the child's case. Tex. Fam. Code § 107.002(c).

COMMENT: Although not specified in section 107.002, the guardian ad litem should also receive copies of any expert's reports and child custody evaluation or adoption evaluation reports.

In a contested case, the guardian ad litem must provide copies of his report, if any, to the attorneys for the parties as the court directs, but not later than the earlier of the date required by the scheduling order or the tenth day before the commencement of the trial. Tex. Fam. Code § 107.002(g).

Further requirements apply to a guardian ad litem appointed for a child in a proceeding brought by a governmental agency under Family Code chapter 262 or 263. *See* Tex. Fam. Code § 107.002(b–1).

Notice of Abortion: The role of guardians ad litem in this area is covered in chapter 14 of this manual.

§ 13.7 Guardian Ad Litem at Trial

A guardian ad litem is entitled to attend all legal proceedings. The guardian ad litem has considerable latitude in determining what hearings, conferences, depositions, or other proceedings to attend in order to protect the ward. *Diamond v. San Soucie*, 239 S.W.3d 428 (Tex. App.—Dallas 2007, no pet.).

The court may compel the guardian ad litem to attend a trial or hearing and to testify as necessary for the proper disposition of the suit. Tex. Fam. Code § 107.002(d). Unless the guardian ad litem is an attorney who has been appointed in the dual role and subject to the Texas Rules of Evidence, the court shall ensure in a hearing or in a trial on the merits that the guardian ad litem has an opportunity to testify regarding, and is permitted to submit a report regarding, the guardian ad litem's recommendations relating to the child's best interests and the basis for the guardian ad litem's recommendations. Tex. Fam. Code § 107.002(e).

In a nonjury trial, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian ad litem's report, even if the guardian ad litem is not listed as a witness by a party. If the guardian ad litem is not called as a witness, the court shall permit the guardian ad litem to testify in the narrative. Tex. Fam. Code § 107.002(f). However, in a jury trial, disclosure to the jury of the contents of the report to the court remains subject to the Texas Rules of Evidence. Tex. Fam. Code § 107.002(h).

Further requirements apply to a guardian ad litem appointed to represent a child in the managing conservatorship of the Department of Family and Protective Services. *See* Tex. Fam. Code § 107.002(i).

§ 13.8 Powers and Duties of Attorney Ad Litem

Family Code section 107.003 sets out the powers and duties of an attorney ad litem appointed to represent a child. *See* Tex. Fam. Code § 107.003. All of the attorney ad litem's duties are mandatory.

The attorney ad litem must be trained in child advocacy or have experience determined by the court to be equivalent to that training. Tex. Fam. Code § 107.003(a)(2).

The attorney ad litem must, subject to rules 4.02, 4.03, and 4.04 of the Texas Disciplinary Rules of Professional Conduct and within a reasonable time after the appointment, interview (1) the child in a developmentally appropriate manner, if the child is

four years of age or older; (2) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and (3) the parties to the suit. He must seek to elicit in a developmentally appropriate manner the child's expressed objectives of representation, consider the impact on the child in formulating the attorney's presentation of the child's expressed objectives of representation to the court, and investigate the facts of the case to the extent the attorney considers appropriate. He must also obtain and review copies of relevant records relating to the child as provided by Family Code section 107.006; participate in the conduct of the litigation to the same extent as an attorney for a party; take any action consistent with the child's interests that the attorney considers necessary to expedite the proceedings; encourage settlement and the use of alternative forms of dispute resolution; and review and sign, or decline to sign, a proposed or agreed order affecting the child. Tex. Fam. Code § 107.003(a)(1).

In addition, the attorney ad litem appointed for a child shall, in a developmentally appropriate manner, advise the child and, if the attorney ad litem determines that the child is competent to understand the nature of an attorney-client relationship and has formed that relationship with the attorney ad litem, represent the child's expressed objectives of representation and follow the child's expressed objectives of representation during the course of litigation. As appropriate, considering the nature of the appointment, the attorney ad litem shall become familiar with the American Bar Association's standards of practice for attorneys who represent children in abuse and neglect cases, the suggested amendments to those standards adopted by the National Association of Counsel for Children, and the American Bar Association's standards of practice for attorneys who represent children in custody cases. Tex. Fam. Code § 107.004(a).

Further requirements apply to an attorney ad litem appointed for a child in a proceeding brought by a governmental agency under Family Code chapter 262, 263, or 264. *See* Tex. Fam. Code §§ 107.003(b), 107.004(b)–(e).

Family Code section 107.0131 sets out the powers and duties of an attorney ad litem appointed to represent the interests of a parent in a suit filed by a governmental agency, Family Code section 107.0132 sets out the powers and duties of an attorney ad litem appointed to represent the interests of an alleged father in such a suit, and Family Code section 107.014 sets out the powers and duties of an attorney ad litem appointed to represent the interests of a parent whose identity or location is unknown or who was served by publication in such a suit. *See* Tex. Fam. Code §§ 107.0131, 107.0132, 107.014. All of the attorney ad litem's duties are mandatory.

An attorney ad litem who fails to perform the required duties is subject to disciplinary action under subchapter E, chapter 81, of the Texas Government Code. Tex. Fam. Code §§ 107.0045, 107.0133.

The term ad litem means "for the suit." Therefore, the attorney serving as ad litem in a suit affecting the parent-child relationship does not have the authority to represent the party in other matters. *See Brownsville-Valley Regional Medical Center v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995).

In *In re D.W.G.K.*, 558 S.W.3d 671, 679 (Tex. App.—Texarkana 2018, pet. denied), a parent whose rights had been terminated complained on appeal that the attorney ad litem had provided ineffective assistance of counsel to the child by not representing the child's "expressed objectives." The court held that the parent did not have standing to raise an ineffective assistance of counsel claim on behalf of the child.

§ 13.9 Entitlements of Attorney Ad Litem

The attorney ad litem is entitled to (1) request clarification from the court if the role of the attorney is ambiguous, (2) request a hearing or trial on the merits, (3) consent or refuse to consent to an interview of the child by another attorney, (4) receive a copy of each pleading or other paper filed with the court, (5) receive notice of each hearing in the suit, (6) participate in certain case staffings concerning the child, and (7) attend all legal proceedings in the suit. Tex. Fam. Code §§ 107.003(a)(3), 107.0131(a)(2). The attorney is also entitled to access to the child and to information about the child, as described in section 13.16 below.

§ 13.10 Substituted Judgment of Attorney for Child

Before the 2003 statutory changes, an attorney ad litem was obliged to advocate the child's wishes even if the attorney ad litem believed that the child's desires were detrimental. However, Family Code section 107.008 now allows the attorney ad litem to use his own judgment to determine if the child cannot meaningfully formulate the child's objectives of representation in a case because the child (1) lacks sufficient maturity to understand and form an attorney-client relationship with the attorney; (2) despite appropriate legal counseling, continues to express objectives of representation that would be seriously injurious to the child; or (3) for any other reason is incapable of making reasonable judgments and engaging in meaningful communication. Tex. Fam. Code § 107.008(a).

If an attorney ad litem determines that the child cannot meaningfully formulate the child's expressed objectives of representation, the attorney ad litem may present to the court a position that the attorney determines will serve the best interests of the child. Tex. Fam. Code § 107.008(b). Family Code section 107.008(c) prescribes the steps for the attorney ad litem to take under these circumstances if a guardian ad litem has been appointed for the child in a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child. *See* Tex. Fam. Code § 107.008(c).

§ 13.11 Answer and Other Pleadings

The attorney ad litem must file an answer for the child or the person he is appointed to represent.

The attorney should also consider whether requests for affirmative relief, on a temporary or final basis, should be made, including requests for psychological examinations or evaluations of the child or parties, child custody evaluations, restraining orders and injunctions, family services, counseling, drug or alcohol testing, parenting classes, establishment of child support, implementation of periods of possession, restrictions or limitations on parental possession or access, and contempt for failure to comply with court orders. The attorney ad litem may need to conduct discovery. If applicable, the attorney ad litem may also wish to file pleadings requesting termination of parental rights or the appointment of a nonparent as the child's managing conservator.

COMMENT: It is important to remember that the Texas Disciplinary Rules of Professional Conduct prohibit contact with a person represented by an attorney. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.02. Accordingly, it is imperative that the attorney ad litem obtain the written consent of a person's attorney before conducting an interview with that person or his expert witnesses. If written consent cannot be obtained, formal discovery will be necessary.

§ 13.12 Powers and Duties of Amicus Attorney

The amicus attorney's primary duty is to the trial court to make recommendations regarding the best interest of the child. Because the amicus attorney is appointed to assist the court, he owes a duty of competent representation only to the trial court. The amicus attorney has no duty of care to either parent. *Zeifman v. Nowlin*, 322 S.W.3d 804 (Tex. App.—Austin 2010, no pet.). An amicus attorney is not considered a neutral person and cannot act as a mediator in a case in which he is appointed. *In re E.B.*, No. 12-

17-00214-CV, 2017 WL 4675109, at *4 (Tex. App.—Tyler Oct. 18, 2017, orig. proceeding [mand. denied]) (mem. op.).

Family Code section 107.003 sets out the specific powers and duties of an amicus attorney appointed to assist the court. *See* Tex. Fam. Code § 107.003. All of the amicus attorney's duties are mandatory.

The amicus attorney must be trained in child advocacy or have experience determined by the court to be equivalent to that training. Tex. Fam. Code § 107.003(a)(2).

The amicus attorney must, subject to rules 4.02, 4.03, and 4.04 of the Texas Disciplinary Rules of Professional Conduct and within a reasonable time after the appointment, interview (1) the child in a developmentally appropriate manner, if the child is four years of age or older; (2) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and (3) the parties to the suit. He must seek to elicit in a developmentally appropriate manner the child's expressed objectives of representation, consider the impact on the child in formulating the attorney's presentation of the child's expressed objectives of representation to the court, and investigate the facts of the case to the extent the attorney considers appropriate. He must also obtain and review copies of relevant records relating to the child as provided by Family Code section 107.006; participate in the conduct of the litigation to the same extent as an attorney for a party; take any action consistent with the child's interests that the attorney considers necessary to expedite the proceedings; encourage settlement and the use of alternative forms of dispute resolution; and review and sign, or decline to sign, a proposed or agreed order affecting the child. Tex. Fam. Code § 107.003(a)(1).

Unless the court specifically limits the amicus attorney in the order of appointment, an amicus attorney shall advocate the best interests of the child after reviewing the facts and circumstances of the case; however, in determining the best interests of the child, an amicus attorney is not bound by the child's expressed objectives of representation. Tex. Fam. Code § 107.005(a). The amicus attorney shall, in a developmentally appropriate manner, (1) with the consent of the child, ensure that the child's expressed objectives of representation are made known to the court; (2) explain the role of the amicus attorney to the child; (3) inform the child that the amicus attorney may use information that the child provides in providing assistance to the court; and (4) become familiar with the American Bar Association's standards of practice for attorneys who represent children in custody cases. Tex. Fam. Code § 107.005(b).

An amicus attorney may not disclose confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the best interests of the child. Tex. Fam. Code § 107.005(c).

§ 13.13 Entitlements of Amicus Attorney

The amicus attorney is entitled to (1) request clarification from the court if the role of the attorney is ambiguous, (2) request a hearing or trial on the merits, (3) consent or refuse to consent to an interview of the child by another attorney, (4) receive a copy of each pleading or other paper filed with the court, (5) receive notice of each hearing in the suit, (6) participate in any case staffing concerning the child conducted by the Department of Family and Protective Services, and (7) attend all legal proceedings in the suit. Tex. Fam. Code § 107.003(a)(3). The attorney is also entitled to access to the child and to information about the child, as described in section 13.16 below. The trial court is not the client of the amicus attorney, however, and therefore the amicus shall not engage in ex parte communications with the court. *In re S.A.G.*, 403 S.W.3d 907, 915–16 (Tex. App.—Texarkana 2013, pet. denied).

§ 13.14 Attorney Work Product and Testimony

An attorney ad litem, an attorney serving in the dual role, or an amicus attorney may not (1) be compelled to produce attorney work product developed during the appointment as an attorney, (2) be required to disclose the source of any information, (3) submit a report into evidence, or (4) testify in court except as authorized by rule 3.08 of the Texas Disciplinary Rules of Professional Conduct. Tex. Fam. Code § 107.007(a). However, Family Code section 107.007(a) does not set aside the duty of an attorney to report child abuse or neglect under section 261.101. Tex. Fam. Code § 107.007(b).

§ 13.15 Fees for Representatives

Nongovernmental Cases: In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, in addition to the attorney's fees that may be awarded under Family Code chapter 106, an attorney appointed as an attorney ad litem for the child or as an amicus attorney and a professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate, is entitled to "reasonable fees and expenses" in an amount set by the court and ordered to

be paid by one or more parties to the suit. Tex. Fam. Code § 107.023(a). The court shall (1) determine the fees and expenses of the representative by reference to the reasonable and customary fees for similar services in the county of jurisdiction; (2) order a reasonable cost deposit to be made at the time the court makes the appointment; and (3) before the final hearing, order an additional amount to be paid to the credit of a trust account for the use and benefit of the representative. Tex. Fam. Code § 107.023(b). The court may determine that fees thus awarded are necessaries for the benefit of the child. Tex. Fam. Code § 107.023(d). A court may not award costs, fees, or expenses to a representative against the state, a state agency, or a political subdivision of the state under this provision. Tex. Fam. Code § 107.023(c).

A trial court cannot characterize the award of fees to an amicus attorney or attorney ad litem as "additional child support" or order that the award be enforced by income withholding. Attorney's fees may be awarded as child support solely under Family Code chapter 157 in child support enforcement proceedings. *In re R.H.W.*, 542 S.W.3d 724, 744 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Although the court in *R.H.W.* mentioned only child support enforcement proceedings under chapter 157, attorney's fees may also be awarded as child support under chapter 157 in proceedings for enforcement of possession.

A trial court cannot compel the Office of Attorney General to disburse funds collected for child support to pay toward a parent's obligation for amicus attorney's fees. *In re H.G.-J.*, 503 S.W.3d 679, 682 (Tex. App.—Houston [14th Dist.], no pet.). Additionally, a trial court has no authority to strike a jury demand as a sanction for failure to pay amicus attorney's fees in a case where the Family Code expressly authorizes a trial by jury. *Wheeler v. Wheeler*, No. 01-16-00642-CV, 2017 WL 3140027 (Tex. App.—Houston [1st Dist.] July 25, 2017, no pet.) (mem. op.) (citing *Saxton v. Daggett*, 864 S.W.2d 729, 734 (Tex. App.—Houston [1st Dist.] 1993, no writ)). Finally, a court retains jurisdiction to award fees until the time that a final judgment is signed that dismisses or disposes of all claims, including a request for amicus/ad litem fees. *In re M.B.D.*, No. 09-18-00278-CV, 2020 WL 1879474, at *3 (Tex. App.—Beaumont Apr. 16, 2020, no pet.) (mem. op.) (amicus fees could be awarded even after nonsuit was granted).

Governmental Cases: Family Code section 107.015 governs fees for attorneys ad litem and guardians ad litem appointed in suits filed by governmental entities requesting termination of the parent-child relationship or appointment of a conservator of a child. *See* Tex. Fam. Code § 107.015. However, the trial court lacked discretion to award the guardian ad litem compensation for fees once it became clear that there was no conflict of interest between the child and the mother, as next friend of the child,

because a guardian ad litem may be compensated only for necessary services performed. *Ford Motor Co. v. Stewart, Cox & Hatcher, P.C.*, 390 S.W.3d 294, 297–98 (Tex. 2013) (per curiam).

§ 13.16 Access to Child and Information about Child

In conjunction with the appointment of an attorney ad litem for the child (not for an adult or a parent), a guardian ad litem for the child, or an amicus attorney, the court shall issue an order authorizing the representative to have immediate access to the child and any information relating to the child. Without requiring an additional order or release, the custodian of any relevant records relating to the child, including records regarding social services, law enforcement records, school records, records of a probate or court proceeding, and records of a trust or account for which the child is a beneficiary, shall provide access to the representative. Without requiring a further order or release, the custodian of a medical, mental health, or substance-abuse treatment record of a child that is privileged or confidential under other law shall release the record to the authorized representative, except that a child's substance-abuse treatment record that is confidential under 42 U.S.C. § 290dd–2 may be released only as provided under federal regulations. The disclosure of a confidential record to a representative does not affect the confidentiality of the record, and the representative may not disclose the record further except as provided by court order or other law. A physician may charge a reasonable fee for providing copies of the records (Texas Occupations Code section 159.008). Tex. Fam. Code § 107.006.

§ 13.17 Immunity of Ad Litems and Amicus

Family Code section 107.009(a) provides that an appointed guardian ad litem, attorney ad litem, or amicus attorney is not liable for civil damages arising from an action taken, a recommendation made, or an opinion given in the appointed capacity. This immunity does not apply to an action taken, a recommendation made, or an opinion given with conscious indifference or reckless disregard to the safety of another, in bad faith or with malice, or that is grossly negligent or willfully wrongful. Tex. Fam. Code § 107.009. The immunity statute recognizes no exception to immunity based on allegations of fraud. *Zeifman v. Nowlin*, 322 S.W.3d 804 (Tex. App.—Austin 2010, no pet.).

In a case of first impression in Texas, the court considered the issue of absolute immunity for the actions taken by a guardian ad litem pursuant to her court appointment. The court of appeals held that the ad litem functions as "an arm of the court" and is thus

entitled to the same immunity extended to judges in the performance of their judicial duties. *Delcourt v. Silverman*, 919 S.W.2d 777, 784–86 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

§ 13.18 Process of Appointment by Court

Certain rules concerning the appointment of attorneys ad litem and guardians ad litem apply to courts in counties with a population of 25,000 or more. *See* Tex. Gov't Code § 37.001.

The court must establish and maintain a list of all attorneys who are qualified to serve as an attorney ad litem and are registered with the court and a list of all attorneys and other persons who are qualified to serve as a guardian ad litem and are registered with the court. Multiple lists categorized by the type of case and the person's qualifications are permitted. Tex. Gov't Code § 37.003(a), (b).

Generally, the court must use a rotation system and appoint the person whose name appears first on the list. Tex. Gov't Code § 37.004(a). A person on the list whose name does not appear first, or a person who meets the requirements to serve but is not on the list, may be appointed if the parties agree and the court approves or if an initial declaration of a state of disaster for the area is made within thirty days before the appointment. Tex. Gov't Code § 37.004(c), (d–1), (g). Such a person may also be appointed on a finding of good cause if the person's appointment is required on a complex matter because he has relevant specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter of the case; has relevant prior involvement with the parties or the case; or is in a relevant geographic location. Tex. Gov't Code § 37.004(d). A person who is not appointed in the order in which his name appears on the applicable list stays next in line, and a person who has been appointed goes to the end of the list. Tex. Gov't Code § 37.004(e), (f).

These provisions do not apply to the appointment of a volunteer under a program authorized by Family Code section 107.031 or of an attorney ad litem, guardian ad litem, or amicus attorney appointed under a domestic relations office established under Family Code chapter 203, providing services without expecting or receiving compensation, or providing services as a volunteer of a nonprofit organization that provides pro bono legal services to the indigent. Tex. Gov't Code § 37.002.

The lists must be posted annually at the courthouse and on the court's website. Tex. Gov't Code § 37.005.

§ 13.19 Special Appointments; Immunity

In addition to appointing amicus attorneys and ad litems, trial courts may delegate their authority or appoint others to perform services for the court. When a trial court makes such a delegation or appointment, judicial immunity that attaches to the judge may follow the delegation or appointment. Whether a delegate or appointee is protected by judicial immunity is determined by whether the delegate or appointee exercises discretionary judgment or merely performs ministerial or administrative tasks. For example, judicial immunity has been extended to court-appointed trustees, receivers, and psychologists, but it has not been extended to court reporters. Derived judicial immunity is lost when the court officer acts in the clear absence of all jurisdiction and outside the scope of his authority. *B.W.D. v. Turnage*, No. 05-13-01733-CV, 2015 WL 869289 (Tex. App.—Dallas 2015, pet. denied) (mem. op.).

§ 13.20 Practical Pointers

The case of *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), although involving the termination of parental rights, is generally recognized for its nonexclusive list of factors that a court should consider in ascertaining the best interests of the child in any suit affecting the parent-child relationship. Accordingly, in conducting an investigation, reviewing records concerning the child, interviewing the child, and interviewing other persons who have information concerning the child, the representative can find guidance in these factors listed in *Holley*. The courts should consider in ascertaining the best interests of a child—

1. the desires of the child,
2. the emotional and physical needs of the child now and in the future,
3. the emotional and physical danger to the child now and in the future,
4. the parenting abilities of the individuals seeking custody,
5. the programs available to assist these individuals to promote the best interest of the child,
6. the plans for the child by these individuals or by the agency seeking custody,
7. the stability of the home or proposed placement,
8. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and

9. any excuse for the acts or omissions of the parents.

Holley, 544 S.W.2d at 371–72.

In addition to complying with any duties established by statute, the representative should consider conducting a home visit of each person seeking conservatorship; attending all hearings and administrative meetings; reviewing psychological evaluations with his own experts; interviewing teachers, doctors, and other professionals who have worked with the child; observing the child and parent interact; reviewing other documentation regarding the child and/or family (such as the TDFPS file or district attorney's file); conducting a criminal background check on the parties and other family members with whom the child will be in regular contact if placed with the party seeking custody; determining the resources available to each party to meet the child's needs; and carefully interviewing each party and the professionals involved in the case as to their perception of the child's needs.

COMMENT: The attorney should consider being discharged as guardian or attorney ad litem or amicus attorney in a court order at the conclusion of the case. Alternatively, the judge should be asked to include the date the attorney's services end in the court's order of appointment or an affirmative statement that the appointment does not include any responsibility to appeal. However, the attorney should advise the client of the right to appeal and the necessary steps to perfect the appeal. The client will have to obtain other counsel or agree to ask the court to affirmatively continue the appointment in a new court order. As a practical matter, the attorney should have the appointment extended, with an order for payment. If this has not been clarified at the trial level, the attorney should seek an order from the appellate court on this issue.

§ 13.21 Useful Websites

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

American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases (§ 13.2)
www.americanbar.org/groups/family_law/resources/standards_of_practice_reports_recommendations.html

National Association of Counsel for Children Recommendations for Representation of Children in Abuse and Neglect Cases (§ 13.2)
www.naccchildlaw.org

Chapter 14

Judicial Bypass

§ 14.1 Generally 405

§ 14.2 Application. 406

§ 14.3 Cover Page 407

§ 14.4 Verification Page 407

§ 14.5 Attorney's Statement 408

§ 14.6 Filing Fees and Court Costs 408

§ 14.7 Assignment of Cases; Objection to, Recusal of, and Disqualification of Judge 409

§ 14.8 Appointment of Ad Litems and Attorney 409

§ 14.9 Hearing—Logistics 412

§ 14.10 Hearing—Evidentiary Considerations by Trial Court 412

§ 14.11 Confidentiality 413

§ 14.12 Appeal 415

§ 14.13 Written Consent Required for Physician; Emergency 416

§ 14.14 Civil Penalties 417

§ 14.15 Practical Tips 417

§ 14.16 Useful Websites 418

Chapter 14

Judicial Bypass

§ 14.1 Generally

Family Code chapter 33 governs parental notification or judicial approval to bypass parental notification and consent required before an abortion can be performed on a pregnant, unemancipated minor. *See* Tex. Fam. Code § 33.001 *et seq.* Specifically, a physician may not perform an abortion on such a minor unless—

1. the physician gives at least forty-eight hours' actual notice, in person or by telephone, to a parent of the minor (if the minor has no managing conservator or guardian) or to a court-appointed managing conservator or guardian;
2. the physician receives an order issued by a court authorizing the minor to consent to the procedure; or
3. the physician concludes that a medical emergency exists, certifies in writing to the Texas Department of Health and in the patient's medical record the medical indications supporting the judgment that a medical emergency exists, and provides the notice required by section 33.0022 of the Family Code.

Tex. Fam. Code § 33.002(a).

A physician may not perform an abortion in violation of section 164.052(a)(19) of the Occupations Code. Tex. Fam. Code § 33.0021; *see* Tex. Occ. Code § 164.052(a)(19). More extensive discussion is provided at section 14.13 below.

A pregnant minor may apply for a court order authorizing the minor to consent to an abortion without notification to and consent of a parent, managing conservator, or guardian. Tex. Fam. Code § 33.003(a).

This chapter of the manual discusses the procedures for seeking judicial authorization.

To ensure confidentiality and expedite the process, the Texas Supreme Court has promulgated a set of rules entitled "Rules for a Judicial Bypass of Parental Notice and Consent under Chapter 33 of the Family Code" (hereinafter TRJB). These rules, in

addition to a set of prescribed forms, are for use in proceedings under chapter 33 of the Family Code. To the extent of any conflict, these rules control over any other statute or rule of law. TRJB 1.1.

The rules and forms must be posted on the Texas Judiciary website at **www.txcourts.gov**. Forms 1A, 2A, and 2B must be translated into Spanish. The clerk of a court in which an application or appeal may be filed must make the rules and forms (including specified Spanish versions) available without charge to a minor. TRJB 1.7.

§ 14.2 Application

The application must be filed in a county court at law, court having probate jurisdiction, or district court, including a family district court, in the minor's county of residence in most circumstances. Other provisions apply if the minor's parent, managing conservator, or guardian is a presiding judge of such a court; if the minor's county of residence has a population of less than 10,000; or if the minor is not a Texas resident. *See* Tex. Fam. Code § 33.003(b); TRJB 2.1.

The application may be filed in paper form, by fax, or by e-mail but may not be filed electronically through the statewide portal. The court clerk must designate an e-mail address or fax number for filings in these proceedings and take all reasonable steps to maintain confidentiality of the filings. An attorney must notify the clerk by telephone before filing a document by fax or e-mail. *See* TRJB 1.5. The time limits for the court to rule on the application do not begin to run until the application is filed, which is "when it is actually received by the district or county clerk." Therefore, the provisions of rule 21a of the Texas Rules of Civil Procedure do not apply. TRJB 2.1(d); TRJB 2 cmt. 2.

An application consists of two pages—a cover page and a separate verification page—if the minor is not represented by an attorney when the application is filed. If the minor is represented by an attorney, the application must also include a third page—the attorney's sworn statement or declaration made under penalty of perjury. TRJB 2.1(c). The minor must be referred to as "Jane Doe" in the numbered cause except on the verification page and required court communications. TRJB 1.3(b), 2.1(c)(1).

A minor who has filed an application may not withdraw it or nonsuit the application without the court's permission. Tex. Fam. Code § 33.003(o); TRJB 2.1(e). In general, a determination by the court is res judicata of the issue whether the minor may or may not be authorized to consent to an abortion without notice to and consent of a parent, managing conservator, or guardian, and the minor may not initiate a new application pro-

ceeding with regard to the same pregnancy. Tex. Fam. Code § 33.003(p); TRJB 2.1(f)(1). However, a minor whose application is denied may submit a new application to the same court if the minor shows that there has been a material change in circumstances since the prior denial. Tex. Fam. Code § 33.003(q); TRJB 2.1(f)(2).

§ 14.3 Cover Page

The cover page must be styled "In re Jane Doe" and state—

1. that the minor is pregnant;
2. that the minor is unmarried, is under eighteen years of age, and has not had her disabilities of minority removed under chapter 31 of the Family Code;
3. that the minor wishes to have an abortion without notifying or obtaining consent from a parent, managing conservator, or guardian and the statutory ground or grounds on which she relies;
4. that venue is proper in the county in which the application has been filed;
5. whether the minor has retained an attorney and, if so, the attorney's name, e-mail address, mailing address, and telephone number;
6. whether the minor requests the court to appoint a particular person as her guardian ad litem; and
7. that, concerning her current pregnancy, the minor has not previously filed an application that was denied; or
8. if the minor has filed a previous application with respect to the current pregnancy that was denied, that this application is being filed in the same court that denied the previous application and that there has been a material change in circumstances since the time the previous application was denied.

Tex. Fam. Code § 33.003(c); TRJB 2.1(c)(1)(A)–(H).

§ 14.4 Verification Page

The verification page must be separate from the cover page, must be signed by the minor under oath or penalty of perjury, and must state—

1. the minor's full name, date of birth, physical address, mailing address, and telephone number;

2. the name, address, telephone number, and relationship to the minor of any person the minor requests the court to appoint as her guardian ad litem;

3. if the minor has not retained an attorney, a telephone number—whether that of the minor or someone else (such as a physician, friend, or relative)—at which the minor may be contacted immediately and confidentially until an attorney is appointed to represent her; and

4. that all information contained in the application, including both the cover page and the verification page, is true.

TRJB 2.1(c)(2).

§ 14.5 Attorney's Statement

If the minor has retained an attorney to assist her in filing an application, the attorney shall fully inform himself of the minor's prior application history, including the representations of the minor in her application regarding her address, proper venue, and whether a prior application has been filed and initiated. If an attorney assists the minor in any way in the application process, with or without payment, the attorney representing the minor must attest to the truth of the minor's claims regarding the venue and prior applications in a sworn statement accompanying the application. Tex. Fam. Code § 33.003(c)(3), (r); TRJB 2.1(c)(3).

§ 14.6 Filing Fees and Court Costs

No filing fee or court costs may be assessed against the minor for any proceeding in a trial or appellate court. Tex. Fam. Code § 33.003(n); TRJB 1.9(a). The state may be ordered to pay the reasonable and necessary fees and expenses of the attorney ad litem and the guardian ad litem, the court reporter's fee, and the trial court's filing fees and costs, which include the expenses of an interpreter and an evaluation by a licensed mental health counselor. Witness fees and expenses are not included. The court's order is directed to the Comptroller of Public Accounts and sent to the Director, Fiscal Division, Texas Department of Health. The order must be a separate document addressing only the assessment of fees, expenses, and costs. Forms 2F and 2G may be used to draft the order, and they are reproduced as part of form 14-1 in this manual. The order must be signed and sent to the Department of Health not later than the ninetieth day after the date of a final ruling. TRJB 1.9(b).

§ 14.7 Assignment of Cases; Objection to, Recusal of, and Disqualification of Judge

The rules give broad discretion in the assignment of cases. The Texas Supreme Court has made it a practice to approve local rules governing chapter 33 proceedings. Most large counties have adopted local rules or have designated a particular deputy clerk to assign cases. The rules govern assignment of cases only in jurisdictions that have not adopted local rules. Rule 2.1(b)(4) details the clerk's duties in assigning cases. *See* TRJB 2.1(b)(4).

After filing and assignment of the case to a judge, a hearing is set. Procedures for disqualification, recusal, or objection to a judge are set forth in rule 1.6. A minor who objects under section 74.053 or section 75.551 of the Government Code to a judge assigned to the proceeding may not thereafter move to recuse the judge assigned to replace that judge. A minor who moves to recuse or disqualify a judge may not thereafter object under section 74.053 or section 75.551 of the Government Code to another judge assigned to the proceeding. TRJB 1.6(d). A motion to recuse or disqualify a trial judge or an objection to the judge under section 74.053 of the Government Code must be filed before 10:00 A.M. on the first business day after the application is filed or promptly after the minor's attorney is notified of the assignment of a judge, whichever is later. A motion to recuse or disqualify an appellate judge or an objection to the judge under section 75.551 of the Government Code must be filed before 10:00 A.M. on the first business day after a notice of appeal is filed or promptly after the minor's attorney is notified of the assignment of a judge, whichever is later. A judge who chooses to withdraw voluntarily must do so immediately. A motion to disqualify or recuse or an objection to an assigned judge does not extend the deadline for ruling on the application. TRJB 1.6(a).

§ 14.8 Appointment of Ad Litems and Attorney

For a discussion of ad litems, see chapter 13 of this manual. (Note, however, that proceedings under chapter 33 of the Family Code are title 2 proceedings and thus are not specifically governed by Code chapter 107 relating to appointments in suits affecting the parent-child relationship under title 5 of the Code.)

The court shall appoint a guardian ad litem for the minor who shall represent the best interest of the minor. If the minor has not retained an attorney, the court shall appoint an attorney to represent the minor. The guardian ad litem may not also serve as the minor's

attorney ad litem. Tex. Fam. Code § 33.003(e); TRJB 2.3(a), (b). The court may appoint to serve as guardian ad litem—

1. a person who may consent to treatment for the minor under Family Code section 32.001(a)(1)–(3) (that is, a grandparent, an adult brother or sister, an adult aunt or uncle);
2. a psychiatrist or a licensed or certified psychologist;
3. an appropriate employee of the Texas Department of Family and Protective Services;
4. a member of the clergy; or
5. another appropriate person selected by the court.

Tex. Fam. Code § 33.003(f).

An attorney ad litem must represent the minor in the trial court and in any appeal to the court of appeals or the Texas Supreme Court. The attorney ad litem is not required to represent the minor in any other court or any other proceeding. TRJB 1.8. The ad litem is not obligated to represent the minor in any appeal to the United States Supreme Court or in "any other proceeding" (for example, if the minor attempts to refile in another court).

A guardian ad litem appointed under chapter 33 acting in the scope and course of the appointment is not liable for damages arising from an act or omission if acting in good faith. Immunity does not extend to conduct committed in a manner described by section 107.009(b)(1)–(3). Tex. Fam. Code § 33.006. Section 107.009 provides exceptions to the immunity of guardians ad litem appointed in suits affecting the parent-child relationship in certain circumstances. The immunity does not apply to an ad litem's action taken, recommendation made, or opinion given with conscious indifference or reckless disregard to the safety of another, in bad faith or with malice, or that was grossly negligent or willfully wrongful. *See* Tex. Fam. Code § 107.009.

The court may order the state to pay the costs of any ad litem appointed for the minor. Tex. Fam. Code § 33.007(a)(1); TRJB 1.9(b). The order is directed to the Comptroller of Public Accounts and sent to the Department of Health. It must be a separate order addressing only the subject of assessment of fees, expenses, and costs. TRJB 1.9(b). Rule 1.9 also establishes other provisions to ensure the continued confidentiality of the order.

Although there are no direct guidelines for the ad litem in chapter 33, the notes and comments to the rules indicate that the guardian ad litem should interview the minor and investigate as deemed appropriate, while protecting confidentiality, to assist the court in determining whether to grant the minor authority to consent to an abortion without notice to and consent of a parent, managing conservator, or guardian. (Nonexclusive factors the court may consider are listed in subsections (i–1) and (i–2) of section 33.003 the Family Code.) The guardian ad litem should also consider the applicability of the duties and responsibilities set forth in Family Code chapter 107 as well as whether—

1. the minor has been examined by a doctor of medicine, doctor of osteopathy, or registered nurse (who is licensed to practice in Texas) and has given the health-care provider an accurate and complete statement of her medical history;
2. the minor has been provided with information or counseling bearing on her decision to have an abortion;
3. the minor desires further counseling;
4. based on the information or counseling provided to the minor, she is able to give informed consent;
5. the minor is attending school or is or has been employed;
6. the minor has previously filed an application that was denied;
7. the minor lives with her parents;
8. the minor desires an abortion or has been threatened, intimidated, or coerced into having an abortion;
9. the pregnancy resulted from sexual assault, sexual abuse, or incest;
10. there is a history or pattern of family violence; and
11. the minor fears for her safety.

These considerations may not be relevant in every case, are not exclusive, and may not be sufficient to discharge the guardian ad litem's responsibilities in every case. Use of these factors as a basis for civil liability or as a statement of the standard of care is contrary to their intended purpose. These considerations do not alter existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct. TRJB 2 cmt. 4.

§ 14.9 Hearing—Logistics

The hearing should be held in a location that will ensure confidentiality, such as the judge's chambers or away from the courthouse. TRJB 2.4(b). The hearing must be closed to the public. Only the judge, the court reporter, other essential court personnel, the minor, her attorney, her guardian ad litem, and witnesses on the minor's behalf may be present. TRJB 2.4(c). The pregnant minor must appear before the court in person and may not appear using videoconferencing, telephone conferencing, or other remote electronic means. Tex. Fam. Code § 33.003(g–1); TRJB 1.5(d). A witness, however, may participate by such remote electronic means. TRJB 1.5(d).

The trial court should attempt to rule on the application without regard to technical defects in the application or evidence. The court may assist the minor in curing defects and presenting evidence. Affidavits of persons other than the minor are admissible. TRJB 2.4(e).

Proceedings shall be given precedence. The court is required to rule on the application and issue written findings of fact and conclusions of law not later than 5:00 P.M. on the fifth business day after the application is filed. The minor may request an extension of time, and, if requested, the court must rule and file findings not later than 5:00 P.M. on the fifth business day after the minor states she is ready to proceed to hearing. Tex. Fam. Code § 33.003(h); TRJB 2.4(a), 2.5(f). If the court fails to timely rule on an application, the application is deemed to be denied. TRJB 2.5(g). On the minor's request if the court failed to timely rule, the clerk must immediately issue a certificate to that effect, stating that the application is deemed to be denied. TRJB 2.2(g).

§ 14.10 Hearing—Evidentiary Considerations by Trial Court

The court shall determine by clear and convincing evidence whether—

1. the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to or consent of a parent, managing conservator, or guardian; or
2. the notification and attempt to obtain consent would not be in the best interests of the minor.

If the court finds *either* of these criteria, it shall enter an order authorizing the minor to consent to abortion without notification and consent. Tex. Fam. Code § 33.003(i–3); TRJB 2.5(b).

If the court finds neither of these grounds exist, the court must deny the application. Tex. Fam. Code § 33.003(j); TRJB 2.5(e)(1). If the minor does not attend the hearing and either the minor had actual knowledge of the setting or diligent attempts were made to notify the minor of the setting, the court must deny the application. TRJB 2.5(e)(2). If the court denies the application, it must inform the minor of her right to appeal and furnish her with the form for the notice of appeal. TRJB 2.5(h).

In determining whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification or consent, the court shall consider the experience, perspective, and judgment of the minor. The court may consider all relevant factors, including the minor's age; the minor's life experiences, such as working, traveling independently, or managing her own financial affairs; and steps taken by the minor to explore her options and the consequences of those options. The court may also inquire about the minor's reasons for seeking an abortion, consider the degree to which the minor is informed about specified state-published informational materials, and require the minor to be evaluated by a licensed mental health counselor. Tex. Fam. Code § 33.003(i–1).

In determining whether the notification and the attempt to obtain consent would not be in the minor's best interest, the court may inquire about the minor's reasons for not wanting to notify and obtain consent from a parent, managing conservator, or guardian; whether notification or the attempt to obtain consent may lead to physical or sexual abuse; whether the pregnancy was the result of sexual abuse by a parent, managing conservator, or guardian; and any history of physical or sexual abuse from a parent, managing conservator, or guardian. Tex. Fam. Code § 33.003(i–2).

§ 14.11 Confidentiality

The application and all other court documents, including the order and information pertaining to the proceedings, are confidential and privileged and not subject to disclosure under chapter 552 of the Texas Government Code or to discovery, subpoena, or other legal process. The court may not notify a parent, managing conservator, or guardian that the minor is pregnant or wants to have an abortion. Confidential records pertaining to the minor may be disclosed to her. Tex. Fam. Code § 33.003(k), (*l*); TRJB 1.4(a), (b).

No reference may be made in any order, decision, finding, or notice or on the record to the name of the minor, her address, or other information by which she might be identified by persons not participating in the proceeding. TRJB 1.3(b). The sole exceptions to this rule are communications from the court to ad litems notifying them of their

appointments and the verification page of the application. TRJB 1.3(b), 2.1(c)(2). The order may not be released to any person except the pregnant minor, her guardian ad litem, her attorney, the physician who is to perform the abortion, another person designated in writing by the minor to receive the order, or a governmental agency or attorney in a criminal or administrative action seeking to assert or protect the interest of the minor, or to another court, judge, or clerk in the same or related proceedings. Tex. Fam. Code § 33.003(*l*); TRJB 1.4(b).

The court clerk is to periodically submit a confidential and privileged report to the Office of Court Administration containing certain information about cases filed under chapter 33. The Office of Court Administration is to publish an annual report aggregating data about (1) the court of appeals districts in which cases have been filed and (2) the disposition of the cases. That report must protect the confidentiality of all minors and judges who are the subject of the report and the case number and style of the cases. Tex. Fam. Code § 33.003(*l*–1), (*l*–2).

A record of all testimony and other oral proceedings shall be kept. Tex. Fam. Code § 33.003(g). The court reporter's notes must be filed with other court documents in the proceeding to ensure confidentiality. TRJB 1.4(c).

Exceptions to Confidentiality: If the court, guardian ad litem, or attorney ad litem reasonably believes, based on the information obtained in the proceeding, that a violation of Texas Penal Code section 21.02, 22.011, 22.021, or 25.02 (possible sexual abuse) has occurred, a report must be made to the appropriate officials or agencies. Tex. Fam. Code § 33.009; *see* TRJB 1.4(d).

A judge or justice who has reason to believe, because of trial or appeal proceedings under chapter 33, that a minor has been or may be physically or sexually abused shall immediately report the suspected abuse and the name of the abuser to the Department of Family and Protective Services and to a local law enforcement agency and refer the minor to the department for services or intervention. The law enforcement agency and the department shall investigate the suspected abuse and, if warranted, refer the case for prosecution. Tex. Fam. Code § 33.0085; *see* TRJB 1.4(d)(1).

If a minor claims to have been physically or sexually abused or a physician or physician's agent has reason to believe that a minor has been physically or sexually abused, the physician or agent shall immediately report the suspected abuse and the name of the abuser to the Texas Department of Family and Protective Services and to a local law enforcement agency and refer the minor to the department for services or intervention.

The law enforcement agency must respond and write a report within twenty-four hours of being notified of the alleged abuse, regardless of whether the agency knows or suspects that a report about the abuse may have been previously made. When the law enforcement agency responds to the report, a law enforcement officer or appropriate agent from the department may take emergency possession of the minor without a court order. The law enforcement agency and the department shall investigate the suspected abuse and, if warranted, refer the case for prosecution. Tex. Fam. Code § 33.008.

The department or a local law enforcement agency may disclose any information obtained under Family Code sections 33.008, 33.0085, and 33.009 to the court, the guardian ad litem, and the minor's attorney without a court order (and must do so on court order). TRJB 1.4(e). Information obtained by the Department or another entity under Family Code section 33.008, 33.0085, or 33.009 is confidential except to the extent necessary to prove a violation of Penal Code section 21.02, 22.011, 22.021, or 25.02. Tex. Fam. Code § 33.010.

§ 14.12 Appeal

If a trial court denies the minor's application, the minor may appeal. The time deadlines, deemed granting of the minor's request, waiver of fees, and confidentiality provisions in the appellate court mirror those in the trial court. *See* Tex. Fam. Code § 33.004(a)–(e); TRJB 3.

There is no provision for an appeal from an order granting an application. TRJB 3 cmt. 1. Neither the Family Code nor the rules prescribe the appellate standard of review. TRJB 3 cmt. 3.

The minor may request permission to file a brief and present oral argument, but the court may decide to rule without either. TRJB 3.3(a).

The court of appeals, sitting in a three-judge panel, must issue a judgment affirming or reversing the trial court's order denying the application. The court may use parental notification form 3C but is not required to do so. TRJB 3.3(b). If the court of appeals fails to timely rule on the appeal, the trial court's judgment is deemed to be affirmed. TRJB 3.3(f).

The court of appeals may publish an opinion relating to the proceeding if it is written in a way to preserve the confidentiality of the minor's identity. Tex. Fam. Code § 33.004(c)(1); TRJB 3.3(e)(1).

An expedited confidential appeal shall be made available if the court of appeals denies an application to authorize the minor to consent to the performance of an abortion without notification to or consent of a parent, managing conservator, or guardian. Tex. Fam. Code § 33.004(f). To appeal from the court of appeals to the supreme court, the minor must simultaneously file a notice of appeal with the clerk of the supreme court, file a copy of the notice of the appeal with the clerk of the court of appeals, and notify the clerk of each court by telephone that an appeal is being taken under Family Code chapter 33. The notice of appeal must (1) be styled "In re Jane Doe," (2) state the number of the cause in the court of appeals, (3) state an intention to appeal, and (4) be signed by the minor's attorney. TRJB 4.1.

The minor may request permission to file a brief and present oral argument, but the supreme court may decide to rule without either. The court must rule as soon as possible. TRJB 4.3.

Amicus briefs may be submitted and received by a court as either a confidential, case-specific brief or a public or general brief. *See* TRJB 1.10.

§ 14.13 Written Consent Required for Physician; Emergency

The Texas Occupations Code defines prohibited practices by a physician or applicant for a license to practice medicine, including (1) performing an abortion on an unemancipated minor without the written consent of the child's parent, managing conservator, or legal guardian or without a court order, as provided in Family Code section 33.003 or 33.004, unless the abortion is necessary due to a medical emergency, as defined by section 171.002 of the Health and Safety Code and (2) otherwise performing an abortion on an unemancipated minor in violation of chapter 33 of the Family Code. *See* Tex. Occ. Code § 164.052(a)(19), (a)(20). A medical emergency is a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed. Tex. Health & Safety Code § 171.002(3).

The statute further requires the physician's licensing board to adopt forms necessary for physicians to obtain the consent required for an abortion to be performed on an unemancipated minor and requires the physician to retain the consent or any other required documentation until the later of the fifth anniversary of the date of the minor's majority or the seventh anniversary of the date the physician received or created the documentation for the record. Tex. Occ. Code § 164.052(c). The forms are published at

22 Tex. Admin. Code § 165.6(f) and are available on the Texas Medical Board's website, **www.tmb.state.tx.us**.

A physician must use due diligence to determine that any woman on whom the physician performs an abortion is of age or emancipated and report to the Department of State Health Services instances in which proof of identify and age was not obtained. *See* Tex. Fam. Code § 33.002(j)–(*l*).

§ 14.14 Civil Penalties

Civil penalties are provided for violations of the provisions of chapter 33 of the Family Code. It is not a defense to an action under those provisions that a minor gave informed and voluntary consent. *See* Tex. Fam. Code § 33.012. An unemancipated minor does not have the capacity to consent to any action that violates chapter 33. Tex. Fam. Code § 33.013.

§ 14.15 Practical Tips

Remember that Family Code chapter 33 focuses on whether a minor's parent should be notified and consent obtained, not whether the minor should be permitted to obtain an abortion. Also, check to see if your county has specific local rules.

Before Hearing: Prepare the minor to give narrative factual answers, rather than conclusions, with reference to each ground on which the application is based. For example, prepare the minor to explain all the options she has considered, persons to whom she has talked, what she has read, and other sources used to reach her decision.

At Hearing: Avoid leading and conclusory questions that require "yes" or "no" answers. The minor should express no doubt about her decision. The minor's testimony needs to be consistent and unequivocal. Have information about the minor's school performance and/or extracurricular or community activities that support the level of maturity you are asserting.

Resources: Jane's Due Process is a nonprofit organization that provides information for minors, lawyers, and health-care providers on the judicial bypass procedures. The organization may be contacted at 1-866-www-jane or on the Internet at **www.janesdueprocess.org**.

§ 14.16 Useful Websites

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

Jane's Due Process (§ 14.15)
www.janesdueprocess.org

Texas Medical Board (§ 14.13)
www.tmb.state.tx.us

Texas Rules for a Judicial Bypass of Parental Notice and Consent under Chapter 33 of the Family Code (§ 14.1)
www.txcourts.gov under the "Rules & Forms" link

Chapter 15
Collaborative Law

§ 15.1 Introduction 421
§ 15.2 Definitions 421
§ 15.3 Participation Agreement 423
§ 15.4 Beginning and Concluding Process 423
§ 15.5 Collaborative Law Cases on Different Track in Court 424
§ 15.6 Status Reports Required 424
§ 15.7 Two-Year Time Limit 425
§ 15.8 Disqualification 425
§ 15.9 Exceptions to Disqualification 426
§ 15.10 Full Disclosure of Information 426
§ 15.11 Professional Responsibility Unchanged 427
§ 15.12 Informed Consent 427
§ 15.13 Family Violence 428
§ 15.14 Confidentiality of Communications 428
§ 15.15 Privilege against Disclosure 428
§ 15.16 Limits of Privilege 429
§ 15.17 Parties Entitled to Judgment 430
§ 15.18 Joint Petitions 431
§ 15.19 Paradigm Shift 431
§ 15.20 Practice Groups 432
§ 15.21 Useful Websites 432

Chapter 15

Collaborative Law

§ 15.1 Introduction

In 2001, when sections 6.603 and 153.0072 were added to titles 1 and 5 of the Family Code, Texas became the first state in the United States to pass statutes specifically authorizing collaborative law. In May 2011, the 82nd Texas Legislature passed the Collaborative Family Law Act (CFLA), which repealed sections 6.603 and 153.0072 and which was assigned to the new title 1–A of the Texas Family Code. It became effective September 1, 2011. The CFLA includes most of the provisions of former Code sections 6.603 and 153.0072 and adds greater detail to the process and procedures of this unique process of alternative dispute resolution, originally created in 1999 by Minnesota family lawyer Stuart G. Webb.

§ 15.2 Definitions

Pauline Tesler, one of the most respected leaders of the collaborative law movement, provided a definition of collaborative law in *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 Am. J. Fam. L. 215, 219 (1999):

> Collaborative law consists of two clients and two attorneys working together toward the sole goal of reaching an efficient, fair, comprehensive settlement of all issues. Each party selects independent collaborative counsel. Each lawyer's retainer agreement specifies that the lawyer is retained solely to assist the client in reaching a fair agreement and that under no circumstances will the lawyer represent the client if the matter goes to court. If the process fails to reach agreement and either party then wishes to have matters resolved in court, both collaborative attorneys are disqualified from further representation. They assist in the orderly transfer of the case to adversarial counsel. Experts are brought into the collaborative process as needed, but only as neutrals, jointly retained by both parties. . . . The process involves binding commitments to disclose voluntarily all relevant information, to

proceed respectfully and in good faith, and to refrain from any threat of litigation during the collaborative process.

Family Code section 15.052 provides a series of definitions that clarify the provisions of the Act. A "collaborative family law communication" is a statement made by a party or nonparty participant, whether oral or in a record, or verbal or nonverbal, that is made to conduct, participate in, continue, or reconvene a collaborative family law process and occurs after the parties sign a collaborative family law participation agreement and before the collaborative family law process is concluded. Tex. Fam. Code § 15.052(1).

The "collaborative family law process" is a procedure intended to resolve a collaborative family law matter without court intervention in which parties sign a family law participation agreement and are represented by collaborative family law lawyers. Tex. Fam. Code § 15.052(4).

The Act makes it clear that collaborative law is a purely voluntary procedure. *See* Tex. Fam. Code §§ 15.102(f), 15.111(3)(b). A court may not order a party to participate in the process over that party's objection. Tex. Fam. Code § 15.102(b).

A new "team" model of collaborative law has developed in Texas, involving mental health professionals who serve as communications coaches for the clients, assisting them in effectively communicating with each other during the collaborative process, and financial professionals who assist in gathering and analyzing financial information, provide financial education, and assist the parties in developing options for dividing their assets. The team approach can also include child specialists (also mental health professionals) who can act as ombudsman for the children of the marriage. Unlike the lawyers, the additional team members are all neutrals, retained to assist the process, not the individual clients.

COMMENT: Although the Act does not require a lawyer to obtain any special training in order to represent a client in a collaborative law matter, a family attorney should not handle a case collaboratively without attending at least one collaborative law training conducted by an experienced trainer. Both the Collaborative Law Institute of Texas, Inc. (CLI-TX), a nonprofit group, and the State Bar of Texas schedule periodic trainings and seminars throughout the state. Information about available training in Texas and throughout the United States, Canada, and worldwide can be found at the website of the International Academy of Collaborative Professionals, **www.collaborativepractice.com**, and at the CLI-TX website, **https://collaborativedivorcetexas.com**. The sites also provide links to other information relevant to collaborative lawyers.

§ 15.3 Participation Agreement

At the beginning of a collaborative law case, the attorneys and parties enter into an agreement to participate in collaborative law. Family Code section 15.101 sets out the requirements for the participation agreement, which must be in writing and signed by the parties. The agreement must state the parties' intent to resolve a collaborative family law matter through a collaborative family law process, describe the nature and scope of the collaborative family law matter, identify the collaborative lawyer who represents each party in the collaborative family law process, and contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative family law process. Tex. Fam. Code § 15.101(a).

A collaborative family law participation agreement must further include provisions for suspending tribunal (court) intervention in the collaborative family law matter while the parties are using the collaborative family law process and, unless otherwise agreed in writing, jointly engaging any professionals, experts, or advisors serving in a neutral capacity. Tex. Fam. Code § 15.101(b).

To obtain the benefit of the collaborative law statute, the parties must expressly provide for "withdrawal of all counsel in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute." *In re Mabray*, 355 S.W.3d 16, 26 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding [mand. denied]).

COMMENT: Collaborative law agreements may include provisions to exchange sworn inventories, enjoin certain behaviors during the collaborative process, determine whether jointly hired experts may or may not testify if the collaborative process breaks down, and allocate the cost of the collaborative process. The agreement may be modified by mutual agreement as the collaborative process progresses, but anticipating potential problems and clarifying the ground rules at the inception of the process will help collaborative lawyers avoid potential roadblocks to a smooth collaboration.

§ 15.4 Beginning and Concluding Process

A collaborative family law process begins when the parties sign a collaborative family law participation agreement. Tex. Fam. Code § 15.102(a). It is concluded by resolution of the collaborative family law matter, as evidenced by a signed record; by resolution of part of the matter, as evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or by termination of the process in a prescribed manner. Tex. Fam. Code § 15.102(c).

The process can terminate under several different conditions: when a party gives notice to the other parties that the process has ended; when a party begins a proceeding (for example, prehearing or posthearing conferences, motions, or discovery) before the court without the agreement of all of the parties; or when, in a pending proceeding related to the matter, a party initiates a pleading, motion, or request for a conference without such agreement, initiates an order to show cause, requests that the case be put on the court's active calendar, or takes a similar action requiring that notice be sent to the parties. Tex. Fam. Code § 15.102(d)(1), (d)(2).

The process also terminates if a collaborative lawyer is discharged or withdraws from further representation of a party and is not replaced within thirty days by a successor collaborative lawyer. Tex. Fam. Code § 15.102(d)(3), (g)(1), (g)(2). A collaborative lawyer must given prompt written notice to all other parties of his discharge or withdrawal. Tex. Fam. Code § 15.102(e).

A party may terminate the collaborative process with or without cause. Tex. Fam. Code § 15.102(f).

On the engagement of a successor collaborative lawyer, the parties must reaffirm the participation agreement and amend the agreement to identify the successor collaborative lawyer, who must confirm his representation of the party in the collaborative process. Tex. Fam. Code § 15.102(g)(2). The new agreement may provide additional methods of concluding the process agreed on by the parties.

§ 15.5 Collaborative Law Cases on Different Track in Court

Parties have until thirty days before trial to notify the court that the parties are using collaborative law procedures to attempt to settle a dispute. For a period of two years after the date that the suit was filed, the court may not, until notified by a party that the collaborative law procedures did not result in a settlement, set a hearing or trial in the case, impose discovery deadlines, require compliance with scheduling orders, or dismiss the case. Tex. Fam. Code § 15.103(b).

§ 15.6 Status Reports Required

Until settlement is reached or the collaborative process is terminated, the parties are required to file periodic status reports with the presiding court. The first such report is required not later than the 180th day after the date the written agreement to use the procedures was signed or, if the proceeding was filed by agreement after the collaborative

law agreement was signed, after the date of filing. A second status report is required on or before the first anniversary of the date the written agreement to use the procedures was signed or, if the proceeding was filed by agreement after the collaborative law agreement was signed, of the date of filing, accompanied with a motion for continuance. Tex. Fam. Code § 15.103(c).

The court is required to grant the continuance if the status report indicates the desire of the parties to continue to use collaborative law procedures. Tex. Fam. Code § 15.103(d). The court shall provide parties notice and an opportunity to be heard before dismissing a proceeding based on delay or failure to prosecute in which a notice of collaborative family law process is filed. Tex. Fam. Code § 15.103(i).

COMMENT: There is no provision in the Code for sanctions if the parties fail to file the required reports. Although anecdotal evidence indicates that most collaborative law cases settle long before the second status report and request for continuance are due, the responsible practitioner would be wise to add the status report dates to his tickler system.

§ 15.7 Two-Year Time Limit

If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court has the options of setting the suit for trial on the regular docket or dismissing the suit without prejudice. Tex. Fam. Code § 15.103(e).

§ 15.8 Disqualification

One of the provisions that makes a case a collaborative one is the provision that a collaborative lawyer is disqualified, except as provided in Family Code section 15.106(d), from appearing before a tribunal to represent a party in an adversarial proceeding related to a collaborative family law matter, whether or not the collaborative lawyer is representing the party for a fee. Any lawyer in a law firm with which the collaborative lawyer is associated is also disqualified from appearing before a tribunal to represent a party in a proceeding related to that collaborative family law matter, except as provided in Code sections 15.106(d), 15.107, and 15.108. Tex. Fam. Code § 15.106(b), (c).

§ 15.9 Exceptions to Disqualification

There are exceptions to the disqualification provision in the CFLA. A collaborative lawyer may represent a collaborative client in exigent circumstances in order to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party or a family if a successor lawyer is not immediately available to represent that party. The lawyer may also represent a party to request a tribunal to approve an agreement resulting from the collaborative family law process. Tex. Fam. Code § 15.106(d). This exception does not apply after the party is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that party or family. Tex. Fam. Code § 15.106(e).

Although the collaborative lawyer may be disqualified, Code sections 15.107 and 15.108 provide exceptions for other attorneys associated with the collaborative lawyer's firm. Associated attorneys at legal aid organizations and law firms that represent clients on a pro bono basis are excepted if the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation, the collaborative family law participation agreement authorizes that representation, and the collaborative lawyer is isolated from any participation in the collaborative family law matter or a matter related to the collaborative family law matter through procedures within the law firm that are reasonably calculated to isolate the collaborative lawyer from such participation. Tex. Fam. Code § 15.107. The same exception exists when the collaborative lawyer represents the state, a political division of the state, or an agency of the state. Tex. Fam. Code § 15.108(c).

§ 15.10 Full Disclosure of Information

During the collaborative family law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party shall update promptly any previously disclosed information that has materially changed. A collaborative law agreement requiring the husband to disclose "all developments affecting . . . [his] income" reestablished a fiduciary duty on the part of the husband to update information, and he committed fraud for failing to do so. *Rawls v. Rawls*, No. 01-13-00568-CV, 2015 WL 5076283 (Tex. App.—Houston [1st Dist.] Aug. 27, 2015, no pet.) (mem. op.). The parties may, by agreement, define the scope of disclosure during the collaborative family law process. Tex. Fam. Code § 15.109.

§ 15.11 Professional Responsibility Unchanged

The CFLA does not affect the professional responsibility obligations and standards applicable to a lawyer or any other licensed professional working in the process or the obligation of a person under other law to report abuse or neglect, abandonment, or exploitation of a child or adult. Tex. Fam. Code § 15.110.

§ 15.12 Informed Consent

Before a prospective party signs a collaborative family law participation agreement, a prospective collaborative lawyer must assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative family law process is appropriate for the prospective party's matter and provide the prospective party with information that the lawyer reasonably believes is sufficient for the prospective party to make an informed decision about the material benefits and risks of a collaborative family law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, including litigation, mediation, arbitration, or expert evaluation. Tex. Fam. Code § 15.111(1), (2).

Additionally, the lawyer must inform the prospective party that, after signing an agreement, if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative family law matter, the collaborative family law process terminates; that participation in a collaborative family law process is voluntary and any party has the right to terminate unilaterally a collaborative family law process with or without cause; and that the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in an adversarial proceeding related to the collaborative family law matter, except as authorized by Code sections 15.106(d), 15.107, and 15.108. Tex. Fam. Code § 15.111(3); see discussion of the authorized exceptions at sections 15.8 and 15.9 above.

COMMENT: Ideally, all family attorneys, whether they practice collaborative law or not, should provide their clients with sufficient information about all the alternative approaches to reaching resolution of their case so they can be sufficiently informed to decide which approach makes the most sense to them. To lead clients blindly into the litigation alternative without informing them of the options available in reaching resolution seems irresponsible and dismissive of the client's right to give informed consent to the form his representation should take. *See* ABA Model Rules of Prof'l Conduct 1.4(a)(1), (a)(2) (2009).

§ 15.13 Family Violence

Before a prospective party signs a collaborative family law participation agreement in a collaborative family law matter in which another prospective party is a member of the prospective party's family or household or with whom the prospective party has or has had a dating relationship, a prospective collaborative lawyer must make reasonable inquiry regarding whether the prospective party has a history of family violence with the other prospective party. Tex. Fam. Code § 15.112(b).

If the collaborative lawyer reasonably believes that the party the lawyer represents, or the prospective party with whom the collaborative lawyer consults, as applicable, has a history of family violence with another party or prospective party, the lawyer may not begin or continue a collaborative family law process unless the party or prospective party requests beginning or continuing a process and the collaborative lawyer or prospective collaborative lawyer determines with the party or prospective party what, if any, reasonable steps could be taken to address the concerns regarding family violence. Tex. Fam. Code § 15.112(c).

§ 15.14 Confidentiality of Communications

A collaborative family law communication is confidential to the extent agreed to by the parties in a signed record or as otherwise provided by law. If the parties agree in the participation agreement or other signed record, the conduct and demeanor of the parties and nonparty participants, including their collaborative lawyers, are confidential. Additionally, if the parties agree in a signed record, communications related to the collaborative family law matter occurring before the signing of the collaborative family law participation agreement are confidential. Tex. Fam. Code § 15.113.

§ 15.15 Privilege against Disclosure

Except as provided by Family Code section 15.115, a collaborative family law communication, whether made before or after the institution of a proceeding, is privileged and not subject to disclosure and may not be used as evidence against a party or nonparty participant in a proceeding. Tex. Fam. Code § 15.114(a). Any record of a collaborative family law communication is privileged, and neither the parties nor the nonparty participants may be required to testify in a proceeding related to or arising out of the collaborative family law matter or be subject to a process requiring disclosure of privileged information or data related to the collaborative matter. Tex. Fam. Code § 15.114(b). An oral communication or written material used in or made a part of a collaborative family

law process is admissible or discoverable if it is admissible or discoverable independent of the collaborative family law process. Tex. Fam. Code § 15.114(c).

If these provisions regarding privilege conflict with other legal requirements for disclosure of communications, records, or materials, the issue of privilege may be presented to the court to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure. The presentation of the issue of privilege to the court does not constitute a termination of the collaborative family law process under Code section 15.102(d)(2)(B). Tex. Fam. Code § 15.114(d).

A party or nonparty participant may disclose privileged collaborative family law communications to a party's successor counsel, subject to the terms of confidentiality in the collaborative family law participation agreement, and those disclosures remain privileged. Tex. Fam. Code § 15.114(e).

A person who makes a disclosure or representation about a collaborative family law communication that prejudices the rights of a party or nonparty participant in a proceeding may not assert a privilege under Code section 15.114. This restriction applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation. Tex. Fam. Code § 15.114(f).

§ 15.16 Limits of Privilege

The privilege prescribed by Code section 15.114 (described in section 15.15 above) does not apply to a collaborative family law communication that is (1) in an agreement resulting from the collaborative family law process, evidenced in a record signed by all parties to the agreement; (2) subject to an express waiver of the privilege in a record or orally during a proceeding if the waiver is made by all parties and nonparty participants; (3) available to the public under chapter 552 of the Texas Government Code or made during a session of a collaborative family law process that is open, or is required by law to be open, to the public; (4) a threat or statement of a plan to inflict bodily injury or commit a crime of violence; or (5) a disclosure of a plan to commit or attempt to commit a crime or conceal an ongoing crime or ongoing criminal activity. Tex. Fam. Code § 15.115(a)(1)–(5).

The privilege also does not apply to disclosures in a report of suspected abuse or neglect of a child to an appropriate agency or in a proceeding regarding abuse or neglect of a child (Code section 15.115(a)(6)(A) allows for attorney-client privilege in

child abuse cases subject to subchapter C of Code chapter 261) or in a report of abuse, neglect, or exploitation of an elderly or disabled person to an appropriate agency. Tex. Fam. Code § 15.115(a)(6).

The privilege also does not apply when the communication is sought or offered to prove or disprove (1) a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative family law process; (2) an allegation that the settlement agreement was procured by fraud, duress, coercion, or other dishonest means or that terms of the settlement agreement are illegal; (3) the necessity and reasonableness of attorney's fees and related expenses incurred during a collaborative family law process or to challenge or defend the enforceability of the collaborative family law settlement agreement; or (4) a claim against a third person who did not participate in the collaborative family law process. Tex. Fam. Code § 15.115(a)(7).

Only the part of the communication necessary for the application of the exception may be disclosed or admitted. Tex. Fam. Code § 15.115(b). The disclosure or admission of evidence excepted from the privilege does not make the evidence or any other collaborative family law communication discoverable or admissible for any other purpose. Tex. Fam. Code § 15.115(c).

§ 15.17 Parties Entitled to Judgment

A collaborative family law settlement agreement is enforceable in the same manner as a written settlement agreement under section 154.071 of the Texas Civil Practice and Remedies Code. A party is entitled to judgment on a collaborative family law settlement agreement if the agreement provides in a prominently displayed statement that is bold-faced, capitalized, or underlined that the agreement is not subject to revocation and is signed by each party to the agreement and the collaborative lawyer of each party. Tex. Fam. Code § 15.105.

COMMENT: It would be unusual for an interim collaborative law agreement with such warnings to be filed with the court. The better practice is for an agreed decree to be prepared, signed, and proved up in an uncontested hearing. If such an agreement were filed and one of the parties had a change of heart, the collaborative attorneys could not represent either party if the other party wanted to enter a decree based on the collaborative law settlement agreement but would instead have to terminate the collaborative process, withdraw, and send their clients on to litigation counsel.

§ 15.18 Joint Petitions

Some jurisdictions will permit the parties to file a joint petition for divorce. If this is the case, before filing, the parties should establish which name appears first in the caption because, in the event the collaborative process breaks down, many court clerks will designate the first named person as the petitioner and the second named person as the respondent.

§ 15.19 Paradigm Shift

The collaborative process requires the practitioner to make a radical paradigm shift in the way representation is viewed and conducted.

> The process moves forward via carefully managed four-way settlement meetings, preceded by considerable groundwork between lawyer and client, and between lawyer and lawyer. The lawyer's job is challenging: In addition to the usual identification, investigation, and development of issues and proposals for settlement, the lawyer must work with the client and the other lawyer to anticipate and manage conflict and to guide the negotiation process. The lawyer also must encourage the client to take a considered and broad view in setting goals and priorities and must teach the client how to use interest-based, rather than positional bargaining.

Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 Am. J. Fam. L. 215, 219–20 (1999).

COMMENT: Because the process entails cooperation between lawyers rather than an arm's-length, adversarial approach, some lawyers fear that collaborative law poses ethical problems. For others, it is just another form of alternative dispute resolution, offering an opportunity to avoid the sometimes emotionally taxing and often outrageously expensive traditional adversarial approach. Despite the fact that there has not been one recorded malpractice case or grievance filed against an attorney in a collaborative case in the United States, many attorneys agonize over what they perceive to be the ethical challenges of collaborative law. Some found relief when the American Bar Association found it to be ethical (ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 447 (2007)), and Texas gave the practice its tacit blessing when it passed the earlier collaborative law statutes. Passage of the CFLA should give additional comfort to those lawyers who have lingering doubts.

§ 15.20 Practice Groups

The practice of collaborative law is unique in that practice groups of unaffiliated lawyers have been formed. These groups pool their resources for mutual support, continuing education, peer evaluation, and marketing collaborative law and other individual services to the public. A number of Texas practice groups are listed at section 15.21 below. A listing of groups throughout the United States and Canada can also be found at the IACP website, **www.collaborativepractice.com**.

§ 15.21 Useful Websites

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

General:

Collaborative Law Institute of Texas, Inc. (§ 15.2)
https://collaborativedivorcetexas.com

Cutting Edge Law
www.cuttingedgelaw.com

International Academy of Collaborative Professionals (§ 15.2)
www.collaborativepractice.com

Renaissance Lawyer Society
www.renaissancelawyer.org

Texas Bar CLE
www.texasbarcle.com

Texas Practice Groups:

Collaborative Divorce Collin County
https://collaborativedivorce-collincounty.com

Collaborative Divorce Denton County
https://collaborativedivorcedentoncounty.org

Collaborative Divorce Dallas
https://collaborativedivorcedallas.net

Collaborative Divorce Austin
www.collaborativedivorceaustin.com

Collaborative Divorce Houston
https://collaborativedivorcehouston.com

Collaborative Divorce San Antonio
https://collaborativedivorcesanantonio.com

Collaborative Divorce Texas
https://collaborativedivorcetexas.com

Chapter 16

Parenting Plans, Parenting Coordinators, and Parenting Facilitators

I. Parenting Plans

§ 16.1 Parenting Plans Generally 437
§ 16.2 No Temporary Parenting Plan Requirement 437
§ 16.3 Final Parenting Plan Requirement 437
§ 16.4 Exception to Dispute Resolution Process Requirement. 438
§ 16.5 Agreed Parenting Plan 438
§ 16.6 Parenting Plan for Joint Managing Conservatorship 439

II. Parenting Coordinators

§ 16.21 Parenting Coordinators Generally 440
§ 16.22 Appointment of Parenting Coordinator 440
§ 16.23 Duties of Parenting Coordinator 441
§ 16.24 Removal of Parenting Coordinator 442
§ 16.25 Report of Parenting Coordinator 442
§ 16.26 Compensation of Parenting Coordinator 443
§ 16.27 Qualifications of Parenting Coordinator 443
§ 16.28 Report of Joint Proposal or Statement of Intent; Agreements and Recommendations. 444

III. Parenting Facilitators

§ 16.41 Parenting Facilitators Generally 444
§ 16.42 Appointment of Parenting Facilitator 445
§ 16.43 Duties of Parenting Facilitator. 445
§ 16.44 Removal of Parenting Facilitator. 446
§ 16.45 Report of Parenting Facilitator. 446
§ 16.46 Compensation of Parenting Facilitator 447
§ 16.47 Qualifications of Parenting Facilitator. 447

§ 16.48 Conflicts of Interest and Bias of Parenting Facilitator 448
§ 16.49 Communications and Recordkeeping of Parenting Facilitator 449
§ 16.50 Report of Joint Proposal or Statement of Intent; Agreements and Recommendations 450

Chapter 16

Parenting Plans, Parenting Coordinators, and Parenting Facilitators

I. Parenting Plans

§ 16.1 Parenting Plans Generally

A parenting plan is the provisions of a final court order that set out rights and duties of a parent or a person acting as a parent in relation to a child, provide for periods of possession of and access to the child, provide for child support, and optimize the development of a close and continuing relationship between each parent and the child. Tex. Fam. Code § 153.601(4).

Requirements in the Family Code related to parenting plans do not apply to a proceeding in a title IV-D case relating to the determination of parentage or establishment, modification, or enforcement of a child support, medical support, or dental support obligation. Tex. Fam. Code § 153.611.

§ 16.2 No Temporary Parenting Plan Requirement

A temporary order in a suit affecting the parent-child relationship rendered in accordance with Family Code section 105.001 is not required to include a temporary plan, and the court may not require the submission of a temporary parenting plan in any case or by local rule or practice. Tex. Fam. Code § 153.602.

§ 16.3 Final Parenting Plan Requirement

With few exceptions, a final order in a suit affecting the parent-child relationship must include a parenting plan. Tex. Fam. Code § 153.603(a). These orders are not required to include a parenting plan: an order that only modifies child support, an order that only

terminates parental rights, and a final order described by Family Code section 155.001(b). Tex. Fam. Code § 153.603(b).

If the parties have not reached agreement on a final parenting plan on or before the thirtieth day before the date set for trial on the merits, a party may file with the court and serve a proposed parenting plan. Tex. Fam. Code § 153.603(c).

These provisions do not preclude the parties from requesting the appointment of a parenting coordinator to resolve parental conflicts. Tex. Fam. Code § 153.603(d).

§ 16.4 Exception to Dispute Resolution Process Requirement

A requirement in a parenting plan that a party initiate or participate in a dispute resolution process before filing a court action does not apply to an action to modify the parenting plan in an emergency, an action to modify child support, an action alleging that the child's present circumstances will significantly impair the child's physical health or significantly impair the child's emotional development, an action to enforce, or an action in which the party shows that enforcement of the requirement is precluded or limited by Family Code section 153.0071. Tex. Fam. Code § 153.6031.

A dispute resolution process is a process of alternative dispute resolution conducted in accordance with Family Code section 153.0071 (mediation and arbitration) and chapter 154 of the Texas Civil Practice and Remedies Code or any other method of voluntary dispute resolution. Tex. Fam. Code § 153.601(1); *see* Tex. Fam. Code § 153.0071; Tex. Civ. Prac. & Rem. Code ch. 154.

§ 16.5 Agreed Parenting Plan

To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreed parenting plan containing provisions for conservatorship and possession of the child and for modification of the parenting plan, including variations from the standard possession order. If the court finds that the agreed parenting plan is in the child's best interest, the court shall render an order in accordance with the parenting plan. Terms of the agreed parenting plan contained in the order or incorporated by reference regarding conservatorship or support of or access to a child in an order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as a contract. If the court finds the agreed parenting plan is not in the child's best interest, the court may request the parties to submit a revised parenting plan. If the parties do not submit a revised parenting plan satisfactory

to the court, the court may, after notice and hearing, order a parenting plan that the court finds to be in the child's best interest. Tex. Fam. Code § 153.007.

§ 16.6 Parenting Plan for Joint Managing Conservatorship

If a written agreed parenting plan is filed with the court, the court shall render an order appointing the parents as joint managing conservators only if the parenting plan designates the conservator who has the exclusive right to designate the primary residence of the child and establishes, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence or specifies that the conservator may designate the child's primary residence without regard to geographic location. The parenting plan must also specify the rights and duties of each parent regarding the child's physical care, support, and education; include provisions to minimize disruption of the child's education, daily routine, and association with friends; allocate between the parents—independently, jointly, or exclusively—all of the remaining rights and duties of a parent provided by Family Code chapter 151; be voluntarily and knowingly made by each parent and not have been repudiated by either parent at the time the order is rendered; and be in the best interest of the child. Tex. Fam. Code § 153.133(a).

The agreed parenting plan may contain an alternative dispute resolution procedure that the parties agree to use before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency. Tex. Fam. Code § 153.133(b).

Notwithstanding the requirement that the parenting plan designate the conservator who has the exclusive right to designate the child's primary residence, the court shall render an order adopting the provisions of a written agreed parenting plan appointing the parents joint managing conservators if the parenting plan meets all the other requirements above and provides that the child's primary residence shall be within a specified geographic area. Tex. Fam. Code § 153.133(c).

If a written agreed parenting plan is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors: (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators; (2) the parents' ability to give first priority to the welfare of the child and reach shared decisions in the child's best interest; (3) whether each parent can encourage and accept a positive relationship between the

child and the other parent; (4) whether both parents participated in child rearing before the filing of the suit; (5) the geographical proximity of the parents' residences; (6) if the child is twelve years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and (7) any other relevant factor. Tex. Fam. Code § 153.134(a).

[Sections 16.7 through 16.20 are reserved for expansion.]

II. Parenting Coordinators

§ 16.21 Parenting Coordinators Generally

A parenting coordinator is an impartial third party who performs any function described by Family Code section 153.606 and who is appointed under subchapter K of chapter 153 of the Code ("subchapter K") by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through confidential procedures and is not appointed under another statute or a rule of civil procedure. Tex. Fam. Code § 153.601(3).

Provisions in the Family Code related to parenting coordinators do not apply to a proceeding in a title IV-D case relating to the determination of parentage or establishment, modification, or enforcement of a child support, medical support, or dental support obligation. Tex. Fam. Code § 153.611.

The provisions for confidentiality of alternative dispute resolution procedures under chapter 154 of the Texas Civil Practice and Remedies Code apply equally to the work of a parenting coordinator and to the parties and any other person who participates in the parenting coordination. This confidentiality provision does not affect a person's duty to report abuse or neglect under Family Code section 261.101. Tex. Fam. Code § 153.0071(g).

§ 16.22 Appointment of Parenting Coordinator

In a suit affecting the parent-child relationship, the court may, on its own motion or on a motion or agreement of the parties, appoint a parenting coordinator or assign a domestic relations office to appoint an employee or other person to serve as a parenting coordinator. Tex. Fam. Code § 153.605(a).

The court may not appoint a parenting coordinator unless, after notice and hearing, the court makes a specific finding that (1) the case is a high-conflict case or there is good cause shown for the appointment of a parenting coordinator and the appointment is in the best interest of any minor child in the suit and (2) the person appointed has the minimum qualifications required by Family Code section 153.610, as documented by the person, unless the court has waived those requirements with the agreement of the parties in accordance with Family Code section 153.610(c). Tex. Fam. Code § 153.605(b). A "high-conflict case" is a suit affecting the parent-child relationship in which the court finds that the parties have demonstrated an unusual degree of repetitiously resorting to the adjucative process, of anger and distrust, and of difficulty in communicating about and cooperating in the care of their children. Tex. Fam. Code § 153.601(2).

However, a party may at any time file a written objection to the appointment of a parenting coordinator on the basis that family violence has been committed by another party against the objecting party or against a child who is the subject of the suit. After an objection is filed, a parenting coordinator may not be appointed unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If a parenting coordinator is appointed, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order may provide that the parties not be required to have face-to-face contact and that they be placed in separate rooms during the parenting coordination. Tex. Fam. Code § 153.605(c).

An individual appointed as a parenting coordinator may not serve in any nonconfidential capacity in the same case, including serving as an amicus attorney; guardian ad litem; child custody or adoption evaluator; friend of the court; or parenting facilitator. Tex. Fam. Code § 153.605(d).

§ 16.23 Duties of Parenting Coordinator

The court must specify the duties of a parenting coordinator in the order appointing the parenting coordinator. Those duties are limited to matters that will aid the parties in identifying disputed issues; reducing misunderstandings; clarifying priorities; exploring possibilities for problem solving; developing methods of collaboration in parenting; understanding parenting plans and reaching agreements about parenting issues to be included in a parenting plan; complying with the court's order regarding conservatorship or possession of and access to the child; implementing parenting plans; obtaining training regarding problem solving, conflict management, and parenting skills; and set-

tling disputes regarding parenting issues and reaching a proposed joint resolution or statement of intent regarding those disputes. Tex. Fam. Code § 153.606(a).

The appointment of a parenting coordinator does not divest the court of its exclusive jurisdiction to determine issues of conservatorship, support, and possession of and access to the child or of its authority to exercise management and control of the suit. Tex. Fam. Code § 153.606(b).

The parenting coordinator may not modify any order, judgment, or decree. Tex. Fam. Code § 153.606(c).

Meetings between the parenting coordinator and the parties may be informal and are not required to follow any specific procedures unless otherwise provided by subchapter K. Tex. Fam. Code § 153.606(d).

A parenting coordinator must comply with the Ethical Guidelines for Mediators as adopted by the Supreme Court of Texas (Misc. Docket No. 05–9107, June 13, 2005). On request by the court, the parties, or the parties' attorneys, the parenting coordinator must sign a statement of agreement to comply with those guidelines and submit the statement to the court on acceptance of the appointment. A failure to comply with the guidelines is grounds for removal of the parenting coordinator. Tex. Fam. Code § 153.606(f).

§ 16.24 Removal of Parenting Coordinator

If a parenting coordinator's services have been conducted as provided by subchapter K and the Ethical Guidelines for Mediators, there is a rebuttable presumption that the parenting coordinator is acting in good faith. The court may remove the parenting coordinator in the court's discretion. The court must remove the parenting coordinator on the request and agreement of all parties; on the request of the parenting coordinator; if good cause is shown, on the motion of a party; or if the parenting coordinator ceases to satisfy the minimum qualifications required by Family Code section 153.610. Tex. Fam. Code § 153.607.

§ 16.25 Report of Parenting Coordinator

A parenting coordinator must submit a written report to the court and to the parties as often as ordered by the court. The report must be limited to a statement of whether the parenting coordination should continue. Tex. Fam. Code § 153.608.

§ 16.26 Compensation of Parenting Coordinator

A court may not appoint a parenting coordinator other than a domestic relations office or a comparable county agency or a volunteer unless, after notice and hearing, the court finds that the parties have the means to pay the fees of the parenting coordinator. Any fees of a parenting coordinator appointed under this provision shall be allocated between the parties as determined by the court. Public funds may not be used to pay the fees of a parenting coordinator, although the court may appoint the domestic relations office or a comparable county agency if personnel are available to serve that function. If due to hardship the parties are unable to pay the fees of a parenting coordinator and a domestic relations office or a comparable county agency is not available, the court, if feasible, may appoint a person, including a court employee, who meets the minimum qualifications prescribed by Family Code section 153.610 to act as a parenting coordinator on a volunteer basis and without compensation. Tex. Fam. Code § 153.609.

§ 16.27 Qualifications of Parenting Coordinator

The court shall determine the required qualifications of a parenting coordinator, provided that a parenting coordinator must have experience working in a field relating to families, have practical experience with high-conflict cases or litigation between parents, and (1) hold at least a bachelor's degree in counseling, education, family studies, psychology, or social work or a graduate degree in a mental health profession, with an emphasis in family and children's issues or (2) be licensed in good standing as an attorney in Texas. Tex. Fam. Code § 153.610(a).

In addition, a parenting coordinator must complete at least eight hours of family violence dynamics training provided by a family violence service provider; forty classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court; and twenty-four classroom hours of training in the fields of family dynamics, child development, family law and the law governing parenting coordination, and parenting coordination styles and procedures. Tex. Fam. Code § 153.610(b).

In appropriate circumstances, a court may, with the agreement of the parties, appoint a person as parenting coordinator who does not satisfy the stated requirements other than the family violence dynamics training requirement if the court finds that the person has sufficient legal or other professional training or experience in dispute resolution processes to serve as a parenting coordinator. Tex. Fam. Code § 153.610(c).

The actions of a parenting coordinator who is not an attorney do not constitute the practice of law. Tex. Fam. Code § 153.610(d).

§ 16.28 Report of Joint Proposal or Statement of Intent; Agreements and Recommendations

If the court has ordered the parties to attempt to settle parenting issues with the assistance of a parenting coordinator and to attempt to reach a proposed joint resolution or statement of intent regarding the dispute, the parenting coordinator must submit a written report describing the parties' joint proposal or statement to the parties, any attorneys for the parties, and any attorney for the child who is the subject of the suit. Tex. Fam. Code § 153.6082(a).

The proposed joint resolution or statement of intent is not an agreement unless the resolution or statement is (1) prepared by the parties' attorneys, if any, in a form that meets the applicable requirements of rule 11 of the Texas Rules of Civil Procedure, a mediated settlement agreement described by Family Code section 153.0071, a collaborative law agreement described by Family Code section 153.0072, a settlement agreement described by section 154.071 of the Civil Practice and Remedies Code, or a proposed court order and (2) incorporated into an order signed by the court. A parenting coordinator may not draft the resolution or statement. Tex. Fam. Code § 153.6082(b), (c).

The actions of a parenting coordinator in this process do not constitute the practice of law. Tex. Fam. Code § 153.6082(d).

[Sections 16.29 through 16.40 are reserved for expansion.]

III. Parenting Facilitators

§ 16.41 Parenting Facilitators Generally

A parenting facilitator is an impartial third party who performs any function described by Family Code section 153.6061 and who is appointed under subchapter K of chapter 153 of the Family Code ("subchapter K") by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through procedures that are not confidential and is not appointed under another statute or a rule of civil procedure. Tex. Fam. Code § 153.601(3–a).

Provisions in the Family Code related to parenting facilitators do not apply to a proceeding in a title IV-D case relating to the determination of parentage or establishment, modification, or enforcement of a child support, medical support, or dental support obligation. Tex. Fam. Code § 153.611.

§ 16.42 Appointment of Parenting Facilitator

In a suit affecting the parent-child relationship, the court may, on its own motion or on a motion or agreement of the parties, appoint a parenting facilitator or assign a domestic relations office to appoint an employee or other person to serve as a parenting facilitator. Tex. Fam. Code § 153.6051(a).

The court may not appoint a parenting facilitator unless, after notice and hearing, the court makes a specific finding that (1) the case is a high-conflict case or there is good cause shown for the appointment of a parenting facilitator and the appointment is in the best interest of any minor child in the suit and (2) the person appointed has the minimum qualifications required by Family Code section 153.6101, as documented by the person. Tex. Fam. Code § 153.6051(b). A "highconflict case" is a suit affecting the parent-child relationship in which the court finds that the parties have demonstrated an unusual degree of repetitiously resorting to the adjucative process, of anger and distrust, and of difficulty in communicating about and cooperating in the care of their children. Tex. Fam. Code § 153.601(2).

However, a party may at any time file a written objection to the appointment of a parenting facilitator on the basis that family violence has been committed by another party against the objecting party or against a child who is the subject of the suit. After an objection is filed, a parenting facilitator may not be appointed unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If a parenting facilitator is appointed, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order may provide that the parties not be required to have face-to-face contact and that they be placed in separate rooms during the parenting facilitation. Tex. Fam. Code § 153.6051(c).

§ 16.43 Duties of Parenting Facilitator

The court must specify the duties of a parenting facilitator in the order appointing the parenting facilitator. Those duties are limited to matters that will aid the parties in identifying disputed issues; reducing misunderstandings; clarifying priorities; exploring

possibilities for problem solving; developing methods of collaboration in parenting; understanding parenting plans and reaching agreements about parenting issues to be included in a parenting plan; complying with the court's order regarding conservatorship or possession of and access to the child; implementing parenting plans; obtaining training regarding problem solving, conflict management, and parenting skills; settling disputes regarding parenting issues and reaching a proposed joint resolution or statement of intent regarding those disputes; and monitoring compliance with court orders. In performing the duties, the parenting facilitator must comply with the standard of care that applies to the professional license the parenting facilitator holds. Tex. Fam. Code § 153.6061(a), (b); *see* Tex. Fam. Code § 153.606(a).

The appointment of a parenting facilitator does not divest the court of its exclusive jurisdiction to determine issues of conservatorship, support, and possession of and access to the child or of its authority to exercise management and control of the suit. Tex. Fam. Code § 153.6061(c).

The parenting facilitator may not modify any order, judgment, or decree. Tex. Fam. Code § 153.6061(d).

Meetings between the parenting facilitator and the parties may be informal and are not required to follow any specific procedures unless otherwise provided by subchapter K or the standards or practice of the parenting facilitator's professional license. Tex. Fam. Code § 153.6061(e).

§ 16.44 Removal of Parenting Facilitator

If a parenting facilitator's services have been conducted as provided by subchapter K and the standard of care that applies to the parenting facilitator's professional license, there is a rebuttable presumption that the parenting facilitator is acting in good faith. The court may remove the parenting facilitator in the court's discretion. The court must remove the parenting facilitator on the request and agreement of all parties; on the request of the parenting facilitator; if good cause is shown, on the motion of a party; or if the parenting facilitator ceases to satisfy the minimum qualifications required by Family Code section 153.6101. Tex. Fam. Code § 153.6071.

§ 16.45 Report of Parenting Facilitator

A parenting facilitator must submit a written report to the court and to the parties as often as the court orders. The report may include a recommendation described by Fam-

ily Code section 153.6082(e) (to implement or clarify an existing court order) and any other information the court requires, but it may not include recommendations regarding conservatorship of, possession of, or access to the child. Tex. Fam. Code § 153.6081.

§ 16.46 Compensation of Parenting Facilitator

A court may not appoint a parenting facilitator other than a domestic relations office or a comparable county agency or a volunteer unless, after notice and hearing, the court finds that the parties have the means to pay the fees of the parenting facilitator. Any fees of a parenting facilitator appointed under this provision shall be allocated between the parties as determined by the court. Public funds may not be used to pay the fees of a parenting facilitator, although the court may appoint the domestic relations office or a comparable county agency if personnel are available to serve that function. If due to hardship the parties are unable to pay the fees of a parenting facilitator and a domestic relations office or a comparable county agency is not available, the court, if feasible, may appoint a person, including a court employee, who meets the minimum qualifications prescribed by Family Code section 153.6101 to act as a parenting facilitator on a volunteer basis and without compensation. Tex. Fam. Code §§ 153.609, 153.6091.

§ 16.47 Qualifications of Parenting Facilitator

A parenting facilitator must hold a license to practice in Texas as a social worker, licensed professional counselor, licensed marriage and family therapist, psychologist, or attorney. A parenting facilitator must also have completed at least eight hours of family violence dynamics training provided by a family violence service provider; forty classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court; twenty-four classroom hours of training in the fields of family dynamics, child development, and family law; and sixteen hours of training in the laws governing parenting coordination and parenting facilitation and the multiple styles and procedures used in different models of service. Tex. Fam. Code § 153.6101(b).

The court must determine whether the qualifications of a proposed parenting facilitator satisfy these requirements. On request by a party, an attorney for a party, or any attorney for a child who is the subject of the suit, a person under consideration for appointment as a parenting facilitator must provide proof that the person satisfies the required minimum qualifications. Tex. Fam. Code § 153.6101(a).

The actions of a parenting facilitator who is not an attorney do not constitute the practice of law. Tex. Fam. Code § 153.6101(c).

§ 16.48 Conflicts of Interest and Bias of Parenting Facilitator

Before being appointed as parenting facilitator in a suit, a person who has a conflict of interest with, or previous knowledge of, a party or a child who is the subject of a suit must disclose the conflict or previous knowledge to the court, each attorney for a party, any attorney for a child, and any party who does not have an attorney. Unless, after the disclosure, the parties and the child's attorney, if any, agree in writing to the person's appointment as parenting facilitator, the person must decline appointment. Tex. Fam. Code § 153.6102(a).

A parenting facilitator who, after being appointed in a suit, discovers that the parenting facilitator has a conflict of interest with, or previous knowledge of, a party or a child who is the subject of the suit must immediately disclose the conflict or previous knowledge to the court, each attorney for a party, any attorney for a child, and any party who does not have an attorney. Unless, after the disclosure, the parties and the child's attorney, if any, agree in writing to the person's continuation as parenting facilitator, the person must withdraw. Tex. Fam. Code § 153.6102(b).

Before accepting appointment in a suit, a parenting facilitator must disclose to the court, each attorney for a party, any attorney for a child who is the subject of the suit, and any party who does not have an attorney a pecuniary relationship with an attorney, party, or child in the suit; a relationship of confidence or trust with an attorney, party, or child in the suit; and other information regarding any relationship with an attorney, party, or child in the suit that might reasonably affect the ability of the person to act impartially during the person's service as parenting facilitator. Unless, after the disclosure, the parties and the child's attorney, if any, agree in writing to the person's service as parenting facilitator in the suit, the person must decline appointment. Tex. Fam. Code § 153.6102(c), (d).

A parenting facilitator may not serve in any other professional capacity at any other time with any person who is a party to, or the subject of, the suit in which the person serves as parenting facilitator, or with any member of the family of a party or subject. A person who, before appointment as a parenting facilitator in a suit, served in any other professional capacity with a person who is a party to, or subject of, the suit, or with any member of the family of a party or subject, may not serve as parenting facilitator in a suit involving any family member who is a party to or subject of the suit. These provi-

sions do not apply to a person whose only other service in a professional capacity with a family or any member of a family that is a party to or the subject of a suit to which this provision applies is as a teacher of coparenting skills in a class conducted in a group setting. The definition of the term *family* in Family Code section 71.003 applies in these provisions. Tex. Fam. Code § 153.6102(e); *see* Tex. Fam. Code § 71.003.

A parenting facilitator must promptly and simultaneously disclose to each party's attorney, any attorney for a child who is a subject of the suit, and any party who does not have an attorney the existence and substance of any communication between the parenting facilitator and another person, including a party, a party's attorney, a child who is the subject of the suit, and any attorney for a child who is the subject of the suit, if the communication occurred outside a parenting facilitator session and involved the substance of parenting facilitation. Tex. Fam. Code § 153.6102(f).

§ 16.49 Communications and Recordkeeping of Parenting Facilitator

A communication made by a participant in parenting facilitation is subject to disclosure and may be offered in any judicial or administrative proceeding, if otherwise admissible under the rules of evidence, regardless of any rule, standard of care, or privilege applicable to the parenting facilitator's professional license. The parenting facilitator may be required to testify in any proceeding relating to or arising from the duties of the parenting facilitator, including as to the basis for any recommendation made to the parties that arises from the duties of the parenting facilitator. Tex. Fam. Code § 153.6083(a). However, it is not error for a court to exclude testimony at trial regarding the facilitator's recommendation regarding conservatorship and possession, as such a recommendation is statutorily prohibited. *Gadekar v. Zankar*, No. 12-16-00209-CV, 2018 WL 2440393 at *3–4 (Tex. App.—Tyler May 31, 2018, no pet.) (mem. op.).

A parenting facilitator must keep a detailed record about meetings and contacts with the parties, attorneys, or other persons involved in the suit. A person who participates in parenting facilitation is not a patient as d efined by section 611.001 of the Health and Safety Code, and no record created as part of the parenting facilitation that arises from the parenting facilitator's duties is confidential. On request, the parenting facilitator must make records of parenting facilitation available to an attorney for a party, an attorney for a child who is the subject of the suit, and a party who does not have an attorney. Tex. Fam. Code § 153.6083(b)–(d).

A parenting facilitator must keep parenting facilitation records from the suit until the seventh anniversary of the date the facilitator's services are terminated, unless the

licensing authority that issues the parenting facilitator's professional license establishes a different period. Tex. Fam. Code § 153.6083(e).

§ 16.50 Report of Joint Proposal or Statement of Intent; Agreements and Recommendations

If the court has ordered the parties to attempt to settle parenting issues with the assistance of a parenting facilitator and to attempt to reach a proposed joint resolution or statement of intent regarding the dispute, the parenting facilitator must submit a written report describing the parties' joint proposal or statement to the parties, any attorneys for the parties, and any attorney for the child who is the subject of the suit. Tex. Fam. Code § 153.6082(a).

The proposed joint resolution or statement of intent is not an agreement unless the resolution or statement (1) is prepared by the parties' attorneys, if any, in a form that meets the applicable requirements of rule 11 of the Texas Rules of Civil Procedure, a mediated settlement agreement described by Family Code section 153.0071, a collaborative law agreement described by Family Code section 153.0072, a settlement agreement described by section 154.071 of the Civil Practice and Remedies Code, or a proposed court order and (2) is incorporated into an order signed by the court. A parenting facilitator may not draft the resolution or statement. Tex. Fam. Code § 153.6082(b), (c).

The actions of a parenting facilitator in this process do not constitute the practice of law. Tex. Fam. Code § 153.6082(d).

If the court has ordered the parties to attempt to settle parenting issues with the assistance of a parenting facilitator and the parties are unable to settle those issues, the parenting facilitator may make recommendations, other than recommendations regarding the conservatorship or possession of or access to the child, to the parties and attorneys to implement or clarify provisions of an existing court order that are consistent with the substantive intent of the court order and in the best interest of the child who is the subject of the suit. Such a recommendation does not affect the terms of an existing court order. Tex. Fam. Code § 153.6082(e).

Chapter 17

Protective Orders

§ 17.1	Introduction	453
§ 17.2	Caption	454
§ 17.3	Relationship between Protective Order and Other Suits	455
§ 17.4	Venue	457
§ 17.5	Contents of Application	458
§ 17.6	Temporary Orders and Extraordinary Relief	459
§ 17.7	Court	463
§ 17.8	Applicant	463
§ 17.9	Fees and Costs	464
§ 17.10	Notice, Hearing, and Evidence	464
§ 17.11	Answer	466
§ 17.12	Findings and Orders	466
§ 17.13	Confidentiality of Certain Information	470
§ 17.14	Agreed Orders	471
§ 17.15	Modification of Orders	471
§ 17.16	Appeal of Protective Orders	472
§ 17.17	Remedies for Violations of Protective Orders or Conditions of Bond	473
§ 17.18	Counseling	474
§ 17.19	Request by Respondent for Protective Order	475
§ 17.20	Copies of Orders	476
§ 17.21	Duration of Protective Orders	477
§ 17.22	Duties of Law Enforcement Officers	479
§ 17.23	Protective Order Registry	480
§ 17.24	Right to Terminate Lease Early	481
§ 17.25	Right to Separate Wireless Telephone Service Account	482

§ 17.26 Related Laws 483
§ 17.27 Protective Orders from Other Jurisdictions 486
§ 17.28 Self-Help Protective Order Kit 487
§ 17.29 Useful Websites 488

Chapter 17

Protective Orders

§ 17.1 Introduction

The provisions for a protective order in title 4 of the Texas Family Code provide broad relief for a variety of people in a wide variety of circumstances. Title 4 provides emergency assistance to abused spouses and other family members, as well as victims of "dating violence." Although much of the relief provided by title 4 is available under title 5, title 4 provides some specialized relief that is not included in title 5, such as the twenty-day duration for an immediate ex parte order and extended protection and relief to members of a household, including a person who previously lived in a household and family members other than an abused or battered spouse, as well as the potential for stronger penalties because the violation can be a criminal offense.

Because a protective order under title 4 is generally effective only for a two-year period, many potential applicants for protective orders opt to file for a dissolution of the marriage instead. *See* Tex. Fam. Code § 85.025(a)(1). If an applicant who is a party to a pending suit for the dissolution of a marriage wishes to apply for a protective order, the application must be filed in accordance with section 85.062 of the Family Code. *See* Tex. Fam. Code § 85.062; *see also* Tex. Fam. Code § 6.504.

Title 4 offers broad possibilities in the area of postdivorce relief, and many practitioners are using protective orders in postdivorce situations in which "family violence" or threats of violence have occurred. If a party to a suit for dissolution of marriage or suit affecting the parent-child relationship seeks a protective order against another party to the suit after a final order has been rendered, the application must be filed in accordance with section 85.063 of the Family Code. *See* Tex. Fam. Code § 85.063.

Title 4 also seems to be useful in dealing with nonmarital situations, such as parent abuse, grandparent abuse, and other violent or threatening situations involving members or former members of the same household or extended family relationships. Protective orders are also available for people who have never been members of the same household but who have a "dating relationship." *See* Tex. Fam. Code § 71.0021(b).

The term *family*, as defined by the Family Code, includes individuals related by consanguinity or affinity, individuals who are former spouses of each other, individuals who are the parents of the same child (without regard to marriage), and a foster child and foster parent, whether or not those individuals reside together. Tex. Fam. Code § 71.003.

The Family Code defines the term *family violence* as (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault but does not include defensive measures to protect oneself; (2) abuse as that term is defined by Family Code section 261.001(1)(C), (E), (G), (H), (I), (J), (K), and (M) by a member of a family or household toward a child of the family or household; or (3) dating violence as that term is defined by section 71.0021. Tex. Fam. Code § 71.004.

The Family Code defines the term *dating violence* as an act, other than a defensive measure to protect oneself, by an actor that is committed against a victim or applicant for a protective order with whom the actor has or has had a dating relationship or because of the victim's or applicant's marriage to or dating relationship with an individual with whom the actor is or has been in a dating relationship or marriage and is (1) intended to result in physical harm, bodily injury, assault, or sexual assault or (2) a threat that reasonably places the victim or applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault. Tex. Fam. Code § 71.0021(a).

The term *dating relationship*, as defined by the Family Code, means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of the length of the relationship, the nature of the relationship, and the frequency and type of interaction between the persons involved in the relationship. Tex. Fam. Code § 71.0021(b). A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a "dating relationship." Tex. Fam. Code § 71.0021(c). A suit for protection from dating violence may be filed by a minor. *See* Tex. Fam. Code § 82.002(b)(1).

§ 17.2 Caption

A proceeding for a protective order is initiated by filing "An Application for a Protective Order." Tex. Fam. Code § 82.001.

If a protective order is applied for in conjunction with a divorce, the application may be contained in the original pleading or in a subsequent pleading.

COMMENT: The attorney should advise the client to consult the county or district attorney in the client's jurisdiction to file an application for protective order before filing the divorce action because of the cost savings to the client.

§ 17.3 Relationship between Protective Order and Other Suits

Application Filed before Other Suit: If an application for a protective order is pending, a court may not dismiss the application or delay a hearing on the application on the grounds that a suit for dissolution of marriage or a suit affecting the parent-child relationship is filed after the application was filed. Tex. Fam. Code § 85.061.

If a protective order is rendered before the suit for dissolution or suit affecting the parent-child relationship was filed or while the suit is pending, the court that rendered the order may, on its own motion or that of a party, transfer the protective order to the court having jurisdiction of the suit if the court finds that the transfer is in the interest of justice or is for the safety or convenience of a party or a witness. Tex. Fam. Code § 85.064(a), (c).

Application Filed during Pending Suit: On the motion of any party to a suit for divorce or annulment or to declare a marriage void, the court may issue a protective order. Tex. Fam. Code § 6.504.

A person who wishes to apply for a protective order with respect to the person's spouse and who is a party to a pending dissolution suit or suit affecting the parent-child relationship must file the application for the order as required by Family Code chapter 85, subchapter D. Tex. Fam. Code § 82.005.

The person may apply for a protective order against another party to the suit by filing an application in the court in which the suit is pending or in a court in the county in which the applicant resides if the applicant resides outside the jurisdiction of the court in which the suit is pending. If the application is filed in a court other than where the dissolution is pending, then the applicant must inform the clerk of the court that renders the protective order that a dissolution suit or suit affecting the parent-child relationship is pending in another county. The clerk of the court rendering the protective order shall inform the clerk of the other court that a final protective order has been rendered and

forward a copy of the protective order to the other court. *See* Tex. Fam. Code § 85.062(a)–(c).

The requirements for service of notice under chapter 82 do not apply if the application is filed as a motion in a suit for dissolution of a marriage. Notice is given in the same manner as in any other motion in that cause. Tex. Fam. Code § 82.043(e).

A protective order in a suit for dissolution of a marriage must be in a separate document entitled "PROTECTIVE ORDER." Tex. Fam. Code § 85.004.

When a suit is pending, the court must inform a party of the right to apply for a protective order if the court believes that the party or a member of the party's family or household may be a victim of family violence. Tex. Fam. Code §§ 6.404, 105.0011.

Application Filed after Final Order Is Rendered in Other Suit: Once a final decree has been rendered for dissolution or a suit affecting the parent-child relationship, an application for a protective order between the same parties, filed in the same county, must be filed in the court that rendered the final order. If the application is filed in another county, it may be filed in any court having jurisdiction to render the protective order. Tex. Fam. Code § 85.063(a).

If a protective order is rendered by a court in a county other than the county that rendered the final order, then it is subject to transfer. Tex. Fam. Code § 85.063(b). If a protective order that affects a party's right to possession of or access to a child is rendered after the date a final order was rendered in a suit affecting the parent-child relationship, on the motion of a party or on the court's own motion, the court may transfer the protective order to the court of continuing, exclusive jurisdiction if the court finds that the transfer is in the interest of justice or is for the safety or convenience of a party or a witness. Tex. Fam. Code § 85.064(b), (c).

Waiting Period for Divorce: The usual sixty-day waiting period can be waived in a divorce if the petitioner has an active protective order or an active magistrate's order for emergency protection, based on a finding of family violence, against the respondent because of family violence committed during the marriage. The waiting period can be waived if the respondent has been finally convicted of, or received deferred adjudication for, an offense involving family violence against the petitioner or a member of the petitioner's household. Tex. Fam. Code § 6.702(c).

Transfer: Transfer of a protective order shall be conducted according to the procedures provided by Family Code section 155.207. Except as provided by Family Code

section 81.002, the fees and costs associated with the transfer are to be paid by the movant. Tex. Fam. Code § 85.064(d), (e).

The transferred order is subject to modification by the transferee court to the same extent modification is permitted under Family Code chapter 87 by the court that rendered the order. Tex. Fam. Code § 85.065(c).

A Texas court with jurisdiction of proceedings arising under title 4 may enforce a protective order rendered by another court in the same manner as the court that rendered the order could enforce the order, regardless of whether the order is transferred under chapter 85. A court may enforce the protective order by contempt. Tex. Fam. Code § 81.010(a), (b).

Validity: A protective order rendered under chapter 85 is valid and enforceable pending further action by the court that rendered the order until it is properly superseded by another court with jurisdiction over the order. Tex. Fam. Code § 85.009. If a magistrate's order for emergency protection is issued under Texas Code of Criminal Procedure article 17.292 before an order issued under Family Code chapter 85 or an order under Family Code title 1 or title 5, the order issued under the Family Code prevails to the extent of any conflict. Tex. Code Crim. Proc. art. 17.292(f–1). If such an emergency protection order is issued before an order issued under Family Code chapter 83, the emergency protection order prevails to the extent of any conflict unless the court that issued the chapter 83 order is informed of the existence of the emergency protection order and makes a finding in the chapter 83 order that the court is superseding the emergency protection order. Tex. Code Crim. Proc. art. 17.292(f–2).

§ 17.4 Venue

The application may be filed in the county in which the applicant resides *or* in the county in which the respondent resides or in any county in which the family violence is alleged to have occurred. Tex. Fam. Code § 82.003.

A motion for enforcement of a protective order may be filed in any court with jurisdiction of proceedings under title 4 in the county in which the order was rendered, a county in which the movant or respondent resides, or a county in which an alleged violation occurs. Tex. Fam. Code § 81.010(c).

See section 17.3 above concerning situations in which a party in a suit for dissolution of marriage or a suit affecting the parent-child relationship that is pending or in which a final order has been rendered seeks a protective order against another party to the suit.

§ 17.5 Contents of Application

The application must state the name and county of residence of each applicant; the name and county of residence of each individual alleged to have committed family violence; the relationships between the applicants and the individual alleged to have committed family violence; a request for one or more protective orders; and whether an applicant is receiving services from the title IV-D agency in connection with a child support case and, if known, the agency case number for each open case. Tex. Fam. Code § 82.004. If a prior court order is required to be attached to the application but is unavailable to the applicant, the application must contain a statement that the order is unavailable to the applicant and that a copy of the order will be filed with the court before the hearing on the application.

If an applicant is a former spouse of the individual alleged to have committed family violence, the application must include a copy of the decree dissolving the marriage. Tex. Fam. Code § 82.006.

An application that requests a protective order for a child who is subject to the continuing, exclusive jurisdiction of a court under title 5 of the Family Code or alleges that such a child has committed family violence must include a copy of each court order affecting the conservatorship, support, and possession of or access to the child. Tex. Fam. Code § 82.007.

An application that requests the issuance of a temporary ex parte order under Family Code chapter 83 must contain a detailed description of the facts and circumstances concerning the alleged family violence and the need for immediate protective orders, and it must be signed by each applicant under oath stating that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant. A statement signed under oath by a child is valid if the statement otherwise complies with Code chapter 82. Tex. Fam. Code § 82.009.

An application for a protective order that is filed after a previously rendered protective order has expired must include—

1. a copy of the expired protective order attached to the application;
2. a description of *either* the violation of the expired protective order, if the application alleges that the respondent violated the expired protective order by committing an act prohibited by that order before it expired, or the threatened harm

that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault; and

3. if a violation of the expired order is alleged, a statement that the violation of the expired order has not been grounds for any other order protecting the applicant that has been issued or requested under subtitle B of title 4.

Tex. Fam. Code § 82.008(a).

If an application for a protective order alleges that an unexpired protective order applicable to the respondent is due to expire not later than the thirtieth day after the date the application was filed, the application for the subsequent protective order must include—

1. a copy of the previously rendered protective order attached to the application; and
2. a description of the threatened harm that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault.

Tex. Fam. Code § 82.0085(a).

§ 17.6 Temporary Orders and Extraordinary Relief

Orders Issued under Family Code Title 4: An application for temporary ex parte orders must contain a detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective orders, *and* it must be signed by each applicant under oath stating that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant. Tex. Fam. Code § 82.009(a). Such a statement, signed under oath by a child, is valid if the statement otherwise complies with Code chapter 82. Tex. Fam. Code § 82.009(b).

A temporary ex parte order is valid for the period specified in the order, not to exceed twenty days, and these orders may be extended for additional twenty-day periods. Tex. Fam. Code § 83.002.

A temporary ex parte order prevails over any other court order made under title 5 of the Family Code to the extent of any conflict between the orders. Tex. Fam. Code § 83.005. A temporary order issued pursuant to Family Code chapter 83 will not prevail over a magistrate's order for emergency protection issued pursuant to Texas Code of Criminal Procedure article 17.292 unless the court that issued the chapter 83 order was informed

of the magistrate's order and makes a finding that the court is superseding the magistrate's order. *See* Tex. Code Crim. Proc. art. 17.292(f–2).

Chapter 83 of the Family Code regulates when a person may be excluded from the occupancy of the person's residence by an ex parte order. The applicant must file a sworn affidavit detailing the facts and circumstances requiring exclusion from the residence, and the applicant must appear in person to testify at the ex parte hearing. For an ex parte order to exclude a person from the person's residence, the court must find from the required affidavit and testimony that (1) the applicant requesting the exclusion order either resides on the premises or has resided there within thirty days before the date the application was filed, (2) the person to be excluded has within the thirty days before the date the application was filed committed family violence against a member of the household, and (3) there is a clear and present danger that the person to be excluded is likely to commit family violence against a member of the household. Tex. Fam. Code § 83.006(a), (b).

The court may recess the hearing on a temporary ex parte order for exclusion of a party from the residence to contact the respondent by telephone and provide the respondent the opportunity to be present when the court resumes the hearing. Without regard to whether the respondent is able to be present at the hearing, the court shall resume the hearing before the end of the working day. Tex. Fam. Code § 83.006(c).

On request by the applicant, the court granting a temporary ex parte order that excludes the respondent from the respondent's residence shall render a written order to the sheriff, constable, or chief of police to provide a law enforcement officer to (1) accompany the applicant to the residence covered by the order; (2) inform the respondent that the court has ordered that the respondent be excluded from the residence; (3) protect the applicant while the applicant takes possession of the residence; and (4) protect the applicant, if the respondent refuses to vacate the residence, while the applicant takes possession of necessary personal property. Tex. Fam. Code § 86.003.

Orders Issued under Code of Criminal Procedure: A defendant who has been charged with family violence may be held by the magistrate for up to four hours after bond has been made and for an additional period of up to forty-eight hours if the magistrate determines that violence would continue if the defendant is released; probable cause for certain aggravating circumstances is required if the additional period exceeds twenty-four hours. Tex. Code Crim. Proc. art. 17.291(b).

A magistrate also has the authority to issue an order for emergency protection after the defendant has been arrested for a criminal offense involving family violence or an offense under Texas Penal Code section 22.011, 22.021, or 42.072. An order for emergency protection shall be issued if the arrest was for an offense involving family violence that also involved serious bodily injury to the victim or the use or exhibition of a deadly weapon during the commission of an assault. The order is issued when the defendant makes an appearance before the magistrate. The victim need not be present when the order is issued. Tex. Code Crim. Proc. art. 17.292(a), (b), (d).

The order for emergency protection may be requested by the victim of the offense, the guardian of the victim, a peace officer, or the attorney representing the state. The magistrate may also issue the order on its own motion. Tex. Code Crim. Proc. art. 17.292(a).

The order for emergency protection may prohibit the arrested person from—

1. committing family violence or an assault of the person protected under the order or an act in furtherance of an offense under Penal Code section 42.072;
2. communicating directly with a member of the family or household or with the person protected under the order in a threatening or harassing manner;
3. communicating a threat through any person to a member of the family or household or to the person protected under the order;
4. going to or near the residence, place of employment, or business of a member of the family or household or of the person protected under the order;
5. going to or near the residence, child care facility, or school where a child protected under the order resides or attends; and
6. possessing a firearm, unless the person is a peace officer, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.

Tex. Code Crim. Proc. art. 17.292(c).

In addition, the magistrate may impose a condition described in article 17.49 of the Code of Criminal Procedure, including ordering the defendant to participate in a global positioning monitoring system or allowing the alleged victim or other person protected by the order to participate in the system. Tex. Code Crim. Proc. art. 17.292(c–1); *see* Tex. Code Crim. Proc. art. 17.49.

The order must suspend the defendant's license to carry a handgun issued under subchapter H of chapter 411 of the Texas Government Code. Tex. Code Crim. Proc. art. 17.292(*l*).

The order must contain prescribed statements in bold-faced type or capital letters. Tex. Code Crim. Proc. art. 17.292(g).

To the extent that an order for emergency protection conflicts with an existing court order granting possession of or access to a child, the emergency protection order prevails for its duration. Tex. Code Crim. Proc. art. 17.292(f). To the extent that an order for emergency protection conflicts with an order subsequently issued under Family Code chapter 85 or under Family Code title 1 or 5, the order issued under the Family Code prevails. Tex. Code Crim. Proc. art. 17.292(f–1). To the extent that an order for emergency protection conflicts with an order subsequently issued under Family Code chapter 83, the order for emergency protection prevails unless the court issuing the Family Code order is informed of the existence of the emergency protection order and makes a finding in the Family Code order that the court is superseding the emergency protection order. Tex. Code Crim. Proc. art. 17.292(f–2).

An order issued under article 17.292(a) or (b)(1) of the Code of Criminal Procedure is effective for not less than thirty-one days after the date of issuance and not more than sixty-one days after the date of issuance. An order issued under article 17.292(b)(2) of the Code of Criminal Procedure is effective for not less than sixty-one days after the date of issuance and not more than ninety-one days after the date of issuance. A copy of the order shall be served on the defendant by the magistrate or the magistrate's designee in person or electronically. The magistrate must make a separate record of the service in written or electronic format. After notice to each affected party and a hearing, the issuing court may modify all or part of the order if the court finds that the order as originally issued is unworkable, the modification will not place the victim of the offense at greater risk than did the original order, and the modification will not in any way endanger a person protected under the order. Tex. Code Crim. Proc. art. 17.292(j).

A copy of the order shall be sent by the magistrate to the chief of police of the municipality or the sheriff of the county where the member of the family or household or individual protected by the order resides. If the victim was not in the court, a peace officer shall make a good-faith effort to notify the victim, within twenty-four hours, that the order was issued by calling the victim's residence and place of employment. The clerk of the court shall send a copy of the order to the victim. Tex. Code Crim. Proc. art. 17.292(h). A copy of the order shall be sent to any school or child care facility affected

by the order. Tex. Code Crim. Proc. art. 17.292(i). If the order suspends the defendant's license to carry a handgun, the clerk shall immediately send a copy of the order to the Department of Public Safety, and the department shall demand surrender of the license from the holder, record the suspension, and report the suspension to the appropriate local law enforcement agencies. Tex. Code Crim. Proc. art. 17.293.

§ 17.7 Court

An application for a protective order may be filed in the district court, court of domestic relations, juvenile court having the jurisdiction of a district court, statutory county court, constitutional county court, or other court expressly given jurisdiction under title 4. *See* Tex. Fam. Code § 71.002. The parties to a protective order are not entitled to a trial before a jury. *See Williams v. Williams*, 19 S.W.3d 544 (Tex. App.—Fort Worth 2000, pet. denied).

§ 17.8 Applicant

An application for a protective order to protect the applicant or any other member of the applicant's family or household from family violence (but not dating violence) may be filed by an adult member of the family or household or by any adult for the protection of a child. Tex. Fam. Code § 82.002(a), (c). An application for a protective order for dating violence may be filed by (1) a member of the dating relationship, regardless of whether the member is an adult or a child; (2) an adult member of the marriage, if the victim is or was married as described by Code section 71.0021(a)(1)(B); or (3) any adult on behalf of a child. Tex. Fam. Code § 82.002(b), (c). An application for a protective order arising out of dating violence may not be filed by another member of the family or household. An application may be filed for the protection of any person alleged to be a victim of family or dating violence by a prosecuting attorney or by the Texas Department of Family and Protective Services. Tex. Fam. Code § 82.002(d). "Prosecuting attorney" means the attorney who represents the state in a district or statutory county court in the county of proper venue and who has responsibility for filing applications under title 4. *See* Tex. Fam. Code §§ 71.007, 81.007. If an application is filed by a prosecuting attorney or the department, or by an adult for the protection of a child, the alleged victim is considered to be the applicant. Tex. Fam. Code § 82.002(e).

COMMENT: The practitioner should inform the client that the prosecuting attorney or the Texas Department of Family and Protective Services can file an application on the client's behalf.

§ 17.9 Fees and Costs

An applicant or an attorney representing an applicant may not be assessed a fee, cost, charge, or expense by a district or county clerk of the court or by a sheriff, constable, or other public official or employee in connection with the filing, serving, or entering of a protective order or for any other services described in Family Code section 81.002, including a fee to dismiss, modify, transfer, or withdraw a protective order. Tex. Fam. Code § 81.002(a).

Except on a showing of good cause or indigence of a party found to have committed family violence, the party against whom the order is rendered shall be ordered to pay the $16 protective order fee, the standard fees charged by the clerk of the court in a general civil proceeding for serving the order, the costs of court, and all other fees, charges, or expenses incurred in connection with the protective order. The court may order such fees paid by a party against whom an agreed protective order is rendered. Tex. Fam. Code § 81.003.

A party who is ordered to pay fees and costs may be punished for contempt of court as provided by section 21.002 of the Texas Government Code for failure to pay before the date specified by the order. If the order does not specify a date, payment of costs is required before the sixtieth day after the date the order was rendered. Tex. Fam. Code § 81.004.

The court may assess reasonable attorney's fees against the party who is found to have committed family violence or a party against whom an agreed protective order is rendered. A protective order can be modified to provide for the recovery of attorney's fees after an unsuccessful appeal of the order. *In re S.S.*, 217 S.W.3d 685, 686 (Tex. App.—Eastland 2007, no pet.). In setting the amount of attorney's fees, the court shall consider the income and ability to pay of the person against whom the fee is assessed. Tex. Fam. Code § 81.005. Attorney's fees that are awarded in protective orders are enforceable by contempt. *In re Skero*, 253 S.W.3d 884, 887 (Tex. App.—Beaumont 2008, no pet.) (per curiam).

§ 17.10 Notice, Hearing, and Evidence

Notice of the application must be served on each respondent. Tex. Fam. Code § 82.043(a). Notice is to be served in the same manner as citation under the Texas Rules of Civil Procedure, except that service by publication is not authorized. Tex. Fam. Code § 82.043(c). A temporary ex parte protective order under Family Code chapter 83 may

be issued without notice to the individual alleged to have committed family violence. Tex. Fam. Code §§ 82.043(d), 83.001(a). The applicant must provide the clerk with sufficient copies of the application for service on each respondent. Tex. Fam. Code § 82.043(b). The statute prescribes the contents of the notice. *See* Tex. Fam. Code § 82.041. If the application is filed as a motion in a suit for dissolution of marriage, these requirements of service of notice do not apply; instead, notice is given in the same manner as any other motion in such a suit. Tex. Fam. Code § 82.043(e).

Generally, a hearing must be set for a date no later than the fourteenth day after the date the application is filed. Tex. Fam. Code § 84.001(a). If the respondent requests additional time because the respondent received service of the application within forty-eight hours before the hearing, the hearing must be rescheduled for no later than fourteen days after the date set for the hearing, with no requirement of additional service. Tex. Fam. Code § 84.004. If a hearing is not held because the respondent failed to receive service, the hearing must be rescheduled for no later than fourteen days after a request from the applicant. Tex. Fam. Code § 84.003. A legislative continuance sought in a proceeding that includes an application for protective order is discretionary with the court. Tex. Fam. Code § 84.005.

On request of a prosecutor in a county with a population of more than two million or in a county in a judicial district composed of more than one county, the district court shall set the hearing for no later than twenty days after the date the application was filed or, if rescheduled, no later than twenty days after the date a request to reschedule was made. Tex. Fam. Code § 84.002(a).

Any individual affected by a temporary ex parte order may file a motion to vacate at any time, and the court must set a date for hearing the motion as soon as possible. Tex. Fam. Code § 83.004. Before vacating the order, the court must hold a hearing. *In re Goddard*, No. 12-18-00355-CV, 2019 WL 456866, at *3 (Tex. App.—Tyler Feb. 6, 2019, orig. proceeding) (mem. op.).

The court may permit the parties to conduct accelerated discovery before the hearing on a protective order, but the hearing date cannot be delayed to accommodate discovery. *See Martinez v. Martinez*, 52 S.W.3d 429, 432–33 (Tex. App.—Fort Worth 2001, pet. denied).

A statement made by a child twelve years of age or younger that describes alleged family violence against the child is admissible if the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliabil-

ity and (1) the child testifies or is available to testify or (2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the child's welfare. Tex. Fam. Code §§ 84.006, 104.006.

Notwithstanding rule 107 of the Texas Rules of Civil Procedure, the court may render a protective order that is binding on a respondent who does not attend a hearing if the respondent received service of the application and notice of the hearing and proof of service was filed with the court before the hearing. If the court reschedules the hearing under chapter 84, a protective order may be rendered if the respondent does not attend the rescheduled hearing. Tex. Fam. Code § 85.006. In the absence of an answer or appearance, the court may grant a protective order by default after determining that all due process requirements for service are met, a record is made, and sufficient evidence is admitted. However, unlike in normal default situations, due to the policy statement and statutory scheme of title 4 of the Family Code, the ten-day period that the return of service must be on file does not apply to cases under title 4. *Johnson v. Simmons*, 597 S.W.3d 538, 545 (Tex. App.—Fort Worth 2020, pet. denied). *But see Lancaster v. Lancaster*, No. 01-14-00845-CV, 2015 WL 9480098, at *4 (Tex. App.—Houston [1st Dist.] Dec. 29, 2015, no pet.) (mem. op.).

The parties are not entitled to a jury trial on the issue of whether the protective order should be granted. *Roper v. Jolliffe*, 493 S.W.3d 624, 634–35 (Tex. App.—Dallas 2015, pet. denied); *Aguilar v. Aguilar*, No. 02-11-00370-CV, 2012 WL 6632526, at *4 (Tex. App.—Fort Worth Dec. 21, 2012, no pet.) (per curiam) (mem. op.).

§ 17.11 Answer

A written answer to an application for a protective order is permitted but is not required and may be filed at any time before the hearing. Tex. Fam. Code § 82.021. A written answer should be filed in response to a motion for enforcement of a protective order to raise affirmative defenses or to request a jury if the movant requests incarceration for more than six months.

§ 17.12 Findings and Orders

If, after the hearing, the court finds that family violence has occurred and is likely to occur in the future, the court *shall* render a protective order applying only to a person found to have committed family violence. Tex. Fam. Code § 85.001(b). There can be a finding of "family violence" even if there is no actual physical harm. *Bedinghaus v. Adams*, No. 2-08-096-CV, 2009 WL 279388 (Tex. App.—Fort Worth Feb. 5, 2009, no

pet.) (mem. op.). A threat without an actual act of violence or physical harm is sufficient. *Wilkerson v. Wilkerson*, 321 S.W.3d 110, 117 (Tex. App.—Houston [1st Dist.] 2010, pet. dism'd); *Clements v. Haskovec*, 251 S.W.3d 79, 85 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.). Even if no express threats are conveyed, the fact finder may conclude that a person was reasonably placed in fear. *Burt v. Francis*, 528 S.W.3d 549, 553–54 (Tex. App.—Eastland 2016, no pet.). While a trial court is required to find, at the close of the hearing on the application for a protective order, whether family violence has occurred and is likely to occur in the future, those findings are not required to be express. *In re M.I.W.*, No. 04-17-00207-CV, 2018 WL 1831678, at *2 (Tex. App.—San Antonio Apr. 18, 2018, no pet.) (mem. op.). Evidence of family violence in the past can be competent evidence that family violence is likely to occur in the future. *Clements*, 251 S.W.3d at 87; *Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 819, 824–25 (Tex. App.—Fort Worth 2007, no pet.); *In re Epperson*, 213 S.W.3d 541, 544 (Tex. App.—Texarkana 2007, no pet.). A court may but is not required to find that violent behavior will continue in the future just because it happened in the past. *Hassan v. Hassan*, No. 14-17-00179-CV, 2018 WL 3061320, at *2 (Tex. App.—Houston [14th Dist.] June 21, 2018, no pet.) (mem. op.).

There is a presumption that family violence has occurred and is likely to occur in the future if (1) the respondent has been convicted of or placed on deferred adjudication community supervision for certain offenses under Penal Code title 5 or 6 against the child for whom the petition is filed, (2) the respondent's parental rights with respect to the child have been terminated, and (3) the respondent is trying to have contact with the child. Tex. Fam. Code § 81.0015.

A protective order may also include orders affecting property and children that apply to both parties as set forth in Family Code section 85.021, if such orders are in the best interests of the person protected by the order or a member of the family or household of the person protected by the order. *See* Tex. Fam. Code §§ 81.001, 85.001(b), 85.021. Unless the evidence shows that family violence occurred against the children of the applicant, a child may not be included as a protected person, but the court may make orders regarding a member of the family or household of a person protected by an order when contact with another member of the family might escalate and involve the protected person. Tex. Fam. Code § 85.022; *see Martin v. Martin*, 545 S.W.3d 162, 168 (Tex. App.—El Paso 2017, no pet.).

If the court finds that (1) the respondent violated a protective order by committing an act prohibited by the order under Family Code section 85.022, (2) the order was in effect at the time of the violation, and (3) the order has expired after the date the viola-

tion occurred, the court shall, without the necessity of finding whether family violence has occurred or is likely to occur again in the future, render a protective order applying only to the respondent and may render a protective order under Family Code section 85.021. Tex. Fam. Code § 85.002; *see* Tex. Fam. Code §§ 85.021, 85.022; *see Maldonado v. Bearden*, No. 01-17-00371-CV, 2018 WL 4087411, at *4 (Tex. App.—Houston [1st Dist.] Aug. 28, 2018, no pet.) (mem. op.). A protective order may not be issued based solely on a violation of a temporary ex parte protective order in the same case. *See Taylor v. Taylor*, 608 S.W.3d 265, 272 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (respondent possessed firearm during term of ex parte order).

If the court approves an agreement between the parties as authorized under section 85.005 (agreed orders), the court shall render a protective order that is in the best interests of the applicant, the family or household, or a member thereof. The court may not approve an agreement that requires the applicant to refrain from doing an act listed in section 85.022. An agreed protective order is enforceable civilly or criminally, regardless of whether the court makes the findings required by Family Code section 85.001. An agreed protective order is not enforceable as a contract. Tex. Fam. Code § 85.005(a)–(d).

On a finding that family violence has occurred and is likely to occur in the future, the court may issue an order prohibiting a party from (1) removing a child from the possession of a named person or the jurisdiction of the court, (2) transferring or encumbering property, or (3) removing a pet, companion animal, or assistance animal from the possession or actual or constructive care of a person named in the order. Tex. Fam. Code § 85.021(1).

The court may also (1) grant exclusive use of residence to one party in certain circumstances, (2) provide for possession of and access to a child, (3) require the payment of support for a party or a child, or (4) award use and possession of certain property. Tex. Fam. Code § 85.021(2)–(5).

The court may order the person found to have committed family violence to perform acts specified by the court that are deemed necessary or appropriate to prevent or reduce the likelihood of family violence and may order the person to complete an accredited battering intervention and prevention program. If an accredited program is not available, the court may order that the person counsel with a professional who has completed specified family violence intervention training. Tex. Fam. Code § 85.022(a)(1)–(3).

The court may also order that the person who has committed family violence is prohibited from (1) committing family violence in the future; (2) communicating with a person protected by an order or a member of the family or household of a person protected by an order in a threatening or harassing manner, communicating a threat through any person to a person protected by an order or a member of the family or household of a person protected by an order, or, on good cause, communicating in any manner with a person protected by an order or a member of the family or household of a person protected by an order except through the party's attorney or a person appointed by the court; (3) going near the residence, school, child care facility, or place of employment or business of a person protected by an order or a member of the family or household of a person protected by an order; (4) engaging in conduct directed specifically toward a person protected by an order or a member of the family or household of a person protected by an order that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person, including following that person; (5) possessing a firearm, unless the person is a peace officer actively engaged in full-time employment as an officer; and (6) harming, threatening, or interfering with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by or is in the actual or constructive care of a person protected by an order or by a member of the family or household of a person protected by an order. Tex. Fam. Code § 85.022(b). Further, the court may enter any other order that it deems appropriate to prevent future violence as those items enumerated in section 85.022(b) of the Texas Family Code are not an exhaustive list. *Rodriguez v. Doe*, 614 S.W.3d 380, 386 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

Further, the court shall suspend a license to carry a handgun issued under subchapter H of chapter 411 of the Texas Government Code that is held by a person found to have committed family violence. Tex. Fam. Code § 85.022(d). In *Webb v. Schlagal*, 530 S.W.3d 793 (Tex. App.—Eastland 2017, pet. denied), the court found that a protective order prohibiting appellant's possession of a firearm did not infringe on his Second Amendment rights and that the statutory provisions under which it was issued, as applied to the appellant, were not unconstitutional under section 23, article 1, of the Texas Constitution. The order was issued under Tex. Code Crim. Proc. art. 7A.05(a)(2)(D), which has identical language to Tex. Fam. Code § 85.022(b)(6).

The court may render a protective order that is effective for more than two years if the court finds that the subject of the order (1) committed an act constituting a felony offense involving family violence against the applicant or a member of the applicant's family or household, regardless of whether the person has been charged with or con-

victed of the offense; (2) caused serious bodily injury to the applicant or a member of the applicant's family or household; or (3) was the subject of two or more previous protective orders rendered to protect the person on whose behalf the current order is sought and after a finding by the court that the subject of the order has committed family violence and is likely to commit family violence in the future. Tex. Fam. Code § 85.025(a–1). If the court renders such a protective order, it must include one of these findings in the order. Tex. Fam. Code § 85.001.

A party who has been found to have committed family violence or a party against whom an agreed protective order is rendered may be ordered to pay reasonable attorney's fees. The income and ability to pay of the party who is assessed the attorney's fees shall be considered by the court. Tex. Fam. Code § 81.005; *Laufer v. Gordon*, No. 14-18-00744-CV, 2019 WL 6210200, at *3 (Tex. App.—Houston [14th Dist.] Nov. 21, 2019, no pet.) (mem. op.). The court shall, if a protective order is rendered, and may, if an agreed protective order is rendered, order the party against whom the order is rendered to pay the required fees. Tex. Fam. Code § 81.003.

§ 17.13 Confidentiality of Certain Information

On request by an applicant for a protective order, the court may protect the applicant's mailing address by (1) ordering the applicant to disclose the information to the court, designate a person to receive notices and filed documents on the applicant's behalf, and disclose that designee's mailing address to the court; (2) requiring the court clerk to strike the applicant's mailing address from the public records of the court, if applicable, and maintain a confidential record of the applicant's mailing address for use only by the court; and (3) prohibiting the release of the information to the respondent. Tex. Fam. Code § 82.011.

On request by a person protected by an order or a member of the family or household of a person protected by an order, the court may exclude from a protective order the address and telephone number of a person protected by the order (specifying only the county of residence), the place of employment or business of a person protected by the order, or the child care facility or school a child protected by the order attends or in which the child resides. In that case the court shall order the clerk to strike the information from the public records and maintain a confidential record of the information solely for the court's use or that of a law enforcement agency for entry of required information into the statewide law enforcement information system. Tex. Fam. Code § 85.007.

In a protective order under Family Code section 85.022(b)(3) or (4), the court shall specifically describe each prohibited location and the minimum distances from the residence, school, child care facility, or place of employment or business that the party must maintain, unless the location information is excluded because of the need for confidentiality. Tex. Fam. Code § 85.022(c).

§ 17.14 Agreed Orders

The parties may agree in writing to a protective order under Family Code sections 85.021 and 85.022, subject to the court's approval. The court may not approve an agreement that requires the applicant to do or refrain from doing an act under section 85.022. Tex. Fam. Code § 85.005(a).

An agreed protective order is enforceable civilly or criminally, regardless of whether the court makes the findings required by Family Code section 85.001. Tex. Fam. Code § 85.005(b).

An agreed protective order must contain the finding that family violence has occurred and is likely to occur again in the future. *In re I.E.W.*, No. 13-09-00216-CV, 2010 WL 3418276 (Tex. App.—Corpus Christi–Edinburg 2010, no pet.) (mem. op.).

If the court approves an agreement, the court shall render an agreed protective order that is in the best interest of the applicant, the family or household, or a member of the family or household. Tex. Fam. Code § 85.005(c).

An agreed protective order is not enforceable as a contract, and it expires on the date the court order expires. Tex. Fam. Code § 85.005(d), (e).

§ 17.15 Modification of Orders

On the motion of any party, the court, after notice and hearing, may modify an existing order to exclude any item included in the order or include any item that could have been included. Tex. Fam. Code § 87.001. A change of circumstances is not required to modify a protective order. *In re S.S.*, 217 S.W.3d 685 (Tex. App.—Eastland 2007, no pet.). A protective order may not be modified to extend the period of the order's validity beyond the second anniversary of the date the original order was rendered or the date the order expires under Family Code section 85.025(a–1) or (c), whichever date occurs later. Tex. Fam. Code § 87.002. Section 85.025(c) provides that, if the subject of the protective order is confined or imprisoned on the date the protective order would expire

under Family Code section 85.025(a) or (a–1) or if the protective order would expire not later than the first anniversary of the date the person is released from confinement or imprisonment, the period for which the order is effective is extended. In this situation, the order expires on the first anniversary of the date the person is released from confinement or imprisonment if the person was sentenced for more than five years or on the second anniversary of the date the person is released if the person was sentenced for five years or less. Tex. Fam. Code § 85.025(c). Notice of a motion to modify is sufficient if delivery of the motion is attempted on the respondent at the respondent's last known address by registered or certified mail as provided by rule 21a of the Texas Rules of Civil Procedure. Tex. Fam. Code § 87.003.

If a protective order includes an address or telephone number of a person protected by the order, of that person's place of employment or business, or of the school or child care facility of a child protected by the order and the information is not confidential under Family Code section 85.007, the person protected by the order may file a notification of change of address or telephone number with the court that rendered the order to modify the information contained in the order. The clerk shall attach the notification to the order and shall deliver a copy of the notification to the respondent by registered or certified mail under rule 21a of the Texas Rules of Civil Procedure. The filing of the notification and its attachment to the order do not affect the validity of the order. Tex. Fam. Code § 87.004.

§ 17.16 Appeal of Protective Orders

Generally, protective orders issued under subtitle B of title 4 of the Family Code may be appealed. However, a protective order rendered against a party in a suit for dissolution of marriage may not be appealed until the decree of dissolution becomes a final, appealable order. Likewise, a protective order rendered against a party in a suit affecting the parent-child relationship may not be appealed until the underlying order becomes a final, appealable order. Tex. Fam. Code § 81.009. Unless one of these two exceptions exists, the protective order is immediately appealable. *Watts v. Adviento*, No. 02-17-00424-CV, 2019 WL 1388534, at *2 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.) (mem. op.). A protective order based on a finding of family violence may be appealed even if the order has expired before the hearing, because of the long-term collateral consequences. *Clements v. Haskovec*, 251 S.W.3d 79 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.); *State for Protection of Cockerham v. Cockerham*, 218 S.W.3d 298 (Tex. App.—Texarkana 2007, no pet.); *Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 815 (Tex. App.—Fort Worth 2007, no pet.).

§ 17.17 Remedies for Violations of Protective Orders or Conditions of Bond

There are a variety of remedies available for violations of protective orders. A violation of a protective order can be punishable as contempt of court by a fine, incarceration, or both. Each protective order must contain warnings about the possible punishments for violation of the order. The warnings must be prominently displayed in bold-faced type or capital letters or underlined, and the wording is prescribed by statute. *See* Tex. Fam. Code § 85.026. The respondent must be served with a temporary ex parte order before he may be arrested for violating it. *See* Tex. Const. art. I, § 11c.

If the protective order is violated by the commission of a prohibited act, the punishment could be up to a $4,000 fine, confinement in jail for as long as one year, or both. *See* Tex. Penal Code §§ 12.21, 25.07. Commission of prohibited acts can also be prosecuted criminally as misdemeanor or felony offenses.

If the provisions of the protective order concerning the payment of fees and costs under Family Code sections 81.003–.006 are not complied with, then pursuant to the Texas Government Code the violations of the provisions could be punished by a fine up to $500, confinement in jail for as long as six months, or both. *See* Tex. Fam. Code § 81.004; Tex. Gov't Code § 21.002. The same remedies are also available for enforcement of the counseling provisions pursuant to Family Code section 85.024. *See* Tex. Fam. Code § 85.024; Tex. Gov't Code § 21.002.

Generally, an award of attorney's fees is not enforceable by contempt. However, one court has found that the obligation to pay fees awarded in a family violence protective order is a legal duty like the duty to pay fees awarded in the enforcement of a child support obligation. *See In re Skero*, 253 S.W.3d 884, 887 (Tex. App.—Beaumont 2008, no pet.) (per curiam). The *Skero* court held that a family violence protective order, including the assessment of attorney's fees, enforces a legal duty, not a private agreement or contract between the parties, and that the attorney's fee in such a proceeding is a part of the procedural remedy for enforcing substantial rights and the fee allowed, like other costs in the protective order proceeding, is "incidental to and a part of" the order necessary to protect the spouse and the minors from family violence.

A person who violates the provisions of a condition of bond set in a family violence case that are related to the safety of the victim or the community may be subject to felony sanctions. An offense under Texas Penal Code section 25.07 for violation of an order or condition of bond is a class A misdemeanor, unless it is shown at trial that the

defendant has been convicted previously under that section two or more times or has violated the protective order or condition of bond by committing assault or stalking; in that case the offense is increased to a third-degree felony. Tex. Penal Code § 25.07(g)(2). Conviction in another state of a substantially similar offense is considered a conviction for purposes of section 25.07(g). *See* Tex. Penal Code § 25.07(h). A person who commits an offense under Penal Code section 25.07 may be taken into custody and denied release on bail if, at a hearing, a judge or magistrate makes certain findings concerning the commission of the offense based on a preponderance of the evidence. *See* Tex. Code Crim. Proc. art. 17.152. In determining whether to deny release on bail, the judge or magistrate may consider facts or circumstances relevant to a determination of whether the accused poses an imminent threat of future family violence. Tex. Code Crim. Proc. art. 17.152(e).

Prescribed warnings concerning penalties for the violation of an emergency protection order issued by a magistrate must appear in each such order in bold-faced type or capital letters. *See* Tex. Code Crim. Proc. art. 17.292(g). A person arrested or held without a warrant in the prevention of family violence may be detained if there is probable cause to believe the violence will continue if the person is immediately released. The person may be held after bond has been posted for a period of not more than four hours; in some cases the period may be extended, but the extension cannot exceed forty-eight hours. Tex. Code Crim. Proc. art. 17.291.

If the relief requested includes six months or more in jail, the respondent is entitled to a jury trial, which should be specifically requested in the respondent's answer. The respondent may also be able to object to discovery if it violates a right against self-incrimination. When appropriate, the answer should specifically assert that the protective order has expired, if the enforcement is seeking to punish the respondent for violating one of the prohibitions contained in the order.

§ 17.18 Counseling

A protective order may contain a requirement that the person found to have committed family violence complete a battering intervention and prevention program accredited under article 42.141 of the Texas Code of Criminal Procedure. If such a program is not available, the person may be ordered to counsel with a social worker, family service agency, physician, psychologist, licensed therapist, or licensed professional counselor who has completed specified family violence intervention training. Tex. Fam. Code § 85.022(a), (a–1).

A person found to have engaged in family violence and ordered to complete an accredited battering intervention and prevention program or counseling under section 85.022 of the Family Code shall file an affidavit with the court before the sixtieth day after the order was rendered stating that the person has begun the program or counseling or that a program or counseling is not available within a reasonable distance from the person's residence. Once the program or counseling is completed, the person must file an affidavit verifying completion by the earlier of the thirtieth day before the order expires or the thirtieth day before the first anniversary of the date the order was issued. The affidavit must be accompanied with a letter, notice, or certificate from the program or counselor verifying the person's completion of the program or counseling. A person who does not comply with these requirements may be fined up to $500 and held in contempt of court under section 21.002 of the Texas Government Code. The protective order must specifically advise the person of this reporting requirement and the possible punishments if the person fails to comply. Tex. Fam. Code § 85.024.

§ 17.19 Request by Respondent for Protective Order

A protective order that requires the first applicant to do or refrain from doing an act under Family Code section 85.022 shall include a finding that the first applicant has committed family violence and is likely to commit family violence in the future. Tex. Fam. Code § 85.001(c).

To apply for a protective order, a respondent to an application for a protective order must file a separate application. Tex. Fam. Code § 82.022; *State for Protection of Cockerham v. Cockerham*, 218 S.W.3d 298 (Tex. App.—Texarkana 2007, no pet.).

A court may not delay a hearing on an application for a protective order in an attempt to consolidate it with a hearing on a subsequently filed application for protective order. Tex. Fam. Code § 84.001(b).

A court may not render one protective order under section 85.022 that applies to both parties. If the respondent files an application for a protective order and there is a separate finding of family violence and that it is likely to occur again in the future, then two separate orders shall be issued that reflect the appropriate conditions for each party. *See* Tex. Fam. Code § 85.003.

§ 17.20 Copies of Orders

A protective order made under subtitle B of title 4 of the Family Code shall be delivered to the respondent as provided by rule 21a of the Texas Rules of Civil Procedure, served in the same manner as a writ of injunction, or served in open court at the close of the hearing. The court shall serve an order in open court to a respondent who is present at the hearing by giving the respondent a copy of the order. A certified copy of the signed order shall be given to the applicant at the same time. If the applicant is not in court at the conclusion of the hearing, the clerk of the court shall mail a certified copy of the order to the applicant no later than the third business day after the date the hearing is concluded. Tex. Fam. Code § 85.041(a), (b).

If the order has not been reduced to writing, the court shall give notice orally to a respondent who is present at the hearing of the part of the order that contains prohibitions under Family Code section 85.022 or any other part of the order that contains provisions necessary to prevent further family violence. The clerk of the court shall mail a copy of the order to the respondent and a certified copy to the applicant no later than the third business day after the date the hearing is concluded. Tex. Fam. Code § 85.041(c).

If the respondent is not present at the hearing and the order has been reduced to writing at the conclusion of the hearing, the clerk of the court shall immediately provide a certified copy of the order to the applicant and mail a copy to the respondent no later than the third business day after the date the hearing is concluded. Tex. Fam. Code § 85.041(d).

The court clerk shall send a copy of the protective order, whether the order is original or modified, along with the information provided by the applicant or the applicant's attorney that is required under section 411.042(b)(6) of the Texas Government Code, to the following not later than the next business day after the court issues the order: the chief of police of the municipality where the protected person resides, if the person resides in a municipality; the appropriate constable and the sheriff of the county where the person resides, if the person does not reside in a municipality; and the title IV-D agency, if the application for the protective order indicates that the applicant is receiving services from the agency. Tex. Fam. Code § 85.042(a). The clerk may delay sending the order only if the clerk lacks information necessary to ensure service and enforcement. Tex. Fam. Code § 85.042(g).

If the respondent is a member of the state military forces or is on active-duty status in the U.S. Armed Forces and the applicant or the applicant's attorney provides to the

court clerk the mailing address of the staff judge advocate or provost marshal, the clerk must also provide a copy of the order and information to the staff judge advocate at Joint Force Headquarters or the provost marshal of the military installation to which the respondent is assigned with the intent that the commanding officer will be notified, as applicable. Tex. Fam. Code § 85.042(a–1). If an original or modified protective order is vacated, the clerk shall so notify each individual or entity who received a copy of the original or modified order from the clerk. Tex. Fam. Code § 85.042(c).

The clerk may transmit the order and any related information electronically or in another manner that can be accessed by the recipient. Tex. Fam. Code § 85.042(f).

If the order prohibits a respondent from going to or near a child care facility or school, the clerk of the court shall send a copy of it to the facility or school. Tex. Fam. Code § 85.042(b).

Since the order must suspend a license to carry a handgun, the clerk of the court shall send a copy of the order to the appropriate division of the Department of Public Safety. On receipt of the order, the department shall record the license suspension in the department records, report the suspension to the local law enforcement agencies, and demand surrender of the suspended license from the license holder. Tex. Fam. Code § 85.042(e).

The applicant or the applicant's attorney shall provide the clerk of the court with the name and address of each law enforcement agency, child care facility, school, and other individual or entity to which the clerk is required to send a copy of the order, along with any other information required under section 411.042(b)(6) of the Texas Government Code. Tex. Fam. Code § 85.042(d).

§ 17.21 Duration of Protective Orders

In general, a protective order is effective for the period stated in the order, not to exceed two years, or, if no period is stated, until the second anniversary of the date the order was issued. Tex. Fam. Code § 85.025(a). However, the court may render a protective order that is effective for more than two years if the court finds that the subject of the order (1) committed an act constituting a felony offense involving family violence against the applicant or a member of the applicant's family or household, regardless of whether the person has been charged with or convicted of the offense; (2) caused serious bodily injury to the applicant or a member of the applicant's family or household; or (3) was the subject of two or more previous protective orders rendered to protect the person on whose behalf the current order is sought and after a finding by the court that

the subject of the order has committed family violence and is likely to commit family violence in the future. Tex. Fam. Code § 85.025(a–1); *Maples v. Maples*, 601 S.W.3d 23, 30–31 (Tex. App.—Tyler 2020, no pet.) (respondent brandished firearm during assault, which constituted felony); *Onkst v. Morgan*, No. 03-18-00367-CV, 2019 WL 4281913, at *9 (Tex. App.—Austin Sept. 11, 2019, pet. denied) (mem. op.) (third protective order granted against respondent). If the court issues an order for a period of more than two years, the court must include in the order a finding described by section 85.025(a–1) of the Texas Family Code. Tex. Fam. Code § 85.001(d); *Lewis v. Yancy*, No. 01-19-00348-CV, 2020 WL 7251448, at *7 (Tex. App.—Houston [1st Dist.] Dec. 10, 2020, no pet.) (mem. op.).

If the subject of a protective order is confined or imprisoned on the date the order would expire or if the order would expire not later than the first anniversary of the date the person is released, the effective period is extended, and the order expires on the first anniversary of the date the person is released from confinement or imprisonment if the person was sentenced for more than five years or on the second anniversary of the date the person is released if the person was sentenced for five years or less. Tex. Fam. Code § 85.025(c).

A person who is the subject of a protective order may file a motion not earlier than the first anniversary of the date on which the order was rendered requesting the court to review the protective order and determine whether there is a continuing need for it. Tex. Fam. Code § 85.025(b). (This provision does not apply to a protective order issued under subchapter A, chapter 7B, of the Texas Code of Criminal Procedure. Tex. Fam. Code § 85.025(b–3).) Following the filing of such a motion, a person who is the subject of an order issued under section 85.025(a–1) that is effective for longer than two years may file not more than one subsequent motion for review; that motion may be filed no earlier than the first anniversary of the date on which the court rendered an order on the previous motion. Tex. Fam. Code § 85.025(b–1). After a hearing on a motion under section 85.025(b) or (b–1), if the court does not make a finding that there is no continuing need for the order, the order stays in effect until it expires under section 85.025. Evidence of the movant's compliance with the order does not by itself support a finding that there is no continuing need for the order. If the court finds that there is no continuing need for the order, the court shall order that it expires on a date set by the court. Tex. Fam. Code § 85.025(b).

A person subject to a protective order does not have standing to file a motion to rescind a protective order issued on family violence grounds under chapter 85 of the Family Code and sexual assault grounds under article 7A of the Code of Criminal Procedure.

Molinar v. S.M., No. 08-15-00083-CV, 2017 WL 511888 (Tex. App.—El Paso Feb. 8, 2017, pet. denied).

§ 17.22 Duties of Law Enforcement Officers

Exclusions from Residence: On request by an applicant obtaining a final order that excludes the respondent from the respondent's residence, the court granting the final order shall render a written order to the sheriff, constable, or chief of police to provide a law enforcement officer from the department of the sheriff, constable, or chief of police to (1) accompany the applicant to the residence covered by the order; (2) inform the respondent that the court has ordered that the respondent be excluded from the residence; (3) protect the applicant while the applicant takes possession of the residence and the respondent takes possession of the respondent's necessary personal property; and (4) if the respondent refuses to vacate the residence, to remove the respondent from the residence and arrest the respondent for violating the court order. Tex. Fam. Code § 86.004. See section 17.6 above for temporary orders.

Awareness of Protective Orders: A law enforcement agency may enter a protective order in the agency's computer records of outstanding warrants as notice that the order has been issued and is currently in effect. On receipt of notification by a clerk of court that the court has vacated or dismissed an order, the law enforcement agency shall remove the order from those records. Tex. Fam. Code § 86.001(b).

To ensure that law enforcement officers responding to calls are aware of the existence and terms of protective orders from their jurisdiction as well as others, each law enforcement agency shall establish procedures to provide adequate information or access to information for officers about the name of each person protected by an order rendered in any Texas jurisdiction and of each person against whom the order is directed. Tex. Fam. Code §§ 86.001(a), 86.005.

Statewide Law Enforcement Information System: On receipt of a protective order from the clerk of the issuing court, or on receipt of information pertaining to the date of confinement or imprisonment or date of release of a person subject to the protective order, a law enforcement agency shall immediately, but not later than the third business day after the date the order or information is received, enter the information required by Government Code section 411.042(b)(6) into the statewide law enforcement information system maintained by the Texas Department of Public Safety. Tex. Fam. Code § 86.0011.

Firearms Transfer Information: On receipt of a request for a law enforcement information system record check of a prospective transferee by a licensed firearms dealer under the Brady Handgun Violence Prevention Act, title 18, section 922, of the United States Code, the chief law enforcement officer shall determine whether the Department of Public Safety has in its law enforcement information system a record indicating the existence of an active protective order directed to the prospective transferee. If so, the chief law enforcement officer shall immediately advise the dealer that the transfer is prohibited. Tex. Fam. Code § 86.002.

§ 17.23 Protective Order Registry

Subchapter F of chapter 72 of the Texas Government Code provides for the establishment by the Office of Court Administration ("the office") of a centralized Internet-based registry for protective order applications filed under chapter 82, and protective orders issued under chapters 83 and 85, of the Texas Family Code. The provisions also apply to such applications and orders under subchapter A of chapter 7B of the Texas Code of Criminal Procedure and those under article 17.292 of the Texas Code of Criminal Procedure with respect to a person arrested for an offense involving family violence. Tex. Gov't Code §§ 72.152, 72.153.

The registry is to allow the public, free of charge, to electronically search and to receive publicly accessible information about each protective order issued in Texas (other than vacated orders or orders issued under chapter 83 of the Family Code or article 7B.002 of the Code of Criminal Procedure (temporary ex parte orders) or article 17.292 of the Code of Criminal Procedure (magistrate's order for emergency protection)). The registry is to be searchable by the county of issuance, by the name of the subject of the order, and by the subject's birth year. The publicly accessible information is (1) the issuing court; (2) the case number; (3) the full name, county of residence, birth year, and race or ethnicity of the subject of the order; (4) the dates the order was issued and served; and (5) the date the order expired or will expire. Tex. Gov't Code § 72.154.

Public access to the information, however, is to be available only if a protected person requests the office to grant the public the ability to access the information for the order protecting the person and the office approves the request. The protected person may thereafter request the office to remove the public's ability to access the information, and the office is to do so no later than the third business day after the request is received. Tex. Gov't Code § 72.158.

While the registry must contain a copy of each application filed and each protective order issued in Texas, only certain authorized users may have access to the non–publicly available information. *See* Tex. Gov't Code § 72.155.

Clerks are generally required to enter copies of applications within twenty-four hours after the time they are filed and to ensure that the information isn't accessible to the public. Tex. Gov't Code § 72.156.

Within twenty-four hours after a court issues an original or modified order or extends the duration of an order, the clerk is to enter a copy of the order (and, if applicable, a notation regarding any modification or extension) and the publicly accessible information. If an order is vacated or expired, the clerk is to modify the record of the order in the registry accordingly and ensure that the record of a vacated order is not accessible to the public. For a protective order that is vacated as the result of an appeal or bill of review from a district or county court, the clerk is to notify the office by the end of the next business day, and the record is to be removed from the registry no later than the third business day after the notice is received. Tex. Gov't Code § 72.157.

§ 17.24 Right to Terminate Lease Early

A tenant with an order protecting the tenant or an occupant from family violence may terminate a lease, vacate the premises, and avoid liability for future rents and other sums due for terminating before the end of the lease period. Tex. Prop. Code § 92.016(b).

The tenant must provide the landlord or agent a copy of one or more of the following: a temporary injunction issued under subchapter F, chapter 6, of the Family Code; a temporary ex parte order issued under chapter 83; a protective order issued under chapter 85; or an order of emergency protection issued under article 17.292 of the Code of Criminal Procedure. Alternatively, the tenant may provide a copy of documentation of the family violence from a licensed health-care services provider who examined the victim, a licensed mental health services provider who examined or evaluated the victim, or an advocate who assisted the victim. Tex. Prop. Code § 92.016(b–1).

The tenant must also furnish the landlord with written notice of termination of the lease on or before the thirtieth day before the lease terminates. Liability then ends on the date after (1) thirty days have passed since the notice of termination was provided to the landlord and (2) the tenant has vacated the property. Tex. Prop. Code § 92.016(c).

If the person who committed the family violence is a cotenant or an occupant of the leased property, unless the protective order is based on a temporary ex parte order issued under chapter 83 of the Texas Family Code, the tenant is not required to provide written notice to the landlord before terminating the lease. *See* Tex. Prop. Code § 92.016(c–1). An occupant is a person who has the landlord's consent to occupy a dwelling but has no obligation to pay the rent. Tex. Prop. Code § 92.016(a).

In general, the tenant's liability for delinquent, unpaid rent or other sums owed before termination is not affected, but the tenant is released from liability for delinquent, unpaid rent if the lease does not contain prescribed language notifying tenants of the right to terminate early in certain circumstances. The tenant may not waive this right. Tex. Prop. Code § 92.016(d), (f), (g).

A landlord who violates these provisions is liable to the tenant for actual damages, a civil penalty equal to a month's rent plus $500, and attorney's fees. Tex. Prop. Code § 92.016(e).

§ 17.25 Right to Separate Wireless Telephone Service Account

Under certain circumstances an applicant may have his wireless telephone number separated from the respondent's account.

An applicant who is the primary user of a wireless telephone number associated with the wireless telephone service account of the respondent may request the court that renders a protective order for the applicant under chapter 85 of the Texas Family Code to order the separation of the applicant's number from the respondent's account. Separation of each wireless telephone number primarily used by a child in the applicant's care or custody may also be sought. Tex. Fam. Code § 85.0225(a).

The request must include each number for which the applicant requests separation. If the applicant shows by a preponderance of the evidence that, for each such number, the applicant or a child in the applicant's care or custody is the primary user, the court shall render a separate order directing the wireless telephone service provider to transfer the billing responsibilities and rights to each listed number to the applicant. Tex. Fam. Code § 85.0225(b), (c).

The order must include the name and billing wireless telephone number of the wireless telephone service account holder; each number to be transferred; and a statement requiring the service provider to transfer to the applicant the right to use each transferred number and all financial responsibility for each such number (including the

monthly service costs associated with any mobile device associated with the number). Tex. Fam. Code § 85.0225(d), (e).

The court must serve a copy of the order on the service provider's registered agent and ensure that the applicant's contact information is not provided to the respondent as the account holder. Tex. Fam. Code § 85.0225(f), (g).

Responsibilities of the wireless telephone service provider are contained in the Texas Business and Commerce Code. When the provider receives the court order, it must transfer to the applicant the use of each number listed in the order. The provider is not required to complete the transfer if, within five days of receiving the order, the provider notifies the applicant of technological or operational issues that would prevent or impair the use of the number if the transfer occurs. Tex. Bus. & Com. Code § 608.001(a), (b).

The transfer of service essentially involves the applicant's establishment of a separate account. The provider may impose routine and customary fees and requirements for establishing a wireless telephone service account, including the applicant's providing proof of identification, financial information, and customer references. In imposing and collecting fees, the provider may not impose a penalty for early termination of a contract; hold the applicant responsible for, or require payment of, any outstanding balance on the respondent's account; or charge a fee for transferring the number in addition to the usual and customary fees for establishing an account. Tex. Bus. & Com. Code § 608.001(c), (d).

If the applicant must take any further steps to complete the transfer process, the provider must make available a written description of the necessary procedures. Tex. Bus. & Com. Code § 608.001(e).

§ 17.26 Related Laws

Several other provisions of Texas law, described below, relate to the prevention of family violence.

The penalty for assault under Penal Code section 22.01(a) (intentionally, knowingly, or recklessly causing bodily injury to another) may be enhanced if the victim is a person whose relationship or association with the defendant is described by Family Code section 71.0021(b) (dating), 71.003 (family), or 71.005 (household). *See* Tex. Penal Code § 22.01(b)(2), (b–3), (f).

A person commits a third-degree felony (continuous violence against the family) if, during a period of twelve months or less, the person two or more times intentionally, knowingly, or recklessly causes bodily injury to a person or persons whose relationship to or association with the defendant is described by Family Code section 71.0021(b), 71.003, or 71.005. Tex. Penal Code § 25.11; *see* Tex. Penal Code § 22.01(a).

A person commits an offense if he sells, rents, leases, loans, or gives a handgun to any person, knowing that an active protective order is directed to the person to whom the handgun is to be delivered. Further, a person against whom an active protective order is directed commits an offense if he knowingly purchases, rents, leases, or receives as a loan or gift a handgun. Tex. Penal Code § 46.06(a)(5), (a)(6).

The Department of Public Safety shall collect information about the number and nature of protective orders and all other pertinent information about all persons on active protective orders. Tex. Gov't Code § 411.042(b)(6).

The spousal privilege not to be called as a witness for the state does not apply if the offense charged is a crime committed against the accused person's spouse, a minor child, or a member of the household of either spouse. Tex. Code Crim. Proc. art. 38.10.

The agency releasing a person arrested or held without warrant for prevention of family violence shall make a reasonable attempt to notify the victim of the imminent release. Tex. Code Crim. Proc. art. 17.29(b). When a magistrate issues an order imposing a condition of bond on a defendant for an offense involving family violence, the clerk must send the victim of the alleged offense a copy of the order and the sheriff must make a good-faith effort to notify the victim by telephone as soon as practicable. *See* Tex. Code Crim. Proc. art. 17.50.

Texas Government Code section 411.180 (concerning notification of denial, revocation, or suspension of a license to carry a handgun and review of the same) does not apply to the suspension of a license under Family Code section 85.022 or Texas Code of Criminal Procedure article 17.292. Tex. Gov't Code § 411.180(i).

Eligibility for a handgun license extends to a person who is at least eighteen but not yet twenty-one years of age who is protected under an active protective order and meets the eligibility requirements other than the minimum age required under federal law. Tex. Gov't Code § 411.172. The license must bear a protective order designation and expires when the protective order expires or is rescinded or on the twenty-second birthday of the license holder, whichever is earlier. *See* Tex. Gov't Code § 411.1735(a), (c).

A person at increased risk of becoming a victim of violence is eligible to obtain a handgun license on an expedited basis and qualify for an at-risk designation on the license. This eligibility is provided if the person or a member of the person's household or family is protected under a temporary restraining order or temporary injunction issued under subchapter F, chapter 6, of the Family Code; a temporary ex parte order issued under chapter 83 of the Family Code; a protective order issued under chapter 85 of the Family Code or chapter 7B of the Code of Criminal Procedure; or a magistrate's order for emergency protection issued under subchapter B, chapter 58, of the Code of Criminal Procedure. Tex. Gov't Code § 411.184(a), (b)(1).

The Department of Public Safety shall suspend a license to carry a handgun if the license holder commits an act of family violence and is the subject of an active protective order rendered under Family Code title 4 or is arrested for an offense involving family violence and is the subject of an order for emergency protection issued under Texas Code of Criminal Procedure article 17.292; such a suspension is for the duration of, or the period specified by, the protective order or the order for emergency protection. *See* Tex. Gov't Code § 411.187(a), (c).

The Department of Public Safety shall issue a new driver's license number or personal identification certificate number to a person who shows a court order stating that the person has been the victim of domestic violence. With few exceptions, the department may not disclose the changed license or certificate number or the person's name or any former name. Tex. Transp. Code § 521.275.

A person who is determined to have committed family violence in the physical presence of, or in the same habitation or vehicle occupied by, a person younger than fifteen years of age, knowing that the young person was present or in the same habitation or vehicle, must be ordered to pay restitution for the cost of necessary rehabilitation of the young person, including medical, psychiatric, and psychological care and treatment. Tex. Code Crim. Proc. art. 42.0373.

The federal Violence Against Women Act provides federal criminal penalties for a person who travels in interstate or foreign commerce with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner and in the course of the travel commits or attempts to commit a crime of violence against that person. The federal law also covers people who commit the act of stalking or placing a person under surveillance with the intent to kill, injure, harass, or intimidate the person and, as a result, places the person in reasonable fear of death or injury or causes substantial emotional

distress. If a person commits the crime of stalking in violation of a protective order, the punishment is imprisonment for not less than one year. *See* 18 U.S.C. §§ 2261, 2261A.

§ 17.27 Protective Orders from Other Jurisdictions

Judicial Enforcement: Texas has enacted the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act. *See* Tex. Fam. Code ch. 88. Under the Act, a Texas court shall enforce a protective order issued in another state, even if it includes terms that a Texas court could not have included in the order. The presentation of a protective order that is valid on its face establishes a prima facie case for the validity of the order. Texas enforcement remedies will apply to the enforcement of foreign protective orders. Tex. Fam. Code § 88.003(a), (e).

A foreign protective order is valid if it (1) names the protected individual and the respondent, (2) is currently in effect, (3) was rendered by a tribunal that had jurisdiction over the parties and the subject matter under the law of the issuing state, and (4) was rendered after the respondent was given reasonable notice and an opportunity to be heard consistent with the right to due process either before the order was issued or, in the case of an ex parte order, within a reasonable time after the order was rendered. It is an affirmative defense to an enforcement action that the order does not meet these requirements. Tex. Fam. Code § 88.003(d), (f).

Provisions of a mutual protective order will be enforced against the applicant only if the respondent filed a written pleading seeking a protective order in the issuing state and the tribunal made specific findings in favor of the respondent. Tex. Fam. Code § 88.003(g).

Nonjudicial Enforcement: A Texas law enforcement officer shall enforce a foreign protective order if he has probable cause to believe that a valid foreign order exists and that it has been violated. The officer has probable cause to believe the existence of a protective order if the protected individual presents a foreign protective order that identifies the protected individual and the respondent and, on its face, is currently in effect. A certified copy is not required. The order may be inscribed in a tangible medium or be stored in an electronic form that can be retrieved in a perceivable form. If a protected individual does not present the foreign protective order, the law enforcement officer may determine that a valid foreign protective order exists by relying on any relevant information. Tex. Fam. Code § 88.004(a)–(c).

If the law enforcement officer determines that the order cannot be enforced because the respondent was never served or notified of the order, the officer shall inform the respondent of the order, make a reasonable effort to serve the order on the respondent, and then allow the respondent a reasonable opportunity to comply with the order. Tex. Fam. Code § 88.004(d).

Registration of Foreign Orders: An individual may register a foreign protective order by presenting a certified copy of the order to the Texas Department of Public Safety (DPS), requesting that the order be registered in the statewide law enforcement system maintained by the DPS, or to the sheriff, constable, or chief of police responsible for the registration of orders in the local computer records and in the statewide law enforcement system maintained by the DPS. The individual registering the foreign protective order shall file an affidavit made by the protected individual that to the best of the protected individual's knowledge the order is in effect. A fee may not be charged for registration of the order. Tex. Fam. Code § 88.005(a), (d), (f). Registration is not required for the enforcement of a valid foreign protective order. Tex. Fam. Code § 88.004(e).

Immunity: Civil and criminal immunity is granted to state and local governmental agencies, law enforcement officers, prosecuting attorneys, court clerks, and any state or local governmental officials acting in an official capacity for acts or omissions arising from the registration or enforcement of a foreign protective order or for the detention or arrest of a person alleged to have violated a foreign protective order if the act or omission was done in good faith. Tex. Fam. Code § 88.006.

§ 17.28 Self-Help Protective Order Kit

A self-help protective order kit for victims of domestic violence is available at **www.TexasLawHelp.org**. The kit was developed by a task force of experienced family law practitioners, judges, and prosecutors from across Texas appointed by the Supreme Court of Texas. The kit includes detailed instructions for filling out the necessary forms, having a temporary order signed by a judge, and requesting a hearing date for grant of the protective order. The kit contains the court forms, which are approved for use by the supreme court in a special order, and helpful information for victims on how to prepare for the hearing. The kit is available in English, Spanish, and Vietnamese.

Although the kit was designed to facilitate pro se action by victims of domestic violence, attorneys also find the forms and instructions useful.

§ 17.29 Useful Websites

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

Office of the Attorney General—general information about protective orders
www.texasattorneygeneral.gov/cvs/protective-orders

Office of the Attorney General—form for victim compensation
www.texasattorneygeneral.gov/cvs/crime-victim-forms-applications

Self-help protective order kit (§ 17.28)
www.TexasLawHelp.org

Chapter 18

Alternative Dispute Resolution and Informal Settlement

I. Alternative Dispute Resolution

§ 18.1 Alternative Dispute Resolution Generally 491

§ 18.2 Notification and Objection 492

§ 18.3 Arbitration and Mediation Agreements 493

§ 18.4 Confidentiality of Communications in ADR Proceedings 497

§ 18.5 Selection and Qualifications of Impartial Third Party 500

§ 18.6 Enforcement of Mediated Settlement Agreement 500

§ 18.7 Court Appointment of Mediator 506

II. Informal Settlement

§ 18.11 Informal Settlement Conference 507

§ 18.12 Informal Settlement Agreement 507

§ 18.13 Not for Suits Affecting Parent-Child Relationship 508

Chapter 18

Alternative Dispute Resolution and Informal Settlement

I. Alternative Dispute Resolution

§ 18.1 Alternative Dispute Resolution Generally

Five different alternative dispute resolution (ADR) methods are described in subchapter B of chapter 154 of the Texas Civil Practice and Remedies Code: mediation, arbitration, summary jury trial, mini-trial, and moderated settlement conference.

Mediation: Mediation is a process in which a neutral third party acts as a facilitator to assist in resolving a dispute between two or more parties. It is an approach to conflict resolution in which the parties generally communicate directly. The role of the mediator is to facilitate communication between the parties, help them focus on the real issues of the dispute, and generate options for settlement. A mediator may not impose the mediator's judgment on the issues for that of the parties. The goal of mediation is for the parties themselves to arrive at a mutually acceptable resolution of the dispute. As with all ADR procedures, the mediation process is flexible; variables affecting the process include the style of the mediator and the communication mode of the parties. See Tex. Civ. Prac. & Rem. Code § 154.023 for a definition of mediation.

Arbitration: In the arbitration process, the arbitrator listens to a typically adversarial presentation of all sides of the case and then renders a decision (usually called an "award"). Arbitration awards may be binding on the parties if they have so agreed in advance. Arbitrations are usually conducted by either a sole arbitrator or a panel of three arbitrators. See Tex. Civ. Prac. & Rem. Code § 154.027 for a definition of arbitration.

Summary Jury Trial: During the summary jury trial, the attorneys present an abbreviated version of their evidence to an advisory jury selected from the regular jury pool.

The jury, after deliberation, returns a nonbinding, advisory verdict. The parties and their attorneys then poll and question the jurors. The information gained from this process is to be used as a basis for further settlement negotiations. The summary jury trial is used if the parties believe that a preview of what a jury may do will help them evaluate the case. See Tex. Civ. Prac. & Rem. Code § 154.026 for a definition of a summary jury trial.

Mini-Trial: The mini-trial is an ADR process in which the attorneys and parties meet with a neutral third party and each side presents its best case. Negotiation by the parties, usually without the attorneys present, follows; if this negotiation is unsuccessful, the neutral party provides an advisory opinion about the merits of the case. This opinion is nonbinding unless the parties agree that it is binding and enter into a written settlement agreement. A primary basis for settlement is often the parties' desire to resolve the dispute without protracted litigation. See Tex. Civ. Prac. & Rem. Code § 154.024 for a definition of a mini-trial.

Moderated Settlement Conference: The moderated settlement conference uses a panel of neutral, experienced attorneys who listen to a presentation of factual and legal arguments by attorneys for each party. The panel then questions the attorneys and the clients, who are present throughout the entire process. After deliberation, the panel renders a confidential advisory evaluation of the strengths and weaknesses of the case and often provides a dollar range or percentage for settlement. The evaluation is not binding on the parties and is used as a basis for further settlement negotiations. See Tex. Civ. Prac. & Rem. Code § 154.025 for a definition of a moderated settlement conference.

All five ADR methods are available for use in all civil cases, including family law cases under the Civil Practice and Remedies Code. However, only mediation and arbitration are mentioned in the Family Code. Accordingly, this manual includes forms only for mediation and arbitration.

Collaborative law is another method of ADR; it is discussed in chapter 15 of this manual.

§ 18.2 Notification and Objection

The court may, on its own motion or that of a party, refer a pending dispute for resolution by one of various alternative dispute resolution procedures. The court shall confer with the parties in determining the most appropriate ADR procedure. Tex. Civ. Prac. & Rem. Code § 154.021.

If the court determines that a pending dispute is appropriate for referral, the court shall notify the parties of its determination. Any party may file a written objection to the referral within ten days of receiving the notice. If the court finds that there is a reasonable basis for the objection, the court may not refer the dispute. Tex. Civ. Prac. & Rem. Code § 154.022.

At any time before the final mediation order a party may file a written objection to the referral of a suit to mediation on the basis that family violence has been committed against the objecting party by the other party (in a suit for dissolution of marriage) or by another party against the objecting party or a child who is the subject of the suit (in a suit affecting the parent-child relationship). After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party (dissolution suit) or of a party (suit affecting the parent-child relationship), a hearing is held, and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order that appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. Tex. Fam. Code §§ 6.602(d), 153.0071(f). These provisions do not apply to suits filed under Family Code chapter 262. Tex. Fam. Code § 153.0071(f).

§ 18.3 Arbitration and Mediation Agreements

Family Code sections 6.601, 6.602, and 153.0071 set out certain procedures concerning alternative dispute resolution that apply to all cases under title 1 and title 5.

Arbitration: On written agreement of the parties, the court may refer a case to arbitration. The agreement must state whether the arbitration is binding or nonbinding. Tex. Fam. Code §§ 6.601(a), 153.0071(a).

If the parties to a suit for dissolution of a marriage agree to binding arbitration, the court shall render an order reflecting the arbitrator's award. Tex. Fam. Code § 6.601(b); *Cayan v. Cayan*, 38 S.W.3d 161, 165 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). As in any contractual provision, an agreement to arbitrate can be waived, either expressly or impliedly. *In re Marriage of Brown & Chavez*, No. 07-13-00025-CV, 2013 WL 6044454, at *3–4 (Tex. App.—Amarillo Nov. 7, 2013, no pet.) (mem. op.). A party may also waive an arbitration agreement by substantially invoking the judicial process without moving for enforcement of the arbitration agreement. *Roman v. Herrera*, No. 13-20-00111-CV, 2021 WL 1306407 (Tex. App.—Corpus Christi–Edin-

burg Apr. 8, 2021, no pet.) (mem. op.); *Menger v. Menger*, No. 01-19-00921-CV, 2021 WL 2654137, at *4 (Tex. App.—Houston [1st Dist.] June 29, 2021, no pet.) (mem. op.).

If the parties to a suit affecting the parent-child relationship agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a nonjury hearing that the agreement is not in the child's best interest. The burden of proof is on the party seeking to avoid rendition of the order based on the arbitrator's award. Tex. Fam. Code § 153.0071(b). If the court determines that the arbitrator's award is not in the child's best interest, it must vacate the award and refer the matter back to binding arbitration pursuant to the parties' agreement. *Stieren v. McBroom*, 103 S.W.3d 602, 605–07 (Tex. App.—San Antonio 2003, pet. denied). By failing to file a motion to vacate the arbitrator's award and failing to present evidence concerning the child's best interest before rendition, a party waives the right to a best-interest hearing. *In re T.B.H.-H.*, 188 S.W.3d 312 (Tex. App.—Waco 2006, no pet.). Absent fraud, misconduct, or gross mistake, the express waiver by parties to an arbitration agreement of a right to judicial review is permissible and effective. *In re C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.—San Antonio 2004, pet. denied). Arbitration of a suit affecting the parent-child relationship is governed by both Tex. Fam. Code § 153.0071 and the Texas General Arbitration Act (Tex. Civ. Prac. & Rem. Code ch. 171). When the two statutes conflict, the provisions of the Family Code control. *Kilroy v. Kilroy*, 137 S.W.3d 780, 786 (Tex. App.—Houston [1st Dist.] 2004, no pet.). However, the court cannot compel arbitration over child-related claims since the court has continuing and exclusive jurisdiction over matters provided for under title 5 of the Texas Family Code. *In re Ron*, 582 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding [mand. denied]).

The Texas Arbitration Act does not preclude an agreement for judicial review of an arbitration award for reversible error, and the Federal Arbitration Act does not preempt enforcement of such an agreement. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

The failure to identify an arbitrator, or even specify a method for choosing one, does not render an arbitration agreement unenforceably incomplete. *Goetz v. Goetz*, 130 S.W.3d 359, 362 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). If an agreement to arbitrate does not specify a method of appointment, or if the agreed method fails or cannot be followed, the court, on application of a party stating the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators, shall appoint one or more qualified arbitrators. Tex. Civ. Prac. & Rem. Code § 171.041(b)(1), (b)(2). If the parties

agree to arbitration, there is no necessity to petition the trial court and seek a referral before proceeding directly to arbitration. *Kilroy*, 137 S.W.3d at 788–89.

If an arbitrator exceeds his authority, the excessive portion of the award should be severed and canceled and the correct portion should be retained. *See In re S.M.H.*, 523 S.W.3d 783 (Tex. App.—Houston [14th Dist.] 2017, no pet.). However, an arbitrator exceeds his authority only if the arbitration agreement does not give the arbitrator authority to decide the issues adjudicated in the arbitration award. The court will not overturn an arbitrator's award on grounds that the arbitrator exceeded his authority by misinterpreting the arbitration agreement if the agreement gives the arbitrator authority to decide the issues adjudicated and the arbitrator's interpretation of the terms of the agreement is plausibly supported by the arbitration agreement. *Cahill v. Jones-Cahill*, No. 04-20-00008-CV, 2021 WL 111729, at *5–6 (Tex. App.—San Antonio Jan. 13, 2021, no pet.) (mem. op.).

Under the Texas Arbitration Act, a trial court shall vacate an award if the rights of a party were prejudiced by the evident partiality of an appointed arbitrator. Tex. Civ. Prac. & Rem. Code § 171.088(a)(2)(A); *see, e.g., In re Marriage of Piske*, 578 S.W.3d 624 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.). However, a motion to vacate the arbitration award on that basis must be filed before the court approves the arbitration award and not later than the ninetieth day after the date of delivery of a copy of the arbitration award to the movant. Tex. Civ. Prac. & Rem. Code § 171.088(b); *Heilmann v. Heilmann*, No. 04-18-00849-CV, 2020 WL 6293446 (Tex. App.—San Antonio Oct. 28, 2020, no pet.) (mem. op.).

However, a motion to vacate an arbitration award on the basis that it was obtained by corruption, fraud, or other undue means must be filed not later than the ninetieth day after the date the grounds for the motion to vacate are known or should have been known. Tex. Civ. Prac. & Rem. Code § 171.088(b).

If a party seeks to avoid arbitration and asserts that the contract containing the agreement to arbitrate is not valid or enforceable, the court must try the issue promptly and may order arbitration only if the court determines that the contract is valid and enforceable against the party seeking to avoid arbitration. Even if the contract is found valid and enforceable, the court may stay arbitration or refuse to compel arbitration on any other ground. These provisions do not apply to a court order, a mediated settlement agreement (MSA), a collaborative law settlement agreement, a written settlement agreement reached at an informal settlement conference, an agreed parenting plan, or

any other agreement between the parties that is approved by a court. Tex. Fam. Code §§ 6.6015, 153.00715.

Mediation: On written agreement of the parties or on the court's own motion, the court may refer a case to mediation. Tex. Fam. Code §§ 6.602(a), 153.0071(c). However, a court referral to mediation is not required before an MSA is binding on the parties. *Cojocar v. Cojocar*, No. 03-14-00422-CV, 2016 WL 3390893, at *3–4 (Tex. App.—Austin June 16, 2016, no pet.) (mem. op.). Likewise, a suit for divorce need not be pending at the time the parties sign an MSA. *Highsmith v. Highsmith*, 587 S.W.3d 771, 776–77 (Tex. 2019).

An MSA is binding on the parties if the agreement provides, in a prominently displayed statement that is in bold-faced type or in capital letters or underlined, that the agreement is not subject to revocation; if it is signed by each party to the agreement; and if it is signed by the party's attorney, if any, who is present when the agreement is signed. Tex. Fam. Code §§ 6.602(b), 153.0071(d). Including "subject to the court's approval" language in an MSA does not make the agreement any less binding if the MSA satisfies all the requirements of the statute. *In re C.C.E.*, 530 S.W.3d 314 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

If an MSA meets these requirements, a party is entitled to judgment on the agreement notwithstanding rule 11 of the Texas Rules of Civil Procedure or another rule of law. Tex. Fam. Code §§ 6.602(c), 153.0071(e). A trial court may not deny a motion to enter judgment on a properly executed MSA solely on the grounds that it is not in a child's best interests. Stated another way, the trial court is not authorized to conduct a best-interest inquiry. *In re Lee*, 411 S.W.3d 445 (Tex. 2013) (orig. proceeding). However, a court may decline to enter a judgment on an MSA in a suit affecting the parent-child relationship if the court finds that the agreement is not in the child's best interest and (1) that a party to the agreement was a victim of family violence and that circumstance impaired the party's ability to make decisions or (2) that the agreement would permit a person who is subject to registration under chapter 62 of the Texas Code of Criminal Procedure, on the basis of an offense committed by the person when the person was seventeen years of age or older, or who otherwise has a history or pattern of past or present physical or sexual abuse directed against any person to reside in the same household as the child or otherwise have unsupervised access to the child. Tex. Fam. Code § 153.0071(e–1). The parties may not agree to set aside a statutorily compliant MSA. *In re Minix*, 543 S.W.3d 446, 452 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding [mand. denied]). Note, however, that nothing in section 153.0071 of the Texas Family Code requires the court to render judgment; merely, it provides that the

parties are entitled to one. *Williams v. Finn*, No. 01-17-00476-CV, 2018 WL 5071196, at *4 (Tex. App.—Houston [1st Dist.] Oct. 18, 2018, pet. denied) (mem. op.); *see also Jardon v. Pfister*, 593 S.W.3d 810, 822 (Tex. App.—El Paso 2019, no pet. h.) (party cannot complain of court's failure to render judgment on MSA for first time on appeal when party never requested such relief).

See section 18.6 below for a discussion of issues regarding enforcement of MSAs.

Family Code section 153.0071(e) does not apply to suits for termination of the parent-child relationship under chapter 161 of the Code. The court can decline to render judgment on an MSA unless there is a clear and convincing showing that termination is in the child's best interests. *In re Morris*, 498 S.W.3d 624, 634 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding [mand. denied]).

If the MSA does not satisfy Family Code criteria for entry of a judgment and is revoked by a party, it may still be enforceable as a contract. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995).

Sometimes parties enter into an MSA containing a provision that any dispute regarding, for example, the drafting of the decree will be decided by binding arbitration. In the absence of a defense to the arbitration agreement, the trial court must compel arbitration of claims falling within the scope of the agreement to arbitrate. *In re Provine*, 312 S.W.3d 824 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *see also In re L.T.H.*, 502 S.W.3d 338, 347 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

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

The mediator can decide issues regarding the intent of the parties and the mediation documents if the MSA contains a provision that the mediator can decide these issues. *In re Marriage of Allen*, 343 S.W.3d 513 (Tex. App.—Texarkana 2011, no pet.).

§ 18.4 Confidentiality of Communications in ADR Proceedings

In general, any communication relating to the subject matter of the referred dispute made by a participant in the alternative dispute resolution procedure, whether before or

after formal judicial proceedings are instituted, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding. Any record made at the ADR procedure is confidential; neither the participants nor the third-party facilitator may be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute. Tex. Civ. Prac. & Rem. Code § 154.073(a), (b).

Unless expressly authorized by the disclosing party, the third-party facilitator may not disclose to either party information given in confidence by the other and must at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. All matters, including the conduct and demeanor of the parties and their attorneys during the settlement process, are confidential and may never be disclosed to anyone, including the court, unless the parties agree otherwise. Tex. Civ. Prac. & Rem. Code § 154.053(b), (c).

An oral communication or written material used in or made a part of an ADR procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure. Tex. Civ. Prac. & Rem. Code § 154.073(c).

These provisions for confidentiality apply equally to the work of a parenting coordinator and to the parties and any other person who participates in the parenting coordination. Tex. Fam. Code § 153.0071(g).

Exceptions to Confidentiality: Despite the requirements for confidentiality discussed above, in certain instances applicable law may require disclosure of information revealed in the mediation process. For example, a mediator may be required to disclose child abuse or neglect to the proper authorities. A person having reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report. Tex. Fam. Code § 261.101(a). Professionals are subject to more specific requirements for reporting child abuse or neglect. *See* Tex. Fam. Code § 261.101(b). Reporting may also be required regarding an adult who was a victim of abuse or neglect as a child. *See* Tex. Fam. Code § 261.101(b–1). The requirement to report child abuse or neglect applies without exception to an individual, including an attorney, whose personal communications may otherwise be privileged. Tex. Fam. Code § 261.101(c). Knowing failure to make a report as required by section 261.101(a) or (b) constitutes a class A misdemeanor or state jail felony. Tex. Fam. Code § 261.109. The confidentiality provisions

for parenting coordination do not affect a person's duty to report abuse or neglect under Code section 261.101. Tex. Fam. Code § 153.0071(g).

Disclosure of mediation communications was permitted when one of the parties alleged that a new and independent tort arose during the course of a mediation, and the tort encompassed a duty to disclose (fiduciary relationship). *Avary v. Bank of America, N.A.*, 72 S.W.3d 779, 800 (Tex. App.—Dallas 2002, pet. denied). A party may bring suit for fraudulent inducement to enter into a mediated settlement agreement, but section 154.073 of the Civil Practice and Remedies Code prohibits the use of any statements made during the mediation. *Vick v. Waits*, No. 05-00-01122-CV, 2002 WL 1163842 (Tex. App.—Dallas June 4, 2002, pet. denied) (not designated for publication). Whether a party attended a mediation and whether he had the mediator's permission to leave do not concern the subject matter of the underlying suit, and the conduct is not confidential. *In re Daley*, 29 S.W.3d 915 (Tex. App.—Beaumont 2000, orig. proceeding). A party can waive mediation confidentiality under sections 154.053 and 154.073 of the Civil Practice and Remedies Code through offensive use of the statutory confidentiality provisions. See *Alford v. Bryant*, 137 S.W.3d 916 (Tex. App.—Dallas 2004, pet. denied), in which a client sued her lawyer for malpractice committed during mediation. The lawyer sought to depose the mediator; the client objected, citing sections 154.053 and 154.073. The court held that the client had waived the protection of the two statutes when she brought suit.

The confidentiality provisions of section 154.073 of the Civil Practice and Remedies Code do not affect the duty to report abuse or neglect under subchapter B of Family Code chapter 261 or abuse, exploitation, or neglect under subchapter C of Human Resources Code chapter 48. *See* Tex. Civ. Prac. & Rem. Code § 154.073(f). Each participant, including the impartial third party, to an ADR procedure is subject to the requirements of subchapter B of Family Code chapter 261 and to subchapter C of Human Resources Code chapter 48. Tex. Civ. Prac. & Rem. Code § 154.053(d).

COMMENT: If confidential information is disclosed during a mediation that is required to be reported, the mediator should advise the parties that disclosure is required and will be made.

Disclosures regarding the valuation, characterization, or existence of assets made during the mediation process remain confidential and cannot be used to set aside the MSA. *See Triesch v. Triesch*, No. 03-15-00102-CV, 2016 WL 1039035, at *6 (Tex. App.—Austin Mar. 8, 2016, no pet.) (mem. op.).

COMMENT: Because a disclosure regarding the value, character, or existence of an asset made during mediation remains confidential, it is good practice to place those disclosures in the actual MSA.

§ 18.5 Selection and Qualifications of Impartial Third Party

When a dispute is referred, the court may appoint one or more properly qualified impartial third parties to facilitate the procedure. Tex. Civ. Prac. & Rem. Code § 154.051. To be qualified for appointment as an impartial third party, a person must have completed at least forty hours of prescribed training in dispute resolution techniques. Appointment to a parent-child case requires the basic forty hours of training plus an additional twenty-four hours of training in family dynamics, child development, and family law, including a minimum of four hours of family violence dynamics training developed in consultation with a statewide family violence advocacy organization. The court may appoint a person who does not have the prescribed training if the appointment is based on legal or other professional training or experience in particular dispute resolution processes. Tex. Civ. Prac. & Rem. Code § 154.052. An amicus attorney is not a neutral person and cannot act as a mediator. *In re E.B.*, No. 12-17-00214-CV, 2017 WL 4675109, at *4 (Tex. App.—Tyler Oct. 18, 2017, orig. proceeding [mand. denied]) (mem. op.).

The court may set a reasonable fee for the services of an impartial third party. Unless the parties agree to a method of payment, the court shall tax the fee as other costs of suit. Tex. Civ. Prac. & Rem. Code § 154.054.

§ 18.6 Enforcement of Mediated Settlement Agreement

A final judgment founded on a settlement agreement must be in strict compliance with the agreement. *In re Marriage of Ames*, 860 S.W.2d 590, 593 (Tex. App.—Amarillo 1993, no writ); *see also Maraio-Wilhoit v. Wilhoit*, No. 11-18-00312-CV, 2021 WL 389243, at *4–5 (Tex. App.—Eastland Feb. 4, 2021, no pet.) (mem. op.) (court erred in awarding attorney's fees where MSA provided that each party would pay his or her own).

Because a mediated settlement agreement (MSA) is a contract, courts look to general contract-interpretation principles to determine its meaning. *Loya v. Loya*, 526 S.W.3d 448, 451 (Tex. 2017). Specifically, courts give terms their plain, ordinary, and generally accepted meanings unless the instrument shows that the parties used them in a technical or different sense. *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). In *Loya*, the MSA stated that "[a]ll future income of a party and/or from any

property herein awarded to a party is partitioned to the person to whom the property is awarded." The wife contended that part of a $4.5 million bonus the husband received nine months after the MSA was signed was undivided community property. The supreme court held that the character of the funds was not relevant, since it was undisputed that the bonus was paid after the MSA was signed; it therefore belonged to the husband. The plain wording of the MSA trumped all other arguments. *Loya*, 526 S.W.3d at 452.

Additionally, under the rules of contract interpretation, the trial court is required to construe an MSA so that no provisions of the MSA will be rendered meaningless. In *In re D.N.P.*, the parties' MSA provided that the father would pay additional child support equal to 25 percent of his net annual bonus. The terms of the MSA were incorporated in the divorce decree. Years later, when the mother filed a suit for enforcement, the father claimed that he never received a "bonus," but he had received a distribution from his employer's profit-sharing plan each year, including the years prior to the parties' execution of the MSA. The trial court's interpretation of the term "bonus" to include the father's annual distribution from his employer's profit-sharing plan was not error, because a contrary interpretation would have rendered that provision of the MSA meaningless. *In re D.N.P.*, No. 05-19-01083-CV, 2021 WL 790896 (Tex. App.—Dallas Mar. 2, 2021, no pet.) (mem. op.).

If the trial court finds that an MSA has been procured by fraud, the proper remedy is to set aside the MSA and proceed as though there were no MSA. In *Penafiel*, after finding that the MSA had been procured by fraudulent inducement, the trial court committed error by enforcing the MSA and also awarding the wife a monetary judgment for the value that she would have received from a just and right division of the community estate, resulting in a double recovery. *In re Marriage of Penafiel*, 633 S.W.3d 36, 50 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

The court may not provide terms, provisions, or essential details not previously agreed to by the parties. *Matthews v. Looney*, 123 S.W.2d 871, 872 (Tex. 1939); *see also Marario-Wilhoit*, 2021 WL 389243, at *4. However, terms necessary to effectuate and implement the parties' agreement do not affect the agreed substantive division of property and may be left to future articulation between the parties or to future consideration by the trial court. *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.—Dallas 2006, no pet.); *McLendon v. McLendon*, 847 S.W.2d 601, 606 (Tex. App.—Dallas 1992, writ denied); *see also In re Lee*, 411 S.W.3d 445, 458 n.17 (Tex. 2013) (to extent there is no dispute about parties' intent, trial court has discretion to provide clarification of any other provision of settlement agreement).

COMMENT: The foregoing doctrine has not yet been applied to agreements in suits affecting the parent-child relationship.

If an agreed divorce decree does not comply with the terms of the MSA, the court may reform the divorce decree to comply with the MSA while the court retains plenary power. *Upton v. Upton*, No. 11-19-00025-CV, 2021 WL 219662, at *3 (Tex. App.—Eastland Jan. 22, 2021, no pet.) (mem. op.). In *Upton*, the court also found that the merger clause contained in the agreed divorce decree did not preclude the trial court from reforming the divorce decree to comply with the MSA because the trial court was without authority to enter a divorce decree that contained a property division that conflicted with the terms of the MSA. *Upton*, 2021 WL 219662, at *3.

Even if an error exists in a mediated settlement agreement, a clarification order is not appropriate if the change would be substantive rather than clerical. *See Weido v. Weido*, No. 01-15-00755-CV, 2016 WL 1355764, at *4 (Tex. App.—Houston [1st Dist.] Apr. 5, 2016, no pet.) (mem. op.).

Ambiguity in an MSA is not cause to set aside the agreement. *See Milner v. Milner*, 361 S.W.3d 615, 623 (Tex. 2011); *In re Lauriette*, No. 05-15-00518, 2015 WL 4967233, at *3–4 (Tex. App.—Dallas Aug. 20, 2015, orig. proceeding [mand. denied]) (mem. op.). If the MSA is clear and unambiguous, the court may not rewrite or add to that agreement. *Jonjak v. Griffith*, No. 03-18-00118-CV, 2019 WL 1576157 (Tex. App.—Austin Apr. 12, 2019, no pet.) (mem. op.); *see also Payne v. Payne*, No. 06-20-00051-CV, 2021 WL 1216885, at *5–6 (Tex. App.—Texarkana Apr. 1, 2021, no pet.) (mem. op.) (mutual release in MSA was clear and unambiguous, precluding husband's subsequent suit involving tort claims against wife based on incident that occurred before execution of MSA).

A motion for new trial filed after entry of an agreed divorce decree based on an MSA must be supported by the introduction of evidence. *In re Willeford*, No. 04-20-00495-CV, 2021 WL 356242 (Tex. App.—San Antonio Feb. 3, 2021, orig. proceeding) (mem. op.).

If the MSA provides that the parties are to return to the mediator for arbitration of a dispute regarding drafting, interpretation, or intent, only the mediator, not the trial court or the court of appeals, has the authority to resolve the fact dispute. *See Milner*, 361 S.W.3d at 622 (divorce); *see also In re L.T.H.*, 502 S.W.3d 338, 347 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (suit affecting parent-child relationship).

One party cannot unilaterally repudiate the agreement. *In re Marriage of Banks*, 887 S.W.2d 160, 163 (Tex. App.—Texarkana 1994, no writ).

A party who has filed an answer and general denial is entitled to forty-five days' notice of a hearing on the other party's motion to enter a divorce decree based on an MSA. Such a hearing to prove up an MSA is still considered a final hearing. *M.B. v. R.B.*, No. 02-19-00342-CV, 2021 WL 2252792 (Tex. App.—Fort Worth June 3, 2021, no pet.) (mem. op.).

Where an MSA provides that each party will pay his own attorney's fees and a party files a postjudgment suit seeking to enforce or set aside the MSA, the other party is not precluded from seeking a judgment for attorney's fees in the subsequent enforcement suit. *Nabers v. Nabers*, No. 14-18-00968-CV, 2020 WL 830025, at *4 (Tex. App.—Houston [14th Dist.] Feb. 20, 2020, no pet.) (mem. op.).

If a mediated settlement agreement contains a provision that is impossible to perform, unless there is a contingency provision, the agreement will be unenforceable. The agreement in a 2016 case contained a provision requiring that certain real property would be refinanced so that the community interest of a spouse would be bought out. The agreement unambiguously provided that the inability to refinance would render the agreement of "no further force and effect." The court was without authority to partially enforce or modify the agreement. *Vasquez v. Vasquez*, No. 13-15-00306-CV, 2016 WL 6804462 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.) (mem. op.).

The Supreme Court of Texas has held that a series of letters constituted an agreement under rule 11 of the Texas Rules of Civil Procedure. Although a rule 11 agreement must be filed, there is no requirement about when the filing must take place. After proper notice and hearing, the court can enforce an order complying with rule 11 even though one side no longer consents to the settlement. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). On the other hand, in a suit affecting the parent-child relationship, the court is not obligated to render a final order on the basis of a rule 11 agreement if the court finds that the terms of the agreement are not in the best interest of the child. *Tidwell v. Tidwell*, No. 08-17-00120-CV, 2019 WL 4743685, at *3 (Tex. App.—El Paso Sept. 30, 2019, no pet.) (mem. op.).

The foregoing cases, however, must be read in conjunction with sections 6.602 and 153.0071 of the Family Code, which are discussed in section 18.3 above. An MSA that meets the statutory requirements of section 6.602(b) or section 153.0071(d) is binding on the parties, and a party is entitled to judgment on the agreement notwithstanding rule

11 of the Texas Rules of Civil Procedure or another rule of law unless, in a title 5 case, the court makes certain findings. Tex. Fam. Code §§ 6.602(c), 153.0071(e), (e–1). If the statutory requirements of section 6.602 of the Family Code are met, an agreement is binding and can be enforced even in the absence of a judgment incorporating it. *Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237, 242 (Tex. App.—Austin 2007, pet. denied) (wife died after MSA but before entry of decree). An MSA can be set aside only if the opposing party establishes that the agreement was illegal or was procured by fraud, duress, coercion, or other dishonest means. *Spiegel*, 228 S.W.3d at 242; *see also Mueller v. Mueller*, No. 01-11-00247-CV, 2012 WL 682285, at *3 (Tex. App.—Houston [1st Dist.] Mar. 1, 2012, pet. denied) (mem. op.). When the Texas legislature enacted section 6.602 of the Family Code, it deliberately created a procedural shortcut for enforcement of MSAs in divorce cases. *Cayan v. Cayan*, 38 S.W.3d 161, 166 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). An agreement in which the stipulation of irrevocability did not meet the specific formal requirements of section 153.0071(d) could be revoked before the rendition of judgment. *Spinks v. Spinks*, 939 S.W.2d 229, 230 (Tex. App.—Houston [1st Dist.] 1997, no writ) (stipulation of irrevocability contained in separate paragraph but not underlined).

Not all MSAs can be enforced even though they comply with sections 6.602 or 153.0071 of the Family Code. A court cannot enforce a section 153.0071 agreement if it contains an illegal provision. *See In re Kasschau*, 11 S.W.3d 305, 311–13 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). If the parties to an MSA have represented to one another that they have disclosed the marital property known to them, there is a duty to disclose all information about substantial assets. Without a full disclosure, the agreement will not be enforced. *Boyd v. Boyd*, 67 S.W.3d 398, 404 (Tex. App.—Fort Worth 2002, no pet.). When one voluntarily discloses information, there is a duty to disclose the whole truth rather than make a partial disclosure that conveys a false impression. *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 670 (Tex. App.—Fort Worth 1998, pet. denied). The *Boyd* court held that construing section 6.602 of the Texas Family Code "to mean that a settlement agreement that complies with section 6.602(b) must be enforced no matter what the circumstances could require enforcement of an agreement that was illegal or that was procured by fraud, duress, coercion or other dishonest means. We do not believe that the legislature intended such an absurd result in enacting section 6.602." *See Boyd*, 67 S.W.3d at 403; *see also Cantillo v. Cantillo*, 627 S.W.3d 367 (Tex. App.—El Paso 2021, no pet.) (party who moves trial court to set aside MSA on basis that other party committed fraud by nondisclosure must show that other party had legal duty to make such disclosure and failed to do so).

However, a trial court may not set aside an MSA on the basis of "newly discovered evidence" or "in the interest of justice and fairness" unless the trial court finds that the MSA does not meet the statutory requirements of an MSA or that the MSA was procured by fraud, duress, coercion, or other dishonest means. *In re Bouajram*, No. 02-21-00072-CV, 2021 WL 3673856, at *3–4 (Tex. App.—Fort Worth Aug. 17, 2021, orig. proceeding) (mem. op.).

In re Calderon, 96 S.W.3d 711 (Tex. App.—Tyler 2003, orig. proceeding [mand. denied]), involved a situation in which an MSA contained a provision requiring that venue remain in Smith County for three years from the date of the entry of the order. The court held that the provisions of an MSA that restricts the right to mandatory transfer in the event of a future controversy could not be enforced. *In re Calderon*, 96 S.W.3d at 718–19. *See also In re Lovell-Osburn*, 448 S.W.3d 616, 621 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding). The trial court has the authority not to enforce an MSA that is illegal or violates public policy. *See Garcia-Udall v. Udall*, 141 S.W.3d 323 (Tex. App.—Dallas 2004, no pet.). However, provisions of an MSA that are void as against public policy may be severed and do not render the entire MSA void as long as those provisions do not constitute the central and essential purpose of the MSA. *In re M.E.H.*, 631 S.W.3d 244, 254 (Tex. App.—Houston [14th Dist.] 2020, no pet.). Moreover, in a parent-child relationship suit, the trial court may decline to enter a judgment on an MSA if it finds that the agreement is not in the child's best interest and (1) that a party to the agreement was a victim of family violence and that circumstance impaired the party's ability to make decisions or (2) that the agreement would permit a person who is subject to registration under chapter 62 of the Texas Code of Criminal Procedure, on the basis of an offense committed by the person when the person was seventeen years of age or older, or who otherwise has a history or pattern of past or present physical or sexual abuse directed against any person to reside in the same household as the child or otherwise have unsupervised access to the child. Tex. Fam. Code § 153.0071(e–1). *See In re C.N.H.*, No. 04-119-00417-CV, 2020 WL 557541, at *3 (Tex. App.—San Antonio Feb. 5, 2020, no pet.) (mem. op.) (when declining to enter judgment on MSA, trial court's failure to make required statutory findings is error).

COMMENT: Sanctions may be imposed on a party who repudiates an MSA without grounds or justification. *See Hall v. Hall*, No. 12-03-00417-CV, 2005 WL 1000619 (Tex. App.—Tyler Apr. 29, 2005, no pet.) (mem. op.). In *Clements v. Clements*, the court of appeals upheld the trial court, which awarded attorney's fees as sanctions against a party for delaying the signing of a decree even though the MSA provided that each party pay his or her attorney's fees. The court distinguished the provision regarding

attorney's fees in the property division and the later effort to frustrate the signing of the decree. *Clements v. Clements*, No. 13-13-00560-CV, 2015 WL 3523028 (Tex. App.—Corpus Christi–Edinburg June 4, 2015, no pet.) (mem. op.).

The enforcement of an otherwise irrevocable MSA may be defeated by quasi-estoppel. In *Brooks v. Brooks*, 257 S.W.3d 418 (Tex. App.—Fort Worth 2008, pet. denied), the divorcing parties entered into an MSA in accordance with section 6.602 of the Texas Family Code. The MSA was filed with the court. Later the parties agreed to remediate the issues and to proceed to trial if the second mediation failed. The second mediation did, indeed, fail. At trial, no mention was made of the original MSA by either party, and both parties submitted to the trial court proposed property divisions that differed from that of the MSA. The court divided the property but did not follow the original MSA. The husband filed a motion for new trial, insisting that the trial court should have divided the community estate according to the provisions of the original MSA because it was irrevocable under section 6.602 of the Family Code. The court of appeals upheld the trial court, holding that the doctrine of quasi-estoppel can be invoked to preclude "a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." *Brooks*, 257 S.W.3d at 423. Compare *Brooks* with *In re Minix*, 543 S.W.3d 446, 452 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding [mand. denied]) (parties may not agree to set aside statutorily compliant MSA).

§ 18.7 Court Appointment of Mediator

Certain rules concerning the appointment of mediators apply to courts in counties with a population of 25,000 or more. *See* Tex. Gov't Code § 37.001.

The court must establish and maintain a list of all persons who are registered with the court to serve as a mediator. Multiple lists categorized by the type of case and the person's qualifications are permitted. Tex. Gov't Code § 37.003(a), (b).

In each case in which the appointment of a mediator is necessary because the parties are unable to agree on a mediator, the court must use a rotation system and appoint the person whose name appears first on the list. Tex. Gov't Code § 37.004(b). A person on the list whose name does not appear first, or a person who meets the requirements to serve but is not on the list, may be appointed on a finding of good cause if the person's appointment is required on a complex matter because he has relevant specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter of the case; has relevant prior involvement with the parties or the case; or is in a relevant geographic location. Tex. Gov't Code § 37.004(d). If an initial declaration of a

state of disaster for the area is made within thirty days before the appointment, the court may appoint a person on the list whose name does not appear first or a person who meets requirements to serve but is not on the list. Tex. Gov't Code § 37.004(d–1), (g). A person who is not appointed in the order in which his name appears on the applicable list stays next in line, and a person who has been appointed goes to the end of the list. Tex. Gov't Code § 37.004(e), (f).

These provisions do not apply to a mediation conducted by an alternative dispute resolution system established under Civil Practice and Remedies Code chapter 152 or to a mediator appointed under a domestic relations office established under Family Code chapter 203, providing services without expecting or receiving compensation, or providing services as a volunteer of a nonprofit organization that provides pro bono legal services to the indigent. Tex. Gov't Code § 37.002.

The lists must be posted annually at the courthouse and on the court's website. Tex. Gov't Code § 37.005.

[Sections 18.8 through 18.10 are reserved for expansion.]

II. Informal Settlement

§ 18.11 Informal Settlement Conference

The parties to a suit for divorce, for annulment, or to declare a marriage void may agree to one or more informal settlement conferences. They may agree that the conferences may be conducted without or without the presence of their attorneys, if any. Tex. Fam. Code § 6.604(a).

§ 18.12 Informal Settlement Agreement

A written settlement agreement reached at an informal settlement conference is binding on the parties if the agreement provides, in a prominently displayed statement that is in bold-faced type, in capital letters, or underlined, that the agreement is not subject to revocation; if it is signed by each party to the agreement; and if it is signed by the party's attorney, if any, who is present when the agreement is signed. Tex. Fam. Code § 6.604(b).

If a written settlement agreement meets these requirements, a party is entitled to judgment on the agreement notwithstanding rule 11 of the Texas Rules of Civil Procedure or another rule of law. Tex. Fam. Code § 6.604(c).

If the court finds that the terms of the agreement are just and right, those terms are binding on the court. If the court approves the agreement, the court may set the agreement forth in full in the final decree or incorporate it by reference. When a trial court renders judgment and signs a decree based on the terms of a written informal settlement agreement and does not issue any findings of fact or conclusions of law, it is implied that the trial court found that the agreement was just and right, which satisfies the statute. *Comerio v. Comerio*, No. 04-13-00493-CV, 2014 WL 2547607, at *2 (Tex. App.—San Antonio June 4, 2014, no pet.) (mem. op.). If the court finds that the terms of the agreement are not just and right, the court may request the parties to submit a revised agreement or set the case for a contested hearing. Tex. Fam. Code § 6.604(d), (e).

If an informal settlement agreement or a rule 11 agreement does not meet the requirements of Family Code section 6.604(c), either party may revoke consent to the agreement at any time before the court renders judgment. *See Cooper v. Cooper*, No. 05-20-00507-CV, 2021 WL 1747856 (Tex. App.—Dallas May 4, 2021, no pet.) (mem. op.); *In re Z.U.L.*, No. 06-20-00079-CV, 2021 WL 96864 (Tex. App.—Texarkana Jan. 12, 2021, no pet.) (mem. op.).

§ 18.13 Not for Suits Affecting Parent-Child Relationship

No provision analogous to section 6.604 of the Family Code, discussed above, has been enacted to apply to proceedings under title 5 of the Code.

Chapter 19
Trial Proceedings

§ 19.1 Applicable Rules 511
§ 19.2 Pretrial Conference 511
§ 19.3 Preferential Setting 511
§ 19.4 Continuance 512
§ 19.5 Inventory Summary; Suggested Property Division 516
§ 19.6 Limiting Attendance 517
§ 19.7 Child as Witness 517
§ 19.8 Default Judgment 518
§ 19.9 Relief Pending Final Order 521
§ 19.10 Motion for Judgment in Nonjury Case 521
§ 19.11 Request for Jury Trial 521
§ 19.12 Number of Peremptory Challenges 523
§ 19.13 Motion in Limine 524
§ 19.14 Requests for Questions, Definitions, and Instructions 525
§ 19.15 Submission to Jury 525
§ 19.16 Objection to Jury Charge 525
§ 19.17 Judgment Non Obstante Veredicto/Directed Verdict 526
§ 19.18 Subpoenas 527
§ 19.19 Attorney's Fees 528
§ 19.20 Pleadings 528
§ 19.21 Expedited Actions 529

Chapter 19

Trial Proceedings

§ 19.1 Applicable Rules

In connection with this chapter on trial proceedings, the family law practitioner should consult not only the Texas Rules of Civil Procedure and the Texas Rules of Evidence but also the local rules of the county of practice. Often the local rules are stricter than the Texas Rules of Civil Procedure or the Texas Rules of Evidence. The material that follows is applicable to a hearing on temporary orders as well as a final trial.

§ 19.2 Pretrial Conference

The court may order the parties and attorneys to attend a conference to consider matters, including motions and pleas, necessity of amending pleadings, setting of discovery schedules, requirement of the written statement of the parties' contentions, stipulations of fact, identification of legal matters to be ruled on, exchange of lists of fact witnesses and expert witnesses, consideration of the jury charge and questions, marking and exchanging of exhibits, stipulations about admissibility or objections, and reference of any issue to a master or auditor. Tex. R. Civ. P. 166. Proper notice of the pretrial conference must be given. *Vega v. Vega*, No. 09-17-00468-CV, 2019 WL 3949463, at *4 (Tex. App.—Beaumont Aug. 22, 2019, no pet.) (mem. op.) (court erred in striking pleadings when counsel filed counterpetition listing different address than one trial court used to mail scheduling letter, pleading did not list fax number, and court did not attempt to provide notice to counsel by using e-file system).

§ 19.3 Preferential Setting

A case may be preferentially set if a motion is filed by a party, the amicus attorney, or the child's attorney ad litem. The court may give precedence to that hearing over other civil cases if the delay created by ordinary scheduling practices will unreasonably affect the best interests of the child. Tex. Fam. Code § 105.004. The parties must be given reasonable notice of not less than forty-five days of the first trial setting. Tex. R. Civ. P. 245; *see Hildebrand v. Hildebrand*, No. 01-18-00933-CV, 2020 WL 4118023, at *4–5

(Tex. App.—Houston [1st Dist.] July 21, 2020, no pet.) (mem. op.) (thirty-nine days' notice not sufficient to take post-answer default).

§ 19.4 Continuance

Any case may be postponed or continued by agreement, with approval of the court. *See* Tex. R. Civ. P. 330(c)–(d). Motions for continuance are controlled by rules 251–254 of the Texas Rules of Civil Procedure and by any local rules that may apply.

Motions for continuance shall not be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law. Tex. R. Civ. P. 251.

Motions for continuance generally must be in writing, state the specific facts supporting the motion, and be verified or supported by an affidavit. *In re C.F.*, 565 S.W.3d 832, 844 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (citing *In re Marriage of Harrison*, 557 S.W.3d 99, 117 (Tex. App.—Houston [14th Dist.] 2018, pet. denied)). When no written motion is filed it is presumed the court did not abuse its discretion in denying a motion for continuance, but the presumption may be overcome. *In re L.N.C.*, 573 S.W.3d 309, 320–21 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (father bench-warranted to trial but did not appear on day of trial, and his counsel had not been given explanation for his nonappearance).

Although the rule provides that an affidavit is to be used to support sufficient cause, case law has interpreted the rule to allow either a verification or an affidavit. *See Texneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *Hawthorne v. Guenther*, 917 S.W.2d 924, 929 (Tex. App.—Beaumont 1996, writ denied). An unsworn declaration may be used in lieu of a verification or affidavit. Tex. Civ. Prac. & Rem. Code § 132.001. Such a verification must be based on personal knowledge, not on knowledge and belief. *Hawthorne*, 917 S.W.2d at 930. A verification that is not notarized is insufficient to support a motion for continuance. *See Hardwick v. Hardwick*, No. 02-15-00325-CV, 2016 WL 5442772 (Tex. App.—Fort Worth Sept. 29, 2016, no pet.) (mem. op.) (husband's motion for continuance, which lacked notary's signature, was not verified or supported by affidavit, and court therefore presumed that trial court did not abuse its discretion in denying it). Failure to comply with rule 251's requirement that a motion for continuance be supported by affidavit will allow an appellate court to presume the trial court did not abuse its discretion by denying the motion. *In re D.P.B.*, No. 05-17-00185-CV, 2018 WL 3014628, at *2 (Tex. App.—Dallas June 15, 2018, no pet.) (mem. op.) (court denied mother's oral motion for continuance).

If the ground of the motion for continuance is that certain necessary testimony is not available at the time of trial, there shall be an affidavit made that the testimony is material, showing its materiality, and that due diligence has been used to procure the testimony, stating the diligence and the cause of failure, if known. The affidavit must show that the testimony cannot be procured from any other source. If continuance is sought for the absence of a witness, the name and residence address of the witness and what is expected to be proved by the witness must be stated. The motion for continuance must also state that it is not sought for delay only but that justice may be done. If it is a first motion for continuance, it is not necessary to show that the absent testimony cannot be procured from another source. Tex. R. Civ. P. 252; *see In re Sakyi*, No. 05-20-00574-CV, 2020 WL 4879902, at *4 (Tex. App.—Dallas Aug. 20, 2020, orig. proceeding) (mem. op.) (supreme court emergency orders expressly granted trial court discretion to allow ex-husband to testify remotely about dates of dissolution of prior marriage and purchase of real property).

Absence of counsel (rule 253) and attendance on legislative business (rule 254) are other grounds for continuance. *See* Tex. R. Civ. P. 253, 254. When the basis for the motion for continuance is the withdrawal of counsel, the movant must show that the failure to be represented at trial was not due to his own fault or negligence. *Harrison v. Harrison*, 367 S.W.3d 822, 827 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *In re J.P.*, 365 S.W.3d 833, 836 (Tex. App.—Dallas 2012, no pet.); *Jordan-Nolan v. Nolan*, No. 07-12-00431-CV, 2014 WL 3764509, at *2 (Tex. App.—Amarillo July 28, 2014, no pet.) (mem. op.) (wife failed to show sufficient cause for continuance where three months after her counsel withdrew she attempted to hire counsel a week before trial and counsel declined to represent her). When counsel withdraws due to the fault of the movant, a trial court generally does not abuse its discretion in denying a motion for continuance. *In re Marriage of Harrison*, 557 S.W.3d at 119 (testimony of counsel that wife had caused conflict between attorney and client). It is an abuse of discretion to allow an attorney to withdraw on the day of trial without ascertaining the substantive basis of the dispute between client and attorney and, therefore, without determining whether the attorney had good cause to withdraw, and without providing adequate time for the client to secure other representation and for new counsel to investigate the case and prepare for trial. *Caddell v. Caddell*, 597 S.W.3d 10, 14 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (citing *Jackson v. Jackson*, 556 S.W.3d 461, 471 (Tex. App.—Houston [1st Dist.] 2018, no pet.)).

Legislative Continuance: A trial court is under the ministerial duty to grant a legislative continuance when the statutory criteria are met. Section 30.003 of the Texas Civil Practice and Remedies Code provides the following:

> Except as provided by subsections (c) and (c–1), at any time within 30 days of a date when the legislature is to be in session, at any time during a legislative session, or when the legislature sits as a constitutional convention, the court on application shall continue a case in which a party applying for the continuance or the attorney for that party is a member or member-elect of the legislature and will be or is attending a legislative session. The court shall continue the case until 30 days after the date on which the legislature adjourns.

Tex. Civ. Prac. & Rem. Code § 30.003(b).

Subsection (c) provides that if the attorney for a party to the case is a member or member-elect of the legislature who was employed on or after the thirtieth day before the date on which the suit is set for trial, the continuance is discretionary with the court. Tex. Civ. Prac. & Rem. Code § 30.003(c).

Subsection (c–1) provides that if the attorney for a party to any criminal case is a member or member-elect of the legislature who was employed on or after the fifteenth day on which the suit is set for trial, the continuance is discretionary with the court. Tex. Civ. Prac. & Rem. Code § 30.003(c–1).

The legislature's intent under section 30.003 was to create a window of time that begins thirty days before session and ends thirty days after session in which a legislator may seek a continuance. During that time frame, when an application for legislative continuance is made, the trial court must grant it. *In re Smart*, 103 S.W.3d 515, 520–21 (Tex. App.—San Antonio 2003, orig. proceeding) (trial court abused discretion in granting legislative continuance, but other party had adequate remedy at law). Because a hearing on temporary orders is neither a suit nor a trial, a legislative continuance is mandatory even if filed within thirty days of the hearing. *In re I.E.F.*, 345 S.W.3d 637, 640 (Tex. App.—San Antonio 2011, orig. proceeding).

It is not relevant whether the attorney is necessary to the party or the extent of the legislator's participation in the lawsuit. *Amoco Production Co. v. Salyer*, 814 S.W.2d 211, 213 (Tex. App.—Corpus Christi–Edinburg 1991, orig. proceeding). *But see Broesche v. Jacobson*, 218 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (trial court found wife hired legislator for purposes of delay, and wife's counsel's failure to

timely notify husband's counsel of legislator's retention, which caused husband's counsel to work over Christmas holiday, was intended to cause husband unnecessary additional litigation fees). The trial court, however, is allowed the discretion in those cases in which the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay. In cases of this type the trial court has a duty to conduct a hearing on the allegations. If the allegations are shown to be meritorious, the court should deny the continuance. *Waites v. Sondock*, 561 S.W.2d 772, 776 (Tex. 1977) (orig. proceeding) (trial court abused discretion in granting continuance rather than recognizing due-process exception; right to child support could not be enforced by any other means).

Stay for Military Service: The Servicemembers Civil Relief Act provides that, under certain circumstances, a stay may be granted to a party to any civil action or proceeding, including any child custody proceeding, who is in military service or has separated from military service within ninety days and who has received notice of the action or proceeding. *See* 50 U.S.C. § 3932(a).

At any stage before final judgment, the court may, on its own motion, and must, on the servicemember's application, stay the action for at least ninety days if the following conditions are met. The application must include (1) a letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear and (2) a letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave for the servicemember has not been authorized. *See* 50 U.S.C. § 3932(b).

The application does not constitute an appearance for jurisdictional purposes or a waiver of any defense. 50 U.S.C. § 3932(c). An additional stay may be sought under certain circumstances, and the court must appoint counsel for the servicemember if it does not grant the additional stay. *See* 50 U.S.C. § 3932(d).

A servicemember of the Texas military forces who is ordered to state active duty or to state training and other duty is entitled to the same benefits and protections provided to U.S. servicemembers by the foregoing provisions of 50 U.S.C. § 3932. Tex. Gov't Code § 437.213.

§ 19.5 Inventory Summary; Suggested Property Division

When a suit for dissolution of a marriage is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may grant temporary orders requiring one or both parties to prepare a sworn inventory and appraisement of the real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities. Tex. Fam. Code § 6.502(a)(1).

Each party in a divorce proceeding has a responsibility to produce evidence of the value of various properties to provide the trial court with a basis on which to make the division of property. *Reyes v. Reyes*, 458 S.W.3d 613, 620 (Tex. App.—El Paso 2014, no pet.). In order for the court to determine, with some degree of accuracy, the true nature and extent of the estates of the parties (whether community or separate), an accurate inventory of all assets and liabilities should be required by the court. Requiring an accurate inventory and appraisement will increase the probability of the court's dividing the property in a manner the court deems just and right, with due regard for the rights of each party and any children of the marriage, in accordance with section 7.001. *See* Tex. Fam. Code § 7.001. The court may not ignore stipulations or inventories that characterize property as separate property when the parties do not dispute the separate property claims and submit proposed property divisions confirming the separate property of the other party. *Alcedo v. Alcedo*, No. 02-17-00451-CV, 2019 WL 2292979, at *3 (Tex. App.—Fort Worth May 30, 2019, pet. denied) (mem. op.). Additionally, an inventory and appraisement should be the starting point for the preparation of findings of fact and conclusions of law concerning the characterization and value of all assets, liabilities, claims, and offsets on which disputed evidence has been presented. *See* Tex. Fam. Code § 6.711(a).

Local rules of the county in which the case is filed govern the form of the inventory, the degree of particularity required in its preparation, and the time within which it must be filed.

Having both an inventory summary and a suggested division of community property for the court's reference available during trial will enable the court to understand the client's position more clearly. Both the inventory and the suggested division of property may be offered into evidence as a shorthand rendition of the witness's testimony. If it involves a great number of items of property, reflected by a number of documents, the inventory may be admitted as a summary as allowed by Tex. R. Evid. 1006.

§ 19.6 Limiting Attendance

In a suit under title 5 of the Family Code, on the agreement of all parties to the suit, the court may limit attendance at any hearing to those persons who have a direct interest in the suit or in the work of the court. Tex. Fam. Code § 105.003(b).

To exclude a witness from the courtroom during the trial, a party must invoke "the rule." Tex. R. Civ. P. 267(a) and Tex. R. Evid. 614 require the trial court, at the request of the party, to administer the oath to the witnesses and remove them from the courtroom so they cannot hear the testimony given by other witnesses. A party or a spouse of a party may not be excluded from the courtroom during the trial. Tex. R. Civ. P. 267(b); Tex. R. Evid. 614(a). A person whose presence is shown by a party to be essential to the presentation of the case also may not be excluded from the courtroom during the trial. Tex. R. Civ. P. 267(b); Tex. R. Evid. 614(c). This provision is commonly applied to an expert witness.

Litigants cannot be denied access to the courts simply because they are inmates. While an inmate does not have an absolute right to appear, inmates may be allowed access through alternative means such as affidavits, deposition, videoconferencing, or telephone. *In re Marriage of Niyonzima & Kazabukeye*, No. 07-18-00287-CV, 2019 WL 923829, at *1 (Tex. App.—Amarillo Feb. 25, 2019, no pet.) (mem. op.).

§ 19.7 Child as Witness

In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the child's attorney ad litem, the court *shall* interview a child twelve years of age or older, and *may* interview a child younger than twelve years of age, in chambers to determine the child's wishes about conservatorship or about the person who will have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for such a purpose. Tex. Fam. Code § 153.009(a).

In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the child's attorney ad litem, or on the court's own motion, the court may interview the child in chambers to determine the child's wishes about possession, access, or any other issue in the suit affecting the parent-child relationship. Tex. Fam. Code § 153.009(b).

In a jury trial, the court may not interview a child in chambers about an issue on which a party is entitled to a jury verdict. Tex. Fam. Code § 153.009(d).

In any trial or hearing, the court may permit the attorney for a party, the amicus attorney, the child's guardian ad litem, or the child's attorney ad litem to be present at the interview. Tex. Fam. Code § 153.009(e). On the motion of a party, the amicus attorney, or the child's attorney ad litem, or on the court's own motion, the court shall cause a record of the interview to be made when the child is twelve years of age or older, and the record of the interview shall be a part of the record in the case. Tex. Fam. Code § 153.009(f). Interviewing a child does not diminish the court's discretion in determining the child's best interests. Tex. Fam. Code § 153.009(c).

Notwithstanding Tex. Fam. Code § 153.009, a trial court may refuse to interview a child, even one over the age of twelve, if it receives sufficient information supporting a finding that such an interview would jeopardize the child's safety and welfare. *In re C.R.D.*, No. 12-20-00143-CV, 2021 WL 3779224, at *4 (Tex. App.—Tyler Aug. 25, 2021, no pet. h.) (mem. op.).

A child is a competent witness unless, after being examined by the court, he appears not to possess sufficient intellect to relate transactions with respect to which he is interrogated. Tex. R. Evid. 601(a)(2). It is error not to permit a child of competent qualifications to testify. *Callicott v. Callicott*, 364 S.W.2d 455, 458 (Tex. App.—Houston 1963, writ ref'd n.r.e.).

Family Code sections 104.002 through 104.005 set out various conditions under which prerecorded statements, videotaped testimony, or remote televised broadcast of testimony of a child are permissible. *See* Tex. Fam. Code §§ 104.002–.005. Such evidence would be subject to the rules of evidence. As a general rule, a trial court should view video evidence before ruling on admissibility when the contents of the video are at issue. *Diamond Offshore Services, Ltd. v. Williams*, 542 S.W.3d 539, 546 (Tex. 2018).

§ 19.8 Default Judgment

On call of the docket or at any time after a respondent is required to answer, a judgment may be taken by default if the respondent has not previously filed an answer, provided the return of service has been filed with the clerk for the length of time required by rule 107 of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 239. Due to the policy statement and statutory scheme of title 4 of the Family Code, the ten-day period that the return of service must be on file does not apply to cases under title 4. *Johnson v. Simmons*, 597 S.W.3d 538, 545 (Tex. App.—Fort Worth 2020, pet. denied). *But see Lancaster v. Lancaster*, No. 01-14-00845-CV, 2015 WL 9480098, at *4 (Tex. App.—Houston [1st Dist.] Dec. 29, 2015, no pet.) (mem. op.).

Notice must be sent immediately to the respondent at the last known mailing address. *See* Tex. R. Civ. P. 239a. See section 26.3:5 in this manual concerning new trials after default judgments.

To support a default judgment in a family law case, the petitioner must present proof to support the material allegations in the petition despite a respondent's failure to answer. *Agraz v. Carnley*, 143 S.W.3d 547, 553 (Tex. App.—Dallas 2004, no pet.); *O'Neal v. O'Neal*, 69 S.W.3d 347, 349 (Tex. App.—Eastland 2002, no pet.). The record must contain evidence as to the value of any property to be divided as well as evidence as to the appellee's income or financial ability to pay child support. *O'Neal*, 69 S.W.3d at 350; *see Rodgers v. Perez*, No. 03-16-00313-CV, 2017 WL 4348170, at *2 (Tex. App.—Austin Sept. 7, 2017, no pet.) (mem. op.) (testimony did not address nature, size, or components of community estate, nor was any such evidence offered through other means); *see also Pena v. Pena*, No. 13-17-00585-CV, 2018 WL 3301920, at *3 (Tex. App.—Corpus Christi–Edinburg July 5, 2018, no pet.) (with no evidence of properties' values, trial court had insufficient evidence to divide property fairly and equitably). A default divorce decree must also be supported by the pleadings. *Garcia v. Benavides*, No. 04-19-00451-CV, 2020 WL 214758, at *1 (Tex. App.—San Antonio Jan. 15, 2020, no pet.) (mem. op.) (pro se petitioner failed to plead for conservatorship or child support); *Lynch v. Lynch*, 540 S.W.3d 107, 134–35 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (citing Tex. R. Civ. P. 301; *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979)).

Service of Amended Petition: When a petition is amended to ask for more onerous relief, the amended petition may be served under rule 21a of the Texas Rules of Civil Procedure. *In re E.A.*, 287 S.W.3d 1, 4 (Tex. 2009).

Citation by Publication: Where service has been made by publication and no answer has been filed or appearance made, the court must appoint an attorney to defend the suit and the attorney must be paid a reasonable fee for his services. A statement of the evidence, approved and signed by the judge, must be filed as part of the record. Tex. R. Civ. P. 244; *see In re Marriage of Serbin*, No. 07-18-00349-CV, 2020 WL 856340, at *2 (Tex. App.—Amarillo Feb. 20, 2020, no pet.) (mem. op.) (where record does not contain order appointing attorney or statement of evidence, default judgment cannot stand).

Record: In a suit affecting the parent-child relationship, the Family Code provides that a record shall be made as in civil cases generally unless waived by the parties with the court's consent. Tex. Fam. Code § 105.003(c). When evidence is offered to support a default judgment, the lack of a reporter's record entitles the defendant to a new trial

because the defendant will be unable to obtain a record of the evidence for review by an appellate court. *In re J.W.*, No. 01-18-00932-CV, 2020 WL 573259, at *3 (Tex. App.—Houston [1st Dist.] Feb, 6, 2020, no pet.) (mem. op.) (suit affecting parent-child relationship).

Protection of Servicemembers: Before default judgment is entered, if the respondent has not made an appearance, an affidavit must be on file stating that the respondent is not in military service. A plaintiff unable to make such a showing must file an alternative affidavit stating either that the defendant is in military service or that the plaintiff is unable to determine whether the defendant is in military service. *See* 50 U.S.C. § 3931(a), (b)(1). A person who knowingly makes or uses a false affidavit may be fined or imprisoned or both. 50 U.S.C. § 3931(c).

The court may not enter judgment until an attorney has been appointed for a defendant in military service. If the appointed attorney cannot locate the servicemember, actions by the attorney do not waive any defense or otherwise bind the servicemember. 50 U.S.C. § 3931(b)(2). If the court is unable to determine whether the defendant is in military service, the court may require the plaintiff to file a bond to indemnify the defendant, if later found to be in military service, against loss or damage suffered because of the judgment if it is set aside. 50 U.S.C. § 3931(b)(3).

If the defendant is in military service, the court must grant a stay for at least ninety days if the court determines that there may be a defense that cannot be presented without the defendant's presence or that counsel, after due diligence, has been unable to contact the defendant or otherwise determine whether a meritorious defense exists. 50 U.S.C. § 3931(d). A defendant who receives actual notice may request a stay under 50 U.S.C. § 3932. 50 U.S.C. § 3931(f). See the discussion at section 19.4 above.

A default judgment entered against a servicemember during military service or within sixty days thereafter may be vacated or set aside under certain circumstances. *See* 50 U.S.C. § 3931(g). See the discussion at section 26.3:5 in this manual.

A servicemember of the Texas military forces who is ordered to state active duty or to state training and other duty is entitled to the same benefits and protections provided to U.S. servicemembers by the foregoing provisions of 50 U.S.C. § 3931. Tex. Gov't Code § 437.213.

§ 19.9 Relief Pending Final Order

After trial, the trial court may make any of a variety of temporary orders pending the rendition of a final order. Tex. Fam. Code §§ 6.501–.507, 105.001. See chapter 4 of this manual for further information about temporary orders.

§ 19.10 Motion for Judgment in Nonjury Case

It is error for the trial court to grant a motion for judgment at the close of the plaintiff's case if the evidence and reasonable inferences raise a material issue of fact. *R.W.M. v. J.C.M.*, 684 S.W.2d 746, 747 (Tex. App.—Corpus Christi–Edinburg 1984, writ ref'd n.r.e.).

§ 19.11 Request for Jury Trial

A written jury request must be filed with the clerk a reasonable time before the date set for the trial of the case on the nonjury docket, but not less than thirty days in advance, and the jury fee must be paid in the same time period. Tex. R. Civ. P. 216. The time limit applies to both the application and the fee deposit. *Huddle v. Huddle*, 696 S.W.2d 895, 895 (Tex. 1985) (per curiam).

It was error for the trial court to deny the mother her right to a jury trial when her jury demand, although untimely according to the trial court's scheduling order, was filed months before the trial actually occurred and there was no showing that a jury case would have interfered with the trial court's docket, delayed the case, or injured the other party in any way. *E.E. v. Texas Department of Family & Protective Services*, 598 S.W.3d 389, 396–97 (Tex. App.—Austin 2020, no pet.).

An untimely jury demand in a suit affecting the parent-child relationship became timely when that suit was consolidated with a CPS case and the trial date of the consolidated matter was reset. Further, the resulting presumption that the jury demand was now timely was not overcome in the absence of evidence establishing that a jury case would have interfered with the trial court's docket, delayed the case, or injured the other party. *In re M.B.*, No. 05-19-00971-CV, 2019 WL 4509224, at *4 (Tex. App.—Dallas Sept. 19, 2019, orig. proceeding) (mem. op.).

A party may demand a jury trial except in a suit to annul an underage marriage, a suit in which an adoption is sought (including a trial on the issue of denial or revocation of

consent to the adoption by the managing conservator), or a suit to adjudicate parentage under Family Code chapter 160. Tex. Fam. Code §§ 6.703, 105.002(a), (b).

In a suit for dissolution of a marriage, a party may demand a jury trial unless the action is a suit to annul a marriage on the grounds that a party was underage. Tex. Fam. Code § 6.703; *see also Skop v. Skop*, 201 S.W.2d 77 (Tex. App.—Galveston 1947, no writ). A party may not demand a jury trial on the issue of the unconscionability of a premarital or marital agreement. *See* Tex. Fam. Code §§ 4.006(b), 4.105(b).

A party may demand a jury trial on issues regarding conservatorship, including which joint managing conservator has the exclusive right to designate the primary residence of a child and any restrictions on the geographic area where the residence may be located, but not regarding the issues of child support, a specific term or condition of possession or access, or the rights and duties of a conservator, other than the determination of which joint managing conservator has the exclusive right to designate the child's primary residence and determinations regarding geographic restrictions on primary residence. Tex. Fam. Code § 105.002(c).

A party may demand a jury trial in an enforcement proceeding if the punishment sought is more than 180 days' incarceration. *Muniz v. Hoffman*, 422 U.S. 454 (1975).

A party may demand a jury trial on the fact issues of the division of property. *See generally Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Lawson v. Lawson*, 828 S.W.2d 158 (Tex. App.—Texarkana 1992, writ denied); *Baker v. Baker*, 104 S.W.2d 531 (Tex. App.—San Antonio 1936, no writ). A jury's determination of value is binding on the trial court; the division of the estate, however, is properly determined by the court, and a jury's division is advisory only. *Archambault v. Archambault*, 763 S.W.2d 50, 51 (Tex. App.—Beaumont 1988, no writ).

If a party demands a jury trial and then does not appear at trial, the party waives its request for a jury. Tex. R. Civ. P. 220. However, a party's failure to appear at a pre-trial conference does not result in waiver, and it is error for the trial court to deny that party a jury trial as a sanction when the sanction was not just under the standards of *Trans-American Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding). *In re Montelongo*, 586 S.W.3d 518, 521 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding).

A court may not strike a jury demand as a discovery sanction. *In re I.R.H.*, No. 01-15-00787-CV, 2016 WL 3571398, at *4 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet.) (mem. op.) (striking jury demand is not sanction provided by Tex. R. Civ. P. 215,

and jury demand survives even death-penalty sanctions for discovery abuse). A trial court has no authority to strike a jury demand as a sanction for failure to pay amicus attorney's fees when the Family Code expressly authorizes a trial by jury as to the determination of the children's primary residence. *Wheeler v. Wheeler*, No. 01-16-00642-CV, 2017 WL 3140027 (Tex. App.—Houston [1st Dist.] July 25, 2017, no pet.) (mem. op.).

A party may rely on another party's jury request and paid jury fee, and once the case has been set on the jury docket it cannot be withdrawn over the objection of the adverse party. *Caldwell v. Barnes*, 154 S.W.3d 93, 98 (Tex. 2004) (per curiam).

§ 19.12 Number of Peremptory Challenges

Each party to a civil suit is entitled to six peremptory challenges in a case tried in district court. Cases tried in statutory county courts with family law jurisdiction may have only six jurors and therefore only three peremptory challenges. Tex. R. Civ. P. 233.

In multiple-party cases, the trial judge must decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue that will be presented to the jury. The term *side* does not mean "party," "litigant," or "person"; rather, it means one or more litigants with common interests on the matters with which the jury is concerned. Tex. R. Civ. P. 233.

In multiple-party cases, on motion of any litigant made before the exercise of peremptory challenges, the trial judge must equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side. In allocating the challenges, the court shall consider any matters brought to the trial judge's attention concerning the ends of justice and the elimination of unfair advantage. Tex. R. Civ. P. 233.

Case law that developed before the 1984 amendment of rule 233 may provide guidance on allocation of peremptory challenges. For example, when paternal grandparents who intervened in a divorce action primarily sought to have custody of the minor children awarded to the husband or, in the alternative, to the intervenors, which would result in the husband's having effective custody, the relationship between the intervenors and the husband, insofar as managing conservatorship was concerned, was not antagonistic and hostile to the extent that the intervenors and the husband were each entitled to six peremptory challenges; and awarding the intervenors and the husband twice the number

of challenges as the wife was awarded denied the wife a fair trial. *Lipshy v. Lipshy*, 525 S.W.2d 222, 226 (Tex. App.—Dallas 1975, writ dism'd).

§ 19.13 Motion in Limine

The motion in limine is not addressed by a particular rule of civil procedure. However, it has been defined by the Supreme Court of Texas as follows:

> The purpose in filing a motion in limine to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which a motion in limine is intended to reach.

Bridges v. City of Richardson, 354 S.W.2d 366, 367 (Tex. 1962) (per curiam).

The motion should be presented before voir dire examination of the jury and preferably at pretrial conference. However, it is not reversible error for the court to rule on the motion after the parties announce ready for trial. *City of Houston v. Watson*, 376 S.W.2d 23, 33 (Tex. App.—Houston 1964, writ ref'd n.r.e.).

If a motion in limine is overruled, a judgment will not be reversed unless *in fact* the questions were asked or the evidence was offered. If they were *in fact* asked or offered, an objection made at the time is necessary to preserve the right to complain on appeal that the questions asked or the evidence tendered was so prejudicial that the mere asking or tendering should require reversal. In neither case—(1) questions not asked or evidence not offered nor (2) questions asked or evidence offered—should the error of the trial court in overruling the motion in limine be regarded as harmful or reversible error. *Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963). When the trial court properly instructs the jury to disregard the statements made in violation of the court's instruction, it is presumed the jury followed these instructions unless there is evidence to the contrary in the record. *See Epps v. Deboise*, 537 S.W.3d 238, 251 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

§ 19.14 Requests for Questions, Definitions, and Instructions

Either party may present to the court and request written questions, definitions, and instructions to be given to the jury. The court may give them or a part of them or may refuse to give them as may be proper. Such a request shall be made separate and apart from the party's objections to the court's charge. Tex. R. Civ. P. 273; *see also* Tex. R. Civ. P. 226a. Suggested questions, definitions, and instructions may be found in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate.*

§ 19.15 Submission to Jury

In all jury cases the court shall, whenever feasible, submit the cause on broad-form questions. The court shall submit such instructions and definitions as are proper to enable the jury to render a verdict. Tex. R. Civ. P. 277. The use of broad-form questions is not permitted in a case involving the termination of parental rights. (*Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990), in which the court had specifically approved broad-form submission, is superseded by amendment of rule 277 effective May 1, 2020. *See* Texas Supreme Court, *Order Amending Texas Rule of Civil Procedure 277*, Misc. Docket No. 20-9008 (Jan. 8, 2020), 83 Tex. B.J. 104 (2020); proposed rule subject to change in response to public comments to be sent by Apr. 1, 2020.)

Inferential rebuttal issues shall not be submitted. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question. Tex. R. Civ. P. 277.

If the judge refuses or modifies a properly requested instruction, question, or definition, the judge shall so endorse the request, which will constitute a bill of exceptions. Tex. R. Civ. P. 276.

For guidance on the content of jury charges, including commentary on the underlying statutory and case law, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate.*

§ 19.16 Objection to Jury Charge

A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint about a question, definition, or instruction, because of any defect, omission, or fault in pleading, is waived unless specifically

included in the objections. If the complaining party's objection or requested question, definition, or instruction is in the opinion of the appellate court obscured or concealed by voluminous unfounded objections, minute differentiations, or numerous unnecessary requests, the objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to another part of the charge by reference only. Tex. R. Civ. P. 274.

Objections must be presented to the court in writing or dictated to the court reporter in the presence of the court and opposing counsel. Tex. R. Civ. P. 272. Failure to submit a question, a definition, or an explanatory instruction shall not be deemed a ground for reversal unless it was requested in substantially correct form in writing. Tex. R. Civ. P. 278.

§ 19.17 Judgment Non Obstante Veredicto/Directed Verdict

On motion and reasonable notice, the court may render judgment non obstante veredicto if a directed verdict would have been proper. On like motion and notice, the court may disregard any jury finding on a question that has no support in the evidence. Only one final judgment shall be rendered in any cause except when it is otherwise specifically provided by law. Tex. R. Civ. P. 301.

If judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more questions, an appellee may bring forward by cross-point contained in his brief filed in the court of appeals any ground that would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based on it should be set aside because of improper argument of counsel. Tex. R. Civ. P. 324(c).

In suits affecting the parent-child relationship, the court may not contravene a jury verdict on the issue of the appointment of a sole managing conservator, the appointment of joint managing conservators, the appointment of a possessory conservator, the determination of which joint managing conservator has the exclusive right to designate the child's primary residence, or any restrictions on the geographic area where the residence may be located. Tex. Fam. Code § 105.002(c)(1).

A motion for directed verdict shall state the specific grounds. Tex. R. Civ. P. 268.

To challenge the legal sufficiency of the evidence supporting a jury's verdict, a party must raise the legal sufficiency challenge with the trial court in either (1) a motion for instructed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to the submission of the question to the jury, (4) a motion to disregard the jury's answer to a vital fact question, or (5) a motion for new trial. *In re A.L.*, 486 S.W.3d 129, 130 (Tex. App.—Texarkana 2016, no pet.).

§ 19.18 Subpoenas

All subpoenas must be issued in the name of "The State of Texas" and contain these elements: the style; the cause number; the court; the date of issuance; identification of the subpoenaed person; the time, place, and nature of the action required by the subpoenaed person; the name of the party causing the subpoena to be issued (and the party's attorney, if any); the text contained in rule 176.8(a); and the signature of the issuing person. Tex. R. Civ. P. 176.1.

Properly issued subpoenas are generally valid within a radius of 150 miles from the county in which the subpoenaed person resides or is served. Tex. R. Civ. P. 176.3(a).

A witness is entitled to a fee of $10 for each day the witness is required to attend trial, and the subpoena must include the fee for one day. Tex. Civ. Prac. & Rem. Code § 22.001(a), (b). The court may not impose a fine or issue a writ of attachment for a witness who was subpoenaed to attend and did not appear until the subpoenaing party provides an affidavit stating that all fees due the witness were paid or tendered. Tex. R. Civ. P. 176.8(b).

A subpoena must command the person to attend and give testimony at a deposition, hearing, or trial; produce and permit inspection and copying of designated documents or tangible things in the person's possession, custody, or control; or both. Tex. R. Civ. P. 176.2.

A subpoena may be issued by an attorney authorized to practice in Texas, the clerk's office, or an officer authorized to take depositions in Texas. Tex. R. Civ. P. 176.4. The subpoena may be served by a sheriff or constable or any nonparty person over eighteen years of age. Tex. R. Civ. P. 176.5(a). Proof of service must be documented either by memorandum signed by the witness acknowledging acceptance of the subpoena or by a statement by the person serving, which must include the date, time, and manner of service and the name of the person served. Tex. R. Civ. P. 176.5(b).

A party causing a subpoena to issue must take reasonable steps to avoid undue burden and expense on the person served. Tex. R. Civ. P. 176.7.

A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the discovery rules. Tex. R. Civ. P. 176.3(b).

Failure by a subpoenaed person to obey the subpoena, without adequate excuse, may be deemed a contempt of court. (Requirements related to the response, objections, and protective orders are detailed in rule 176.6.) On a finding of contempt, the court may punish the violating party by fine, confinement, or both. Tex. R. Civ. P. 176.8(a).

Before a fine may be imposed on a person who has failed to comply with a subpoena or the person be attached, there must be filed an affidavit of the party requesting the subpoena, or the attorney of record, that all fees due the witness by law were paid or tendered. Tex. R. Civ. P. 176.8(b).

§ 19.19 Attorney's Fees

Attorney's fees paid to prosecute or defend a lawsuit cannot be recovered absent a statute or contract that allows for their recovery. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 120 (Tex. 2009); *In re Marriage of Pyrtle*, 433 S.W.3d 152, 160 (Tex. App.—Dallas 2014, pet. denied); *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006). Attorney's fees are specifically authorized by statute in many circumstances encountered by the family law practitioner. See section 20.41 in this manual.

Proving up attorney's fees, including establishing reasonableness and necessity, is discussed in part II of chapter 20 (sections 20.11–20.23).

§ 19.20 Pleadings

Relief granted by the court must be supported by the pleadings. *See* Tex. R. Civ. P. 301. Because the best interests of the child are the principal concern in child custody cases, technical pleading rules in such cases are of reduced significance, but the pleadings must nevertheless notify the opposing party of the claim involved. *Messier v. Messier*, 389 S.W.3d 904, 907 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see King v. Lyons*, 457 S.W.3d 122 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

While issues may be tried by consent, when evidence at trial is relevant to an issue that has been pleaded, it will not be regarded as evidence of trial of an unpleaded issue.

King, 457 S.W.3d at 133. Unless waived by a failure to object, a trial amendment must be filed as a written pleading; an oral amendment at trial is insufficient to modify the pleadings. *In re J.C.J.*, No. 05-14-01449-CV, 2016 WL 345942, at *8 (Tex. App.—Dallas Jan. 28, 2016, no pet.) (mem. op.).

§ 19.21 Expedited Actions

As amended for cases filed on or after January 1, 2021, rule 169 of the Texas Rules of Civil Procedure no longer exempts from the expedited actions process suits in which a party has filed a claim governed by the Family Code. *See* Tex. R. Civ. P. 169.

Rule 169 applies only to suits in which all claimants, other than counterclaimants, affirmatively plead that they seek only monetary relief aggregating $250,000 or less, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs. Tex. R. Civ. P. 196(a). Under the rule, discovery is limited, and an early trial date must be set on request. The length of trial is restricted. Expert witness challenges are limited. *See* Tex. R. Civ. P. 196(d)(1)–(3), (d)(5). The greatest effect of rule 169 on a family law suit is the requirement to participate in alternative dispute resolution once, but that requirement does not apply if the parties agree not to engage in ADR. Tex. R. Civ. P. 196(d)(4).

A suit is removed from the expedited actions process on motion and a showing of good cause or by the filing of an amended or supplemental pleading for any relief other than monetary relief over $250,000. Tex. R. Civ. P. 196(c)(1).

The vast majority of family law litigation involves some sort of nonmonetary relief. Enforcement of a property division (whether under chapter 9 of the Family Code or brought as a breach of contract claim outside the Code) or a postdivorce suit to partition undivided community property may be subject to rule 169. A party can avoid the application of rule 169 by also requesting nonmonetary relief, such as clarification of the court's order or specific performance, including delivery of property.

It is unclear whether courts will interpret child support enforcement suits in which only a judgment for child support arrearages is requested as being subject to rule 169. Again, this issue may be resolved by a request for nonmonetary relief, such as a request for a finding of contempt, for the posting of bond or other security, or even for withholding of income to pay the arrears.

Even if rule 169 applies to a motion for enforcement of a property division or a child support order, the ramifications are minor. The restrictions under the process have lim-

ited effect in enforcement suits, which generally are resolved quickly, often without any discovery.

COMMENT: For additional information on trial proceedings, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family and Probate* and *Predicates Manual 4.0* (Texas Family Law Foundation 2021).

Chapter 20
Attorney's Fees

I. Setting the Fee

§ 20.1 Setting the Fee—Generally 533

§ 20.2 Factors to Consider in Setting Fee 534

§ 20.3 Written Contract for Fees 535

§ 20.4 Retainers 535

§ 20.4:1 Refundable Retainers (Deposits) 535

§ 20.4:2 Nonrefundable Retainers 536

§ 20.4:3 Evergreen Retainers 537

§ 20.5 Contingent Fees 537

§ 20.6 Fee Splitting 539

II. Proving Up Attorney's Fees

§ 20.11 Pleadings Required 540

§ 20.12 Authorization to Recover Attorney's Fees 541

§ 20.13 Reasonable and Necessary 541

§ 20.14 Expert Testimony 542

§ 20.15 Lodestar Method 542

§ 20.16 Sufficiency of Evidence 543

§ 20.17 Relevance of Amount Incurred under Fee Contract 544

§ 20.18 *Arthur Andersen* Factors 544

§ 20.19 Attorney's Fees as Sanctions 545

§ 20.20 Paralegal Fees 546

§ 20.21 Segregation of Fees 547

§ 20.22 Proof for Interim Attorney's Fees 548

§ 20.23 Attorney's Fees on Appeal 549

III. Collecting Attorney's Fees

§ 20.31 Charging Interest on Attorney's Fees 552
§ 20.32 Filing Suit for Fees 552
§ 20.33 Withholding of Services Until Fee Is Paid 553
§ 20.34 Attorney's Liens 554

IV. Statutory Authority

§ 20.41 Appendix: Statutes and Rules—Attorney's Fees 556

Chapter 20

Attorney's Fees

This chapter addresses the issues regarding attorney's fees that are commonly encountered by the family law practitioner. Considerations specific to particular proceedings are discussed in other chapters.

I. Setting the Fee

§ 20.1 Setting the Fee—Generally

Comment 2 to rule 1.04 of the Texas Disciplinary Rules of Professional Conduct provides:

> When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. If, however, the basis or rate of fee being charged to a regularly represented client differs from the understanding that has evolved, the lawyer should so advise the client. In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth. In the case of a contingent fee, a written agreement is mandatory.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 2, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

§ 20.2 Factors to Consider in Setting Fee

Rule 1.04(a) prohibits arranging for, charging, or collecting an illegal or unconscionable fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a). Some factors that may be considered in determining the reasonableness of a fee, set out in rule 1.04(b), are—

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04(b). These factors are not exclusive.

An attorney in good conscience should not charge or collect more than a reasonable fee. However, a standard of "reasonableness" is too vague to be an appropriate standard in a disciplinary action. For disciplinary purposes only, the attorney is subject to discipline for an illegal or unconscionable fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 1.

A fee is unconscionable if a competent attorney could not form a reasonable belief that the fee is reasonable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a).

Several of the factors listed above have been cited by appellate courts to support the reasonableness of a jury award of attorney's fees in matters involving substantial amounts of property. *See Morgan v. Morgan*, 657 S.W.2d 484, 491–92 (Tex. App.—

Houston [1st Dist.] 1983, writ dism'd); *Braswell v. Braswell*, 476 S.W.2d 444, 446 (Tex. App.—Waco 1972, writ dism'd).

§ 20.3 Written Contract for Fees

If the attorney has not regularly represented the client, the basis or rate of the fee must be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c). This practice will not only prevent later misunderstanding but will also promote good attorney-client relations. Many persons who desire legal services have had little or no experience with attorney's fees, and therefore the attorney should explain fully the reasons for the particular fee arrangement.

Because of the confidential nature of the attorney-client relationship, courts carefully scrutinize all contracts for attorney compensation. "There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney." *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) (wife deeded real property to lawyer under contingent fee contract for lawyer's representation of wife in divorce; court set aside deed because value of property was approximately ten times that which was considered reasonable fee for services provided in case); *see also Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508–09 (Tex. 1980).

§ 20.4 Retainers

Lawyers must distinguish between advance payment retainer fees (advance payments for services to be performed) and true retainer fees (payments to compensate a lawyer for his commitment to provide certain services and to forgo other employment opportunities).

§ 20.4:1 Refundable Retainers (Deposits)

A refundable retainer is an advance payment or deposit paid by the client to the lawyer for costs, expenses, and legal fees that will be incurred but are not yet earned. A refundable retainer, until it is earned or expenses incurred, belongs to the client and must be placed in the lawyer's trust account. As fees are earned, whether the lawyer uses an hourly billing method or some other basis for establishing the fee, the client is billed and payment is made out of the lawyer's trust account, under the provisions of the written fee contract between the client and the lawyer. The lawyer enjoys the security of the retainer for the payment of fees and costs.

The retention and handling of client funds, in the form of a refundable retainer, must conform to the requirements imposed by rule 1.14 of the Texas Disciplinary Rules of Professional Conduct. Virtually every issue of the *Texas Bar Journal* reports disciplinary action taken against one or more lawyers for violating some portion of rule 1.14 by either failing to maintain an identifiable bank account for client trust funds, failing to account for client funds, or failing to return client trust funds to the client. Segregation and safekeeping of client funds, as required by rule 1.14, is discussed in section 1.15 in this manual.

§ 20.4:2 Nonrefundable Retainers

Nonrefundable retainers, though not inherently unethical, pose many potential problems and must be used with caution. A fee is not earned simply because it is designated as "nonrefundable." A "true retainer" is a payment to compensate the lawyer for his commitment to provide certain services and forgo other employment opportunities. *See* Tex. Comm. on Prof'l Ethics, Op. 431 (1986).

A true nonrefundable retainer belongs entirely to the lawyer at the time it is received because the fee is earned at the time of receipt. The fee is earned on receipt because payment commits the lawyer to the client's case. In effect, a nonrefundable retainer is an engagement fee that indicates the lawyer's willingness to represent the client and guarantees the lawyer's availability to take on the case for the client. However, a nonrefundable retainer is subject to rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct, which states that a lawyer shall not enter into an agreement for or charge or collect an illegal or unconscionable fee. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a).

A legal fee relating to future services is a true nonrefundable retainer when received only if the fee in its entirety is a reasonable fee to secure the availability of the lawyer's services and compensate the lawyer for the preclusion of other employment. An agreement with a client that a fee is nonrefundable on receipt, whether or not designated nonrefundable, would violate the rules of disciplinary conduct if the fee includes payment for the provision of future legal services rather than being solely for the *availability* of future services. Such an arrangement would not be reasonable under rule 1.04(a) and (b), and placing the entire payment in the lawyer's operating account would violate rule 1.14 of the Texas Disciplinary Rules of Professional Conduct. *See* Tex. Comm. on Prof'l Ethics, Op. 611 (2011); *see also Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.—Austin 2007, no pet.) (lawyer's deposit in operating account

of "nonrefundable retainer" against which hourly fee would be billed constituted professional misconduct).

Only the payment meeting the requirements for a true nonrefundable retainer may be deposited in the lawyer's operating account; any advance payment amount must be deposited in a trust or escrow account from which amounts may be transferred to the operating account only when earned. *See* Tex. Comm. on Prof'l Ethics, Op. 611 (2011); Tex. Disciplinary Rules Prof'l Conduct R. 1.14 cmt. 2. A client paying for both a true nonrefundable retainer and an advance payment should pay the lawyer with two separate checks. It is critically important to note that if a client pays both amounts with one check, the entire check must be deposited into the lawyer's trust account according to the provisions of rule 1.14. Thereafter, the lawyer may transfer the funds representing the nonrefundable retainer into the lawyer's general operating account in accordance with rule 1.14.

§ 20.4:3 Evergreen Retainers

Many lawyers include an "evergreen" refundable retainer provision in their employment contracts. When credits against the evergreen retainer for the lawyer's fees deplete it below a designated dollar amount, the client is required to replenish it. For example, the employment contract could require the client to pay the lawyer an initial refundable retainer of $5,000, which is placed in the lawyer's trust account; as the lawyer bills for legal services and reduces the refundable retainer by monthly billings to an amount below $2,000, the client would be required to replenish the lawyer's trust account—to keep it "green"—by paying an amount into the lawyer's trust account to replenish the retainer to $5,000 or by paying a designated dollar amount. A properly used evergreen retainer allows a lawyer to enjoy the security of having funds on hand with which to pay attorney's fees as they are earned and billed.

§ 20.5 Contingent Fees

In civil cases, a lawyer may contract with a client for a reasonable contingent fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(b)(8), (d), (e). The rules, however, discourage contingent fees in family law cases:

> Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained

> for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 9.

Although contingent fees are discouraged in family law matters, they may be appropriate in tort causes of action arising in domestic relations circumstances and in some other types of family law cases.

One court has found that a contingent fee was enforceable in connection with determining the validity of a common-law marriage, stating:

> While rarely justified in divorce actions, contingent fee contracts may be appropriate in a situation such as this. If the marriage is not established, the plaintiff may recover nothing, a situation differing sharply from a divorce suit involving a ceremonial marriage in which each party will obtain a recovery of some sort.

Ballesteros v. Jones, 985 S.W.2d 485, 497 (Tex. App.—San Antonio 1999, pet. denied).

A lawyer may charge a contingent fee for the collection of a child support arrearage, but the fee must be reasonable and must comply with rule 1.04 of the Texas Disciplinary Rules of Professional Conduct. Before execution of the contingent fee contract, the lawyer must fully disclose all options to the client, including the option for the client to use the Texas Attorney General's Office to handle the child support arrearage case free of charge to the client. Other options should be discussed, as well as the pros and cons of the options. All dealings with the arrearages that are collected should comply with rule 1.14 of the Texas Disciplinary Rules of Professional Conduct involving the safekeeping of property and keeping client funds separate from attorney's fees. *See* Tex. Comm. on Prof'l Ethics, Op. 485 (1994).

Formal Requirements: Any contingent fee contract must be in writing; state the method by which the fee is to be determined, including any percentage differentiation in the event of settlement, trial, or appeal; and provide for all expenses. On conclusion of the matter, the attorney must give the client a written closing statement stating the outcome of the representation and, if there is a recovery, showing the remittance to the client and describing how it was determined. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(d). A contingent fee contract for legal services must be in writing and signed by the attorney and the client. Tex. Gov't Code § 82.065(a). A lawyer's attempt to enforce

an arbitration agreement contained in a contingent fee contract failed because the lawyer failed to sign the contract. *In re Godt*, 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi–Edinburg 2000, orig. proceeding).

Recovery on Contract: A lawyer under a contingent fee contract terminated by the client may recover on the contract in Texas. The usual rules of contract law apply. Any of three remedies may be pursued: (1) treating the contract as rescinded and recovering on a quantum meruit theory to the extent justified by performance; (2) keeping the contract alive for the benefit of both parties, being always ready and able to perform; or (3) treating the repudiation as ending the contract for all purposes of performance and suing for the profits that performance would have justified. *Howell v. Kelly*, 534 S.W.2d 737, 739–40 (Tex. App.—Houston [1st Dist.] 1976, no writ). *But cf. Rocha v. Ahmad*, 676 S.W.2d 149, 156 (Tex. App.—San Antonio 1984, writ dism'd) (lawyer discharged for good cause may recover fees earned before discharge under quantum meruit but may not recover under contingent fee contract). *See also Findlay v. Cave*, 611 S.W.2d 57 (Tex. 1981) (attorney's fees for prosecuting suit on contingent fee contract allowed although contract found not fair and reasonable and recovery based on quantum meruit; circumstances did not show sufficient level of unreasonableness or bad faith to warrant finding excessive demand as matter of law).

§ 20.6 Fee Splitting

Fee splitting is the practice of sharing fees with professional colleagues in return for being sent referrals or being associated with the colleague on a legal matter.

Fee splitting between lawyers who are not in the same firm is permitted only if the following conditions are met:

1. The division is in proportion to the professional services performed by each attorney or made between attorneys who assume joint responsibility for the representation.

2. The client consents in writing to the terms of the arrangement before the time of the association or referral proposed. The consent must include (a) the identity of all lawyers or law firms who will participate in the fee-splitting agreement; (b) whether fees will be divided based on the proportion of services performed or by attorneys agreeing to assume joint responsibility for the representation; and (c) the share of the fee that each attorney or firm will receive or, if the divi-

sion is based on the proportion of services performed, the basis on which the division will be made.

3. The aggregate fee does not violate rule 1.04(a).

Tex. Disciplinary Rules Prof'l Conduct R. 1.04(f).

As always, there is an overarching requirement that the aggregate fee is not illegal or unconscionable. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a).

Any agreement that allows an attorney or firm to associate other counsel in representing a person, or to refer the person to other counsel for representation, that results in such an association with or referral to a different firm or an attorney in a different firm must be confirmed by an arrangement conforming to rule 1.04(f). Consent by a client or prospective client without knowledge of the information described above about the terms of the arrangement does not constitute a confirmation. No attorney may collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way except for the reasonable value of legal services provided to the person and the reasonable and necessary expenses actually incurred on behalf of the person. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(g).

[Sections 20.7 through 20.10 are reserved for expansion.]

II. Proving Up Attorney's Fees

§ 20.11 Pleadings Required

Attorney's fees must be pleaded in order to be awarded. Because a trial court's judgment must conform to the pleadings, a party seeking attorney's fees must plead for them, specifying the legal standard under which they are sought. *See Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 659 (Tex. 2009) (party waived right to recover attorney's fees under contractual provision by pleading for attorney's fees only under statutory provision); *Peterson Group, Inc. v. PLTQ Lotus Group, L.P.*, 417 S.W.3d 46, 61 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (party could not recover attorney's fees under contractual provision when it pleaded for attorney's fees only under statutory provision). If a person requesting attorney's fees pleads for a specific amount, he will be limited to that amount. *Carson v. Carson*, 528 S.W.2d 308, 309 (Tex. App.—Waco 1975, no writ).

§ 20.12 Authorization to Recover Attorney's Fees

Attorney's fees paid to prosecute or defend a lawsuit cannot be recovered absent a statute or contract that allows for their recovery. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 120 (Tex. 2009); *In re Marriage of Pyrtle*, 433 S.W.3d 152, 160 (Tex. App.—Dallas 2014, pet. denied); *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006).

Attorney's fees are specifically authorized by statute in many circumstances encountered by the family law practitioner. In a suit for dissolution of marriage or in a suit affecting the parent-child relationship, the court may award reasonable attorney's fees and expenses. Tex. Fam. Code §§ 6.708(c), 106.002(a). During the pendency of such a suit, the court may render temporary orders for the payment of reasonable attorney's fees and expenses. Tex. Fam. Code §§ 6.502(a)(4), 105.001(a)(5). The court may also require payment of reasonable and necessary attorney's fees and expenses during the pendency of an appeal of such a suit. Tex. Fam. Code §§ 6.709(a)(2), 109.001(a)(5). In a SAPCR proceeding, attorney's fees under chapter 106 may not be assessed against a nonparty to the proceeding. *In re Z.O.M.*, 613 S.W.3d 638, 643 (Tex. App.—San Antonio 2020, no pet.).

For a more comprehensive list of statutes allowing or related to the recovery of attorney's fees, see section 20.41 below.

§ 20.13 Reasonable and Necessary

As a general rule, the party seeking to recover attorney's fees carries the burden of proof, and reasonableness of the fee is a fact question. *See, e.g.*, *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892 (Tex. App.—Austin 2010, pet. denied).

When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019).

The idea behind awarding attorney's fees in fee-shifting situations is to compensate the prevailing party generally for its reasonable losses resulting from the litigation process. To secure an award of attorney's fees from an opponent, the prevailing party must prove that (1) recovery of attorney's fees is legally authorized and (2) the requested attorney's fees are reasonable and necessary for the legal representation, so that such an award

will compensate the prevailing party generally for its losses resulting from the litigation process. *Rohrmoos Venture*, 578 S.W.3d at 487.

Because such fee awards are compensatory in nature, fee-shifting is not a mechanism to improve a lawyer's economic situation, and only fees that are reasonable and necessary for the legal representation will be shifted to the nonprevailing party. The fee award may not necessarily be the amount contracted for between the prevailing party and its lawyer, because a client's agreement to a certain fee arrangement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 487–88.

A party must be represented by a lawyer to secure an award of attorney's fees. A law firm can be awarded fees for representation by its own lawyer. *Rohrmoos Venture*, 578 S.W.3d at 488.

§ 20.14 Expert Testimony

Reasonableness of attorney's fees must be supported by expert testimony. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 830 (Tex. App.—Dallas 2014, no pet.); *Twin City Fire Insurance Co. v. Vega-Garcia*, 223 S.W.3d 762, 770–71 (Tex. App.—Dallas 2007, pet. denied). This requirement may be satisfied by sworn testimony from an attorney designated as an expert before testifying. *See Woodhaven Partners*, 422 S.W.3d at 830. Testimony from a party's lawyer about that party's attorney's fees that "is not contradicted by any other witness and is clear, positive, direct, and free from contradiction" is taken as true as a matter of law. *In re A.B.P.*, 291 S.W.3d 91, 98 (Tex. App.—Dallas 2009, pet. denied).

An affidavit complying with section 18.001 of the Texas Civil Practice and Remedies Code can support an award of attorney's fees; however, compliance with the statute is cumbersome, and live expert testimony by the attorney is the common practice for proving reasonableness and necessity of attorney's fees in proceedings under the Family Code. *See* Tex. Civ. Prac. & Rem. Code § 18.001. Form 20-2 in this manual contains sample prove-up testimony for attorney's fees.

§ 20.15 Lodestar Method

The lodestar method for proving reasonableness and necessity of attorney's fees applies to fee-shifting claims under the Texas Family Code. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019).

There is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney's fees that can be shifted to a nonprevailing party. *Rohrmoos Venture*, 578 S.W.3d at 499.

The determination of what constitutes a reasonable attorney's fee involves two steps. *Rohrmoos Venture*, 578 S.W.3d at 501.

The fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts. *Rohrmoos Venture*, 578 S.W.3d at 498. Under the lodestar method, sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. The fact finder then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. *Rohrmoos Venture*, 578 S.W.3d at 501.

The fact finder may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. Thus, the fact finder must first determine a base lodestar figure based on reasonable hours worked multiplied by a reasonable hourly rate. In a jury trial, the jury should be instructed that the base lodestar figure is presumed to represent reasonable and necessary attorney's fees, but other considerations may justify an enhancement or reduction to the base lodestar; accordingly, the fact finder must then determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to reach a reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 501.

§ 20.16 Sufficiency of Evidence

Legally sufficient evidence to establish a reasonable and necessary fee must include a description of the particular services performed, the identity of each person who performed the services, approximately when the services were performed, the reasonable amount of time required to perform the services, and the reasonable hourly rate for each person performing the services. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). Although Texas courts do not require contemporaneous billing records to prove that the requested fees are reasonable and necessary, such billing records are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested. In all but the simplest cases, counsel

should introduce detailed billing records into evidence, in addition to counsel's oral testimony, to support fee requests. *See Rohrmoos Venture*, 578 S.W.3d at 502.

Thus, when representing family law clients, counsel should document their time by using contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed to ensure that a potential award of attorney's fees can withstand appellate scrutiny. *Jardon v. Pfister*, 593 S.W.3d 810, 840–41 (Tex. App.—El Paso 2019, no pet. h.) (evidence showing only total hours billed without detail regarding services performed insufficient to support fee award); *Sims v. Sims*, 623 S.W.3d 47, 67–68 (Tex. App.—El Paso 2021, no pet.) (evidence insufficient to support attorney's fee award without billing records or testimony specifying tasks or services performed). Additionally, when proving up attorney's fees, counsel should provide evidence describing in detail the work performed; the identity of each person working on the case; and the number of hours, rate, and amount billed for each such person to establish the reasonableness and necessity of the fees incurred. *See, e.g., Bennett v. Zucker*, No. 05-19-01445-CV, 2021 WL 3701365, at *11 (Tex. App.—Dallas Aug. 20, 2021, no pet. h.) (mem. op.) (redacted billing records sufficient evidence to support attorney's fee award); *Seitz v. Seitz*, 608 S.W.3d 272, 281–82 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (detailed summary of attorney's fees and expenses incurred sufficient to support fee award).

§ 20.17 Relevance of Amount Incurred under Fee Contract

Because fee-shifting awards are to be reasonable and necessary for successfully prosecuting or defending against a claim, reasonableness and necessity do not depend solely on the contractual fee arrangement between the prevailing party and its lawyer. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). An amount incurred or contracted for is not conclusive evidence of reasonableness or necessity; the fee claimant still has the burden to establish reasonableness and necessity. *Rohrmoos Venture*, 578 S.W.3d at 488.

§ 20.18 *Arthur Andersen* Factors

The lodestar method developed as a "short hand version" of the *Arthur Andersen* factors and was never intended to be a separate test or method for determining reasonableness and necessity of attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019); *see Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

The base lodestar figure accounts for most of the relevant *Arthur Andersen* considerations, and an enhancement or reduction of the base lodestar figure cannot be based on a consideration that is subsumed in the first step of the lodestar method. The base lodestar calculation usually includes at least the following considerations from *Arthur Andersen*: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal service properly; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved; (6) the experience, reputation, and ability of the lawyer or lawyers performing the services; (7) whether the fee is fixed or contingent on results obtained; (8) the uncertainty of collection before the legal services have been rendered; and (9) results obtained. These *Arthur Andersen* considerations therefore may not be used to enhance or reduce the base lodestar calculation to the extent that they are already reflected in the reasonable hours worked and reasonable hourly rate. If a fee claimant seeks an enhancement, it must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award. Similarly, if a fee opponent seeks a reduction in the fee, that party bears the burden of providing specific evidence to overcome the presumptive reasonableness of a base lodestar figure. *Rohrmoos Venture*, 578 S.W.3d at 500–501.

In cases under the Family Code, additional factors may be considered when determining reasonableness and necessity of fee awards, including (1) the financial standing of the parties and their disparate earning capacities (*Smith v. Smith*, 620 S.W.2d 619, 625 (Tex. App.—Dallas 1981, no writ)); (2) disparity of ages, size of separate estates, and nature of the property (*Campbell v. Campbell*, 625 S.W.2d 41, 43 (Tex. App.—Fort Worth 1981, writ dism'd)); and (3) disparate earning capabilities, different business opportunities, the relative abilities of the parties, the relative financial standing of the parties, their physical conditions, and their probable future needs of support (*Mills v. Mills*, 559 S.W.2d 687, 689 (Tex. App.—Fort Worth 1977, no writ)).

§ 20.19 Attorney's Fees as Sanctions

Before a court may exercise its discretion to shift attorney's fees as a sanction, there must be some evidence of reasonableness, because without such proof a trial court cannot determine that the sanction is no more severe than necessary to fairly compensate the prevailing party. The standard for fee-shifting awards in *Rohrmoos Venture* applies as well to fee-shifting sanctions. *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 710 (Tex. 2019); *see Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Thus, the lodestar method for proving reasonableness and necessity

must be used when requesting attorney's fees as sanctions, including discovery sanctions.

§ 20.20 Paralegal Fees

Paralegal fees are not automatically recoverable as a subset of attorney's fees. For recovery of paralegal fees in connection with the recovery of attorney's fees, the paralegal must have performed work that has traditionally been done by an attorney. *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied). In addition, the evidence must establish—

1. that the paralegal is qualified through education, training, or work experience to perform substantive legal work;
2. that the substantive legal work was performed under the direction and supervision of an attorney;
3. the nature of the legal work performed;
4. that the hourly rate charged for the paralegal was reasonable and necessary; and
5. that the number of hours expended by the paralegal were reasonable and necessary.

"Substantive legal work" includes conducting client interviews and maintaining general contact with the client; locating and interviewing witnesses; conducting investigations and statistical and documentary research; drafting documents, correspondence, and pleadings; summarizing depositions, interrogatories, and testimony; and attending executions of wills, real estate closings, depositions, court or administrative hearings, and trials with an attorney. "Substantive legal work" does not include clerical or administrative work. Texas Paralegal Standards, Paralegal Division of the State Bar of Texas. For more information about the definition of paralegal standards, see State Bar of Texas Paralegal Division, **txpd.org**.

In *Gill Savings*, although holding that paralegal fees are includable in an attorney's fee award under certain conditions, the court found that the testimony and exhibits did not provide any help in determining the qualifications, if any, of the legal assistants, the nature of the work performed, or the hourly rate being charged and held that the evidence was legally insufficient to support the award. *Gill Savings*, 759 S.W.2d at 705; *see also Clary Corp. v. Smith*, 949 S.W.2d 452, 469–70 (Tex. App.—Fort Worth 1997, pet. denied) (outlining requirements necessary for recovery and finding evidence legally insufficient for recovery); *Moody v. EMC Services*, 828 S.W.2d 237, 248 (Tex.

App.—Houston [14th Dist.] 1992, writ denied) (outlining requirements necessary for recovery and finding evidence legally insufficient for recovery); *Multi-Moto Corp. v. ITT Commercial Finance Corp.*, 806 S.W.2d 560, 570 (Tex. App.—Dallas 1991, writ denied) (outlining requirements necessary for recovery).

When proving a reasonable attorney's fee, the lawyer should testify that the hourly rate charged for the paralegal work was reasonable; testifying simply about the total amount of paralegal fees is not sufficient. *See Clary Corp.*, 949 S.W.2d at 470; *see also Moody*, 828 S.W.2d at 248 (invoices listing total cost for various services performed by paralegal not sufficient to support award of fees).

§ 20.21 Segregation of Fees

Generally, a party is required to segregate fees that are recoverable from fees that are not. If discrete legal services advance both a recoverable and an unrecoverable claim, they need not be segregated. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006). In other words, courts concentrate on intertwined legal services rather than intertwined facts.

As examples of legal services that may be necessary whether a claim is filed alone or with others, the supreme court listed "[r]equests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services." The court stated that "[t]o the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service." *Tony Gullo Motors*, 212 S.W.3d at 313.

This standard does not require more precise proof for attorney's fees than for any other claims or expenses. For example, a lawyer need not keep separate time records when drafting the paragraphs of a petition that includes both recoverable and unrecoverable claims. An opinion that a certain percentage of the drafting time would have been necessary even if there had been no unrecoverable claim would suffice. *Tony Gullo Motors*, 212 S.W.3d at 314.

Evidence of unsegregated fees for the entire case constitutes some evidence of what the segregated amount should be. If segregation was required but the lawyer failed to introduce evidence of segregation, remand is required. *Tony Gullo Motors*, 212 S.W.3d at 314.

Whether fees should be segregated is a question of law, and the issue of proper segregation is a mixed question of law and fact. *Endsley Electric, Inc. v. Altech, Inc.*, 378

S.W.3d 15, 28–29 (Tex. App.—Texarkana 2012, no pet.); *Penhollow Custom Homes, LLC v. Kim*, 320 S.W.3d 366, 374 (Tex. App.—El Paso 2010, no pet.).

Segregation can be done simply by using color-coded highlights. *In re Marriage of Mobley*, 503 S.W.3d 636, 646 (Tex. App.—Texarkana 2016, pet. denied).

If attorney's fees are incurred for both enforcement and modification proceedings, the lawyer must segregate the fees attributable to the enforcement action or all the fees are enforceable only as a debt. Specifically, when a party fails to segregate attorney's fees incurred with an enforcement proceeding (fees that can be enforced through contempt) from attorney's fees incurred for work performed in connection with a modification proceeding (fees that cannot be enforced through contempt), the award of attorney's fees is enforceable only as a debt. *See In re Braden*, 483 S.W.3d 659, 666 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (per curiam). An obligee necessarily required to defeat the obligor's motion to recover overpayments in order to prevail on a claim for unpaid child support need not segregate requested fees. *Bruce v. Bruce*, No. 03-17-00672-CV, 2018 WL 2653550, at *4 (Tex. App.—Austin June 5, 2018, no pet.) (mem. op.).

Because attorney's fees are not recoverable in tort actions, attorney's fees attributable to those causes of action must be segregated. *See Villasenor v. Villasenor*, 911 S.W.2d 411, 420 (Tex. App.—San Antonio 1995, no pet.).

Appeals: The requirement of segregation also applies to attorney's fees on appeal in some circumstances. Because an award of appellate attorney's fees to the appellee in a suit for dissolution of marriage must be contingent on the appellant's unsuccessful appeal, an appellee may not recover attorney's fees for work performed on any issue of the appeal where the appellant was successful but may still recover attorney's fees for work performed on any issue of the appeal where the appellant was unsuccessful. If a party is entitled to attorney's fees from the adverse party on one claim but not another, the party claiming attorney's fees must segregate the recoverable fees from the unrecoverable fees. *Robertson v. Robertson*, No. 13-16-00309-CV, 2017 WL 6546005, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 21, 2017, no pet.) (mem. op.).

§ 20.22 Proof for Interim Attorney's Fees

Dissolution of Marriage: While a suit for dissolution of marriage is pending, the court may order payment of reasonable attorney's fees and expenses after notice and hearing. *See* Tex. Fam. Code § 6.502(a)(4). The court must hold an evidentiary hearing

and allow the opposing spouse an opportunity to participate through cross-examination and presentation of evidence. *Post v. Garza*, 867 S.W.2d 88, 90 (Tex. App.—Corpus Christi–Edinburg 1993, orig. proceeding). In a hearing for interim attorney's fees, it is important to prove not only that the fees are reasonable and necessary but also the source from which the fees will be paid. The award of temporary attorney's fees must be based on the needs of the applicant as weighed against the ability of the other party to pay, but the court may not order a party to pay interim attorney's fees beyond the party's present ability to pay. *See Herschberg v. Herschberg*, 994 S.W.2d 273, 279 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.).

Suit Affecting the Parent-Child Relationship: In a suit affecting the parent-child relationship, the court may make a temporary order for the safety and welfare of the child, including an order for payment of reasonable attorney's fees and expenses. Tex. Fam. Code § 105.001(a). Notice and a hearing are required. Tex. Fam. Code § 105.001(b). The statute does not authorize a trial court to order payment of temporary attorney's fees for a purpose other than the safety and welfare of the child. *Saxton v. Daggett*, 864 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding). The party seeking fees must present evidence concerning the safety and welfare of the child, not just evidence that an award of fees is sought to address the disparity in the parties' relative wealth. *In re T.M.F.*, No. 09-10-00019-CV, 2010 WL 574577 (Tex. App.—Beaumont 2010, orig. proceeding) (per curiam) (mem. op.). The party seeking fees must also present evidence that the funds are necessary at the time of the request, not at trial, to protect the safety and welfare of the child. *In re Rogers*, 370 S.W.3d 443 (Tex. App.—Austin 2012, orig. proceeding). *But see In re H.D.V.*, No. 05-15-00421, 2016 WL 4492702 (Tex. App.—Dallas Oct. 5, 2016, pet. denied) (mem. op.) (evidence that, without fee award, party seeking fees would be taking money away from children to pay legal fees would support fee award as being necessary for welfare of children).

§ 20.23 Attorney's Fees on Appeal

The general rule is that a trial court's award of attorney's fees may include appellate attorney's fees. *Hunsucker v. Fustok*, 238 S.W.3d 421, 431 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Neal v. SMC Corp.*, 99 S.W.3d 813, 818 (Tex. App.—Dallas 2003, no pet.)).

Allowing attorney's fees for an appeal is within the discretion of the trier of fact but is not required. However, if there is uncontroverted testimony by the movant for fees and the opposing party has "the means and opportunity of disproving the testimony and

fails to do so, the testimony will be taken as true as a matter of law." *Hunsucker*, 238 S.W.3d at 431.

An award of appellate attorney's fees must be contingent on the appellant's unsuccessful appeal; to do otherwise would penalize a party for pursuing a meritorious appeal. *Robertson v. Robertson*, No. 13-16-00309-CV, 2017 WL 6546005, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 21, 2017, no pet.) (mem. op.). If the fees are not so conditioned, the court may reform the judgment to make them conditional on success, so failure to condition is not the basis for reversible error. *See Solomon v. Steitler*, 312 S.W.3d 46, 59–60 (Tex. App.—Texarkana 2010, no pet.). In a suit affecting the parent-child relationship, an award of appellate attorney's fees is not required to be conditioned on a successful appeal. *In re Mansour*, 360 S.W.3d 103, 108–09 (Tex. App.—San Antonio 2020, orig. proceeding); *In re Jafarzadeh*, No. 05-14-01576-CV, 2015 WL 72693, at *2 (Tex. App.—Dallas Jan. 2, 2015, orig. proceeding) (mem. op.). (See the discussion in section 26.8 in this manual.)

Ideally attorney's fees for the appeal should be requested as part of the final judgment and proved up as part of the general request for attorney's fees. If there is a credible showing of the need for appellate attorney's fees in the amount requested and of the opposing spouse's ability to meet that need, the trial court, pending appeal, has authority by temporary orders to require payment of the fees. *Halleman v. Halleman*, 379 S.W.3d 443, 454 (Tex. App.—Fort Worth 2012, no pet.). Several levels of attorney's fees should be considered when proving up the appellate attorney's fees:

1. *Perfecting the appeal.* This step requires the filing of the notice of appeal. At or about the same time, the clerk's record and the reporter's record should be requested, the docketing statement should be filled out, and the filing fee should be paid.

2. *Appellate mediation.* Some of the courts of appeal require the parties to attend mediation. Usually this is voluntary, but not always. An objection may be filed, but the court of appeals may still order both parties to attend.

3. *Appellant's brief.* The appellant's brief is due thirty days after both the clerk's record and the reporter's record have been filed with the court.

4. *Appellee's brief.* The appellee's brief is due thirty days after the appellant's brief has been filed.

5. *Appellant's reply brief.* A reply brief is optional; it is due twenty days after the appellee's brief has been filed.

6. *Oral argument.* The parties must request oral argument, or none will be granted. Even if requested, oral argument is not always granted.

7. *Motion for rehearing.* A motion for rehearing is optional and is due fifteen days after the court of appeals has issued its opinion. A response is required only if requested by the court.

8. *Petition for review.* A petition for review is the first step in pursuing the appeal to the Supreme Court of Texas. It is due forty-five days after the court of appeals has issued its opinion or after the last ruling on the motion for rehearing.

9. *Response to petition for review.* A response to the petition for review is optional unless specifically requested by the supreme court. Usually a response is not requested. If the response is requested, the supreme court generally allows thirty days to file it.

10. *Reply to response to petition for review.* If a response is filed, a reply to the response to the petition for review is optional but may be necessary. A reply is due fifteen days after the response is filed.

11. *Brief on the merits.* A brief on the merits is filed only if specifically requested by the supreme court. If the brief is requested, the supreme court generally allows thirty days to file it.

12. *Response to brief on the merits.* If a brief on the merits has been requested by the supreme court, a response brief should be filed. Generally, the supreme court allows twenty days to file a response brief on the merits.

13. *Oral argument.* Even if both sides request oral argument, the supreme court does not always grant it.

14. *Motion for rehearing.* A motion for rehearing is optional and is due fifteen days after the supreme court has issued its opinion.

The court may grant one or more extensions of the deadlines described above.

Temporary Orders During Appeal: Both title 1 and title 5 of the Texas Family Code provide for temporary orders for attorney's fees during the pendency of an appeal. *See* Tex. Fam. Code §§ 6.709, 109.001. Both require notice and hearing. In a suit for dissolution of marriage, a temporary order may be rendered as considered equitable and necessary for the preservation of the property and for the protection of the parties during the appeal. Tex. Fam. Code § 6.709(a). In a suit affecting the parent-child rela-

tionship, the court may make any order necessary to preserve and protect the safety and welfare of the child during pendency of the appeal as the court may deem necessary and equitable. Tex. Fam. Code § 109.001(a).

Mandamus: Unlike for appeals, there are no specific statutory provisions for the award of attorney's fees for prosecuting or defending a petition for writ of mandamus.

[Sections 20.24 through 20.30 are reserved for expansion.]

III. Collecting Attorney's Fees

§ 20.31 Charging Interest on Attorney's Fees

A lawyer may charge interest on unpaid balances of fees owed to the lawyer by a client, provided that the interest charged is reasonable and complies with custom and law and that the underlying fee is reasonable. Tex. Comm. on Prof'l Ethics, Op. 409 (1984). The original fee must not be excessive or unconscionable, in violation of rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct.

The interest rate must not violate Texas usury laws as set forth in chapters 301–305 of the Texas Finance Code. In some instances, the interest charged and the credit arrangements made must comply with Regulation Z (12 C.F.R. pt. 1026) of the Federal Truth in Lending Act (15 U.S.C. §§ 1601–1667f). Failure to comply with these state and federal provisions can result in both civil and criminal penalties, and lawyers must use utmost caution. For a discussion of these complex provisions, see State Bar of Texas, 1 *Texas Collections Manual* ch. 2 (2020 ed.).

§ 20.32 Filing Suit for Fees

It is improper for a lawyer to secure a judgment for legal fees against his client in the same suit in which the lawyer is representing the client. Tex. Comm. on Prof'l Ethics, Op. 374 (1974). Thus a lawyer may not prepare a divorce decree that includes a judgment for recovery of his fees against the client. Such conduct would violate rule 1.06 of the Texas Disciplinary Rules of Professional Conduct. However, a lawyer can include language in a divorce decree awarding debts to the husband and debts to the wife, including the husband's attorney's fees and the wife's attorney's fees. Allocating a debt

for these attorney's fees is far different from including language for a judgment for attorney's fees.

The proper procedure would be to withdraw from representation in accordance with rule 1.15 of the Texas Disciplinary Rules of Professional Conduct and then intervene in the same suit or file a separate suit. See the discussion of withdrawal from representation in section 8.12 in this manual.

A lawyer may seek to recover attorney's fees by intervening in the title 1 or title 5 suit. Careful consideration should be given to the ethical aspects of such an intervention and to the possible detrimental effect on the case of the lawyer's client or former client. A lawyer representing a client whose former lawyer intervenes for fees should advise the client that an action for legal malpractice is a compulsory counterclaim to the action for fees.

"Nearly every continuing legal education article or speech on the topic . . . advises against suing your client for attorney's fees. . . . Invariably your suit for attorney's fees will be followed by a suit against you for some alleged act of malpractice." Larry H. Schwartz, *Attorney's Fees*, 1 State Bar of Tex. Prof. Dev. Program, Advanced Family Law Course 8 (2003). *See also* Kathryn J. Murphy, *Attorney's Fees Agreements*, 1 State Bar of Tex. Prof. Dev. Program, Advanced Family Law Course 6 (2011). However, if the practitioner is determined to do so, he must first withdraw and then file suit. He may intervene if he can show that the intervention will not complicate the case and that the intervention is almost essential to effectively protect his interest. *Collins v. Moroch*, 339 S.W.3d 159, 163 (Tex. App.—Dallas 2011, pet. denied).

COMMENT: In an intervention for fees based on a client's breach of an hourly-fee contract, the evidence, including the lawyer's billing statements and witness testimony, must provide sufficient detail for the trial court to determine the nature of the work performed. *See John H. Carney & Associates v. Ahmad*, No. 07-15-00252-CV, 2016 WL 368527 (Tex. App.—Amarillo Jan. 28, 2016, pet. denied) (mem. op.).

§ 20.33 Withholding of Services Until Fee Is Paid

Late payment or nonpayment of a fee does not justify withholding services from a client. If the client substantially fails to fulfill an obligation to the attorney regarding the attorney's services, including an obligation to pay the attorney's fee as agreed, the only recourse is to withdraw from representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5). Withdrawal is permitted only on written motion for good cause shown. Tex.

R. Civ. P. 10. The attorney must take steps to the extent reasonably practicable to protect the client's interests. These steps include giving reasonable warning to the client that the attorney will withdraw unless the obligation is fulfilled, allowing time to employ other attorneys, and surrendering papers and property to which the client is entitled. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5), (d). The attorney must continue representing the client, notwithstanding good cause to withdraw, if the court so orders. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(c). Withdrawal from representation is more fully discussed in section 8.12 in this manual.

A Texas lawyer was publicly reprimanded when, after obtaining a divorce for his client, he failed to distribute all the property awarded to the client. He kept certain properties in his own name and failed to return them because of a fee dispute with the client. The district grievance committee concluded that these actions constituted professional misconduct. 45 Tex. B.J. 203 (1982).

A lawyer may condition acceptance of employment on advance payment but may not condition completion of legal services on payment of unpaid portions of the fee. A client's failure to pay for the lawyer's services does not relieve the lawyer of the duty to perform completely and on time unless the lawyer withdraws from representation in a manner that does not prejudice the client's legal rights. If a client refuses to pay for legal services, the lawyer may withdraw from representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5). Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d).

§ 20.34 Attorney's Liens

Often lawyers mistakenly believe that clients' attempts to dismiss them can be denied on an attorney's lien theory. An attorney who is discharged by a client must withdraw from employment. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(a)(3).

In Texas, a lien for attorney's fees has a common-law rather than statutory basis. To perfect and maintain the lien, the lawyer must have actual possession of the client's property and must make a demand for payment. *Smith v. State*, 490 S.W.2d 902, 910 (Tex. App.—Corpus Christi–Edinburg 1972, writ ref'd n.r.e.).

Assertion of Lien May Be Unethical: An attorney withdrawing from representation must take steps to the extent reasonably practicable to protect the client's interests. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d). Thus, if assertion of an attorney's lien

would result in foreseeable prejudice to the client, the lien should not be exercised. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 395 (1979); Tex. Comm. on Prof'l Ethics, Op. 411 (1984).

If clients request payment or delivery of funds or other property to which they are entitled, attorneys have a duty to comply promptly. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d). One lawyer was suspended from practice for three months for refusing to return a client's files after repeated requests. *Hebisen v. State*, 615 S.W.2d 866 (Tex. App.—Houston [1st Dist.] 1981, no writ). In *Smith v. State*, 523 S.W.2d 1, 6 (Tex. App.—Corpus Christi–Edinburg 1975, writ ref'd n.r.e.), a disbarment proceeding, the jury found that a lawyer who refused to turn over a client's file to her selected lawyer was not trying to exert an attorney's lien but was instead willfully and wrongfully refusing to relinquish a client's documents.

The lawyer is the agent of the client, and the work product generated by the lawyer in representing the client belongs to the client. *In re George*, 28 S.W.3d 511, 516 (Tex. 2000) (orig. proceeding).

COMMENT: To avoid potential embarrassment and ill will by the client, the lawyer should refrain from putting uncomplimentary comments in the client's file.

In another case, the court held the following:

> An attorney should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. . . . [The attorney should give] due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm.

Robinson v. Risinger, 548 S.W.2d 762, 766 (Tex. App.—Tyler 1977, writ ref'd n.r.e.).

Under former DR 9-102(B)(4), a client has a right to the return of papers on request if the lawyer cannot claim an attorney's lien. The court reasoned that, although a client's remedy for a lawyer's violation of this right would be a damage action sounding in tort, the fact that the client cast the violation in terms of breach of contract would not preclude damages if the client could prove the violation. *Nolan v. Foreman*, 665 F.2d 738, 742–43 (5th Cir. 1982). *But see Martin v. Trevino*, 578 S.W.2d 763, 770 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.) (violation of former Code of Profes-

sional Responsibility will not give rise to private cause of action). However, the same court later stated that the appellee might seek recovery in a private cause of action against the appellant's lawyer whose violation of the Code of Professional Responsibility rendered a postjudgment settlement agreement void and unenforceable. *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 233 (Tex. App.—Corpus Christi–Edinburg 1985, writ ref'd n.r.e.).

COMMENT: Returning a client's file has become increasingly important because most discovery is not filed with the court and many clients do not retain a complete copy of the papers sent to them during the course of the case. If a client subsequently changes lawyers, the second lawyer may be unaware of outstanding discovery requests or that discovery supplementation may be needed.

A court may not place an equitable lien on a former spouse's real and personal property to ensure payment of attorney's fees incurred in a postdivorce enforcement action. *Higgins v. Higgins*, 514 S.W.3d 382, 391 (Tex. App.—San Antonio 2017, pet. denied).

[Sections 20.35 through 20.40 are reserved for expansion.]

IV. Statutory Authority

§ 20.41 Appendix: Statutes and Rules—Attorney's Fees

The following statutes and rules allow or relate to the recovery of attorney's fees in family law litigation:

Family Code:

§ 6.502(a)(4)	Temporary Injunction and Other Temporary Orders [Dissolution of Marriage]
§ 6.708(c)	Costs: Attorney's Fees and Expenses [Dissolution of Marriage]
§ 6.709(a)(2)	Temporary Orders Pending Appeal [Dissolution of Marriage]
§ 8.0591(b)	Overpayment [of Spousal Maintenance]
§ 8.206(b)(3)	Liability and Obligation of Employer for Payments [of Spousal Maintenance]

§ 8.208(c)	Employer's Liability for Discriminatory Hiring or Discharge
§ 9.014	Attorney's Fees [for Enforcement of Decree]
§ 9.106	Attorney's Fees [for Obtaining QDRO]
§ 9.205	Attorney's Fees [for Suit to Divide Undivided Property]
§ 41.002	Limit of Damages [for Liability of Parents for Conduct of Child]
§ 41.0025	Liability for Property Damages to an Inn or Hotel [for Liability of Parents for Conduct of Child]
§ 42.006	Damages [Civil Liability for Interference with Possessory Interest in Child]
§ 42.009	Frivolous Suit [Civil Liability for Interference with Possessory Interest in Child]
§ 81.005	Attorney's Fees [for Obtaining Protective Order]
§ 81.006	Payment of Attorney's Fees [for Obtaining Protective Order]
§ 105.001(a)(5)	Temporary Orders before Final Order [in SAPCR]
§ 106.002	Attorney's Fees and Expenses [SAPCR]
§ 107.23(a)	Fees in Suits Other Than Suits by Governmental Entity [for Professionals] [SAPCR]
§ 109.001(a)(5)	Temporary Orders During Pendency of Appeal [SAPCR]
§ 152.208(c)	Jurisdiction Declined by Reason of Conduct [UCCJEA]
§ 152.308(b)(5)	Expedited Enforcement of Child Custody Determination [UCCJEA]
§ 152.312	Costs, Fees, and Expenses [UCCJEA]
§ 154.012(b)	[Child] Support Paid in Excess of Support Order
§ 156.005	Frivolous Filing of Suit for Modification

§ 157.110	Forfeiture of Security for Failure to Comply with Order [Enforcement]
§ 157.162(b)	Proof [SAPCR Enforcement]
§ 157.167	Respondent to Pay Attorney's Fees and Costs [SAPCR Enforcement]
§ 157.211(5)	Conditions of Community Supervision [SAPCR Enforcement]
§ 157.268(6)	Application of Child Support Payment [SAPCR Enforcement]
§ 157.318(a)	Duration and Effect of Child Support Lien [SAPCR Enforcement]
§ 157.319(c)	Effect of Lien Notice [SAPCR Enforcement]
§ 157.322(a)	Mandatory Release of Lien [SAPCR Enforcement]
§ 157.323(c)(1)	Foreclosure or Suit to Determine Arrearages [SAPCR Enforcement]
§ 157.330(b)	Failure to Comply with Notice of Levy [SAPCR Enforcement]
§ 157.375(b)	Immunity to Civil Process [SAPCR Enforcement]
§ 158.0051(a), (c)	Order for Withholding for Costs and Fees
§ 158.102	Time Limitations [Withholding]
§ 158.206(b)(3)	Liability and Obligation of Employer [Withholding]
§ 158.209(c)	Employer's Penalty for Discriminatory Hiring or Discharge [Withholding]
§ 159.102(28)	Definitions [UIFSA]
§ 159.305(b)(11)	Duties and Powers of Responding Tribunal [UIFSA]
§ 159.313(b), (c)	Costs and Fees [UIFSA]
§ 160.636(c)	Order Adjudicating Parentage; Costs
§ 160.762(d)	Effect of Gestational Agreement That Is Not Validated

§ 231.006(f)	Ineligibility to Receive State Grants or Loans or Receive Payment on State Contracts
§ 231.211(a)	Award of Cost Against Nonprevailing Party in Title IV-D Case
§ 231.303(c)	Title IV-D Administrative Subpoena
§ 261.107(d)	False Report; Criminal Penalty; Civil Penalty [Child Abuse or Neglect]
§ 261.108(b), (c)(2)	Frivolous Claims Against Person Reporting
§ 261.110(d)(4)	Employer Retaliation Prohibited

Civil Practice and Remedies Code:

§ 18.001	Affidavit Concerning Cost and Necessity of Services
§ 37.009	Costs [Declaratory Judgment]
§ 38.001	Recovery of Attorney's Fees
§ 38.002	Procedure for Recovery of Attorney's Fees
§ 38.003	Presumption
§ 38.004	Judicial Notice
§ 171.048(c)	Representation by Attorney; Fees [Arbitration]

Government Code:

§ 804.003(c)	Qualified Domestic Relations Orders [Public Retirement System]

Property Code:

§ 92.016(e)	Right to Vacate and Avoid Liability Following Family Violence
§ 92.017(h)	Right to Vacate and Avoid Liability Following Certain Decisions Related to Military Service

Texas Rules of Civil Procedure:

Rule 162	Dismissal or Non-Suit

Rule 166a(h) Summary Judgment

[Chapters 21 and 22 are reserved for expansion.]

Chapter 23

Divorce—Decrees and Agreements Incident to Divorce

I. Decrees

§ 23.1 Required Specificity 563
§ 23.2 Orders Not Enforceable by Contempt 563
§ 23.3 Specificity of Dates and Times 565
§ 23.4 Execution and Delivery of Instruments 565
§ 23.5 Clarification and Enforcement of Orders 565
§ 23.6 Insurance 566
§ 23.7 Continuation of Insurance Coverage to Former Spouse 568
§ 23.8 Debts and Tax Liabilities 569
§ 23.9 Spousal Maintenance and Contractual Alimony 570
§ 23.10 Attorney's Fees 579
§ 23.11 Suit Affecting Parent-Child Relationship 580
§ 23.12 Managing Conservatorship 580
§ 23.13 Possessory Conservatorship 581
§ 23.14 Child Support Provisions 581
§ 23.15 Withholding from Earnings for Child Support 581
§ 23.16 Medical and Dental Expenses of Children 581
§ 23.17 Provisions for Possession and Access 582
§ 23.18 Passport Application for Minors 582
§ 23.19 Mandatory Provisions in Decrees Affecting Children 582
§ 23.20 Parent Education and Family Stabilization Course 582
§ 23.21 Parenting Plan 582
§ 23.22 Limits to Enforcement of Support and Conservatorship Agreements Regarding Minors 582
§ 23.23 Necessity of Evidence for Final Hearing in Divorce Default 583
§ 23.24 Employment and Retirement Benefits 584

§ 23.25 Wills 585

II. Agreements Incident to Divorce

§ 23.31 Agreement Incident to Divorce—Generally. 585
§ 23.32 Property-Settlement Agreement 586

III. Tax Considerations

§ 23.41 Tax Considerations Generally 588
§ 23.42 Filing Status 589
§ 23.43 Division of Property 592
§ 23.44 Alimony 594
§ 23.45 Child Support Payments 594
§ 23.46 Dependency Exemption 595
§ 23.47 Medical and Dental Expense Deductions 596
§ 23.48 Child Care Expenses. 596
§ 23.49 Costs of Obtaining Divorce 597
§ 23.50 Innocent-Spouse Relief and Separate-Liability Election 597

IV. Useful Websites

§ 23.61 Useful Websites 598

Chapter 23

Divorce—Decrees and Agreements Incident to Divorce

I. Decrees

§ 23.1 Required Specificity

Courts have inherent and statutory power to enforce decrees, but a decree's enforceability is determined by the nature of the decree itself. *Ex parte Gorena*, 595 S.W.2d 841, 845 (Tex. 1979) (orig. proceeding). The decree must set out the details of compliance in clear, specific, and unambiguous terms so that the parties will readily know exactly what obligations are imposed. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding). A general residuary clause in a divorce decree can divide property if the property was not otherwise divided in a specific award. *See In re W.L.W.*, 370 S.W.3d 799, 804 (Tex. App.—Fort Worth 2012, orig. proceeding). The decree must inform the parties of their obligations without calling on them to make or draw conclusions about which persons might well differ. *Ex parte Slavin*, 412 S.W.2d at 44–45. Except as discussed below, if the requirement of specificity is met, the final decree will be enforceable by contempt as a court order even if the terms of the judgment have been determined by agreement of the parties rather than by decision of the judge. *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979) (per curiam) (although rules relating to contract interpretation apply, agreed judgment is accorded same finality and binding force as final judgment rendered at conclusion of adversary proceeding).

§ 23.2 Orders Not Enforceable by Contempt

Certain provisions of a divorce decree are not enforceable by contempt, either because enforcement would violate constitutional principles or because the court lacks the requisite subject-matter jurisdiction. For example, a finding of contempt for violation of an order for the payment of debts resulting in imprisonment violates the Texas Constitution. *Ex parte Yates*, 387 S.W.2d 377, 380 (Tex. 1965) (orig. proceeding). Similarly,

orders requiring a party to perform an act the party is incapable of performing are likewise not subject to enforcement by contempt. *Ex parte Gonzales*, 414 S.W.2d 656, 657 (Tex. 1967) (orig. proceeding). Orders requiring religious instruction violate article I, section 6, of the Texas Constitution and are not enforceable by contempt. *See Salvaggio v. Barnett*, 248 S.W.2d 244 (Tex. App.—Galveston, writ ref'd n.r.e.). Accordingly, visitation cannot be conditioned on taking a child to Sunday school. *Watts v. Watts*, 563 S.W.2d 314, 316–17 (Tex. App.—Dallas 1978, writ ref'd n.r.e.), *disapproved on other grounds*, *Jones v. Cable*, 626 S.W.2d 734, 736 (Tex. 1981). Unless otherwise allowed by statute, orders for the support of children beyond their eighteenth birthdays are unenforceable by contempt, even if such orders incorporate an agreement to that effect, absent statutory authority for such an order. *In re Cobble*, 592 S.W.2d 46, 48–49 (Tex. App.—Tyler 1979, writ dism'd). An order enjoining future speech, even if defamatory, may be an unconstitutional infringement on free speech and therefore not enforceable by contempt. *Kinney v. Barnes*, 443 S.W.3d 87, 98–99 (Tex. 2014). A decree providing for the payment of contractual alimony and not spousal maintenance is not enforceable by contempt. *In re Green*, 221 S.W.3d 645 (Tex. 2007) (per curiam).

COMMENT: Under certain conditions, orders for the support of children over the age of eighteen but still enrolled in an accredited secondary school in a program leading toward a high school diploma under chapter 25 of the Texas Education Code, enrolled in courses for joint high school and junior college credit pursuant to Education Code section 130.008, or enrolled on a full-time basis in a private secondary school in a program leading toward a high school diploma, and meeting relevant attendance requirements, are valid and enforceable court orders. *See* Tex. Fam. Code § 154.002(a). Furthermore, the court retains the authority to issue orders for the support of an adult disabled child over the age of eighteen. *See* Tex. Fam. Code § 154.302 *et seq.*

Other provisions of a decree may be enforceable by contract. A marital property agreement, although incorporated into a final divorce decree, is treated as a contract, and its legal force and meaning are governed by the law of contracts, not by the law of judgments. *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986). A person may contract to support his spouse, and that obligation, to the extent it exceeds his legal duty, is a debt. *Ex parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993) (orig. proceeding). Where the duty to make support payments arises from an agreement between the parties, rather than from a divorce decree based entirely on the power conferred by the Family Code, the rights and obligations of the parties are governed by the rules of contract. *See Hutchings v. Bates*, 406 S.W.2d 419, 420 (Tex. 1966); *Griffin v. Griffin*, 535 S.W.2d 42, 43–44 (Tex. App.—Austin 1976, no writ). As with any other contract, absent the parties' consent,

the provisions of an agreed decree cannot be set aside except on the basis of fraud, accident, or mutual mistake of fact. *Schwartz v. Schwartz*, 247 S.W.3d 804 (Tex. App.—Dallas 2008, no pet.). However, a court may modify the provisions of a decree pertaining to the parent-child relationship as authorized by the Texas Family Code. *See* Tex. Fam. Code ch. 156.

§ 23.3 Specificity of Dates and Times

The divorce decree should specify the dates, times, and locations of any required acts, including the conveyance of property or payment of money. The requirement to pay certain medical bills "timely" has been held to be unduly vague. *Ex parte Carpenter*, 566 S.W.2d 123, 124 (Tex. App.—Houston [14th Dist.] 1978, orig. proceeding) (per curiam). However, an order that required certain transfers of personalty or payments of money be made "immediately," while not as desirable as stating a specific time, has been held to have unequivocal meaning and therefore not to be unduly vague. *Ex parte Fernandez*, 645 S.W.2d 636, 638 (Tex. App.—El Paso 1983, orig. proceeding). Payment into the "registry of the court" is also not unduly vague, because it is a common procedure, provided the court and county are identified in the order sought to be enforced. *Ex parte Fernandez*, 645 S.W.2d at 638.

§ 23.4 Execution and Delivery of Instruments

General language providing for the execution of future documents necessary to effect the terms of the decree is often too vague for enforcement by contempt. *See Ex parte Choate*, 582 S.W.2d 625, 627–28 (Tex. App.—Beaumont 1979, orig. proceeding) (order holding husband in contempt for failure to sign "required instruments" was void).

COMMENT: The attorney may wish to include specific language requiring the execution of certain transfer documents attached to the decree as exhibits, as such language should increase the availability of contempt.

§ 23.5 Clarification and Enforcement of Orders

The court retains the inherent power to clarify or enforce a divorce decree as long as the court does not substantively alter the property division made in the original decree. Clarifying a decree that imposes an equitable lien against property to provide that the lien must be satisfied on the sale of the property is not a substantive alteration. *Karigan*

v. Karigan, 239 S.W.3d 436 (Tex. App.—Dallas 2007, no pet.). Various procedures for clarification and enforcement of property divisions and orders in parent-child cases are discussed in chapters 31, 33, and 34 of this manual.

§ 23.6 Insurance

Life Insurance: The trial court is authorized to divest title to a life insurance policy as part of the division of the estate of the parties. *Wallace v. Wallace*, 371 S.W.2d 918, 920–22 (Tex. App.—San Antonio 1963, writ dism'd). The court may also order that the policy be transferred to the noninsured spouse to be held in trust for the benefit of the children or that life insurance coverage be continued for the benefit of the children. Forms 24-25 and 24-26 in this manual are designed to assist in securing the change of beneficiary and to obtain confirmation of continued coverage.

A constructive trust may be imposed on the proceeds of a life insurance policy paid to a third party when the divorce decree orders the insured to name the children or the former spouse, who is the trustee for the children, as beneficiary. *Hudspeth v. Stoker*, 644 S.W.2d 92, 95–96 (Tex. App.—San Antonio 1982, writ ref'd); *Roberts v. Roberts*, 560 S.W.2d 438, 439-40 (Tex. App.—Beaumont 1977, writ ref'd).

An ownership interest in an undivided life insurance policy may be asserted in a suit for a postdecree division of property under Family Code chapter 9.

If a decree of divorce or annulment is rendered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of rendition of the decree, a provision in the policy in favor of the insured's former spouse is not effective unless (1) the decree designates the insured's former spouse as the beneficiary, (2) the insured redesignates the former spouse as the beneficiary after rendition of the decree, or (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse. Tex. Fam. Code § 9.301(a); *see also Gray v. Nash*, 259 S.W.3d 286 (Tex. App.—Fort Worth 2008, pet. denied). *But see Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (ERISA requires payment of benefits to designated beneficiary notwithstanding state law to the contrary). Although ERISA requires payment of benefits to the designated beneficiary, it does not preempt a postdistribution lawsuit against that beneficiary. *Hennig v. Didyk*, 438 S.W.3d 177 (Tex. App.—Dallas 2014, pet. denied) (ex-wife ordered to pay proceeds to estate of ex-husband where agreed divorce decree awarded husband all life insurance policies incident to his employment).

If the predecree designation fails, the proceeds of the policy are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the estate of the insured. Tex. Fam. Code § 9.301(b). An insurer who pays the proceeds of a life insurance policy issued by the insurer to the beneficiary under a predecree designation that is not effective under section 9.301(a) is liable for payment of the proceeds to the proper person or estate *only if* before the improper payment the insurer received written notice at its home office from an interested person that the designation was not effective *and* the insurer did not interplead the proceeds into the registry of a court of competent jurisdiction. Tex. Fam. Code § 9.301(c).

Health Insurance for Child: The court must render an order for the medical support of a child in any suit affecting the parent-child relationship in which the court orders periodic payments of child support or determines that medical support of the child must be established, modified, or clarified. Tex. Fam. Code § 154.181(a)(1), (a)(2). On rendering a final order, the court must make specific findings with respect to how health-care coverage is to be provided and must follow the statutory priorities unless good cause is shown for not doing so. Tex. Fam. Code §§ 154.181(d), 154.182(b). Except for good cause shown or on agreement of the parties, the court must require the parent ordered to provide health-care coverage to provide evidence to the court's satisfaction that the parent has applied for or secured health insurance or has otherwise taken necessary action to provide for health-care coverage for the child as ordered. Tex. Fam. Code § 154.181(d).

Detailed coverage of this topic is provided in chapter 9 of this manual.

Form 24-27 in this manual is designed to assist the obligee of a child support order in verifying the continued existence of the coverage.

Dental Insurance for Child: In any suit affecting the parent-child relationship, the court must render an order for the dental support of the child. Tex. Fam. Code § 154.1815(b). On rendering a final order, the court must make specific findings with respect to how dental coverage is to be provided and must follow the statutory priorities unless good cause is shown for not doing so. Tex. Fam. Code §§ 154.1815(e), 154.1825(c). Except for good cause shown or on agreement of the parties, the court must require the parent ordered to provide dental coverage to provide evidence to the court's satisfaction that the parent has applied for or secured dental insurance or has otherwise taken necessary action to provide for dental insurance coverage for the child as ordered. Tex. Fam. Code § 154.1815(e).

Detailed coverage of this topic is provided in chapter 9 of this manual.

Form 24-27 in this manual is designed to assist the obligee of a child support order in verifying the continued existence of the coverage.

Insurance for Child Support after Obligor's Death: The court may order a child support obligor to obtain and maintain life insurance to satisfy the support obligation in the event of the obligor's death. Tex. Fam. Code § 154.016. For a discussion of this topic, see section 9.10 in this manual.

Disposition of Insurance Policies: In the decree of divorce, the trial court shall specifically divide or award the rights of each spouse in an insurance policy. Tex. Fam. Code § 7.004.

If the decree does not specifically award all the rights of the spouses in an insurance policy (for example, casualty, homeowner's insurance, auto insurance) other than life insurance in effect at the time the decree is rendered, the policy remains in effect until it expires according to its own terms. If the interest in the insured property is awarded solely to one former spouse by the decree, the proceeds are payable to that former spouse. If each spouse receives an interest in the insured property, the proceeds are payable to those former spouses in proportion to the interests awarded. If the insurance coverage is directly related to the person of one of the former spouses, the proceeds are payable to that former spouse. The failure of either former spouse to change the endorsement on a policy to reflect the proper distribution of proceeds established by section 7.005 does not relieve the insurer of liability to pay the proceeds or any other obligation of the policy. Tex. Fam. Code § 7.005(a)–(c).

§ 23.7 Continuation of Insurance Coverage to Former Spouse

Health Insurance: After divorce, a spouse can elect to continue health insurance under either federal or state law. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires most group health plans to offer continued coverage for former spouses of members of the group. COBRA provisions for health insurance are codified at 26 U.S.C. § 4980B (Internal Revenue Code), 29 U.S.C. §§ 1161–1168 (ERISA), and 42 U.S.C. §§ 300bb–1 to –8. COBRA does not apply to church plans, small employer plans (fewer than twenty employees), and certain governmental plans.

A former spouse desiring to obtain continued health insurance coverage under a former spouse's group policy must make the election by notifying the plan administrator within sixty days of the severance of the family relationship. The applicant must have been a

dependent of the group member on the day preceding the date of the dissolution of the marriage. The coverage is available for a period of thirty-six months following the dissolution or until the applicant is covered under another group plan or Medicare, whichever occurs first.

The Texas Insurance Code contains similar extended coverage provisions for all group health insurance policies delivered, issued for delivery, or renewed in Texas and does not exempt small employers or churches. *See* Tex. Ins. Code §§ 1251.301–.310. Either the group member or dependent must notify the plan administrator within fifteen days of the dissolution of the marriage. Tex. Ins. Code § 1251.308(a). (This fifteen-day notice is not required for plans covered by the federal version.) The applicant must request the continued coverage within sixty days of the dissolution. Tex. Ins. Code § 1251.308(d). Unlike under the federal COBRA, which allows for continuation of coverage even if the spouse has only been a member of the plan for one day, the applicant must have been a member of the group for at least one year before the dissolution. Tex. Ins. Code § 1251.302. The Texas version also provides for extended coverage for a period of thirty-six months or until the applicant becomes eligible for coverage under another plan, whichever occurs first. Tex. Ins. Code § 1251.310. Forms 24-28 and 24-29 in this manual are designed for seeking continuation of health insurance coverage.

COMMENT: Failure to strictly comply with the notice requirements of both federal and Texas COBRA provisions may result in the complete loss of the opportunity to continue health insurance coverage.

Homeowner's or Fire Insurance: A homeowner's or fire insurance policy covering residential property remains in effect regardless of divorce or change of ownership between the spouses, unless excluded by endorsement, until regular expiration or cancellation of the policy. Tex. Ins. Code § 2002.003.

Automobile Insurance: Automobile insurance coverage continues during a period of separation in contemplation of divorce. Tex. Ins. Code § 1952.056.

§ 23.8 Debts and Tax Liabilities

The court's authority to divide the estate of the parties includes the authority to order one of the parties to pay liabilities incurred during marriage. The court's award cannot prejudice the rights of creditors, but, as between husband and wife, it may award property to one party and liabilities incurred during marriage to the other. *Johnson v. Johnson*, 948 S.W.2d 835, 838 (Tex. App.—San Antonio 1997, pet. denied) (liabilities

incurred during marriage must be paid; if parties cannot agree, it is duty of trial court to enter appropriate order).

However, taxes on community income must be specifically addressed to a party. General language ordering one party to pay the "community debts" is not sufficient to include an obligation to pay taxes on community income. *Brooks v. Brooks*, 515 S.W.2d 730, 733 (Tex. App.—Eastland 1974, writ ref'd n.r.e.).

COMMENT: While decrees often require a party to be responsible for the taxes associated with the property awarded to that party or confirmed as the party's separate property, the parties should also address the tax consequences of any assets that were disposed of during the year of divorce but before the date of divorce. For example, if, in the year of divorce, a wife sold shares of stock in her name to pay her husband's interim attorney's fees and temporary spousal support, should the wife, the husband, or both the wife and the husband be responsible for the tax resulting from that sale?

§ 23.9 Spousal Maintenance and Contractual Alimony

Spousal Maintenance: The purpose of spousal maintenance is to provide temporary and rehabilitative support for a spouse whose ability to support himself has eroded over time while engaged in homemaking activities and whose capital assets are insufficient to provide support. *Howe v. Howe*, 551 S.W.3d 236, 256 (Tex. App.—El Paso 2018, no pet.). There are several scenarios for which Texas law allows an award of spousal maintenance at the time of divorce. *See* Tex. Fam. Code § 8.051. In all cases, the spouse seeking maintenance must lack sufficient property, including his separate property, on dissolution of the marriage to provide for his minimum reasonable needs. Tex. Fam. Code § 8.051. Such maintenance may be granted if the party from whom maintenance is requested was convicted of or received deferred adjudication for a criminal offense that also constitutes an act of family violence, as defined by Family Code section 71.004, committed during the marriage against the other spouse or the other spouse's child and the offense occurred within two years before the date on which the suit was filed or while the suit is pending. Tex. Fam. Code § 8.051(1). Alternatively, maintenance may be granted if the spouse seeking maintenance (1) is unable to earn sufficient income to provide for his minimum reasonable needs because of an incapacitating physical or mental disability or (2) has been married to the other spouse for ten years or longer and lacks the ability to earn sufficient income to provide for his minimum reasonable needs or (3) is the custodian of a child of the marriage of any age who requires substantial care and personal supervision because of a physical or mental disability that

prevents the spouse from earning sufficient income to provide for his minimum reasonable needs. Tex. Fam. Code § 8.051(2).

The trial court is not required to determine whether a spouse seeking spousal support will be able to provide for his minimum reasonable needs at some point in the future. The trial court must only consider the requesting spouse's eligibility for maintenance at the time of the divorce. *Castillo v. Castillo*, No. 13-16-00174-CV, 2018 WL 1960168, at *3 (Tex. App.—Corpus Christi–Edinburg Apr. 26, 2018, no pet.) (mem. op.).

A spouse is not required to spend down long-term assets, liquidate all available assets, or incur new debt simply to obtain job skills and meet needs in the short term. *Trueheart v. Trueheart*, No. 14-02-01256-CV, 2003 WL 22176626, at *3 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, no pet.) (mem. op.); *see also Alfayoumi v. Alzoubi*, No. 13-15-00094-CV, 2017 WL 929482, at *2 (Tex. App.—Corpus Christi–Edinburg Mar. 9, 2017, no pet.) (mem. op.) (wife not required to spend down $250,000 in gold awarded to her to meet her short-term needs).

The term "minimum reasonable needs" is not defined in the Family Code. A trial court determines whether a party's minimum reasonable needs are met on a fact-specific, individualized, case-by-case basis. *Howe*, 551 S.W.3d at 256. A court abuses its discretion if it awards maintenance when there is insufficient evidence of the requesting spouse's minimum reasonable needs. *See Howe*, 551 S.W.3d at 257. A court also abuses its discretion in awarding maintenance if the requesting spouse will receive more income than his proven minimum reasonable needs. The income can include Social Security benefits and payments for a judgment awarded to the requesting spouse by the court as part of the property division. *See Willis v. Willis*, 533 S.W.3d 547, 556 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

The ten-year marriage requirement is measured as of the time of trial, not the time of filing suit. *See Hipolito v. Hipolito*, 200 S.W.3d 805 (Tex. App.—Dallas 2006, pet. denied).

Texas Family Code section 8.053 creates a rebuttable statutory presumption against the award of spousal maintenance based on a marriage of ten years or longer. To rebut this presumption, the requesting spouse must show he has exercised diligence in (1) earning sufficient income to provide for his minimum reasonable needs or (2) in developing the necessary skills to provide for his minimum reasonable needs during separation and during the pendency of the dissolution suit. Tex. Fam. Code § 8.053; *see Day v. Day*, 452 S.W.3d 430 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Evidence that a requesting spouse had exercised diligence in attempting to develop necessary skills to

provide for the spouse's minimum reasonable needs was sufficient to rebut this presumption. *See Arellano v. Arellano*, No. 01-16-00854-CV, 2018 WL 284333, at *4 (Tex. App.—Houston [1st Dist.] Jan. 4, 2018, no pet.) (mem. op.). A requesting spouse's high-school education, twenty years of marriage as a homemaker, work at a low-paying job, lack of transportation, and child-rearing responsibilities also were sufficient to rebut this presumption. *See In re Marriage of Eilers*, 205 S.W.3d 637, 646 (Tex. App.—Waco 2007, pet. denied).

If the court determines that the requesting spouse is eligible for postdivorce spousal maintenance, the court may consider a multitude of factors in deciding on the nature, amount, duration, and manner of the periodic payments. Among these factors are—

1. each spouse's ability to provide for that spouse's minimum reasonable needs independently, considering that spouse's financial resources on dissolution of the marriage;
2. the education and employment skills of the spouses, the time necessary to acquire sufficient education or training to enable the spouse seeking maintenance to earn sufficient income, and the availability and feasibility of that education or training;
3. the duration of the marriage;
4. the age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance;
5. the effect on each spouse's ability to provide for that spouse's minimum reasonable needs while providing periodic child support payments or maintenance, if applicable;
6. acts by either spouse resulting in excessive or abnormal expenditures or destruction, concealment, or fraudulent disposition of community property, joint tenancy, or other property held in common;
7. the contribution by one spouse to the education, training, or increased earning power of the other spouse;
8. the property brought to the marriage by either spouse;
9. the contribution of a spouse as homemaker;
10. marital misconduct, including adultery and cruel treatment, by either spouse during the marriage; and

11. any history or pattern of family violence, as defined by Family Code section 71.004.

Tex. Fam. Code § 8.052. These factors apply only once the trial court had determined that a spouse is eligible for spousal support. *Howe*, 551 S.W.3d at 257.

The court may not deny a request for maintenance on the basis that the spouse could acquire additional debts to meet monthly expenses. *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 15 (Tex. App.—Waco 2002, no pet.).

If the spouse seeking maintenance is not suffering from an impediment that diminishes the ability to meet minimum reasonable needs, the court must limit the time the spouse receives court-ordered spousal maintenance to the shortest reasonable period sufficient for that spouse to earn sufficient income to provide for his minimum reasonable needs. The court may not order maintenance that remains in effect for more than five years after the date of the order if the spouses were married for less than ten years and eligibility for maintenance is based on family violence or if the spouses were married for at least ten but not more than twenty years; the limit is seven years if the spouses were married for at least twenty but not more than thirty years; the limit is ten years if the spouses were married for thirty years or more. *See* Tex. Fam. Code § 8.054(a).

However, an order of longer duration may be made for a spouse who is unable to earn sufficient income because of having an incapacitating physical or mental disability (Code section 8.051(2)(A)) or because of being the custodian of a child who requires substantial care and personal supervision because of a physical or mental disability (Code section 8.051(2)(C)). In these circumstances, the court may order maintenance for as long as the spouse continues to satisfy those eligibility criteria. Tex. Fam. Code § 8.054(b). On its own motion or that of a party, the court may order periodic review of such an order. Tex. Fam. Code § 8.054(c). Continuation of maintenance under these circumstances is subject to a motion to modify under Family Code section 8.057. Tex. Fam. Code § 8.054(d). An order may require that payment of spousal maintenance continue until "further order of the court." *Summerville v. Bright*, No. 05-19-00989-CV, 2020 WL 3566721 (Tex. App.—Dallas July 1, 2020, no pet.) (mem. op.).

The amount awarded may be modified by the filing of a motion in the court that originally rendered the order. A party affected by the order may file the motion to modify. Tex. Fam. Code § 8.057(a). The person seeking the modification must plead and prove that there has been a material and substantial change in circumstances that occurred after the date of the order, including circumstances reflected in the factors specified in Code section 8.052, relating to either party or to a child of the marriage requiring sub-

stantial care and personal supervision because of a physical or mental disability. The court shall apply the modification only to payment accruing after the filing of the motion and may not increase maintenance to an amount or duration that exceeds the amount or remaining duration of the original maintenance order. Tex. Fam. Code § 8.057(c); *see Carlin v. Carlin*, 92 S.W.3d 902, 911 (Tex. App.—Beaumont 2002, no pet.) (in suit to extend maintenance, former wife did not establish by preponderance of evidence that she had incapacitating disability and that disability prevented her from supporting herself through appropriate employment). *But see Crane v. Crane*, 188 S.W.3d 276 (Tex. App.—Fort Worth 2006, pet. denied) (continuation of spousal maintenance based on incapacitating physical or mental disability is not modification of spousal maintenance and places no special burden of proof on movant other than to prove by preponderance of evidence that disability is continuing).

Medical testimony regarding disability or prognosis based on medical probability is not required to support a claim for spousal maintenance. In fact, no expert testimony of any kind is required to make a case for postdivorce spousal maintenance. The trial court may infer disability from the circumstances. *Pickens v. Pickens*, 62 S.W.3d 212, 215–16 (Tex. App.—Dallas 2001, pet. denied); *see also Galindo v. Galindo*, No. 04-13-00325-CV, 2014 WL 1390474, at *2 (Tex. App.—San Antonio Apr. 9, 2014, no pet.) (mem. op.) (trial court could infer incapacity from evidence of long-term medical issues even though wife did not feel she was disabled). However, a spouse's uncontradicted testimony that she is disabled does not require a court to award spousal maintenance for an indefinite duration. *Caudillo v. Caudillo*, No. 07-19-00198-CV, 2020 WL 1980524 (Tex. App.—Amarillo Apr. 24, 2020, no pet.) (mem. op.).

The obligation to pay spousal maintenance terminates on the death of either party, remarriage of the obligee, or a court finding of cohabitation of the obligee with another person with whom the obligee has a dating or romantic relationship in a permanent place of abode on a continuing basis. Termination, whether as a result of death or remarriage or a court order based on cohabitation, does not terminate the obligation to pay any maintenance that accrued before the date of termination. Tex. Fam. Code § 8.056.

An agreed maintenance provision, enforceable as a contract, is not subject to Family Code chapter 8 treatment merely because it references chapter 8 or recites that a spouse is eligible for spousal maintenance under chapter 8. However, if the agreement expressly provides that the maintenance may be terminated or modified by court order, the trial court has the authority to address those matters under statutory grounds. *Waldrop v. Waldrop*, 552 S.W.3d 396 (Tex. App.—Fort Worth 2018, no pet.).

"Maintenance" means an award in a suit for dissolution of a marriage of periodic payments from the future income of one spouse for the support of the other spouse. Tex. Fam. Code § 8.001(1). An award of maintenance is limited to the lesser of $5,000 or 20 percent of the paying spouse's average monthly gross income. Tex. Fam. Code § 8.055(a). Gross income is defined in Tex. Fam. Code § 8.055(a–1). For purposes of Code chapter 8, gross income includes "wage and salary income and other compensation for personal services" and other specified types of "income." *See* Tex. Fam. Code § 8.055(a–1)(1). The statute also identifies certain items not included in gross income, such as return of principal or capital, accounts receivable, and benefits provided by certain government programs. *See* Tex. Fam. Code § 8.055(a–1)(2). Incumbent in a spousal maintenance award is the obligor spouse's ability to earn income to satisfy the maintenance obligation. *Mathis v. Mathis*, No. 12-17-00049-CV, 2018 WL 1324777, at *4 (Tex. App.—Tyler Mar. 15, 2018, no pet.) (mem. op.) (incarcerated spouse lacks "income" from any source identified in Code section 8.055(a–1)).

Spousal maintenance may be subject to an order or writ of income withholding. *See* Tex. Fam. Code §§ 8.101–.108. Only an amount (including any amount being withheld for child support) up to 50 percent of the obligor's disposable earnings is subject to withholding. Tex. Fam. Code § 8.106.

If an obligor is ordered to pay an obligee both spousal maintenance under Family Code chapter 8 and child support under chapter 154, the court must order payment of the maintenance to the state disbursement unit. Tex. Fam. Code § 8.062.

For a discussion of the enforcement of spousal maintenance and the return of any overpayments, see chapter 32 of this manual.

The court that rendered an order for the payment of maintenance has continuing jurisdiction to render enforceable qualified domestic relations orders or similar orders (QDROs) permitting payment of pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee to satisfy amounts due under the maintenance order. Tex. Fam. Code § 8.351(a). For a discussion of the use of QDROs for payment of spousal maintenance, see chapter 25 of this manual.

Spousal maintenance is not property. *O'Carolan v. Hopper*, 71 S.W.3d 529, 533 (Tex. App.—Austin 2002, no pet.). A court may not award maintenance in lieu of any interest in the available community property. *O'Carolan*, 71 S.W.3d at 533–34.

The court has the authority to render a spousal maintenance award only in a suit for dissolution of marriage or, after a dissolution of marriage by a court that did not have per-

sonal jurisdiction over an absent spouse, in a proceeding for maintenance in a court that has personal jurisdiction over both former spouses. Tex. Fam. Code § 8.051. Loss of job or incapacitating disability occurring after the original order cannot be grounds for the institution of spousal maintenance. Tex. Fam. Code § 8.057(d).

Contractual Alimony: The husband and wife can agree to an alimony contract that is enforceable under Texas law as a contract. *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967). An affidavit of sponsorship for an alien spouse creates a contractual support obligation that the court cannot modify. *In re Marriage of Kamali & Alizadeh*, 356 S.W.3d 544, 547 (Tex. App.—Texarkana 2011, no pet.). Chapter 8 of the Family Code also provides that an order for maintenance or an agreement for periodic payments of maintenance voluntarily entered into between the parties and approved by the court may be enforced by contempt. Tex. Fam. Code § 8.059(a). This provision applies only to agreements that would qualify for maintenance in both amount and duration under Family Code chapter 8 (with a $5,000 monthly cap and, generally, a limit of five to ten years). *See In re Green*, 221 S.W.3d 645 (Tex. 2007) (orig. proceeding) (per curiam); *Kee v. Kee*, 307 S.W.3d 812 (Tex. App.—Dallas 2010, pet. denied). A court cannot order wage withholding to enforce payment of contractual alimony. *Heller v. Heller*, 359 S.W.3d 902 (Tex. App.—Beaumont 2012, no pet.). However, section 8.101 allows withholding for agreed periodic payments to the extent that they do not exceed in amount or duration maintenance that the court could have ordered. *See* Tex. Fam. Code § 8.101. See chapter 32 of this manual concerning enforcement of spousal maintenance provisions.

Tax Considerations of Alimony and Maintenance: Federal tax treatment of alimony and separate maintenance payments differs depending on when the underlying decree or agreement was executed or, in some instances, modified. Under recent amendments to the Internal Revenue Code, longstanding provisions regarding the deductibility and taxation of such payments will no longer be in effect for instruments executed after December 31, 2018, or for instruments executed on or before that date but modified thereafter if the modification expressly provides that the amended law applies to the modification. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051(c), 131 Stat. 2054 (2017). ***The provisions set out below apply only to payments under decrees and agreements executed before January 1, 2019, and not thereafter modified to apply the new law.***

Note: Internal Revenue Code sections 62(a)(10), 71, and 215, cited below, were stricken in the 2017 Act and are effective only as noted above.

Sections 62(a)(10), 71, and 215 of the Internal Revenue Code provide for tax treatment of "alimony" and "separate maintenance" payments. Qualified payments under these sections are deductible in arriving at adjusted gross income by the payor (26 U.S.C. §§ 62(a)(10), 215) and are taxable to the payee as ordinary income (26 U.S.C. § 71). For the payments to qualify, the requirements are that—

1. the payment must be made in cash,
2. the payment must be received by (or on behalf of) a spouse pursuant to a divorce or separation instrument,
3. the liability to pay must be terminable on the death of the recipient,
4. the spouses involved must not file a joint return,
5. the spouses involved must not be in the same household when the payments are made,
6. the payment is not for child support or tied to any contingency relating to a child, and
7. the instrument involved does not designate the payment as a payment not includable in gross income under section 71 and not allowable as a deduction under section 215.

26 U.S.C. § 71(b), (c), (e); Temp. Treas. Reg. § 1.71–1T.

Payments of alimony in cash can also be made by checks and money orders payable on demand. Generally, transfers of services or property or the receiving spouse's use of property owned by the payor spouse do not qualify as alimony. Temp. Treas. Reg. § 1.71–1T, Question 5. However, payments to a third party for the benefit of the payee spouse will generally qualify, as long as all the other requirements are met. Payments to maintain property owned by the payor spouse do not qualify, however. Payments made by the payor spouse of life insurance premiums on the payor spouse's life will qualify as alimony to the extent that the payee spouse is the owner of the policy. Temp. Treas. Reg. § 1.71–1T, Question 6. Additionally, cash payments made by the payor spouse based on a specific written request of the payee spouse will qualify as alimony if all other requirements are met. Temp. Treas. Reg. § 1.71–1T, Question 7.

The alimony agreement must be in writing, and it must be in the form of (1) a decree of divorce or separate maintenance agreement, (2) a written instrument incident to such a decree, (3) a written separation agreement, or (4) a decree requiring a spouse to make payments for the support or maintenance of the other spouse. *See* 26 U.S.C. § 71(b)(2).

Further, there is no liability to make payments for any period after the death of the payee spouse and no liability to make any payment in cash or property as a substitute for such payments after the death of the payee spouse. 26 U.S.C. § 71(b)(1)(D). If the agreement provides that the payor spouse must make substitute payments after the death of the payee spouse, then the substitute payments as well as all other payments before the death of the payee spouse will fail to qualify as alimony. Temp. Treas. Reg. § 1.71–1T, Question 13.

The payor spouse will be required to recapture any "excess alimony payments." The payor spouse must include the amount of the excess payments in gross income in the third postseparation year, and the payee spouse is entitled to a corresponding deduction in computing adjusted gross income. If payments in the first postseparation year exceed by more than $15,000 the average of the second-year payments (reduced by excess payments for that year) and the third-year payments, the excess amounts are subject to recapture. There are excess payments in the second year (which are also subject to recapture) if the second-year payments exceed the third-year payments by more than $15,000. *See* 26 U.S.C. § 71(f)(1)–(4). However, the recapture provisions will not be applicable—

1. to any spousal support under existing court-ordered temporary orders, 26 U.S.C. § 71(f)(5)(B); Temp. Treas. Reg. § 1.71–1T, Question 21;
2. to any fluctuating payments that are not within the control of the payor spouse, 26 U.S.C. § 71(f)(5)(C); and
3. when the payments of alimony cease by reason of the death of the payor spouse or the death or remarriage of the payee spouse, 26 U.S.C. § 71(f)(5)(A); Temp. Treas. Reg. § 1.71–1T, Question 25.

A number of contingencies that have frequently been included in alimony contracts, such as disability of the paying party or sale of specified real property, are not exceptions to the recapture rules.

A husband and wife may designate payments that would otherwise qualify as alimony to be nondeductible by the payor spouse and nontaxable to the payee spouse by so stating in a qualifying written agreement. 26 U.S.C. § 71(b)(1)(B); Temp. Treas. Reg. § 1.71–1T, Question 8. The designation must be in writing, and a copy of the written election must be attached to the payee spouse's first filed income tax return for each year in which the designation applies. Temp. Treas. Reg. § 1.71–1T, Question 8. If the payor spouse deducts the payment, the payee spouse is required to furnish to the payor

spouse his or her Social Security number, which the payor spouse must report on the payor spouse's federal income tax return. Temp. Treas. Reg. § 1.215–1T, Question 1.

For information on the tax consequences of alimony, see IRS Publication 504 ("Divorced or Separated Individuals").

§ 23.10 Attorney's Fees

Suits for Dissolution of Marriage: The court may award reasonable attorney's fees and expenses in a suit for dissolution of a marriage. The fees and expenses and any postjudgment interest may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 6.708(c). A spouse's legal fees in a divorce proceeding are not necessaries. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651, 655 (Tex. 2013).

Property Division: Attorney's fees are a factor to be considered in making an equitable division of the estate, considering the conditions and needs of the parties and all the surrounding circumstances. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981); *Carle v. Carle*, 234 S.W.2d 1002, 1005 (Tex. 1950). The court may award attorney's fees in making a just and right division of the community property. *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 667 (Tex. App.—San Antonio 1990, no writ). If there is no community-property estate as a result of marital agreement, the court may not award attorney's fees to a party. *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied), *overruled on other grounds by Twyman v. Twyman*, 855 S.W.2d 619, 624 (Tex. 1993). However, the court can award attorney's fees when there is a negative community estate. *See Powell v. Powell*, 822 S.W.2d 181, 184 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Suits Affecting Parent-Child Relationship: In the suit affecting the parent-child relationship brought as part of a divorce proceeding, the court may render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to the attorney. A judgment for attorney's fees and expenses may be enforced in the attorney's name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 106.002.

In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, in addition to the attorney's fees that may be awarded under Family Code chapter 106, the

following persons are entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit: (1) an attorney appointed as an amicus attorney or as an attorney ad litem for the child and (2) a professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate. Tex. Fam. Code § 107.023(a). A friend of the court is entitled to compensation for services rendered and for expenses incurred in rendering those services. Tex. Fam. Code § 202.005(a).

Attorney's Fees as Child Support: There is a split of authority on whether attorney's fees may be awarded as child support or in the nature of child support. See the discussion in section 40.16 in this manual.

Attorney's fees are discussed in chapter 20 of this manual.

§ 23.11 Suit Affecting Parent-Child Relationship

The final decree of divorce entered in proceedings involving minor children of the marriage must also contain all of those provisions of a final order entered in a suit affecting the parent-child relationship.

A detailed discussion of the final order in suits affecting the parent-child relationship can be found in chapter 40 of this manual.

§ 23.12 Managing Conservatorship

In a suit affecting the parent-child relationship, except as provided by Tex. Fam. Code § 153.004, the court may appoint joint managing conservators or may appoint a sole managing conservator. If the parents are or will be separated, the court shall appoint at least one managing conservator. A managing conservator must be a parent, a competent adult, the Department of Family and Protective Services, or a licensed child-placing agency. In making the appointment, the court must consider whether, before the suit was filed or while it is pending, a party engaged in a history or pattern of family violence, as defined by Code section 71.004; a party engaged in a history or pattern of child abuse or child neglect; or a final protective order was rendered against a party. Tex. Fam. Code § 153.005.

Provisions regarding the conservatorship of children can be found in Family Code chapter 153. For a detailed discussion of managing conservatorship, see chapter 40 of this manual.

§ 23.13 Possessory Conservatorship

If a managing conservator is appointed, the court may also appoint one or more possessory conservators. Tex. Fam. Code § 153.006(a).

Provisions regarding conservatorship can be found in Family Code chapter 153. For a detailed discussion of possessory conservatorship, see chapter 40 of this manual.

§ 23.14 Child Support Provisions

Provisions regarding child support can be found in Family Code chapter 154; subchapter C deals with the child support guidelines. For a detailed treatment of child support, see chapter 9 of this manual.

§ 23.15 Withholding from Earnings for Child Support

The trial court must order income withholding directly from the obligor's disposable earnings for the payment of child support. *See* Tex. Fam. Code § 158.001. Provisions regarding withholding from earnings for child support can be found in Family Code chapter 158. Section 158.011 contains procedures for filing a request by the obligor with the clerk of the court for voluntary withholding from earnings for child support. Subchapter D of chapter 158 deals with the issuance of judicial writs of withholding, and subchapter F deals with administrative writs of withholding in title IV-D cases. For a more detailed treatment of income withholding, see chapter 9 of this manual.

§ 23.16 Medical and Dental Expenses of Children

Section 154.183(c) requires the court to allocate between the parties, according to their circumstances, the reasonable and necessary health-care expenses, including vision and dental expenses, of a child that are not reimbursed by health or dental insurance or otherwise covered by ordered cash medical support, as well as insurance deductibles or copayments paid by either party for the child. Tex. Fam. Code § 154.183(c).

Provisions regarding medical and dental expenses for the child are contained in the child support discussions found in chapter 9 of this manual.

§ 23.17 Provisions for Possession and Access

It is the policy of Texas to encourage frequent contact between the child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and the child. Tex. Fam. Code § 153.251(b).

Provisions regarding conservatorship can be found in subchapters E and F of Family Code chapter 153. For additional discussion of possession and access, see chapter 40 and chapter 41 of this manual.

§ 23.18 Passport Application for Minors

Federal regulations control who may apply for a passport for a minor child. For a detailed discussion of these requirements, see section 40.25 in this manual.

§ 23.19 Mandatory Provisions in Decrees Affecting Children

Family Code section 105.006 requires that certain information and provisions be included in final orders entered in a suit affecting the parent-child relationship. For a detailed discussion of these requirements, see section 40.22 in this manual.

§ 23.20 Parent Education and Family Stabilization Course

In a suit affecting the parent-child relationship the court may order the parties to attend a parent education and family stabilization course if the court determines that the order is in the child's best interests. Tex. Fam. Code § 105.009(a). For additional information, see section 40.24 in this manual.

§ 23.21 Parenting Plan

The final order in a suit affecting the parent-child relationship must include a parenting plan. Tex. Fam. Code § 153.603. See the discussion in chapter 16 of this manual regarding parenting plans.

§ 23.22 Limits to Enforcement of Support and Conservatorship Agreements Regarding Minors

Family Code section 153.007(c) limits enforcement of terms of an agreed parenting plan regarding support or conservatorship of or access to a minor child to enforcement

by all remedies available for enforcement of a judgment, including contempt, but not as a contract. Tex. Fam. Code § 153.007(c); *see also Hill v. Hill*, 819 S.W.2d 570, 572–73 (Tex. App.—Dallas 1991, writ denied) (contract seeking to fix permanently amount of child support held void as against public policy).

COMMENT: Despite the language of section 153.007(c) precluding the enforcement of orders for the support of children by contract, contracts entered into before September 1, 1995, remain enforceable.

§ 23.23 Necessity of Evidence for Final Hearing in Divorce Default

In a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer. Tex. Fam. Code § 6.701. The statute requires the petitioner, in a suit for divorce, to present proof to support the material allegations in the petition despite a respondent's failure to answer. *O'Neal v. O'Neal*, 69 S.W.3d 347, 349 (Tex. App.—Eastland 2002, no pet.).

A petitioner's conclusions at a default final divorce hearing regarding character of property, division of property, periods of possession of the child, and child support are insufficient by themselves for a court to make a default judgment. Evidence must be introduced by the petitioner as to value of property, character of separate property, and income or financial ability to pay child support. *O'Neal*, 69 S.W.3d at 350. *See also Smith v. Hickman*, No. 04-19-00182-CV, 2020 WL 1442663, at *2 (Tex. App.—San Antonio Mar. 25, 2020, no pet.) (mem. op.) (abuse of discretion for court to enter decree of divorce providing for conservatorship, child support, and property division without sufficient evidence). Without a proper valuation of the spouses' community assets and liabilities, the trial court cannot properly exercise its discretion in making a just and right division of the community estate. *Pena v. Pena*, No. 13-17-00585-CV, 2018 WL 3301920, at *3 (Tex. App.—Corpus Christi–Edinburg July 5, 2018, no pet.) (mem. op.). However, if the respondent fails to appear and properly assert his separate-property interests, the community-property presumption prevails; characterization of these interests as community property is not a divestiture of separate property but a necessary classification of property in compliance with the community-property presumption. *Pearson v. Fillingim*, 332 S.W.3d 361 (Tex. 2011) (per curiam).

If English is not the primary language of one of the parties, evidence should be presented that the non-English-speaking party either is able to understand the proceedings or has been provided a competent interpreter. *Chisholm v. Chisholm*, 209 S.W.3d 96 (Tex. 2006) (per curiam).

Provisions for prove-up of an agreed divorce can be found in form 23-7 in this manual.

§ 23.24 Employment and Retirement Benefits

Retirement benefits accrued during a marriage are presumptively community property, but those accrued before or after marriage are not. *Howard v. Howard*, 490 S.W.3d 179, 184 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

Where the divorce decree awarded the wife a portion of the husband's pension accounts as of a valuation date and did not expressly award her postdivorce contributions and increases, the wife was not entitled to postdivorce increases in value. *Tatum v. Tatum*, No. 14-19-0072-CV, 2020 WL 2832104 (Tex. App.—Houston [14th Dist.] May 28, 2020, pet. denied) (mem. op.).

A judge's intention to render a qualified domestic relations order (QDRO) in the future cannot be a present rendition of a QDRO. Family Code chapter 9 governs obtaining a QDRO when the trial court that rendered a final decree of divorce did not enter a QDRO or similar order permitting payment of benefits to an alternate payee or other lawful payee. *Araujo v. Araujo*, 493 S.W.3d 232, 237 (Tex. App.—San Antonio 2016, no pet.).

Provisions in a decree that is not a QDRO are not sufficient to affect a spouse's entitlement to benefits from an employee pension benefit plan governed by ERISA. The United States Supreme Court has addressed the issue of whether the terms of 29 U.S.C. § 1056(d)(1), barring the assignment or alienation of benefits, "invalidated the act of a divorced spouse, the designated beneficiary under her ex-husband's ERISA pension plan, who purported to waive her entitlement by a federal common law waiver embodied in a divorce decree that was not a QDRO." *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 555 U.S. 285, 288 (2009). The Supreme Court held that "such a waiver is not rendered invalid by the text of the antialienation provision, but that the plan administrator properly disregarded the waiver owing to its conflict with the designation made by the former husband in accordance with plan documents." *Kennedy*, 555 U.S. at 288.

COMMENT: A client who is a participant in an ERISA plan must be advised to immediately make any desired beneficiary designations in accordance with the formalities required by the plan administrator if benefits under the plan are not addressed by a QDRO.

A QDRO may be used not only to effect a property division, but also to satisfy amounts due under orders for spousal maintenance or child support. *See* Tex. Fam. Code §§ 8.351–.359, 157.501–.508.

Employment and retirement benefits are the subject of chapter 25 of this manual.

§ 23.25 Wills

A court may not prohibit a person from executing a new will, executing a codicil to an existing will, or revoking an existing will or codicil in whole or in part. Any portion of a court order that purports to prohibit a person from engaging in any of those actions is void and may be disregarded without penalty or sanction. Tex. Est. Code § 253.001.

[Sections 23.26 through 23.30 are reserved for expansion.]

II. Agreements Incident to Divorce

§ 23.31 Agreement Incident to Divorce—Generally

Purpose: Texas public policy encourages the amicable settlement of disputes in divorce cases. Accordingly, spouses may enter into a written agreement concerning the division of the property and liabilities of the spouses and maintenance of either spouse. *See* Tex. Fam. Code § 7.006(a). If minor children are involved, the agreement (called an "agreed parenting plan") may also contain provisions regarding child custody, visitation, and child support. *See* Tex. Fam. Code § 153.007. Once the court approves an agreement incident to divorce, the court will render an order in accordance with the agreement, either by setting forth the agreement in full within the order or by incorporating the agreement by reference in the final decree. Tex. Fam. Code §§ 7.006(b), 153.007(b). A final decree that provides that it was rendered after considering the evidence, as well as the signed agreements and stipulations of the parties, is a valid consent judgment and, as such, is enforceable as both a judgment and a contract. *See Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986).

COMMENT: Agreements incident to divorce, when contained in a separate agreement, do not have to be filed with the court, and many attorneys choose not to file those agreements in order to protect the client's confidential information with regard to property. Whether in a separate document or included within the text of the decree, agree-

ments incident to divorce must be used if the parties wish to agree to perform certain acts that the court may not order them to perform. Such agreements are contracts and should contain the elements of a contract in order to afford the remedies available under contract law. However, the attorney should avoid merely incorporating by reference provisions for the support, conservatorship, or visitation of minor children but should set forth these provisions with specific order language within the final decree itself. Any provisions of the agreement that will be subject to enforcement by contempt should be included in the actual court order.

Contractual Alimony: Parties may enter into agreements for the payment of alimony above and beyond in amount and duration that which the court could order as spousal maintenance. See section 23.9 above for an explanation of the tax implications for certain agreements entered before January 1, 2019.

The Family Code provides that the court may enforce by contempt maintenance agreements "voluntarily entered into between the parties and approved by the court." Tex. Fam. Code § 8.059(a). This provision applies only to agreements that qualify as maintenance in both amount and duration under Family Code chapter 8 (with a $5,000 monthly cap and, generally, a limit of five to ten years). *See In re Green*, 221 S.W.3d 645 (Tex. 2007) (orig. proceeding) (per curiam). See chapter 32 of this manual concerning enforcement of spousal maintenance provisions.

Additional Contractual Provisions: Although sections 153.007 and 154.124 preclude the enforcement as contracts of agreements regarding child support, certain provisions, such as agreements to pay for post-high school education, automobiles, wedding expenses, COBRA premiums, and so forth, are enforceable by contract and should be contained in an agreement incident to divorce or agreed decree containing the provisions of an agreement incident to divorce. *Burtch v. Burtch*, 972 S.W.2d 882, 885–90 (Tex. App.—Austin 1998, no pet.) (finding provisions of agreement incident to divorce contained in agreed decree requiring father to pay for college expenses of child were enforceable as contract).

§ 23.32 Property-Settlement Agreement

Once the property-settlement agreement is adopted by the decree, the judgment becomes a consent judgment, carrying with it the attributes and problems of a consent judgment. *See Peddicord v. Peddicord*, 522 S.W.2d 266, 267 (Tex. App.—Beaumont 1975, writ ref'd n.r.e.); *see also Lee v. Lee*, 509 S.W.2d 922 (Tex. App.—Beaumont 1974, writ ref'd n.r.e.). In rendering judgment on the parties' settlement agreement, the

trial court may not supply terms, provisions, or conditions that were not previously agreed to by the parties. A consent judgment must be in strict compliance with the terms of the parties' settlement agreement. *Snider v. Snider*, 343 S.W.3d 453 (Tex. App.—El Paso 2010, no pet.).

The agreement may be revised or repudiated before rendition of the divorce unless it is binding under another rule of law. Tex. Fam. Code § 7.006(a); *see also* Tex. Fam. Code § 6.602(c) (requiring enforcement of mediated settlement agreements meeting specific statutory requirements); *Cayan v. Cayan*, 38 S.W.3d 161 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (divorce decree properly entered based on mediated settlement agreement despite husband's repudiation). *But see Boyd v. Boyd*, 67 S.W.3d 398, 404–05 (Tex. App.—Fort Worth 2002, no pet.) (husband's failure to disclose substantial community assets rendered mediated settlement agreement unenforceable, despite catch-all provision in the agreement).

The terms of the agreement are binding on the court if it finds that the agreement is just and right. An agreement approved by the court may be set forth in full or incorporated by reference in the final decree. An agreement incorporated by reference is not required to be filed with the court or the court clerk. Tex. Fam. Code § 7.006(b). If the court finds the agreement is not just and right, the court may request the spouses to submit a revised agreement or may set the case for a contested hearing. Tex. Fam. Code § 7.006(c).

Consent must exist at the time the consent judgment is rendered. A consent judgment must also be in strict compliance with the parties' agreement. When a consent judgment is rendered without consent or is not in strict compliance with the terms of the agreement, the judgment must be set aside. *Chisholm v. Chisholm*, 209 S.W.3d 96, 98 (Tex. 2006) (per curiam). Approval of a settlement does not necessarily constitute rendition of judgment. Judgment is rendered when the trial court officially announces its decision in open court or by written memorandum filed with the clerk. *S & A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995). The judge's intention to render judgment in the future cannot be a present rendition of judgment. The rendition of judgment is a present act, either by spoken word or signed memorandum, that decides the issues on which the ruling is made. The words used by the trial court must clearly indicate the intent to render judgment at the time the words are expressed. *Leal*, 892 S.W.2d at 858. Words indicating what the trial judge "will grant" and "will approve" do not signify a present rendition of judgment. *Hall v. Hall*, No. 05-16-01141-CV, 2018 WL 1373951, at *2 (Tex. App.—Dallas Mar. 19, 2018, no pet.) (mem. op.).

However, even if a party repudiates its agreement before rendition of the divorce, the agreement incident to divorce may still be enforceable as a contract and the other party may be able to recover damages for its breach. *Cary v. Cary*, 894 S.W.2d 111, 112–13 (Tex. App.—Houston [1st Dist.] 1995, no writ).

Under the Texas Family Code, mediated settlement agreements meeting certain statutory formalities are binding on the parties and require rendition of a divorce decree adopting the parties' agreement. Tex. Fam. Code § 6.602(b), (c). To be binding, a mediated settlement agreement must provide, in a prominently displayed statement with boldfaced type or capital letters or underlined, that the agreement is not subject to revocation and must be signed by each party and the parties' attorneys, if any, present at the time the agreement is signed. Tex. Fam. Code § 6.602(b).

Parties to a mediated settlement agreement need not agree to all of the provisions to be contained in the divorce decree. *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.—Dallas 2006, no pet.). They are required only to reach an agreement as to all material terms, and a trial court has no discretion to enter a decree that varies from those terms. *Haynes*, 180 S.W.3d at 930; *In re Marriage of Joyner*, 196 S.W.3d 883, 890–91 (Tex. App.—Texarkana 2006, pet. denied). Terms necessary to effectuate and implement the parties' agreement do not affect the agreed substantive division of property and may be left to future articulation by the parties or consideration by the trial court. *Haynes*, 180 S.W.3d at 930.

A court applies contract principles to interpret a mediated settlement agreement's meaning. If an agreement can be given a certain or definite legal meaning, it is unambiguous. An unambiguous agreement must be enforced as written as a matter of law. *Toler v. Sanders*, 371 S.W.3d 477, 480 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

[Sections 23.33 through 23.40 are reserved for expansion.]

III. Tax Considerations

§ 23.41 Tax Considerations Generally

COMMENT: When dealing with tax issues, the practitioner or client should consult with a certified public accountant, tax attorney, or other tax professional.

These notes are presented as a quick reference to the most common tax considerations in a divorce case. They are meant only to make the practitioner aware of the potential areas that may be affected and are by no means complete and do not exhaust the possible tax considerations in a divorce. They are meant to be helpful in calling the problems to mind for further consideration and research.

§ 23.42 Filing Status

A person's filing status is determined by his marital status as of the last day of the tax year. Thus, if a final decree of divorce is obtained on or before the last day of the tax year, the parties are considered unmarried for the entire year, cannot file jointly, and must file single returns. 26 U.S.C. § 7703(a); Treas. Reg. § 1.6013–4. Lower rates are available if a spouse meets the requirements of head of household. *See* 26 U.S.C. §§ 1(b), 2(b).

If a husband and wife are separated, they are considered married for the entire year if on the last day of the tax year no final decree of divorce has been obtained. Treas. Reg. § 1.6013–4. As married individuals, they may file jointly or as married filing separately; they may file a joint return even if one had no income or deductions. 26 U.S.C. § 6013; Treas. Reg. § 1.6013–1(a)(1).

However, a married person who is separated from the other spouse may elect to file as head of household if—

1. the taxpayer files a separate return;
2. the taxpayer's household was, for more than six months of the year, the principal residence of a child (as described in the statute) of the taxpayer;
3. the taxpayer provided more than one-half of the costs of maintaining the household; and
4. the taxpayer's spouse did not live in the home during the last six months of the year.

26 U.S.C. § 7703(b); *see also* 26 U.S.C. § 2(c).

The head-of-household filing status will also be available to the separated spouse if the separated spouse meets the tests set forth in items 1., 3., and 4. above and if the child resided with the taxpayer spouse for more than six months of the year.

The custodial parent has the right to file a return claiming head-of-household status even if that parent is not entitled to the dependency exemption for the child. 26 U.S.C. § 2(b).

Tax Returns: A joint return must include all income, exemptions, and deductions of both spouses. Generally, both spouses are jointly and severally liable for the tax due on a joint return. Treas. Reg. § 1.6013–4(b). Thus, a spouse may be liable for the entire tax even though all the income was earned by the other spouse. If the husband and wife file as married filing separately, each is liable only for the tax due on his or her own return. *See Edith Stokby*, 26 T.C. 912(A) (1956).

Generally, any income characterized by Texas law as community income is taxed half to each spouse; that is, the community income of both spouses is combined and half the total is included in each spouse's gross income, along with any separate income of that spouse. Effective for tax years after 1980, however, section 66 of the Internal Revenue Code eliminates the requirement that each spouse report one-half of the other's income and treats income as belonging to the spouse who earned it only if—

1. the spouses must live apart for the entire calendar year,
2. a joint return is not filed,
3. at least one spouse has "earned income" for the year (as distinguished from "passive" or "investment" income), and
4. no portion of the earned income was transferred between the spouses.

26 U.S.C. § 66(a).

The Internal Revenue Service (IRS) may disallow the benefits of any community-property law to a taxpayer with respect to any income if the taxpayer—

1. acted as if he or she were solely entitled to the income and
2. failed to notify the taxpayer's spouse before the due date for filing the return for the taxable year in which the income was derived of the nature and amount of such income.

26 U.S.C. § 66(b).

However, a spouse who meets the requirements of an "innocent spouse," as set forth in section 23.50 below, may be relieved of liability.

While forms 23-1 and 23-6 in this manual include provisions for addressing the division of tax liabilities for predivorce years, changes to the Internal Revenue Code and IRS regulations require careful consideration of the use of this or similar language if there is an entity taxed as a partnership for federal income tax purposes. The Bipartisan Budget Act of 2015 created a new centralized partnership audit regime that generally assesses and collects tax at the partnership level, not the partner level, resulting from an audit of the partnership. Pub. L. No. 114-74, § 1101, 129 Stat. 584 (2015). This new audit regime, set out in 26 U.S.C. §§ 6221–6241, commences with partnership tax years beginning in 2018. Partnership tax years before 2018 are governed by the old audit rules, while those beginning in 2018 are governed by the new audit rules. The new audit regime applies to any entity taxed as a partnership for federal income tax purposes. Thus, entities formed and taxed as partnerships are subject to the audit regime, as well as joint ventures and limited liability companies taxed as partnerships. Charles D. Pulman & Matthew L. Roberts, *New Partnership Tax Audit and Collection Rules Impact Divorce Property Settlements*, State Bar of Texas Family Law Section Report (Spring 2018). The new audit regime significantly changes the obligations and liabilities of the parties to divorce instruments with respect to the partnership interest and the economic consequences of an IRS audit of a partnership with the result that what should have been a predivorce year tax liability of the parties turns out to be a postdivorce year tax liability of the partnership arising out of an IRS audit of a predivorce year of the partnership. Charles D. Pulman & Matthew L. Roberts, *New Partnership Tax Audit and Collection Rules Impact Divorce Property Settlements*, State Bar of Texas Family Law Section Report (Spring 2018).

State law controls whether income is separate or community property. *United States v. Mitchell*, 403 U.S. 190 (1971); *Hopkins v. Bacon*, 282 U.S. 122 (1930). When the community's assets are divided between the spouses, any subsequent income and accumulations are separate income and taxable only to the spouse to whom they belong. For the tax year during which the community is dissolved, however, each spouse is still liable for taxes on half the community income for the part of the year before divorce.

For further information on whether to file jointly, separately, or as head of household and on the effect of community property when filing individual tax returns, see IRS Publication 504 ("Divorced or Separated Individuals"), which can be found at **www.irs.gov/pub/irs-pdf/p504.pdf**.

§ 23.43 Division of Property

COMMENT: The potential tax effects of property division require the most careful consideration and should be evaluated not only for settlement purposes but also for presentation to the court if the case is tried. When dealing with the federal tax implications of a proposed division of property, the practitioner or client should consult with a certified public accountant, tax attorney, or other tax professional.

No gain or loss is recognized when property is transferred between spouses or between former spouses "incident to the divorce." 26 U.S.C. § 1041(a). The spouse receiving the property has a tax basis equal to that of the transferring spouse just before the transfer regardless of the property's fair market value. 26 U.S.C. § 1041(b); Temp. Treas. Reg. § 1.1041–1T, Question 11. The loss disallowance rules of section 267 do not apply to such transfers. 26 U.S.C. § 267(g). Notwithstanding the nonrecognition rule of section 1041(a), the transferor must recognize gain under a transfer in trust to the extent that liabilities assumed by the trust exceed the transferor's basis. The transferee's basis is adjusted to take the gain into account. 26 U.S.C. § 1041(e). Gain must also be recognized when installment obligations are transferred to a trust. 26 U.S.C. § 453B(g).

The provisions of section 1041 are mandatory and not elective, and they will apply to all transfers between spouses regardless of whether a divorce is being contemplated and whether a divorce ever occurs. Temp. Treas. Reg. § 1.1041–1T, Question 2. (But see Temp. Treas. Reg. § 1.1041–1T, Question 9, relating to the transfer of property to a third party for or on behalf of a former or present spouse.)

The general rule regarding a transfer between present or former spouses applies to a transfer of any type of property but does not apply to a transfer of services. *See* 26 U.S.C. § 1041; Temp. Treas. Reg. § 1.1041–1T, Question 4.

The transferor of property under section 1041 recognizes no gain or loss on the transfer regardless of whether the property being transferred is characterized as separate or community property and regardless of whether the actual division of the property is equal or unequal. Temp. Treas. Reg. § 1.1041–1T, Question 10.

Transfers pursuant to an annulment will also qualify as a nontaxable event under section 1041. Temp. Treas. Reg. § 1.1041–1T, Question 8.

The term *incident to the divorce* is defined as (1) a transfer that occurs within one year after the date on which the marriage ceases or (2) a transfer that is related to the cessa-

tion of the marriage. 26 U.S.C. § 1041(c). The date on which the marriage ceases is determined by applicable state law.

A transfer of property is treated as related to the cessation of marriage if the transfer is pursuant to a decree of divorce, agreement incident to divorce, or separation agreement (including a modification or an amendment to the instrument) *and* the transfer occurs within six years after the marriage ceases. If either of those conditions is not met, the transfer of the property is presumed to be unrelated to the cessation of the marriage. This presumption may be rebutted only by showing that the transfer was made to effect the division of property owned by the former spouses at the time of the cessation of the marriage. Temp. Treas. Reg. § 1.1041–1T, Question 7.

The receiving party will recognize no gain or loss on a section 1041 transfer and takes the property with the adjusted basis of the transferring party regardless of the property's fair market value. Temp. Treas. Reg. § 1.1041–1T, Question 11.

Generally, the transfer alone will not cause the recapture of investment tax credit. Temp. Treas. Reg. § 1.1041–1T, Question 13. Further, tacking exists with respect to the recognition of a long-term capital gain or loss relating to the one-year holding period requirement. *See* 26 U.S.C. § 1223(2).

The transferring party must supply the receiving party with records sufficient to determine the adjusted basis, the holding period, and any amount and period for potential liability for investment tax credit recapture as of the date of the transfer. The receiving party is required to preserve these records. Temp. Treas. Reg. § 1.1041–1T, Question 14. There can be no partial elections with respect to the transfer of certain properties; once an election for nonrecognition of a transfer under an elective transitional rule is made, it is irrevocable. Temp. Treas. Reg. § 1.1041–1T, Question 17. An election is made by the transferring party's attaching to his first filed income tax return for the taxable year in which the first transfer occurs a statement signed by both parties that includes the Social Security number of each party. Both parties must keep a copy of the signed election, and the transferring party must attach a copy of the election with each tax return filed thereafter that involves the transitional election. Temp. Treas. Reg. § 1.1041–1T, Question 18.

Gift Tax Exclusion: If spouses or former spouses enter a written agreement relative to their marital and property rights and a divorce occurs within the three-year period beginning on the date one year before the agreement is entered (whether the decree approves the agreement or not), any transfer made pursuant to the agreement to either

spouse to settle marital or property rights or for child support is deemed a transfer for full and adequate consideration in money or money's worth. 26 U.S.C. § 2516.

Retirement Accounts: Transfers of a person's interest in an individual retirement account or individual retirement annuity under a divorce decree or written instrument incident to a divorce, in a qualified plan under a qualified domestic relations order, or in a qualified governmental or church plan are treated as nontaxable transfers. 26 U.S.C. §§ 408(d)(6), 414(p)(10), (p)(11).

Residence: An individual taxpayer may exclude up to $250,000 ($500,000 for certain joint returns) of gain on the sale or exchange of a residence if the residence has been owned and used by the taxpayer as the taxpayer's principal residence for at least two of the last five years. 26 U.S.C. § 121(a), (b).

An individual taxpayer who fails to satisfy these requirements by reason of a change of place of employment, health, or unforeseen circumstances may exclude a fraction of the taxpayer's realized gain based on the fraction of the two-year period that the property was owned and used by the taxpayer as the taxpayer's principal residence. The amount to be excluded is the lesser of a fraction of the maximum amount that could be excluded if the two-year ownership and use requirement had been met or the actual gain on the sale. 26 U.S.C. § 121(c).

Stock Options: Under IRS Revenue Ruling 2002–22, a taxpayer who transfers interests in nonstatutory stock options and nonqualified deferred compensation to the taxpayer's former spouse incident to divorce is not required to include an amount in gross income on transfer. The former spouse, and not the taxpayer, is required to include an amount in gross income when the former spouse exercises the stock options or when the deferred compensation is paid or made available to the former spouse.

§ 23.44 Alimony

For a discussion of the tax consequences of alimony, see section 23.9 above.

§ 23.45 Child Support Payments

Child support payments made for a minor child are not deductible by the payor and are not taxable to the payee.

§ 23.46 Dependency Exemption

Although the tax deduction for personal exemptions is suspended, the eligibility to claim an exemption may be important for tax credits and other tax benefits:

> **Exemption deduction suspended.** The deduction for personal exemptions is suspended for tax years 2018 through 2025 by the Tax Cuts and Jobs Act. Although the exemption amount is zero, eligibility to claim an exemption may make you eligible for other tax benefits. See Pub. 501 for details. Although taxpayers can't claim a deduction for exemptions, eligibility to claim an exemption for a child remains important for determining who may claim the child tax credit, the additional child tax credit, and the credit for other dependents, as well as other tax benefits. See the instructions and Pub. 501 for details.

IRS Form 8332 Rev. October 2018. *See* 26 U.S.C. § 151(d)(5), as added by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11041(a), 131 Stat. 2054 (2017).

Generally, the divorced or separated parent who has custody of a child for the greater portion of the calendar year is entitled to the dependency exemption for the child. 26 U.S.C. § 152(a), (e)(1). The child must be in the custody of one or both parents for more than half the year and must receive half his support during the year from his parents. 26 U.S.C. § 152(e)(1).

Parents of a child are considered divorced or separated if they are divorced or legally separated under a decree, they are separated under a written separation agreement, or they have lived apart at all times during the last six months of the calendar year. 26 U.S.C. § 152(e)(1)(A).

However, the custodial parent will not be entitled to the dependency exemption if (1) the noncustodial parent attaches to his or her income tax return for the year of the exemption a written declaration signed by the custodial parent stating that he or she will not claim the exemption, (2) a decree or agreement executed before January 1, 1985, specifically provides that the noncustodial parent shall have the exemption *and* the noncustodial parent pays $600 or more during the year as support for the child, or (3) a multiple-support agreement is in effect. 26 U.S.C. § 152(e)(2), (e)(3), (e)(5).

The release of the exemption by the custodial parent may be for a single year, for a number of specific years, or for all future years. IRS Form 8332 ("Release of Claim to Exemption for Child of Divorced or Separated Parents") may be used for this purpose.

If the release is for more than one year, the noncustodial parent must attach the original designation of release to the tax return for the first year in which the exemption is to be claimed and attach a copy of the release to the return for each succeeding taxable year in which the noncustodial parent claims the dependency exemption. Temp. Treas. Reg. § 1.152–4T, Question 4. Alternatively, the agreement incident to divorce may include language with regard to the release of the dependency exemption to the noncustodial parent. In that case, the applicable pages of the agreement can be sent with the federal income tax return in order to claim the exemption.

For further information claiming dependency exemptions, see IRS Publication 504 ("Divorced or Separated Individuals"), which can be found at **www.irs.gov/pub/irs-pdf/p504.pdf**.

§ 23.47 Medical and Dental Expense Deductions

Medical and dental expenses incurred for a child are deductible by either parent who has paid the medical or dental expenses regardless of which parent is entitled to the dependency exemption. 26 U.S.C. § 213(d)(5); Temp. Treas. Reg. § 1.152–4T, Question 5. Uncompensated medical expenses are deductible to the extent they exceed 10 percent of adjusted gross income. 26 U.S.C. § 213(a). (The floor is reduced to 7.5 percent for tax years 2017 and 2018. 26 U.S.C. § 213(f), as amended by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11027(a), 131 Stat. 2054 (2017).) *See also* 26 U.S.C. § 7703(b) (regarding married individuals who may be considered not married for federal income tax purposes). For information on deducting medical expenses, see IRS Publication 502 ("Medical and Dental Expenses"), which can be found at **www.irs.gov/pub/irs-pdf/p502.pdf**.

§ 23.48 Child Care Expenses

A divorced or separated taxpayer who is the "custodial parent" may be able to take a tax credit for expenses for household services and personal care that are necessary to enable the parent to be gainfully employed, even if that parent did not claim a dependency exemption. *See* 26 U.S.C. § 21(e)(5). For information on deducting child and dependent care expense, see IRS Publication 503 ("Child and Dependent Care Expenses"), which can be found at **www.irs.gov/pub/irs-pdf/p503.pdf**.

§ 23.49 Costs of Obtaining Divorce

Legal fees and court costs for obtaining a divorce are nondeductible personal expenses. *See United States v. Gilmore*, 372 U.S. 39 (1963). Provisions in effect for tax years before 2018 that allowed for deduction under 26 U.S.C. § 212(1), (3) of legal fees paid for tax advice in connection with divorce to obtain alimony includable in gross income have been temporarily suspended.

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

For further information about deducting the costs of getting a divorce, see IRS Publication 504 ("Divorced or Separated Individuals"), which can be found at **www.irs.gov/pub/irs-pdf/p504.pdf**.

§ 23.50 Innocent-Spouse Relief and Separate-Liability Election

A taxpayer filing a joint return may be shielded from tax liability under either the innocent-spouse relief or separate-liability election.

Under the innocent-spouse relief, an individual shall be relieved of a tax liability, including penalty and interest, to the extent the liability is attributable to an understatement of tax if—

1. a joint return was filed for the year;
2. there is an understatement of tax on the return attributable to erroneous items of the individual's spouse;
3. the individual establishes that, in signing the return, the individual did not know, and had no reason to know, of the understatement;
4. taking into account all the facts and circumstances, it would be inequitable to hold the individual liable for the deficiency attributable to the understatement; and
5. the individual elects the benefits of this provision no later than two years after the Internal Revenue Service has begun collection activities with respect to the individual.

26 U.S.C. § 6015(b).

The separate-liability election limits an individual's liability for any deficiency assessed with respect to a joint return to the portion of such deficiency properly allocable to the individual under rules specified in section 6015(d). This election is available if, when the election is filed, the individual is no longer married to, or is legally separated from, the spouse with whom the return was filed or has lived apart from the spouse for at least twelve months before filing the election. The election must be made not later than two years after the Internal Revenue Service has begun collection activities with respect to the individual. 26 U.S.C. § 6015(c).

For information about innocent spouse relief, see IRS Publication 971 ("Innocent Spouse Relief"), which can be found at **www.irs.gov/pub/irs-pdf/p971.pdf**.

[Sections 23.51 through 23.60 are reserved for expansion.]

IV. Useful Websites

§ 23.61 Useful Websites

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

IRS Publication 502 ("Medical and Dental Expenses") (§ 23.47)
www.irs.gov/pub/irs-pdf/p502.pdf

IRS Publication 503 ("Child and Dependent Care Expenses") (§ 23.48)
www.irs.gov/pub/irs-pdf/p503.pdf

IRS Publication 504 ("Divorced or Separated Individuals") (§§ 23.9, 23.42, 23.46, 23.49)
www.irs.gov/pub/irs-pdf/p504.pdf

IRS Publication 971 ("Innocent Spouse Relief") (§ 23.50)
www.irs.gov/pub/irs-pdf/p971.pdf

Chapter 24
Closing Documents

I. Real Estate Conveyances

§ 24.1 Statutory Requirements 601
§ 24.2 General Requirements 602
§ 24.3 General Warranty Deed 603
§ 24.4 Special Warranty Deed 603
§ 24.5 Quitclaim Deed 604
§ 24.6 Mineral Royalty Interests 604
§ 24.7 Timeshare 605
§ 24.8 Cemetery Lots 605

II. Real Estate—Debt and Security Instruments

§ 24.11 Real Estate Lien Note 605
§ 24.12 Deed of Trust 607
§ 24.13 Deed of Trust to Secure Assumption 608
§ 24.14 Foreclosure and Sale under Deed of Trust 609
§ 24.15 Recordation 611
§ 24.16 Homestead Exemption and Equitable Liens 612
§ 24.17 Separate Property and Equitable Liens 613
§ 24.18 Owelty Liens 614

III. Personal Property

§ 24.21 Motor Vehicles 615
§ 24.22 Motorboats, Jet Skis, and Outboard Motors 616
§ 24.23 Trailers 616
§ 24.24 Travel Trailers 617
§ 24.25 Manufactured Housing 617

§ 24.26 Aircraft 618
§ 24.27 Animals 618
§ 24.28 Stock 619
§ 24.29 Retirement Benefits 620
§ 24.30 Promissory Notes 620
§ 24.31 Security Agreement 620
§ 24.31:1 Definitions 620
§ 24.31:2 Classifications of Collateral 620
§ 24.31:3 Description of Collateral 622
§ 24.31:4 Attachment 622
§ 24.31:5 Perfecting Security Interest 623
§ 24.32 Transfer of TUTMA Accounts 625
§ 24.33 Transfer of U.S. Savings Bonds 625
§ 24.34 Estates Code Provisions Affecting Former Spouses 626
§ 24.35 Transfer on Death Deeds 627

IV. Virtual Assets and Intellectual Property

§ 24.41 Transfer of Domain Names 628
§ 24.42 Transfer of Patent 628
§ 24.43 Transfer of Trademark 628

V. Useful Websites

§ 24.51 Useful Websites 629

Chapter 24

Closing Documents

In most divorces, collateral documents are used to effect portions of the decree of divorce, the agreement incident to divorce, or both. These practice notes cover some of the more commonly used documents.

I. Real Estate Conveyances

§ 24.1 Statutory Requirements

Written and Subscribed Instrument: A written instrument, subscribed and delivered by the conveyer or the conveyer's agent, is the customary method to convey real estate. Tex. Prop. Code § 5.021; *see Truitt v. Wilkinson*, 379 S.W.2d 400, 402 (Tex. App.—Texarkana 1964, no writ); *Gillman v. Martin*, 366 S.W.2d 89, 90 (Tex. App.—San Antonio 1963, writ ref'd). The conveyance is typically some form of a deed. It may not be recorded unless it is signed and acknowledged or sworn to by the grantor in the presence of two or more credible subscribing witnesses or acknowledged or sworn to before and certified by an officer authorized to take acknowledgments or oaths, as applicable. Tex. Prop. Code § 12.001(b). A certified copy of the decree of divorce can also be used to transfer real property, provided that the legal description of the property is contained in the decree. *See* Tex. Prop. Code § 12.013.

Words of Grant: The Texas Property Code provides a form for a conveyance of fee simple title to real estate, but use of the form is not required to effect a valid conveyance. The parties may use any form not in contravention of law. Tex. Prop. Code § 5.022(a), (c). Technical words are not necessary as long as there are operative words of grant demonstrating the grantor's intention to convey title to the land, the land is sufficiently described, and the deed is signed by the grantor. *See Harris v. Strawbridge*, 330 S.W.2d 911, 914–15 (Tex. App.—Houston 1959, writ ref'd n.r.e.).

Unless the deed expressly provides otherwise, use of the word *grant* or *convey* in a deed gives rise to the implied covenants that, before the execution of the conveyance, the grantor has not conveyed the estate or any interest in the estate to any person other than

the grantee and that, at the time of the execution of the conveyance, the estate is free from encumbrances. These implied covenants may be the basis for a lawsuit as if they had been expressed in the conveyance. Tex. Prop. Code § 5.023.

§ 24.2 General Requirements

Description of Property: A deed must accurately describe the land being conveyed. If the deed fails to furnish a means of determining with reasonable certainty the land intended to be covered by the deed, the deed is void. *Rubiolo v. Lytle*, 370 S.W.2d 202, 205 (Tex. App.—San Antonio 1963, writ ref'd n.r.e.). If the description in the deed, by extrinsic evidence, such as parol testimony, can be made to apply to a definite piece of property, the description is sufficient. *American Spiritualist Ass'n v. City of Dallas*, 366 S.W.2d 97, 102 (Tex. App.—Dallas 1963, no writ); *Ehlers v. Delhi-Taylor Oil Corp.*, 350 S.W.2d 567, 573 (Tex. App.—San Antonio 1961, no writ). If the description is sufficient for a party familiar with the locality to identify the premises with reasonable certainty, or if there is enough in the instrument to enable one, by pursuing an inquiry based on the information contained in the deed, to identify the particular property, the description will also be sufficient. *Oswald v. Staton*, 421 S.W.2d 174, 176 (Tex. App.—Waco 1967, writ ref'd n.r.e.).

Control of Grantee: Unless the deed has been placed within the control of the grantee by the grantor with the intention that it become operative as a conveyance and has been accepted by the grantee, it will not be effective to pass title. *Estes v. Reding*, 398 S.W.2d 148, 149 (Tex. App.—El Paso 1965, writ ref'd n.r.e.); *Young v. Jewish Welfare Federation*, 371 S.W.2d 767, 771 (Tex. App.—Dallas 1963, writ ref'd n.r.e.); *Wilson v. Olsen*, 336 S.W.2d 899, 901 (Tex. App.—El Paso 1960, no writ).

Consideration: Consideration is not necessary for a duly executed and delivered deed. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); *Cannon v. Wingard*, 355 S.W.2d 776, 781 (Tex. App.—Dallas 1962, writ ref'd n.r.e.).

Duress: A deed signed by a spouse in favor of the other spouse may be set aside if the court finds that the deed was executed under duress. *In re Marriage of Lopez*, No. 14-18-00797-CV, 2020 WL 4523594 (Tex. App.—Houston [14th Dist.] Aug. 6, 2020, no pet.) (mem. op.).

§ 24.3 General Warranty Deed

A general warranty deed contains an express covenant of warranty that the grantor and his heirs, executors, and administrators will "warrant and forever defend all and singular the property to Grantee and Grantee's heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof." Its purpose is to indemnify the grantee against any loss or injury he may sustain by a defect in the grantor's title, with the grantor warranting that he will (1) restore the purchase price to the grantee if the land is entirely lost; (2) discharge any liens or encumbrances incurred before the conveyance that are not assumed by the grantee; and (3) in the event of partial loss, repay the proportionate amount of the consideration that the amount of loss bears to the entire consideration paid. *City of Beaumont v. Moore*, 202 S.W.2d 448, 453 (Tex. 1947). The liability of the warrantor extends to all cases involving a failure of title to land purported to be conveyed by the terms of the deed. *Peavy-Moore Lumber Co. v. Duhig*, 119 S.W.2d 688, 690 (Tex. App.—Beaumont 1938), *aff'd*, 144 S.W.2d 878 (Tex. 1940). If a grantor has conveyed property he did not own by a deed containing a general covenant of warranty and, after the conveyance, actually acquires title to the property, title to the property will pass to his grantee, and the grantor and subsequent purchasers from him will be estopped from disputing the title of the grantee. This principle is known as the doctrine of after-acquired title. *Cherry v. Farmers Royalty Holding Co.*, 160 S.W.2d 908, 909 (Tex. 1942); *Baldwin v. Root*, 40 S.W. 3, 6 (Tex. 1897).

§ 24.4 Special Warranty Deed

A special warranty deed is used if the grantor wishes to limit his liability to persons claiming through him alone, rather than warranting the entire chain of title of the property from its inception to his grantee. By addition of the phrase "by, through, or under me, but not otherwise" to the general warranty clause, the general warranty deed is changed into a special warranty deed. *Owen v. Yocum*, 341 S.W.2d 709, 710 (Tex. App.—Fort Worth 1960, no writ). By limiting the general warranty clause in this manner, the grantor restricts his liability only to claims of title or right asserted through or under him and he has no liability for any defects in title that arose before his title. *Garrett v. Houston Land & Trust Co.*, 33 S.W.2d 775, 777 (Tex. App.—Galveston 1930, writ ref'd). Like a general warranty deed, a special warranty deed will also pass after-acquired title to the grantee named in the special warranty deed. *Breen v. Morehead*, 126 S.W. 650, 655 (Tex. App. 1910), *aff'd*, 136 S.W. 1047 (Tex. 1911).

Special Warranty Deed with Lien for Owelty: A special warranty deed with lien for owelty is given when one spouse receives the entire property and seeks to buy out the grantor spouse by refinancing through a third-party lender. The third-party lender will insist on a lien against the entirety of the property, not just a one-half interest. *See Sayers v. Pyland*, 161 S.W.2d 769, 771 (Tex. 1942).

§ 24.5 Quitclaim Deed

A quitclaim deed conveys only the grantor's right, title, and interest in the land described in the deed and not the land itself. *Cook v. Smith*, 174 S.W. 1094, 1095 (Tex. 1915); *Baldwin v. Drew*, 180 S.W. 614, 616 (Tex. App.—Beaumont 1915, no writ). If the grantor owns the property at the time of the execution and delivery of the quitclaim deed, the deed will pass title to the property to the grantee, but a quitclaim deed will not pass after-acquired title. *Halbert v. Green*, 293 S.W.2d 848, 851 (Tex. 1956); *Breen v. Morehead*, 126 S.W. 650, 656 (Tex. App. 1910), *aff'd*, 136 S.W. 1047 (Tex. 1911). A grantee under a quitclaim deed is charged with notice of outstanding claims against the property and is not protected as an innocent purchaser for value. *Cook*, 174 S.W. at 1095; *Threadgill v. Bickerstaff*, 29 S.W. 757, 758–59 (Tex. 1895). The foregoing is true even if the quitclaim deed is from a remote grantor in the grantee's chain of title and not from the grantee's grantor. *Houston Oil Co. v. Niles*, 255 S.W. 604, 610 (Tex. Comm'n App. 1923, judgm't adopted).

COMMENT: An ideal use of a quitclaim deed would be to extinguish any claim for economic contribution or reimbursement one spouse might have against the separate property of the other spouse.

§ 24.6 Mineral Royalty Interests

Grants and reservations in Texas are styled "oil, gas, and other minerals" or "all minerals in and under the land." Although the meanings of "oil" and "gas" are usually clear, adjudication has been required to determine what minerals are included in a conveyance of "minerals." The Supreme Court of Texas has held that "a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of the word, whether their presence or value is known at the time of severance." *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984). A royalty is the nonpossessory right to receive a cost-free share of production. Many oil companies require changes in ownership to be set forth in a preprinted document called a "division order," which is available from the company.

§ 24.7 Timeshare

A "timeshare plan" is any arrangement, plan, scheme, or similar method (excluding an exchange program but including a membership agreement, sale, lease, deed, license, or right-to-use agreement) by which the purchaser, in exchange for consideration, receives an ownership right in or the right to use accommodations for a period of time less than a year during a given year, but not necessarily consecutive years. Tex. Prop. Code § 221.002(28). Once the timeshare plan is established, each timeshare interest may be separately conveyed or encumbered, and the title is recordable. Tex. Prop. Code § 221.012. A "timeshare interest" is a timeshare estate (an arrangement under which the purchaser receives a right to occupy a timeshare property and an estate interest in the real property) or timeshare use (an arrangement under which the purchaser receives a right to occupy a timeshare property but not an estate interest in the timeshare property). Tex. Prop. Code § 221.002(24), (25), (30).

§ 24.8 Cemetery Lots

A general assignment of interest (see form 24-16 in this manual) should be sufficient to transfer ownership interest in cemetery lots, interment rights, and merchandise.

[Sections 24.9 and 24.10 are reserved for expansion.]

II. Real Estate—Debt and Security Instruments

§ 24.11 Real Estate Lien Note

Purpose of Instrument: The real estate lien note represents the maker's personal obligation to repay the debt. It sets out the terms and conditions of repayment, such as when and where payments are to be made and the interest rate.

"Negotiable Instrument": Ideally, real estate lien notes should be drafted to qualify as "negotiable instruments" under article 3 of the Uniform Commercial Code. To be a negotiable instrument, a promissory note must (1) contain an unconditional promise to pay a fixed sum of money (with or without interest or other charges described in the note); (2) be payable to "order" (for example, "pay to the order of Mary Smith") or to "bearer"; (3) be payable on demand or at a definite time; and (4) not state any other undertaking or instruction by the obligor to do anything besides pay money.

The following provisions do not affect negotiability:

1. An undertaking by the obligor to give, maintain, or protect collateral.
2. A reference to another document (form 24-19 in this manual, for example, refers to the divorce decree).
3. An authorization of the holder to confess judgment or realize on or dispose of collateral.
4. A waiver of the benefit of any law intended to benefit the obligor.

Tex. Bus. & Com. Code §§ 3.104(a), 3.106; *see also* Tex. Bus. & Com. Code §§ 3.108, 3.109.

If the note's due date is determined by a future act, such as a spouse's remarriage or cohabitation, a sale of the property, or a child's death, the note will not qualify as a "negotiable instrument." The terms of the note will, however, be enforceable to the extent they could have been enforced in a pure contract action. If the holder of the note contemplates transferring it to a third party, such as an investor who buys promissory notes, this lack of negotiability will at least impair its value to that third party.

"Holder in Due Course": The primary advantage of negotiability is that only holders of negotiable instruments may benefit from the protection of holder-in-due-course status. The requirements for holder-in-due-course status are found at Business and Commerce Code section 3.302(a). *See* Tex. Bus. & Com. Code § 3.302(a). Holders in due course take the note free of all defenses to its enforcement except—

1. infancy of the obligor to the extent it is a defense to a simple contract;
2. duress, lack of legal capacity, or illegality of the transaction that, under other law, nullifies the obligation of the obligor;
3. fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms; or
4. discharge of the obligor in insolvency proceedings.

Tex. Bus. & Com. Code § 3.305(a), (b).

Unless the holder of the note qualifies for holder-in-due-course status, he is subject to any claim or defense the obligor may raise to a simple contract, such as failure of consideration, waiver, estoppel, undue influence, or accord and satisfaction, as well as a

claim in recoupment against the original payee of the note. *See* Tex. Bus. & Com. Code § 3.305(a), (b).

Usury: The real estate lien note found at form 24-6 in this manual contains a usury savings clause (the paragraph beginning "Interest on the debt evidenced by this note will not exceed the maximum rate or amount of nonusurious interest . . ."). Texas courts have favored and enforced usury savings clauses. *See Woodcrest Associates v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 437–38 (Tex. App.—Dallas 1989, writ denied). Nonetheless, a usury savings clause will not protect the holder from a usury claim in which the interest rate stated in the note exceeds the statutory ceiling. *See* Tex. Fin. Code ch. 303 *et seq.* Finance Code chapter 303 sets the ceiling rates for loans on written contracts, including promissory notes. If a creditor contracts for, charges, or receives interest in excess of the statutory ceiling amount in connection with a transaction for personal, family, or household use, the statutory penalty is three times the amount of interest contracted for, charged, or received in excess of the allowable amount, except that the penalty cannot be less than the lesser of $2,000 or 20 percent of the principal; if the interest charged and received is more than double the maximum amount, the creditor also forfeits all principal on which the interest is charged and received and the interest and all other amounts charged and received. Tex. Fin. Code §§ 305.001(a), 305.002. The creditor is also liable for reasonable attorney's fees. Tex. Fin. Code § 305.005.

In subsequent negotiations or proceedings to enforce the note or the underlying transaction, the attorney should take care not to demand any amount not specifically allowed in the loan documents, such as a late charge, because such a demand also might constitute usury. *See Augusta Development Co. v. Fish Oil Well Servicing Co.*, 761 S.W.2d 538, 542 (Tex. App.—Corpus Christi–Edinburg 1988, no writ); *Moore v. Sabine National Bank*, 527 S.W.2d 209, 213–14 (Tex. App.—Austin 1975, writ ref'd n.r.e.).

§ 24.12 Deed of Trust

Effect: A deed of trust is merely a security instrument and does not convey title to land, although words of conveyance are usually used. *Fleming v. Adams*, 392 S.W.2d 491, 495 (Tex. App.—Houston 1965, writ ref'd n.r.e.). The mortgagee is not the owner and is not entitled to possession, rentals, or profits. *Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981). To be effective, the deed of trust must be delivered to the grantee. Delivery may be established by the filing of the deed of trust for record in the proper office by the grantor on the request of or with the consent of the grantee. *West v. First Baptist Church*, 71 S.W.2d 1090, 1099 (Tex. 1934).

Description: The deed of trust must contain "the nucleus of description" that will allow the land to be identified with reasonable certainty. *Jones v. Mid-State Homes, Inc.*, 356 S.W.2d 923, 925 (Tex. 1962); *Crow v. Davis*, 435 S.W.2d 176, 178 (Tex. App.—Waco 1968, writ ref'd n.r.e.). Ambiguities in the deed of trust may be explained by parol evidence as long as the parol evidence does not contradict the language in the deed of trust. *Jasper State Bank v. Goodrich*, 107 S.W.2d 600, 603 (Tex. App.—Beaumont 1937, writ dism'd).

Existence of Debt: The existence of a debt is essential to the validity of a deed of trust or mortgage, the deed of trust or mortgage being incident to the note. *West*, 71 S.W.2d at 1098; *Rutland Savings Bank v. Seeger*, 125 S.W.2d 1113, 1115 (Tex. App.—Galveston 1939, writ dism'd judgm't cor.).

Priority of Liens: Generally, different liens on the same property have priority according to the time of their creation; that is, "first in time is first in right." *Windham v. Citizens National Bank*, 105 S.W.2d 348, 351 (Tex. App.—Austin 1937, writ dism'd). Even though a lien may attach prior in time to a later lien, the prior lien will be void as to the subsequent lien if the prior lien instrument was not acknowledged, sworn to, or proved and recorded and the subsequent lienholder acquired his lien for a valuable consideration without notice of the prior lien. Tex. Prop. Code § 13.001(a). Moreover, when a lienholder has on the date his lien attaches actual or constructive notice of an inchoate security interest in the property, his lien will be secondary to that security interest when it ripens into an effective lien. For example, a recorded deed of trust to secure future indebtedness will be a prior and superior lien to either a sale or encumbrance occurring after the deed of trust was recorded but before the incurring of indebtedness referred to in the deed of trust. *Jolly v. Fidelity Union Trust Co.*, 15 S.W.2d 68, 70–71 (Tex. App.—Fort Worth 1929, writ ref'd).

§ 24.13 Deed of Trust to Secure Assumption

In the context of division of property on divorce, the party referred to as the buyer in the following discussion is the spouse who is awarded real property and assumes the debt, and the seller is the other spouse.

A deed of trust to secure assumption may be used if the buyer assumes payment of a debt for which the seller is liable at the time of sale. If this instrument is used under these circumstances, the seller usually conveys title by deed with a vendor's lien reserved. The assumed debt and lien are evidenced by a note and deed of trust. The deed of trust to secure assumption provides that the lien it creates is released with the

release of the prior deed of trust, unless before the release the seller files a notice with the proper county clerk setting forth any amount the seller has advanced to cure a default in payment of the assumed lien.

The primary function of the deed of trust to secure assumption is to give the seller recourse against the property if the buyer defaults in payment of the debt secured by the first lien.

In a transaction involving the deed of trust to secure assumption the buyer is the grantor in the deed of trust to secure assumption and the grantee in the special warranty deed. The seller is the grantor in the warranty deed, the lender in the deed of trust to secure assumption, and usually the borrower in the note and grantor in the deed of trust assumed. The deed should contain an assumption clause and a clause for vendor's lien and deed of trust to secure assumption.

Deed of Trust to Secure Assumption without Maturity Date: The deed of trust to secure assumption without maturity date (form 24-7 in this manual) should be used when the buyer does not have a deadline to pay off the assumed debt by refinancing the loan solely in the buyer's name, selling the property, or some other means.

Deed of Trust to Secure Assumption with Maturity Date: The deed of trust to secure assumption with maturity date (form 24-37 in this manual) should be used when the buyer has a deadline to refinance the loan solely in the buyer's name or pay off the loan by sale of the property or some other means. This form includes a maturity date of the assumption and forces the buyer to pay off the assumed loan by a certain date. If the buyer does not pay off the assumed loan or refinance it by the maturity date, the buyer will face foreclosure. Use of the deed of trust to secure assumption with maturity date should be considered carefully for each situation. The following factors may be particularly relevant: (1) the domicile of each party and any geographic restrictions; (2) the ability of the buyer to refinance the loan by the maturity date; (3) children living in the school district; and (4) stability of the parent-child relationship.

§ 24.14 Foreclosure and Sale under Deed of Trust

When Authorized: The power of sale given a trustee in a deed of trust is considered a harsh remedy and may be exercised only by strictly complying with the terms and conditions of the note and those imposed on the power of sale by the maker of the trust instrument. *Purnell v. Follett*, 555 S.W.2d 761, 763 (Tex. App.—Houston [14th Dist.] 1977, no writ). A sale is authorized only on default by the debtor. *Ford v. Emerich*, 343

S.W.2d 527, 531 (Tex. App.—Houston 1961, writ ref'd n.r.e.). A tender of arrearages due on a deed of trust containing an acceleration clause, before exercise by the holder of the deed of trust of his option to declare the entire debt due, prevents the exercise of acceleration. *Hiller v. Prosper Tex, Inc.*, 437 S.W.2d 412, 415 (Tex. App.—Houston [1st Dist.] 1969, no writ).

How Exercised: When the power of sale is validly exercised under the deed of trust, the sale must be made at a public auction held between 10:00 A.M. and 4:00 P.M. of the first Tuesday of a month (or the first Wednesday, if the first Tuesday occurs on January 1 or July 4). The sale must be made at the county courthouse or other place designated by the county's commissioners court in the county in which the real estate is located. If the property is located in more than one county, the sale may be made at the courthouse or other designated place in any county in which the property is located. The commissioners court shall designate the area at the courthouse or other designated place where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by that notice is to take place, and the sale must occur in that area. Tex. Prop. Code § 51.002(a), (a–1), (h).

Notice of the proposed sale, which must include a statement of the earliest time at which the sale will begin, must be given at least twenty-one days before the date of the sale. This notice must be given by a proper notice posted at the courthouse door of each county in which the property is located, designating the county in which the property will be sold; by a copy of the notice filed in the office of the county clerk in each such county; and by service of written notice of the sale by certified mail on each debtor. Tex. Prop. Code § 51.002(b). If the county maintains an Internet website, the county must post a notice of sale filed with the county clerk on the website on a page that can be viewed by the public without charge or registration. Tex. Prop. Code § 51.002(f–1). If the courthouse or the clerk's office is closed because of inclement weather, natural disaster, or other act of God, the posting or filing may be made up to forty-eight hours after the court or office reopens for business. Tex. Prop. Code § 51.002(b–1). The entire calendar day on which the notice of sale is given, regardless of the time of day at which it is given, is included in computing the twenty-one-day notice period, and the entire calendar day of the foreclosure sale is excluded. Tex. Prop. Code § 51.002(g). The sale must begin at the time stated in the notice of sale or not later than three hours after that time. Tex. Prop. Code § 51.002(c).

Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or contract lien and giving the debtor at least twenty days to cure the default before notice of sale can be given under Property Code section 51.002(b). The entire calendar day on which the notice to the debtor is given, regardless of the time of day at which the notice is given, is included in computing the twenty-day notice period, and the entire calendar day on which notice of sale is given under section 51.002(b) is excluded. Tex. Prop. Code § 51.002(d). Service of the notice by certified mail is completed when the notice, with postage prepaid and addressed to the debtor at the last known address, is deposited with the United States Postal Service. The affidavit of a person having knowledge of the facts to the effect that service was completed is prima facie evidence of service. Tex. Prop. Code § 51.002(e). The purpose of this statute is to provide a minimum level of protection for the debtor. *Hausmann v. Texas Savings & Loan Ass'n*, 585 S.W.2d 796, 799 (Tex. App.—El Paso 1979, writ ref'd n.r.e.).

Mortgagee's Entitlement: After a valid trustee's sale, the mortgagee is entitled to judgment for the amount of the note, interest, and attorney's fees, less the amount received at the trustee's sale and other legitimate credits. *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965).

§ 24.15 Recordation

Effect of Lack of Recordation: A conveyance of real property is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record. Tex. Prop. Code § 13.001(a). Therefore, a purchaser of land for value and without notice acquires title to the property as against a person claiming under a deed that has not been filed for record as required by law. *See Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802, 805 (Tex. App.—Amarillo 1952, writ ref'd n.r.e.). The same rule applies to a judgment creditor as to a perfected judgment lien against the grantor of an unrecorded deed—the lien will prevail over the unrecorded deed as long as the lien creditor did not have notice of the deed. *Paris Grocer Co. v. Burks*, 105 S.W. 174, 175 (Tex. 1907). An unrecorded instrument is binding, however, on a party to the instrument, the party's heirs, and a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument. Tex. Prop. Code § 13.001(b).

Similarly, all deeds of trust and mortgages are void as to creditors and subsequent purchasers for valuable consideration without notice, unless they have been acknowledged, sworn to, or proved and filed for record as required by law. Tex. Prop. Code § 13.001(a). Accordingly, the holder of a subsequent lien who does not have actual notice of a prior unrecorded lien has priority over the prior unrecorded lien. *Gordon-Sewall & Co. v. Walker*, 258 S.W. 233, 237 (Tex. App.—Beaumont 1924, writ dism'd w.o.j.).

Grantee's Address: A deed or other conveyance conveying an interest in real property executed after December 31, 1981, must contain the mailing address of each grantee appearing on the document itself or in a separate instrument signed by the grantor or grantee and attached to the document. Although failure to include the address does not affect the validity of the conveyance as between the parties, a failure to include it results in a penalty filing fee equal to the greater of twice the statutory recording fee or $25. Tex. Prop. Code § 11.003.

Place of Recording: To be effectively recorded, the deed or other conveyance must be eligible for recording and must be recorded in the county in which a part of the property is located. Tex. Prop. Code § 11.001(a).

§ 24.16 Homestead Exemption and Equitable Liens

The only valid liens that may be placed on the homestead are—

1. those liens for all or part of the purchase money for the homestead;
2. taxes due on the homestead;
3. an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of the family homestead in a divorce proceeding;
4. the refinancing of a lien against the homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;
5. work and material used in constructing new improvements on the homestead contracted for in writing and work and material used to repair or renovate existing improvements contracted for in writing with the proper consent of both spouses, if certain formal requirements are met;

6. certain extensions of credit (or extensions of credit that meet various requirements) commonly known as home equity loans;
7. reverse mortgages; and
8. the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property, including the refinance of the purchase price of the manufactured home, the cost of installing the manufactured home on the real property, and the refinance of the purchase price of the real property.

Tex. Const. art. XVI, § 50(a); *see also* Tex. Prop. Code § 41.001(b).

A homestead is subject to division in a divorce case, and the court has the authority to award one party the homestead and the other a judgment for a sum of money found by the court to represent the fair value of his or her interest in the homestead and to grant a lien to secure the judgment. *Brunell v. Brunell*, 494 S.W.2d 621, 623 (Tex. App.—Dallas 1973, no writ). The court may order one spouse to execute a general warranty deed to the spouse who will receive the homestead and order the spouse receiving the homestead to execute a note evidencing the deferred payments and a deed of trust securing payment of the note. *Ex parte McKinley*, 578 S.W.2d 437, 438 (Tex. App.—Houston [1st Dist.] 1979, orig. proceeding).

Even if the property in question is the separate property of one spouse, the court may award a judgment for reimbursement for community funds spent on the property and secure the judgment with an equitable lien. *Day v. Day*, 610 S.W.2d 195, 198 (Tex. App.—Tyler 1980, writ ref'd n.r.e.); *Smith v. Smith*, 187 S.W.2d 116, 120 (Tex. App.—Fort Worth 1945, no writ); *see also* Tex. Fam. Code § 3.406. *But see Heggen v. Pemelton*, 836 S.W.2d 145, 148 (Tex. 1992) (judgment cannot be secured by lien on separate-property homestead of one spouse unless specifically allowed under Texas Constitution).

Care must be taken in perfecting a lien that may be foreclosed against the homestead. The instruments creating the lien must establish that it falls within one of the constitutional and statutory exceptions discussed above and how much of the property falls within the exception. *See McGoodwin v. McGoodwin*, 671 S.W.2d 880, 881 (Tex. 1984); *Sayers v. Pyland*, 161 S.W.2d 769, 771 (Tex. 1942).

§ 24.17 Separate Property and Equitable Liens

When dividing marital property, trial courts may impose equitable liens on one spouse's separate property to secure the other spouse's claim for economic contribution or right

of reimbursement for community improvements to that property. *Heggen v. Pemelton*, 836 S.W.2d 145, 146 (Tex. 1992); *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772, 779 (Tex. App.—San Antonio 2004, pet. denied). Trial courts may not impress reimbursement liens simply to ensure a just and right division. *Heggen*, 836 S.W.2d at 146.

On dissolution of a marriage, the court may impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against that property by a contributing marital estate. Tex. Fam. Code § 3.406(a).

§ 24.18 Owelty Liens

One of the inherent rights of a cotenant is that, if the commonly owned property cannot be divided into equal shares without materially injuring its value, it may be divided into unequal shares and a lien be fixed for the difference against the larger share in favor of the recipient of the smaller share. Each cotenant has this valuable right, because otherwise the property might have to be sacrificed on an unfavorable market. The difference is usually referred to as owelty. The owelty so assessed is recognized as being in the nature of purchase money secured by a vendor's lien on the larger tract. *Sayers v. Pyland*, 161 S.W.2d 769, 772 (Tex. 1942).

The Texas Constitution and the Texas Property Code permit the forced sale of a homestead to collect a debt for "an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding." Tex. Const. art. XVI, § 50(a)(3); Tex. Prop. Code § 41.001(b)(4).

A lien may therefore be placed on a spouse's homestead to secure payment of an amount awarded to the other spouse, but the amount secured is limited to the amount of the homestead interest awarded to the other spouse. *Cole v. Cole*, 880 S.W.2d 477 (Tex. App.—Fort Worth 1994, no writ); *Smith v. Smith*, 836 S.W.2d 688, 693 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Wren v. Wren*, 702 S.W.2d 250, 252 (Tex. App.—Houston [1st Dist.] 1985, writ dism'd); *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. App.—Houston [1st Dist.] 1981, no writ). The lien may be imposed only for the specific amount that is to be paid. *Crockett v. McSwain*, No. 11-00-00374-CV, 2001 WL 34373604 (Tex. App.—Eastland Nov. 1, 2001, no pet.) (not designated for publication).

[Sections 24.19 and 24.20 are reserved for expansion.]

III. Personal Property

§ 24.21 Motor Vehicles

The owner designated on the title must transfer the ownership of the title in a manner prescribed by the Texas Department of Motor Vehicles that certifies that the purchaser is the owner of the vehicle and certifies that there are no liens or provides a release of each lien on the vehicle. Tex. Transp. Code § 501.071. For most vehicles less than ten years old, the transferor must also give the transferee a written disclosure of the odometer reading at the time of transfer in accordance with 49 U.S.C. § 32705. This disclosure must be made on a prescribed form that includes space for the signature and printed name of both transferor and transferee. Tex. Transp. Code § 501.072; *see* 49 C.F.R. § 580.3. The form currently appears on the reverse side of the certificate of title.

While the simplest method of transfer is to have the transferor execute the form on the back of the certificate of title, the transfer may also be accomplished with a power of attorney executed by the transferor, authorizing the attorney-in-fact designated in the power to transfer the vehicle. The transferee then files the signed certificate of title or power of attorney (if the assignment on the certificate of title was not executed by the transferor) with the county tax assessor-collector not later than thirty days after the assignment. Tex. Transp. Code § 501.145.

The transferee must present personal identification when applying for a new title using the form prescribed by the Department of Motor Vehicles. Tex. Transp. Code §§ 501.023, 501.0235. In order to establish personal identification, the transferee/applicant must present a current photo identification document that must be one of the nine documents specified by the Department, which include a driver's license, state identification certificate, and United States passport. Then, after the required fees are paid, the county tax assessor-collector issues a title receipt to the transferee, which authorizes the transferee to operate the motor vehicle until the title is issued. Tex. Transp. Code § 501.024.

A certified copy of the decree of divorce can also be used to transfer the title of the vehicle to the party awarded the vehicle, provided that the vehicle is specifically described in the decree by make, year, and vehicle identification number. *See* Tex. Transp. Code § 501.074(a). In some circumstances, an application for title may also be required.

The Texas Tax Code provides for the imposition of taxes for certain transfers of motor vehicles. The tax is imposed on the sale of motor vehicles, on motor vehicles brought into the state by new Texas residents, on even exchanges of motor vehicles, and on most gifts of motor vehicles. *See* Tex. Tax Code §§ 152.021–.025.

COMMENT: Because the transfer of a motor vehicle in a divorce case is considered a transfer by court order, there should be no tax on the transfer.

§ 24.22 Motorboats, Jet Skis, and Outboard Motors

State-Registered Boats, Jet Skis, and Motors: Transfer of motorboats and outboard motors registered in Texas is handled by the Texas Department of Parks and Wildlife. The application for a certificate of title requires detailed information. *See* Tex. Parks & Wild. Code § 31.047(b). The application to transfer title to a boat is Texas Department of Parks and Wildlife form PWD 143. The application to transfer title to an outboard motor is form PWD 144. The form to transfer title to a boat with an inboard motor is PWD 143. Both forms may be downloaded at **http://tpwd.texas.gov/fishboat/boat/forms/**. The application must be accompanied with other evidence reasonably required by the department to establish entitlement of ownership to transfer a motorboat, jet ski, or outboard motor. A judgment of a court of competent jurisdiction with an affidavit evidencing ownership and reciting the required language is sufficient. Tex. Parks & Wild. Code § 31.047(c). Transfer of ownership pursuant to a divorce is a nontaxable event as long as the motorboat or outboard motor is used, not new.

U.S.–Registered Boats: Vessels that are U.S. Coast Guard–documented vessels are documented by the assignment by the U.S. Coast Guard of an official number and a certificate of documentation. The Coast Guard requires the applicant to submit an "Application for Initial Issue, Exchange or Replacement of Certificate of Documentation; Redocumentation," form CG-1258. The applicant must include a certified copy of the decree if the transfer is pursuant to a divorce or a "Bill of Sale," form CG-1340. The decree of divorce should include the make, model, hull number, and name of vessel to ensure transfer of a documented vessel pursuant to a divorce.

§ 24.23 Trailers

A title is required for all motor vehicles operated on a public highway in Texas. Tex. Transp. Code § 501.022(a). However, a trailer is not a motor vehicle unless it weighs more than four thousand pounds. Tex. Transp. Code § 501.002(14)(B). Even though a

title may not be required, the owner must register a trailer if it is to be used on a public highway in Texas. Tex. Transp. Code § 502.002.

§ 24.24 Travel Trailers

House trailers and camper trailers less than eight feet in width and less than forty feet in length and designed for use as temporary living quarters are classified as travel trailers and must be registered and titled regardless of weight. Tex. Transp. Code § 502.166. According to personnel of the Texas Department of Transportation, the procedure for the transfer of title to a travel trailer is the same as that for the transfer of title to a motor vehicle. The term *house trailer* means a trailer designed for human habitation and does not include manufactured housing. Tex. Transp. Code § 501.002(6).

§ 24.25 Manufactured Housing

The term *manufactured housing* refers to a structure that is transportable in one or more sections, and that, in the traveling mode, is or more than eight feet wide or forty or more feet in length or, when erected on site, is at least 320 square feet. If the housing was constructed before June 15, 1976, it is called a "mobile home." If it was constructed after that date, it is called a "HUD-code manufactured home." *See* Tex. Occ. Code § 1201.003(12), (20).

The Texas Department of Housing and Community Affairs (TDHCA) administers the Texas Manufactured Housing Standards Act, chapter 1201 of the Texas Occupations Code. *See* Tex. Occ. Code § 1201.001 *et seq.* Subchapters A through E detail the election process for when an owner of a manufactured home applies for a statement of ownership. Specifically, in completing an application for the issuance of a statement of ownership, an owner of a manufactured home shall indicate whether the owner elects to treat the home as real property. An owner may elect to treat a manufactured home as real property only if the home is attached to real property that is owned by the owner of the home or land leased to the owner of the home under a long-term lease. Tex. Occ. Code § 1201.2055(a).

If an owner elects to treat a manufactured home as real property, TDHCA shall issue to the owner a copy of the statement of ownership reflecting the real property election on its face. Within sixty days of the issuance of the statement, the owner must file the copy in the real property records of the county in which the home is located and notify TDHCA and the tax assessor-collector that the copy has been filed. The manufactured home is not considered to be real property until the copy has been filed and TDHCA

and the tax assessor-collector have been notified as required. After a real property election is perfected, the home is considered to be real property for all purposes; no additional issuance of a statement of ownership is required with respect to the manufactured home unless the home is moved from the location specified on the statement of ownership, the real property election is changed, or the use of the property is changed. Tex. Occ. Code § 1201.2055(d)–(g).

E-mail updates of changes to manufactured housing law and rules are available at **www.tdhca.state.tx.us/mh/index.htm**.

§ 24.26 Aircraft

Registration of an aircraft is handled by the Aircraft Registration Branch of the Federal Aviation Administration. An aircraft registration application, AC form 8050-1, may be obtained from FAA Aircraft Registration Branch by calling 405-954-3116 or writing to FAA Aircraft Registration Branch, AFS-750, P.O. Box 25504, Oklahoma City, OK 73125-0504. Original applications, not photocopies or computer-generated copies, are required. The applicant's physical location or physical address must be given. Evidence of ownership, such as AC form 8050-2 (aircraft bill of sale) or its equivalent, must be provided and meet the requirements prescribed in part 47 of the Federal Aviation Regulations. If the applicant did not purchase the aircraft from the last registered owner, the applicant must submit conveyances completing the chain of ownership from the registered owner to the applicant. A certified copy of a decree of divorce should suffice to complete the chain of ownership.

§ 24.27 Animals

The following organizations should be contacted regarding the transfer of the following types of animals:

Dogs: American Kennel Club, 260 Madison Ave., New York City, NY 10016, 212-696-8200, **www.akc.org**.

Cats: The Cat Fanciers' Association, Inc., P.O. Box 1005, Manasquan, NJ 08736-0805, 732-528-9797, **https://cfa.org**.

Horses: *Thoroughbreds:* The Jockey Club, Registry Office, 821 Corporate Drive, Lexington, KY 40503-2794, 859-224-2700, **www.jockeyclub.com**; *Arabians:* Arabian Horse Association (part and purebred), 10805 East Bethany Drive, Aurora, CO 80014,

303-696-4500, **www.arabianhorses.org**; *Quarter Horses:* American Quarter Horse Association, P.O. Box 200, Amarillo, TX 79168, 806-376-4811, **www.aqha.com**; *Palominos:* Palomino Horse Breeders of America, 15253 Skelly Drive, Tulsa, OK 74116-2620, 918-438-1234, **www.palominohba.com**; *Appaloosas:* Appaloosa Horse Club, P.O. Box 8403, Moscow, ID 83843, 208-882-5578, **www.appaloosa.com**.

Cattle: *Brahman:* American Brahman Breeders Association, 3003 South Loop West, Suite 140, Houston, TX 77054, 713-349-0854, **https://brahman.org**; *Beefmaster:* Beefmaster Breeder's United, 6800 Park Ten Blvd., Suite 290W, San Antonio, TX 78213, 210-732-3132, **https://beefmasters.org**; *Angus:* American Angus Association, 3201 Frederick Ave., St. Joseph, MO 64506, 816-383-5100, **www.angus.org**; *Longhorns:* Texas Longhorn Breeders Association of America, 2315 North Main Street, Suite 402, Fort Worth, TX 76106, 817-625-6241, **www.tlbaa.org**.

§ 24.28 Stock

Stock Held by Brokerage Firm: The transfer of outstanding shares of stock is ordinarily handled by a transfer agent. Transferring stock held in the vault by a brokerage firm, known as held in "safekeeping," is accomplished in the same way as certificated stock is transferred, as set out below. If the stock certificate is held in a "street name" and the actual certificate is not available, the transfer can be accomplished by written request from the transferor to the broker, such as a letter of authorization or "L.O.A."

Certificated Stocks: Two steps are necessary to transfer certificated stock: endorsement and delivery. Endorsement occurs when the transferor signs the back of the certificate or a separate "stock power" indicating a transfer of the security. To complete the transfer, delivery of the certificate and the stock power, if one is used, is necessary. To transfer stock held in safekeeping by a brokerage firm, the transferor must execute a transfer document, such as a stock power, and sign his or her name on the stock power exactly as it appears on the account or actual stock certificate. The agent will usually require that the signature of endorsement be guaranteed by a responsible institution, such as a national bank or member of the stock exchange. The transfer agent forwards the certificate or stock power and/or letter of authorization to a registrar, who cancels the old certificates, countersigns new ones, and forwards them to the transfer agent.

Chapter 8 of the Texas Business and Commerce Code deals with the issuance, purchase, and registration of investment securities.

§ 24.29 Retirement Benefits

For a discussion of the disposition of retirement benefits, see chapter 25 of this manual.

§ 24.30 Promissory Notes

There are no specific documents required to transfer a promissory note. Generally, a written assignment acknowledged by the assignor in the presence of a notary public is sufficient. Whether a transferred note qualifies as a negotiable instrument, giving the transferee special status as a holder in due course, is discussed in section 24.11 above.

§ 24.31 Security Agreement

§ 24.31:1 Definitions

A "security agreement" is an agreement that creates or provides for a security interest. Tex. Bus. & Com. Code § 9.102(a)(74). A "security interest" is an interest in personal property or fixtures that secures payment or performance of an obligation. Tex. Bus. & Com. Code § 1.201(b)(35). "Collateral" means the property subject to a security interest. Tex. Bus. & Com. Code § 9.102(a)(12). "Debtor" means the person who has a property interest, other than a security interest or other lien, in the collateral. Tex. Bus. & Com. Code § 9.102(a)(28)(A). "Obligor" means the person who owes payment or other performance of the obligation secured. Tex. Bus. & Com. Code § 9.102(a)(60)(i). "Secured party" means the person in whose favor there is a security interest. Tex. Bus. & Com. Code § 9.102(a)(73)(A).

§ 24.31:2 Classifications of Collateral

A security interest may be granted in the following types of collateral:

1. *Accounts*—a right to payment of a monetary obligation for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, for services rendered or to be rendered, and for other listed items, if not evidenced by chattel paper or an instrument. Tex. Bus. & Com. Code § 9.102(a)(2).
2. *Chattel paper*—a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, or a lease of specific goods. Tex. Bus. & Com. Code § 9.102(a)(11).

3. *Commercial tort claim*—a claim arising in tort if the claimant is an organization *or* if the claimant is an individual and the claim arose in the course of the claimant's business or profession and does not include damages arising out of personal injury or death. Tex. Bus. & Com. Code § 9.102(a)(13).

4. *Deposit account*—a demand, time, savings, passbook, or similar account maintained with a bank, including a nonnegotiable certificate of deposit. Tex. Bus. & Com. Code § 9.102(a)(29).

5. *Documents*—documents of title, such as bills of lading, dock warrants, dock receipts, warehouse receipts, or orders for the delivery of goods. Tex. Bus. & Com. Code §§ 1.201(b)(16), 7.201, 9.102(a)(30).

6. *Instrument*—a negotiable instrument, such as a draft, check, or certificate of deposit, or any other writing evidencing a right to the payment of money that, in the ordinary course of business, is transferred by delivery with any necessary indorsement or assignment. Tex. Bus. & Com. Code §§ 3.104(b), 9.102(a)(47).

7. *Investment property*—a certificated or uncertificated security (Tex. Bus. & Com. Code § 8.102(a)(15)); a security entitlement (Tex. Bus. & Com. Code § 8.102(a)(17)); a securities account (Tex. Bus. & Com. Code § 8.501); a commodity contract (Tex. Bus. & Com. Code § 9.102(a)(15)); or a commodity account (Tex. Bus. & Com. Code § 9.102(a)(14)). Tex. Bus. & Com. Code § 9.102(a)(49).

8. *Letter-of-credit right*—a right to payment or performance under a letter of credit. Tex. Bus. & Com. Code § 9.102(a)(51).

9. *General intangibles*—personal property (including things in action) other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. General intangibles include payment intangibles (a general intangible under which the account debtor's principal obligation is to pay money, Tex. Bus. & Com. Code § 9.102(a)(62)) and software (a computer program and supporting information, but not when it constitutes goods, Tex. Bus. & Com. Code § 9.102(a)(76)). Tex. Bus. & Com. Code § 9.102(a)(42).

10. *Promissory note*—an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain a bank's acknowledgment of receipt of money or funds for deposit. Tex. Bus. & Com. Code § 9.102(a)(66).

11. *Health-care insurance receivable*—an interest in or claim under an insurance policy that is a right to payment of a monetary obligation for health-care goods or services provided or to be provided. Tex. Bus. & Com. Code § 9.102(a)(46).

12. *Equipment*—goods that are not consumer goods, inventory, or farm products. Tex. Bus. & Com. Code § 9.102(a)(33). ("Goods" are all things that are movable when a security interest attaches, including certain embedded software. Tex. Bus. & Com. Code § 9.102(a)(44).)

13. *Consumer goods*—goods used or bought for use primarily for personal, family, or household purposes. Tex. Bus. & Com. Code § 9.102(a)(23).

14. *Farm products*—crops, livestock, supplies produced or used in farming operations, or products of crops or livestock in their unmanufactured states (for example, ginned cotton, wool-clip, maple syrup, milk, and eggs), with respect to which the debtor is engaged in farming operations. Tex. Bus. & Com. Code § 9.102(a)(34), (a)(35).

15. *Inventory*—goods, other than farm products, that are leased; that are held by a person for sale or lease or to be furnished under contracts of service or that the person has so furnished; or that are raw materials, work in process, or materials used or consumed in a business. Tex. Bus. & Com. Code § 9.102(a)(48).

§ 24.31:3 Description of Collateral

Any description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described. Tex. Bus. & Com. Code § 9.108(a). A description by collateral type alone is not sufficient if the collateral is a commercial tort claim or, in a consumer transaction, if the collateral is consumer goods, a security entitlement, a securities account, or a commodity account. Tex. Bus. & Com. Code § 9.108(e). A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or some such phrase does not reasonably identify the collateral in a security agreement, although such a description is sufficient in a financing statement. Tex. Bus. & Com. Code §§ 9.108(c), 9.504.

§ 24.31:4 Attachment

A security interest attaches when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment. Tex.

Bus. & Com. Code § 9.203(a). Generally, a security interest may be enforced against the debtor and third parties only if—

1. value has been given;
2. the debtor has rights in the collateral or the power to transfer such rights to a secured party; and
3. one of these conditions is met:
    a. the debtor has authenticated a security agreement describing the collateral (and, if the collateral includes timber to be cut, describes the land concerned);
    b. the collateral is not a certificated security and is in the secured party's possession under Business and Commerce Code section 9.313 pursuant to the security agreement;
    c. the collateral is a certificated security and the security certificate has been delivered to the secured party under Business and Commerce Code section 8.301 pursuant to the security agreement; or
    d. the collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents and the secured party has control under Business and Commerce Code section 7.106, 9.104, 9.105, 9.106, or 9.107 pursuant to the security agreement.

Tex. Bus. & Com. Code § 9.203(b).

§ 24.31:5 Perfecting Security Interest

An attached security interest is effective between the parties, but it must be perfected to be effective against third parties. Only an attached security interest may be perfected. Tex. Bus. & Com. Code § 9.308(a). For a specific category of collateral, there may be several ways to perfect a security interest or only one. The basic methods of perfection are filing a properly completed financing statement, possession, and control. A few types of security interests are perfected on attachment. *See* Tex. Bus. & Com. Code § 9.309.

Filing Financing Statement: Filing a properly completed financing statement in the appropriate UCC filing office is the only method of perfecting a security interest in accounts, a commercial tort claim, and general intangibles, except for a security interest arising out of certain sales of accounts or payment intangibles. Filing is an alternative

method to perfect a security interest in goods (other than those having a certificate of title or other form of registration), negotiable documents, instruments, chattel paper, and investment property. (If filing is an alternative method, a security interest perfected by another method generally (with certain exceptions for goods) may take priority over a security interest perfected by filing.)

A financing statement must set forth specific information required in Business and Commerce Code sections 9.502 and 9.516 identifying the debtor, the secured party, and the collateral. *See* Tex. Bus. & Com. Code §§ 9.502(a), 9.516(b)(3)–(5). For timber to be cut, as-extracted collateral, or fixtures (in a fixture filing), additional information is required concerning the related real property. *See* Tex. Bus. & Com. Code §§ 9.502(b), (c), 9.516(b)(3)(D). Except as provided by Business and Commerce Code section 9.516(b), a filing office that accepts written records may not refuse to accept a written initial financing statement on an industry standard form, including a national standard form or a form approved by the International Association of Commercial Administrators, adopted by rule by the secretary of state. Tex. Bus. & Com. Code § 9.5211.

Generally, the financing statement must be filed in only one office in a jurisdiction. If Texas law governs perfection, the filing office is the office of the secretary of state for most types of collateral. If the collateral is as-extracted collateral, timber to be cut, or fixtures (in a fixture filing), the filing is instead made in the real estate recording office for a mortgage on the related real property. Tex. Bus. & Com. Code § 9.501(a).

Filings generally expire after five years and must be continued within six months before the end of the five-year period by the filing of a continuation statement. Tex. Bus. & Com. Code § 9.515. Special transitional rules for continuing the effectiveness of filings made before July 1, 2001, are found at Acts 1999, 76th Leg., R.S., ch. 414, §§ 3.01–.08 (S.B. 1058), eff. July 1, 2001.

Federal and state statutes may provide a means of perfecting a security interest in vessels, aircraft, intellectual property, and titled goods; perfection by these means constitutes perfection by filing. *See* Tex. Bus. & Com. Code § 9.311(b).

Possession: A secured party may perfect a security interest by having possession, either by itself or through a third party, of certain collateral. Tex. Bus. & Com. Code § 9.313.

Possession is required to perfect a security interest in money. Tex. Bus. & Com. Code § 9.312(b)(3). A security interest in an instrument, in goods (except those subject to a certificate of title or other registration), in a tangible negotiable document, or in tangible

chattel paper may be perfected by filing or by possession. Tex. Bus. & Com. Code §§ 9.312, 9.313(a). A secured party may perfect a security interest in a certificated security by taking delivery of the security under Business and Commerce Code section 8.301. Tex. Bus. & Com. Code § 9.313(a).

Control: A secured party may perfect a security interest in a deposit account or letter-of-credit right as original collateral only by obtaining control of the deposit account or letter-of-credit right. Tex. Bus. & Com. Code §§ 9.312(b), 9.314(a). A security interest in investment property or electronic chattel paper may be perfected by filing or by control. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a). A security interest in an electronic document may be perfected by control. Tex. Bus. & Com. Code § 9.314(a). Specific rules determine when a secured party has control of an electronic document (Business and Commerce Code section 7.106), a deposit account (Business and Commerce Code section 9.104), electronic chattel paper (Business and Commerce Code section 9.105), investment property (Business and Commerce Code section 9.106), and a letter-of-credit right (Business and Commerce Code section 9.107).

§ 24.32 Transfer of TUTMA Accounts

Section 141.010 of the Texas Property Code provides for the transfer of custodial property. *See* Tex. Prop. Code § 141.010. Custodial property that is held in the form of a certificate may be transferred by delivering the certificate (with any necessary endorsement) to the transferee together with an instrument similar to form 24-32 in this manual. Custodial property that is not evidenced by a certificate may be transferred by delivering any document necessary for transfer, with any necessary endorsement, to the transferee together with an instrument similar to form 24-32. The transferor should place the custodian in control of the custodial property as soon as practicable.

§ 24.33 Transfer of U.S. Savings Bonds

The redemption value of U.S. savings bonds is available on the Internet at **www.treasurydirect.gov/indiv/tools/tools_savingsbondcalc.htm**.

The bonds can be transferred from one spouse to the other on divorce or to one spouse if the bonds are in the names of both spouses, but only one will be the owner after the divorce. If the divorce decree awards the bonds, a certified copy of the decree and any property settlement agreement can be sent to Treasury Retail Securities Site, P.O. Box 299, Pittsburg, PA 15230-0299. It would be wise to call the agency at 1-800-245-2804 to get the latest detailed instructions. The transfer may also be made by completing and

sending Form PD F 4000, which is available at **www.treasurydirect.gov/forms.htm**. Simply follow the instructions on the form.

§ 24.34 Estates Code Provisions Affecting Former Spouses

If, after the making of a will, the testator's marriage is dissolved, unless the will expressly provides otherwise, all provisions in the will, including fiduciary appointments, are read as if the former spouse had failed to survive the testator. Unless a court order or contract relating to the division of the marital estate, whenever executed, provides otherwise, all provisions in the will disposing of property to an irrevocable trust in which the former spouse is a beneficiary or is nominated as a trustee or other fiduciary or that confers a power of appointment on the former spouse are read to instead dispose of the property to a trust the provisions of which are identical to the irrevocable trust, except that (1) any provision in the irrevocable trust conferring a beneficial interest or power of appointment on the former spouse shall be treated as if the former spouse had disclaimed the interest granted in the provision and (2) any provision in the irrevocable trust nominating the former spouse as a trustee or other fiduciary shall be treated as if the former spouse had died immediately before the marriage dissolution. Tex. Est. Code § 123.001. References to the former spouse include relatives of the former spouse who are not relatives of the testator.

The dissolution of marriage revokes the provision in a revocable trust instrument that was executed by a divorced person as settlor before the dissolution and disposes of property to the former spouse or confers a power of appointment or nominates the former spouse as a personal representative, trustee, conservator, agent, or guardian or in any other fiduciary or representative capacity. These provisions do not apply if a court order, the express terms of a trust instrument executed before the dissolution, or the express provision of a contract relating to the division of the marital estate, whenever executed, provides otherwise. Tex. Est. Code § 123.052. References to the former spouse include relatives of the former spouse who are not relatives of the settlor.

On the death of a divorced person who is a settlor in a trust created under a trust instrument executed by that person and his former spouse during their marriage that revocably disposes of property to the former spouse or confers a power of appointment or nominates the former spouse as a personal representative, trustee, conservator, agent, or guardian or in any other fiduciary or representative capacity, the trustee must divide the trust into two trusts, each of which is composed of the property attributable to the contributions of one of the settlors. These provisions do not apply if a court order, the express terms of a trust instrument executed before the dissolution, or the express provi-

sion of a contract relating to the division of the marital estate, whenever executed, provides otherwise. Tex. Est. Code § 123.056. References to a former spouse include relatives of the former spouse who are not relatives of the settlor.

If a decedent established a P.O.D. account or other multiple-party account and the decedent's marriage is later dissolved, any payable on request after death designation provision or provision of a survivorship agreement with respect to the account in favor of the decedent's former spouse is not effective unless (1) the divorce decree designates the former spouse as the P.O.D. payee or beneficiary or reaffirms the survivorship agreement in favor of the former spouse; (2) after the dissolution the decedent redesignated the former spouse as the P.O.D. payee or beneficiary or reaffirmed the survivorship agreement in writing; or (3) the former spouse is designated to receive, or under the survivorship agreement would receive, the proceeds in trust for a child or dependent of the decedent or the former spouse. If the designation is not effective, notice of the dissolution must be given to the financial institution. If the provision of a survivorship agreement is not effective under these provisions, the former spouse or relative is treated as having predeceased the decedent. Tex. Est. Code § 123.151. References to the former spouse include relatives of the former spouse who are not relatives of the decedent.

An agent's authority under a power of attorney terminates when the agent's marriage to the principal is dissolved, unless the power of attorney provides otherwise. Tex. Est. Code § 751.132.

§ 24.35 Transfer on Death Deeds

An individual may transfer the individual's interest in real property to one or more beneficiaries, effective at the transferor's death, by a document called a "transfer on death deed." Tex. Est. Code § 114.051. Revocation of a transfer on death deed may be accomplished by a subsequent transfer of the property or an instrument that expressly revokes the transfer on death deed. To be effective, the revoking instrument must be filed in the deed records before the transferor's death. Tex. Est. Code § 114.057. If a marriage between the transferor and a designated beneficiary is dissolved after a transfer on death deed is recorded, a final judgment of the court dissolving the marriage operates to revoke the transfer on death deed as to that designated beneficiary if notice of the judgment is recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed is recorded. Tex. Est. Code § 114.057(c).

[Sections 24.36 through 24.40 are reserved for expansion.]

IV. Virtual Assets and Intellectual Property

§ 24.41 Transfer of Domain Names

A domain name is transferred by first contacting the Web host online. Self-explanatory forms are available on the Web host's website. Completion of the form requires the action of both parties. There is a small fee.

§ 24.42 Transfer of Patent

A patent may be transferred by completing an assignment of any document of conveyance. For example, see form 24-16, Assignment of Interest, in this chapter. The assignment must be attached to Patent Office–prescribed form PTO-1595 and mailed to Mail Stop Assignment Recordation Services, Director of the USPTO, P.O. Box 1450, Alexandria, VA 22313–1450. There is a small fee. A patent may also be transferred on the Internet. A transfer cover sheet may be created and submitted by completing the online Web forms and attaching the supporting legal documentation as a TIFF image or a PDF file for submission via the Internet. The web address is **https://epas.uspto.gov**.

§ 24.43 Transfer of Trademark

A trademark may be transferred by completing an assignment of any document of conveyance. For example, see form 24-16, Assignment of Interest, in this chapter. The assignment must be attached to Patent Office–prescribed form PTO-1594 and mailed to Mail Stop Assignment Recordation Services, Director of the USPTO, P.O. Box 1450, Alexandria, VA 22313–1450. There is a small fee. A trademark may also be transferred on the Internet. A transfer cover sheet may be created and submitted by completing the on-line Web forms and attaching the supporting legal documentation as a TIFF image or a PDF file for submission via the Internet. The web address is **https://epas.uspto.gov**.

[Sections 24.44 through 24.50 are reserved for expansion.]

V. Useful Websites

§ 24.51 Useful Websites

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

Animals (§ 24.27)

Cats
https://cfa.org

Cattle
www.angus.org (Angus)
https://beefmasters.org (Beefmaster)
https://brahman.org (Brahman)
www.tlbaa.org (Longhorns)

Dogs
www.akc.org

Horses
www.aqha.com (American Quarter Horses)
www.appaloosa.com (Appaloosas)
www.arabianhorses.org (Arabians)
www.palominohba.com (Palominos)
www.jockeyclub.com (Thoroughbreds)

Application to transfer Texas title to a boat (§ 24.22)
http://tpwd.texas.gov/fishboat/boat/forms/

Manufactured housing (§ 24.25)
www.tdhca.state.tx.us/mh/index.htm

Redemption value of savings bonds (§ 24.33)
www.treasurydirect.gov/indiv/tools/tools_savingsbondcalc.htm

Savings bond transfer forms (§ 24.33)
www.treasurydirect.gov/forms.htm

Transfer of patent online (§ 24.42)
https://epas.uspto.gov

Transfer of trademark online (§ 24.43)
https://etas.uspto.gov

Chapter 25

Employment and Retirement Benefits

I. Introduction

§ 25.1 Complexity of Drafting Orders 635

§ 25.2 Scope of Chapter 635

II. Retirement Benefits Divisible on Divorce

§ 25.11 Divisibility on Divorce 636

§ 25.12 Methods of Division 637

III. General Definitions

§ 25.21 Qualified Domestic Relations Order (QDRO). 639

§ 25.22 Defined Benefit and Defined Contribution Plans 639

IV. Continuing Jurisdiction for Order Dividing Plan

§ 25.31 Continuing Jurisdiction for Order Dividing Retirement Plans 641

V. Private Retirement Plans

§ 25.41 No Standard Forms 643

§ 25.42 Variety of Plans 644

§ 25.43 Definitions Applicable to Private Plans. 644

§ 25.44 Requirements of QDRO for Private Plans. 645

§ 25.45 Survivor Benefits for Private Plans 646

§ 25.46 Shared-Payment (Shared-Interest) QDRO vs. Separate-Interest QDRO for Defined Benefit Plan QDROs 647

§ 25.47 Early Retirement Subsidy 649

§ 25.48 Cost-of-Living Adjustment 650

VI. Texas Public Retirement System

§ 25.51 Texas Public Retirement System Generally 650
§ 25.52 Definitions for State Retirement Systems 651
§ 25.53 Requirements of QDRO 652
§ 25.54 Statutory Reasons for Rejection by Retirement System 653
§ 25.55 Payments to Alternate Payee 654
§ 25.56 Death Terminates Interest of Alternate Payee 655
§ 25.57 Optional Retirement Program 655
§ 25.58 Qualification Process 655
§ 25.59 Appeal of Nonqualification Determination 656
§ 25.60 Special Decree Language to Change TRS Beneficiary Designation . . 657
§ 25.61 Lien on Benefits 657

VII. Uniformed Services Former Spouses' Protection Act

§ 25.71 Historical Perspective 658
§ 25.72 Definitions 659
§ 25.73 Divisible Benefits 661
§ 25.74 Jurisdiction of Member 663
§ 25.75 Payment to Former Spouse 663
§ 25.76 Notice to Member 664
§ 25.77 Sending Order to DFAS 664
§ 25.78 Benefits to Abuse Victims 666
§ 25.79 Survivor Benefit Plan 666
§ 25.80 Medical and Commissary Benefits for Former Spouse 667
§ 25.81 Military Retirement Resources 669

VIII. Civil Service Retirement System and Federal Employees Retirement System

§ 25.91 CSRS and FERS Generally 670
§ 25.92 Definitions 671

§ 25.93 Payments under Court Order 673
§ 25.94 Survivor Annuities 673
§ 25.95 Thrift Savings Plan 673
§ 25.96 Addresses for Sending Court Orders 674

IX. Railroad Retirement

§ 25.101 Railroad Retirement Generally 674
§ 25.102 Definitions 675
§ 25.103 Requirements for Court Decree 677
§ 25.104 Procedure 677
§ 25.105 Private Retirement Plans Associated with Railroad Employees 678
§ 25.106 Cessation of Divorced Spouse Benefits 678
§ 25.107 Conversion of Annuity Received as Divorced Spouse to Annuity Received as Surviving Spouse 679
§ 25.108 Entitlement as Remarried Widow(er) 679
§ 25.109 Other Documentation 680
§ 25.110 Delivery of Court Decree to Board 680

X. Use of QDRO for Payment of Spousal Maintenance

§ 25.121 Continuing Jurisdiction for Order for Payment of Spousal Maintenance 681
§ 25.122 Practical Considerations 682

XI. Use of QDRO for Payment of Child Support

§ 25.131 Continuing Jurisdiction for Order for Payment of Child Support 683
§ 25.132 Practical Considerations 684

XII. Stock Options and Restricted Stock

§ 25.141 Stock Options and Restricted Stock 685

XIII. Useful Websites

§ 25.151 Useful Websites 687

Chapter 25

Employment and Retirement Benefits

I. Introduction

§ 25.1 Complexity of Drafting Orders

Drafting orders for the division of retirement and other such employee benefit plans is a complex undertaking. Generally, an order in addition to the decree is needed to divide the benefit. For plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), this order is a qualified domestic relations order (QDRO), but it may have a different title if it is for a non-ERISA plan. No single set of rules controls the division of these plans, and no simple form order can be used for all plans. Many types of plans exist; each must be approached on the basis of the particular rules and terminology that control it, which are found either in the plan documents or in the statutes and regulations governing the type of plan involved. Division of an individual retirement account (IRA) or a nonqualified plan does not require an order separate from the decree of divorce, and care must be taken when dividing the benefit and drafting the applicable decree language. However, some IRA providers may want an additional order or assignment of interest.

§ 25.2 Scope of Chapter

These practice notes concentrate primarily on the division of retirement, employee benefit, and other plans, which are usually incident to employment of some sort, as an aspect of property division on divorce. There is some discussion of various attributes of the plans, but the emphasis is on the rules of division, the benefits that may be divided, and the orders required to accomplish the division.

Parts X and XI discuss the use of domestic relations orders for payment of spousal maintenance and child support, respectively.

[Sections 25.3 through 25.10 are reserved for expansion.]

II. Retirement Benefits Divisible on Divorce

§ 25.11 Divisibility on Divorce

The general rule is that the part of a spouse's retirement benefits earned during the marriage constitutes community property subject to division in a divorce. *Allard v. Frech*, 754 S.W.2d 111, 114 (Tex. 1988); *Berry v. Berry*, 647 S.W.2d 945, 946 (Tex. 1983); *Valdez v. Ramirez*, 574 S.W.2d 748, 749 (Tex. 1978); *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977); *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976); *Herring v. Blakeley*, 385 S.W.2d 843, 846 (Tex. 1965). These benefits should be valued on the date of divorce. *Berry*, 647 S.W.2d at 947.

As with other assets, retirement benefits may have mixed character, and a party claiming that part of a retirement account constitutes his separate property must prove such separate-property character by clear and convincing evidence. *See Kelly v. Kelly*, 634 S.W.3d 335, 351–52 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (trial court's finding that all of husband's 401(k) account was community property was error; although husband did not introduce any account statements into evidence, testimony of his expert regarding expert's tracing analysis of the separate property portion of husband's 401(k) account was sufficient to rebut community-property presumption where wife presented no evidence to the contrary).

Although retirement benefits should be valued on the date of divorce, the portion to which an employee's former spouse will be entitled can change after the divorce, if the employee later becomes eligible for a new benefit as a result of his or her employment during the marriage. *See Howard v. Howard*, 490 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). At time of divorce, the husband in *Howard* would have been entitled only to reimbursement of his payroll contributions to his retirement plan, because his interest had not yet vested. The decree of divorce awarded the wife a portion of "all sums related to" benefits "existing by reason of [husband]'s employment during the marriage." When the husband's interest in the plan vested after divorce and a new benefit—here, a deferred retirement option program—was added to which the husband was entitled because of employment during the marriage, the wife was entitled to a portion of the new benefit.

Social Security benefits are not divisible on divorce, but rather are exempt from the just and right division of the community property, regardless of whether the benefits were received during the marriage. Federal law expressly preempts state law with respect to

the treatment of Social Security benefits. *Everse v. Everse*, 440 S.W.3d 749, 752–55 (Tex. App.—Amarillo 2013, no pet.); *see* 42 U.S.C. § 407.

COMMENT: The attorney should ensure that the plan permits the proposed division of benefits.

COMMENT: The attorney should determine if a previous qualified domestic relations order (QDRO) has been entered dividing any portion of the retirement benefits currently being considered for division.

§ 25.12 Methods of Division

There are two types of plans. The first are private retirement plans, which are governed by the Employee Retirement Income Security Act of 1974 (ERISA), the federal pension law. The second are governmental plans and some church plans, which are not covered by ERISA. A private plan may be a defined contribution plan or a defined benefit plan (including a money purchase pension plan or a target benefits plan).

There are a number of ways to divide retirement benefits on divorce. The simpler private benefit plan to divide is a defined contribution plan, in which there is an account established for each participant—for example, a 401(k). The separate-property interest of a spouse in a defined contribution retirement plan may be traced using the tracing and characterization principles that apply to a nonretirement asset. Tex. Fam. Code § 3.007(c). Section 3.007(c) gives statutory authority to trace separate-property assets within a defined contribution plan. The attorney should address in the decree of divorce and the QDRO the date for the division of the benefit (sometimes called the "valuation date"), whether the alternate payee will receive gains and losses on the portion of any defined contribution benefit awarded to the alternate payee, and whether the value of any outstanding loans should be included or excluded when calculating the alternate payee's award. The assets of many defined contribution plans are invested in mutual funds and stocks, making the value of the plan market driven and, thus, subject to gains of the particular stocks and mutual funds that compose the assets of the retirement plan. Also, there is usually an interval of time between the valuation date and the date that the plan is actually divided by the plan administrator (sometimes called the "segregation date"). Failure to specifically award gains and losses on the alternate payee's portion to the alternate payee for the period between the valuation date and the segregation date could result in one party's benefitting or being harmed by a change in the market.

The most difficult private plans to divide are defined benefit plans because these plans often include survivor annuities, cost-of-living adjustments, and early retirement subsidies. It is important to realize that there are plans that are a hybrid of defined contribution plans and defined benefit plans, such as money purchase pension plans and target benefit plans.

Within the context of awarding a portion of the participant's retirement benefit in a defined benefit plan, the court is limited to an award that does not exceed the interest of the community estate in the retirement benefit. The "holy trinity" of cases pertaining to identification and division of the community estate's interest in the employee spouse's retirement benefits are *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983); *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977); and *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976). For a defined benefit plan or retirement annuity that has a guaranteed minimum benefit, any nonguaranteed portion of the benefit should also be divided by the court if there is sufficient evidence of the value of the nonguaranteed portion. *In re Marriage of Hardin*, 572 S.W.3d 310, 314–15 (Tex. App.—Amarillo 2019, no pet.).

Fundamental conclusions can be drawn from these cases:

1. A nonvested defined benefit that is not in pay status is an asset subject to division by the court.

2. The proper method of ascertaining the interest of the community estate in a benefit that was earned partially during marriage and partially outside marriage is on the basis of time spent by the employee earning the benefit.

3. The value of the benefit that is to be apportioned within the community estate is the value of the benefit as of the date of divorce.

4. The proper time apportionment fraction is that in which the numerator is the credited service earned by the employee during marriage and the denominator is the credited service earned by the employee through the date of divorce (or date of retirement if retirement occurs before divorce). These fractions have become commonly known as the "Berry" fraction if the party is not retired at the time of divorce and the "Taggart" fraction if the party has already retired at the time of divorce. These fractions yield the community estate's share of the retirement benefit.

The *Taggart* formula has withstood the challenge of subsequent proposed apportionment methodologies. *See Parliament v. Parliament*, 860 S.W.2d 144 (Tex. App.—San Antonio 1993, writ denied).

It is important to note that, in most plans, orders to divide retirement benefits may also be used for payment of child support, spousal maintenance, and alimony. See parts X and XI of this chapter.

[Sections 25.13 through 25.20 are reserved for expansion.]

III. General Definitions

§ 25.21 Qualified Domestic Relations Order (QDRO)

The term *qualified domestic relations order* (QDRO) is used to describe the order that divides all qualified retirement plans. *See* 26 U.S.C. § 414(p)(1)(A); 29 U.S.C. § 1056(d)(3)(B)(i); Tex. Gov't Code § 804.001(4). This term is not used to describe all such orders. It is a term of art used in the Internal Revenue Code, the Employee Retirement Income Security Act (ERISA), and the Texas Government Code. It applies to private retirement plans and Texas government and some church plans, but it does not apply to military retirement plans, federal civil service plans, and benefits accrued under the Railroad Retirement Act. Using the term *qualified domestic relations order* where it does not belong may result in rejection of the order by the plan administrator.

§ 25.22 Defined Benefit and Defined Contribution Plans

The practitioner must first determine whether the plan is a defined benefit plan or a defined contribution plan. Those terms are defined in the Internal Revenue Code and ERISA. *See* 26 U.S.C. § 414(i), (j); 29 U.S.C. § 1002(34), (35). The terms do not apply to all plans, but they describe the basic types of plans.

A defined contribution plan provides for an individual account for each participant and consists of employee and/or employer contributions. The account also includes any income, expenses, gains and losses, and any forfeitures of accounts of other participants that may be allocated to the participant's account. 26 U.S.C. § 414(i); 29 U.S.C. § 1002(34). The apportionment formula in *Berry*, which divides defined benefit plans, is inappropriate for the division of a defined contribution plan. *Iglinsky v. Iglinsky*, 735 S.W.2d 536, 537–38 (Tex. App.—Tyler 1987, no writ) (citing *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983)).

A defined benefit plan is any qualified plan that is not a defined contribution plan. 26 U.S.C. § 414(j); 29 U.S.C. § 1002(35). A defined benefit plan usually involves the payment of benefits according to a formula. The formula takes into account the credited service earned under the plan during employment; the salary of the participant; and, in the case of a cash balance plan, the contributions made by the employer. If the participant accrued a benefit before marriage, a formula will typically be used to divide the benefit.

Valuation and Apportionment of Defined Benefit Plan If Employee Spouse Is Retired at Time of Divorce: The community-property interest in a defined benefit plan, if the employee spouse is already retired at the time of divorce, is calculated in accordance with the following formula: the number of months of credited service earned under the plan while married divided by the total number of months of credited service earned under the plan times the value of the retirement benefits (for example, the monthly annuity) as of the date of retirement equals the extent of the community-property interest. *See Taggart v. Taggart*, 552 S.W.2d 422, 424 (Tex. 1977).

Valuation and Apportionment of Defined Benefit Plan If Employee Spouse Is Not Retired at Time of Divorce: If a couple divorces before retirement, the value of the retirement benefits of a defined benefit plan is determined as of the date of divorce. *May v. May*, 716 S.W.2d 705, 710 (Tex. App.—Corpus Christi–Edinburg 1986, no writ). The nonemployee spouse (alternate payee) may not share in any of the employee spouse's (participant's) postdivorce earning and efforts. The community-property interest in the defined benefit plan if the benefits are contingent at the time of the divorce, because the employee spouse is still employed, is calculated in accordance with the following formula: the number of months of credited service earned under the plan while married divided by the total number of months of credited service earned under the plan as of the date of divorce times value of the retirement benefits (for example, the monthly annuity) as of the date of divorce equals the extent of the community-property interest. *Berry*, 647 S.W.2d at 946–47. Also, see *Albrecht v. Albrecht*, 974 S.W.2d 262 (Tex. App.—San Antonio 1998, no writ), holding that the *Berry* formula, not the *Taggart* formula, should be used when an employee has not retired as of the time of divorce. The *Taggart* formula is used when a party has already retired at the time of divorce.

Lump-Sum Amount or Percentage: Although some retirement plans may allow for the QDRO to state the amount to be awarded to the alternate payee in terms of a lump sum, other plans require the award to be stated in terms of a percentage of the value of the retirement account. If the plan requires the award to be stated in terms of a percent-

age, the trial court's refusal to sign a QDRO stating the award in terms of a percentage constitutes error. Even where a mediated settlement agreement provides a lump-sum amount, the trial court would not be improperly modifying or altering the division of property contained in the agreement by expressing the lump-sum amount as the corresponding percentage of the account in the QDRO. *In re Marriage of Dennings & Stokes*, ___ S.W.3d. ___, No. 14-19-00646-CV, 2021 WL 3577731, at *3 (Tex. App.—Houston [14th Dist.] Aug. 10, 2021, no pet.).

[Sections 25.23 through 25.30 are reserved for expansion.]

IV. Continuing Jurisdiction for Order Dividing Plan

§ 25.31 Continuing Jurisdiction for Order Dividing Retirement Plans

The court that rendered the final decree maintains continuing, exclusive jurisdiction to render and correct enforceable QDROs or similar orders permitting payment of pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee. Unless prohibited by federal law, a suit seeking such an order applies to a previously divided pension, retirement plan, or other employee benefit divisible under Texas or federal law, whether the plan or benefit is private, state, or federal. Tex. Fam. Code § 9.101.

A party may petition a court to render a QDRO if the court that rendered a final decree of divorce dividing retirement benefits did not provide a QDRO permitting payment of benefits to an alternate payee. *See* Tex. Fam. Code § 9.103. If the order dividing a plan has been rejected by the plan or agency, the trial court retains continuing, exclusive jurisdiction to render a corrected QDRO that will qualify with the plan. Tex. Fam. Code § 9.104. However, if the court has lost plenary power, any petition requesting an original or amended QDRO is governed by the Texas Rules of Civil Procedure that apply to the filing of an original lawsuit. *See* Tex. Fam. Code § 9.102. *See also Araujo v. Araujo*, 493 S.W.3d 232 (Tex. App.—San Antonio 2016, no pet.).

In rendering a QDRO based on a prior divorce decree, the court cannot change the substantive division of the retirement benefits made in the original decree. *Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003). However, a residuary clause in a divorce decree awarding a party 50 percent of the community property interest in any retirement benefits existing by reason of the other party's past and present employment as of the date of

divorce has been held sufficient to uphold the trial court's subsequent rendering of a QDRO dividing the other party's Federal Employees Retirement System benefits. *Helm v. Hauser*, No. 04-17-00232-CV, 2018 WL 2943823 (Tex. App.—San Antonio June 13, 2018, pet. denied), *cert. denied*, 140 S. Ct. 896 (2020). *But see also Tatum v. Tatum*, No. 14-19-00272-CV, 2020 WL 2832104 (Tex. App.—Houston [14th Dist.] May 28, 2020, pet. denied) (mem. op.) (for court to include postdivorce contributions and increases, such as cost-of-living adjustments, such benefits must be expressly awarded to alternate payee in final decree of divorce).

A court that renders a divorce but fails to divide retirement benefits can later divide the undivided property. Tex. Fam. Code §§ 9.201–.205. In *In re Marriage of Malacara*, the divorce decree did not specifically address retirement benefits but provided that "all community property not listed on any schedule . . . shall be owned by Husband and Wife as equal co-tenants." After the husband retired and began receiving benefits, the wife sued for her share. The court of appeals held that the trial court could award a portion of the benefits already distributed as back payments pursuant to sections 9.009 and 9.010(b) of the Family Code. *In re Marriage of Malacara*, 223 S.W.3d 600 (Tex. App.—Amarillo 2007, no pet.) (per curiam).

Amendment of QDRO: A court that renders a QDRO retains continuing, exclusive jurisdiction to amend the order to correct it *or* clarify its terms to effectuate the division of property ordered by the court. Such an amended domestic relations order must be submitted to the plan administrator or equivalent to determine whether the amended order satisfies the requirements of a QDRO. If the order is rejected by the plan, the court retains continuing, exclusive jurisdiction to render a corrected QDRO that will qualify with the plan. Tex. Fam. Code § 9.1045; *see* Tex. Fam. Code § 9.104.

In amending a QDRO, however, the court may not amend, modify, alter, or change the division of property made or approved in the decree. *See* Tex. Fam. Code § 9.007. Where both the decree and the amended QDRO expressly stated that the amounts to be transferred were for child support, the amended QDRO did not change the substantive property division by naming the child, instead of the wife, as alternate payee; by specifying that the husband would be responsible for payment of taxes associated with the payment; or by including provision for payment of the remainder to the child's beneficiary if the child died before receiving the full amount. *Quijano v. Quijano*, 347 S.W.3d 345 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *see also Gourley v. Gourley*, No. 02-17-00228-CV, 2018 WL 2976431 (Tex. App.—Fort Worth June 14, 2018, no pet.) (mem. op.) (nunc pro tunc divorce decree that substantively changed division of husband's retirement benefits void).

Attorney's Fees: In a proceeding to obtain an enforceable order as provided by sections 9.101 through 9.105 of the Family Code, the court may award reasonable attorney's fees incurred by a party to a divorce or annulment against the other party to the divorce or annulment and order that they be paid directly to the attorney. The attorney may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 9.106.

[Sections 25.32 through 25.40 are reserved for expansion.]

V. Private Retirement Plans

§ 25.41 No Standard Forms

No standard forms for QDROs exist, because each retirement plan is different. Even the plan's model QDRO may not serve the needs of every client and should be closely scrutinized by the attorney. These are not fill-in-the-blank forms and can be rejected if the person using the form does not understand how the plans or model QDROs work. Worse still, a lack of understanding can cause the alternate payee to receive the incorrect benefit, as approval by the plan does not mean the QDRO complies with the decree and awarded benefit. It should not be assumed that the approval of the QDRO means that it has been drafted correctly.

The plan may not require the attorney to use its form. The plan's model may secure the needs of the participant or employer. An order that might be approved by the administrator of one plan may be rejected by the administrator of another. Whenever possible, the proposed order should be submitted to the particular plan administrator for prequalification before the order is signed by the judge. If this is not possible, the QDRO can be corrected under Family Code section 9.104. *See* Tex. Fam. Code § 9.104.

COMMENT: In a defined benefit plan, the plan administrator may not assess a fee to administer or review the QDRO. However, defined contribution plan administrators may assess fees to administer or review a QDRO, and those fees are generally deducted from the parties' plan account. Moreover, many plans assess higher fees for the review of QDROs that differ from the plans' model QDROs. The attorney should determine and consider the amount of such fees that will be assessed in evaluating whether to use a particular plan's model QDRO. However, the attorney should not use a model

QDRO that does not protect the client or conform to the agreed-to division in order to save on review fees.

COMMENT: In drafting a settlement agreement or proposed order that will require a QDRO, the attorney should also consider whether the settlement agreement or proposed order should include specific terms regarding the allocation between the parties of fees assessed by the plan for review of the QDRO.

§ 25.42 Variety of Plans

To be qualified under the Internal Revenue Code and ERISA, a plan must meet certain requirements. Beyond meeting those requirements, the rules and features of plans may differ from company to company.

In drafting a QDRO dividing the benefits of a qualified plan, it is best that the attorney have a copy of the summary plan description and QDRO procedures.

The numerous requirements of qualification will be discussed only insofar as they affect the division of benefits on divorce.

§ 25.43 Definitions Applicable to Private Plans

Specific definitions set out in the Internal Revenue Code and ERISA apply to qualified private retirement plans.

Defined contribution plan: A defined contribution plan is one that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account and any income, expenses, gains and losses, and any forfeitures of accounts of other participants that may be allocated to the participant's account. 26 U.S.C. § 414(i).

Defined benefit plan: A defined benefit plan is any plan that is not a defined contribution plan. 26 U.S.C. § 414(j).

Domestic relations order: A domestic relations order is any judgment, decree, or order (including approval of a property settlement agreement) that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant and is made in accordance with a state domestic relations law (including a community-property law). 26 U.S.C. § 414(p)(1)(B); 29 U.S.C. § 1056(d)(3)(B).

Qualified Domestic Relations Order (QDRO): A QDRO is a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under a plan and meets the requirements for a QDRO. 26 U.S.C. § 414(p)(1)(A); 29 U.S.C. § 1056(d)(3)(B)(i).

Participant: The participant is the employee who is or may become eligible to receive a benefit of any type from an employee benefit plan that is qualified under the federal statutes. 29 U.S.C. § 1002(7).

Alternate payee: An alternate payee is any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable under a plan with respect to the participant. 26 U.S.C. § 414(p)(8); 29 U.S.C. § 1056(d)(3)(K).

Qualified joint and survivor annuity: A qualified joint and survivor annuity is an annuity for the life of the participant with a survivor annuity for the life of the spouse that is not less than 50 percent and not more than 100 percent of the amount of the annuity that is payable during the joint lives of the participant and spouse and that is the actuarial equivalent of a single annuity for the life of the participant. 26 U.S.C. § 417(b); 29 U.S.C. § 1055(d).

Qualified preretirement survivor annuity: A qualified preretirement annuity is an annuity for a spouse in a situation in which the participant had a vested benefit under the plan but had not retired before the participant's death. The preretirement annuity must be for the life of the spouse and must be not less than 50 percent and not more than 100 percent of the amount of the annuity that would have been payable to the participant. 26 U.S.C. § 417(c); 29 U.S.C. § 1055(e).

§ 25.44 Requirements of QDRO for Private Plans

To be a QDRO, the order must include the following information: (1) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order, (2) the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee or the manner in which the amount or percentage is to be determined, (3) the number of payments or period to which the order applies, and (4) each plan to which the order applies. 26 U.S.C. § 414(p)(2); 29 U.S.C. § 1056(d)(3)(C).

A domestic relations order meets the requirements of a QDRO only if the order (1) does not require a plan to provide any type or form of benefit, or any option, not otherwise

provided under the plan; (2) does not require the plan to provide increased benefits (determined on the basis of actuarial value); and (3) does not require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO. 26 U.S.C. § 414(p)(3); 29 U.S.C. § 1056(d)(3)(D).

§ 25.45 Survivor Benefits for Private Plans

In most cases a qualified defined benefit plan requires a joint and survivor annuity and a preretirement survivor annuity. 26 U.S.C. § 401(a)(11)(A); 29 U.S.C. § 1055(a). These survivor annuities are most common in defined benefit plans but may exist in a defined contribution plan that contains annuity provisions.

Unless the participant has elected the joint and survivor annuity option under the plan, the benefits payable to the alternate payee will cease on the participant's death if the participant is retired at the time of divorce. If the participant is not retired at the time of divorce, without the joint and survivor annuity, the alternate payee's benefit payments may cease at the participant's death. The benefits would not cease if the QDRO is written so that the alternate payee's life is the measuring life. This type of QDRO is called a separate-interest QDRO. If the participant's life is the measuring life, this type of QDRO is called a shared-payment QDRO and would require the election of a joint and survivor annuity for the alternate payee's benefits to continue after the participant's death. The qualified joint and survivor annuity provides payments that are at least 50 percent and not more than 100 percent of the annuity that is received by the participant. 26 U.S.C. § 417(b); 29 U.S.C. § 1055(d).

If the participant dies after becoming eligible to retire but before retirement, the preretirement annuity provides payments to the beneficiary that are at least 50 percent and not more than 100 percent of the annuity that would have been received by the participant. 26 U.S.C. § 417(c); 29 U.S.C. § 1055(e). This annuity needs to be awarded if the QDRO is a shared-payment QDRO and the participant has not yet retired and sometimes if it is a separate-interest QDRO. The alternate payee's benefits will be lost if no preretirement survivor annuity is awarded in the QDRO and the participant dies before reaching the earliest retirement age.

The QDRO must address these survivor benefits in dividing the plan benefits, or the survivor benefits may be lost forever. The attorney should realize that in most defined benefit plans, a QDRO can be drafted to provide an alternate payee with a benefit over his or her lifetime (with the alternate payee's life as the measuring life), also called a

separate-interest QDRO, or over the lifetime of the participant (with the participant's life as the measuring life), also called a shared-payment QDRO. A separate-interest approach allows the alternate payee to begin to receive benefits when the participant reaches the earliest retirement age and will more than likely yield a different monthly benefit amount. The alternate payee's benefits are actuarially adjusted over the life of the alternate payee. The shared-interest approach requires the alternate payee to wait to receive benefits until the participant begins to receive benefits, assuming the participant is not already in pay status. The alternate payee's benefits would be paid over the life of the participant, and on the death of the participant, the alternate payee's benefits would cease unless survivor benefits were awarded. The qualified joint and survivor annuity requires the participant's benefits to be reduced at the time of retirement to pay for the annuity.

The qualified joint and survivor annuity and the qualified preretirement annuity may be waived during the marriage. During marriage a waiver can be accomplished only after a written explanation of the benefits is provided, and the spouse must join in the election to waive. The election must be in writing and signed by the participant and the spouse. 26 U.S.C. § 417(a); 29 U.S.C. § 1055(c). Once those benefits are waived and the participant is in pay status, they are waived forever. A divorce does not change that. If benefits have not been waived but are not agreed to and awarded in the QDRO, they are forfeited.

COMMENT: The attorney for the alternate payee should verify with the plan whether any waivers have occurred and whether they may be revoked.

COMMENT: If these survivor benefits are not covered in the QDRO, they can be lost forever. *See* 26 U.S.C. § 414(p)(5).

§ 25.46 Shared-Payment (Shared-Interest) QDRO vs. Separate-Interest QDRO for Defined Benefit Plan QDROs

All plans allow the shared-payment approach, and it is unusual to find a private retirement plan that does not allow the separate-interest approach. The separate interest is the most widely used approach today but may not be best for one or both of the parties. It is wise to have the alternate payee select the form of payment in writing after the client has obtained advice from the appropriate professional.

The shared-payment QDRO generally operates as follows:

- The alternate payee cannot commence benefits early. The alternate payee must wait for the participant to retire.
- The alternate payee's benefits are not actuarially adjusted to his lifetime. The alternate payee simply shares in each monthly pension payment payable to the participant. However, because the benefit is being paid over two lives, rather than one, and because of postretirement survivor protection, the entire initial monthly benefit will be reduced to pay for the postretirement survivor protection. Some plans have a subsidized joint and survivor annuity.
- Preretirement survivorship protection is also necessary to protect the alternate payee's interest if the participant dies before commencing benefit payments. This annuity is known as the qualified preretirement survivor annuity (QPSA) and must be included in the QDRO to afford the alternate payee protection.
- Postretirement survivorship protection is also necessary to protect the alternate payee's interest if the participant dies after commencing benefit payments. This annuity is known as the qualified joint and survivor annuity (QJSA) and must be included in the QDRO to afford the alternate payee protection.
- Any preretirement and postretirement survivor annuity benefits will be payable in lieu of, and not in addition to, any other benefit payments under the QDRO.
- The alternate payee's benefits *usually* revert to the participant if the alternate payee dies first.
- If the participant is in pay status, the parties must use a shared-payment QDRO, and the form of benefit usually cannot be changed. Any survivor benefits waived at retirement are no longer available.

The separate-interest QDRO generally operates as follows:

- If the plan allows, the alternate payee can commence benefits early and before the participant actually retires but only on an unsubsidized basis—meaning that the alternate payee's benefits will be reduced for early commencement.
- The alternate payee's benefits are actuarially adjusted to his lifetime so the alternate payee is guaranteed to receive benefits for the alternate payee's life. Accordingly, the alternate payee's benefits may be reduced to a lower monthly number to pay for a longer lifespan of the alternate payee or to a higher monthly number to reflect the shorter lifespan of the alternate payee. This adjustment is in addition to the adjustment for early commencement.

- The participant and alternate payee's benefits are completely severed, and each can take their benefits in whatever form they choose under most plans. In addition, if the participant remarries, he or she can elect a joint and survivor benefit for his or her new spouse.
- Preretirement survivorship protection may be, but is often not, necessary to protect the alternate payee's interest if the participant dies before the alternate payee commences benefits. Verify if the plan requires that the QPSA must be included in the QDRO to afford the alternate payee protection.
- Any preretirement survivor annuity benefits will be payable in lieu of, and not in addition to, any other benefit payments under the QDRO.
- Postretirement survivorship protection is not necessary, because once the alternate payee commences his benefit, the alternate payee is receiving benefits based on the alternate payee's lifetime, and the participant's death does not affect the alternate payee's benefit.
- Benefits *may* revert to the participant if the alternate payee dies before the alternate payee's commencement of benefits.
- Benefits do not revert to the participant if the alternate payee dies after the alternate payee's commencement of benefits. As most plans will not allow the alternate payee to elect a beneficiary, the alternate payee's benefits inure to the plan; however, the alternate payee's ability to elect a beneficiary usually depends on the form of benefit elected by the alternate payee. An alternate payee may not elect a joint and survivor benefit with a new spouse as the joint annuitant.
- Separate-interest QDROs cannot be used if the participant is in pay status.

The primary difference in the two approaches is that the alternate payee's benefits are either actuarially adjusted for the alternate payee's lifetime (the separate-interest QDRO) or not (the shared-payment QDRO).

§ 25.47 Early Retirement Subsidy

The vast majority of defined benefit plans include early retirement provisions that afford participants the opportunity to retire before their normal retirement age. The early retirement subsidy is a benefit that a defined benefit plan may offer and is a marital asset subject to division on divorce. The alternate payee should be entitled to receive a pro rata share of any early retirement subsidy payable to the participant under the

plan. If agreed to by the parties, the QDRO should contain language regarding a recalculation of the benefits should the participant subsequently elect to retire early under the plan after the alternate payee has already commenced benefits. The QDRO should instruct the plan administrator to recalculate the alternate payee's benefits to provide a pro rata share of any early retirement subsidy received by the participant on the date of retirement, if allowed by the plan.

§ 25.48 Cost-of-Living Adjustment

If the participant is in pay status at the time of divorce, both the final decree of divorce and the QDRO should include language that provides the alternate payee with a pro rata share of cost-of-living adjustments (COLAs). *Harrell v. Harrell*, 700 S.W.2d 645, 647–48 (Tex. App.—Corpus Christi–Edinburg 1986, no writ); *Neese v. Neese*, 669 S.W.2d 388, 390 (Tex. App.—Eastland 1984, writ ref'd n.r.e.). If the participant is not in pay status, some COLAs may not be divisible if, for example, they are based on the participant's services or continued employment. *See May v. May*, 716 S.W.2d 705, 711 (Tex. App.—Corpus Christi–Edinburg 1986, no writ); *Dunn v. Dunn*, 703 S.W.2d 317, 320–21 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). However, COLAs that are subject to community-property division are those that are not attributable to postdivorce raises, promotions, services rendered, or contributions but instead are based on inflation or investment increases. *See Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987). Such benefits must be expressly awarded to the alternate payee spouse in the final decree of divorce in order to be included in a QDRO. *See Tatum v. Tatum*, No. 14-19-00272-CV, 2020 WL 2832104 (Tex. App.—Houston [14th Dist.] May 28, 2020, pet. denied) (mem. op.).

[Sections 25.49 and 25.50 are reserved for expansion.]

VI. Texas Public Retirement System

§ 25.51 Texas Public Retirement System Generally

The retirement programs for officers or employees of the state, political subdivisions, and agencies and instrumentalities of the state and political subdivisions, including those participating in the optional retirement program governed by chapter 830 of the Texas Government Code, are governed by title 8 of the Texas Government Code. *See* Tex. Gov't Code §§ 801.001(2), 830.001.

The public retirement system includes the Employees Retirement System of Texas, the Judicial Retirement System of Texas Plan One, the Judicial Retirement System of Texas Plan Two, the Teacher Retirement System of Texas, the Texas County and District Retirement System, the Texas Municipal Retirement System, and any other continuing, organized program of service retirement, disability retirement, or death benefits for officers or employees of the state, a political subdivision, and an agency or instrumentality of the state or a political subdivision and includes the optional retirement program governed by chapter 830 of the Government Code. Tex. Gov't Code § 804.001(3).

Benefits provided by a statewide retirement system, the optional retirement program, and those public retirement systems that have elected to adopt the provisions of subchapter A and subchapter C of chapter 804 of the Government Code may be divided only by a QDRO. *See* Tex. Gov't Code §§ 804.002, 804.003.

§ 25.52 Definitions for State Retirement Systems

The following definitions apply to the division of Texas public retirement system plans covered by chapter 804 of the Texas Government Code.

Domestic relations order: A domestic relations order means any judgment, decree, or order, including approval of a property settlement agreement, that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a member or retiree and is made pursuant to a domestic relations law, including a community-property law of Texas or of another state. Tex. Gov't Code § 804.001(2).

Qualified domestic relations order (QDRO): A QDRO is a domestic relations order that creates, recognizes, or assigns to an alternate payee the right to receive benefits, that directs the public retirement system to disburse the benefits to the alternate payee, and that meets the requirements of section 804.003 of the Government Code. Tex. Gov't Code § 804.001(4).

Alternate payee: In a divorce case the alternate payee is the former spouse of a member or retiree who is recognized by a QDRO as having a right to receive all or a portion of the benefits payable by a public retirement system with respect to the member or retiree. Tex. Gov't Code § 804.001(1).

Statewide retirement system: The term *statewide retirement system* means the following retirement systems: Employees Retirement System of Texas, Judicial Retirement System of Texas Plan One, Judicial Retirement System of Texas Plan Two, Teacher

Retirement System of Texas, Texas County and District Retirement System, and Texas Municipal Retirement System. Tex. Gov't Code § 804.001(5).

Public retirement system: The term *public retirement system* includes the same entities as the statewide retirement system plus any other continuing, organized program of service retirement, disability retirement, or death benefits for officers or employees of the state or a political subdivision or of any agency or instrumentality of the state or a political subdivision; it includes the optional retirement program under Government Code chapter 830. Tex. Gov't Code § 804.001(3).

§ 25.53 Requirements of QDRO

To be "qualified," a domestic relations order must satisfy the following requirements:

Identifying information: The order must clearly specify the name and last known mailing address of the member or retiree and each alternate payee covered by the order. It must also specify the Social Security number, or an express authorization for the parties to use an alternate method acceptable to the retirement system to verify the Social Security number, of the member or retiree and each alternate payee covered by the order. Tex. Gov't Code § 804.003(f)(1).

Division of benefits: The order must clearly specify the amount or percentage of the member's or retiree's benefits to be paid by a public retirement system to each alternate payee or the manner in which the amount or percentage is to be determined. Tex. Gov't Code § 804.003(f)(2).

Payment specifics: The order must clearly specify the number of payments or the period to which the order applies. Tex. Gov't Code § 804.003(f)(3).

Identity of retirement system: The order must clearly specify that the order applies to a designated public retirement system. Tex. Gov't Code § 804.003(f)(4).

No benefits or options not in plan: The order may not require the public retirement system to provide any type or form of benefit or any option not otherwise provided for under the plan. Tex. Gov't Code § 804.003(f)(5).

No increase based on actuarial value: The order may not require the public retirement system to provide increased benefits determined on the basis of actuarial value. Tex. Gov't Code § 804.003(f)(6).

No double payment to alternate payees: The order may not require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO. Tex. Gov't Code § 804.003(f)(7).

No payments before certain events: The order may not require the payment of benefits to an alternate payee before the retirement of a member, the distribution of a withdrawal of contributions by a member, or other distribution to a member required by law. Tex. Gov't Code § 804.003(f)(8).

§ 25.54 Statutory Reasons for Rejection by Retirement System

A state public retirement system may reject a domestic relations order as a QDRO if the order does not meet the following criteria:

Reduction before normal retirement age: The order may be rejected by the system unless the order provides for a proportional reduction of the amount awarded to the alternate payee in the event of the retirement of the member before normal retirement age. Tex. Gov't Code § 804.003(g)(1).

Beneficiary on death of member: The order may be rejected by the system if the order purports to require the designation of a particular person as the recipient of benefits in the event of a member's or annuitant's death. Tex. Gov't Code § 804.003(g)(2).

Selection of payment plan or option: The order may be rejected by the system if the order purports to require the selection of a particular benefit payment plan or option. Tex. Gov't Code § 804.003(g)(3).

Clear provisions for benefit distribution: The order may be rejected by the system unless it provides clearly for each possible benefit distribution under the plan provisions. Tex. Gov't Code § 804.003(g)(4).

Actions contrary to law or plan: The order may be rejected by the system if the order requires any action on the part of the retirement system contrary to its governing statutes or plan provision other than the direct payment of the benefit awarded to an alternate payee. Tex. Gov't Code § 804.003(g)(5).

Award contingent on condition other than provided in plan: The order may be rejected by the system if the award is contingent on any condition other than those con-

ditions resulting in the liability of a retirement system for payments under its plan provisions. Tex. Gov't Code § 804.003(g)(6).

Future benefit increases: The order may be rejected by the system if the order purports to award any future benefit increases that are provided or required by the legislature. Tex. Gov't Code § 804.003(g)(7).

Reduction of benefits: The order may be rejected by the system if the order does not provide for a proportional reduction of the amount awarded to an alternate payee if benefits available to the retiree or member are reduced by law. Tex. Gov't Code § 804.003(g)(8).

Model order: The order may be rejected by the system if the order does not conform to a model order adopted by the retirement system, if the system so requires. Tex. Gov't Code § 804.003(g)(9).

§ 25.55 Payments to Alternate Payee

Payments to an alternate payee pursuant to a QDRO are generally if, as, and when received by the retiree member. They are governed by the form of benefit elected by the member. *See* Tex. Gov't Code § 804.003.

The public retirement system may, by rule, direct that the actuarial equivalent of the share of the benefit awarded to the alternate payee shall be paid in the form of either an annuity payable in equal monthly installments for the life of the alternate payee or a single lump sum. Except with respect to the Employees Retirement System of Texas and the Teacher Retirement System of Texas, the decision to pay by one of these alternative means is within the sole discretion of the public retirement system. *See* Tex. Gov't Code § 804.004(a), (b).

Alternate payees of members of the Employees Retirement System of Texas or the Teacher Retirement System of Texas may elect to receive the actuarial equivalent of the share of benefits awarded to them by a QDRO paid in the form of a straight life annuity for the life of the alternate payee, provided the member has not retired but is eligible to retire. *See* Tex. Gov't Code § 804.005(b).

§ 25.56 Death Terminates Interest of Alternate Payee

The alternate payee's death terminates the alternate payee's interest in the public retirement system. Tex. Gov't Code § 804.101. The constitutionality of this statute has been upheld. *See Kunin v. Feofanov*, 69 F.3d 59, 159–60 (5th Cir. 1995).

§ 25.57 Optional Retirement Program

The optional retirement program applies to faculty members employed in state-supported institutions of higher education. Tex. Gov't Code § 830.001. Investments in this program may be in any type of investment authorized under sections 401(g) and 403(b) of the Internal Revenue Code. Tex. Gov't Code § 830.002(a). These plans are usually defined contribution plans but may include some part as a defined benefit plan.

§ 25.58 Qualification Process

A certified copy of the domestic relations order must be sent to the public retirement system. On receipt of the domestic relations order, the administrative head of the public retirement system or his designee (or applicable carrier, if under the optional retirement program) shall determine whether the order is a QDRO. The member, retiree, or any alternate payee shall be notified of the determination. Tex. Gov't Code § 804.003(h). With respect to the Texas County and District Retirement System and the Texas Municipal Retirement System, the designated "domestic relations liaison" is required to give prompt written confirmation of receipt of the domestic relations order to all parties. 34 Tex. Admin. Code §§ 109.3, 129.3. If the domestic relations liaison determines, on receipt of the order, that the order may not be a "qualified" order, the liaison shall so state in the confirmation letter. Within ninety days of the date of the confirmation letter, the parties must commence action to bring the order into compliance. If that action is not commenced within the ninety-day period, a nonqualification determination will be made. 34 Tex. Admin. Code §§ 109.9(a), 129.9(a).

If an order or decree is found to be a QDRO, the public retirement system (or applicable carrier, if under the optional retirement program) shall pay the segregated amounts without interest to the person or persons entitled to them and shall thereafter pay benefits under the order. Tex. Gov't Code § 804.003(j).

A "nonqualification" determination may be appealed. Alternatively, the dissatisfied party may seek amendment of the domestic relations order by the court that issued the domestic relations order or by a court that would otherwise have jurisdiction over the

matter. Tex. Gov't Code § 804.003(h); *Conti v. Conti*, 866 S.W.2d 671, 672–73 (Tex. App.—Houston [14th Dist.] 1993, writ denied). If the court renders an amended order that addresses the objections to qualification stated by the plan, a certified copy of the amended order must be sent to the public retirement system. The qualification process then begins again. With respect to the Texas County and District Retirement System and the Texas Municipal Retirement System, the risk of a "nonqualification" determination can be avoided by use of a "pre-approved" QDRO. These forms are authorized by 34 Tex. Admin. Code § 109.13(a) for the Texas County and District Retirement System and by 34 Tex. Admin. Code § 129.13(a) for the Texas Municipal Retirement System.

The public retirement system may assess administrative fees on a party who is subject to a domestic relations order for the review of the order and, as applicable, for the administration of payments under an order that is determined to be qualified. In addition to other methods of collecting fees, the system may deduct the fees from payments made under the order. Tex. Gov't. Code § 804.003(p).

COMMENT: In drafting a settlement agreement or proposed order that will require a QDRO, the attorney should also consider whether the settlement agreement or proposed order should include specific terms regarding the allocation between the parties of fees assessed by the plan for review of the QDRO.

§ 25.59 Appeal of Nonqualification Determination

If an order is determined not to be a QDRO, the member or retiree or any alternate payee named in the order may appeal the determination. Tex. Gov't Code § 804.003(h). Appeal is to the board of trustees of the public retirement system. By rule, the board of trustees of a statewide retirement system may waive appeal to the board and may provide that appeal shall be to the administrative head of the system. A nonqualification determination by the Teacher Retirement System of Texas is deemed a final decision by the system and cannot be appealed to the board of trustees. However, a party adversely affected by a nonqualification determination made by the system may, within twenty days of the date of the nonqualification determination, file a motion for reconsideration. 34 Tex. Admin. Code § 47.6. Procedures for review of a nonqualification determination made by the Texas County and District Retirement System or the Texas Municipal Retirement System are set forth at 34 Tex. Admin. Code §§ 109.9–.11 for the Texas County and District Retirement System and 34 Tex. Admin. Code §§ 129.9–.11 for the Texas Municipal Retirement System.

An appeal is a contested case under Government Code chapter 2001, and the standard of review is by substantial evidence. Tex. Gov't Code § 804.003(b). A court does not have jurisdiction to require a public retirement system to recognize an order as a QDRO. Tex. Gov't Code § 804.003(c).

§ 25.60 Special Decree Language to Change TRS Beneficiary Designation

The Teacher Retirement System (TRS) allows a retiree to elect, instead of a standard service retirement annuity, an optional annuity that provides reduced payments to the retiree during his life and, at death, continued payments to and throughout the life of a designated beneficiary. Only one beneficiary can be designated, and changing the designation is restricted, since the value of the optional annuity, and hence the cost to TRS, depend on the beneficiary's longevity. To revoke the beneficiary designation, the retiree must strictly follow the TRS requirements: prescribed forms must be used, and either (1) a divorce court must approve or order the revocation or (2) the beneficiary spouse must sign a notarized consent to the revocation. *See* Tex. Gov't Code §§ 824.101(c), 824.1012, 824.1013. Provisions in a divorce decree that awarded the retiree all retirement benefits and divested the beneficiary spouse of all right to the benefits did not constitute an order for a change of beneficiary and was not accepted by TRS. *Holmes v. Kent*, 221 S.W.3d 622 (Tex. 2007) (per curiam). The decree must clearly order a change of beneficiary or a revocation of the spouse as beneficiary and a substitution of a new beneficiary.

Note: The foregoing paragraph applies only to TRS participants who are in pay status and have elected a joint survivor annuity.

§ 25.61 Lien on Benefits

A reimbursement lien imposed on the interest awarded to the nonmember spouse in a retirement account in the Teacher Retirement System (TRS) is not prohibited by the nonassignability statute applicable to TRS benefits or the Employee Retirement Income Security Act (ERISA). The purpose of section 821.005 of the Texas Government Code is to protect the interests in the teacher retirement fund from a member's creditors, not from the community property division in favor of another spouse. The lien did not violate the antialienation provisions of ERISA, because ERISA specifically excludes "government plans" from its coverage (29 U.S.C. § 1003(b)(1)). TRS falls neatly into the

definition of a governmental plan and is not, therefore, subject to title 1 of ERISA. *Chacon v. Chacon*, 222 S.W.3d 909 (Tex. App.—El Paso 2007, no pet.).

[Sections 25.62 through 25.70 are reserved for expansion.]

VII. Uniformed Services Former Spouses' Protection Act

§ 25.71 Historical Perspective

Texas courts have long held that military retirement benefits are community property and that the trial court must consider those benefits in a division of the estate of the parties. *Cearley v. Cearley*, 544 S.W.2d 661, 662 (Tex. 1976); *Mora v. Mora*, 429 S.W.2d 660, 662 (Tex. App.—San Antonio 1968, writ dism'd); *Kirkham v. Kirkham*, 335 S.W.2d 393, 394 (Tex. App.—San Antonio 1960, no writ). In 1981, however, the United States Supreme Court held that federal law preempted state law regarding the division or apportionment of military retirement and that military-related benefits (that is, retired pay and survivorship benefits) were not divisible on divorce and could not be considered in dividing the property of the parties. *McCarty v. McCarty*, 453 U.S. 210 (1981).

In 1982, in direct response to *McCarty*, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), which reversed the effect of *McCarty* such that military retired pay, at least, became divisible as a divorce asset. Survivorship benefits, however, continued to be subject to federal preemption until November 14, 1986, when Congress amended the USFSPA to allow trial courts to order the service member to designate his then spouse as a "former spouse beneficiary" of his Survivor Benefit Plan (SBP) to afford the surviving "former spouse" some measure of security if the service member predeceased the former spouse.

The issue of whether the USFSPA authorized trial courts to divide "gross retired pay" (GRP) or "disposable retired pay" (DRP) was decided by the United States Supreme Court in 1989 in *Mansell v. Mansell*, 490 U.S. 581 (1989). It held that trial courts are authorized to divide only DRP. As a result, the government finance office administering the implementation of the USFSPA, the Defense Finance and Accounting Service (DFAS), will pay the former spouse only the court-ordered percentage of the service member's DRP, regardless of whether the parties were to agree that the former spouse should receive a percentage of the service member's GRP. Thus, as far as the DFAS is

concerned, the USFSPA, as amended and interpreted by *Mansell*, now governs the division of military retired pay on divorce.

Congress has enacted major changes to the military retirement system in recent years. In 2016, Congress amended the USFSPA to include the "Frozen Benefit Rule," which requires courts to freeze a servicemember's retired pay base and years of service on the date of divorce. *See* 10 U.S.C. § 1408(a)(4)(B). This method of retirement calculation has been the law in Texas since 1983, and as a result of the amendment, the division of DRP in a divorce using a *time rule* formula is no longer permitted in any state.

In 2015, Congress established the Blended Retirement System, which took effect on January 1, 2018, for any person who entered military service on or after that date. Some other active duty service members and reservists were allowed to opt in to the Blended Retirement System or remain in the previous system, now known as the "legacy retirement system." See the discussion at section 25.73 below.

The relevant and controlling provisions of the USFSPA are found in 10 U.S.C. § 1408. The following sections in this chapter of the manual are concerned with the division of the military retirement benefits in a current divorce and do not treat retroactivity issues, which may be particularly troublesome if arising from divorce decrees that predate the enactment of the USFSPA.

§ 25.72 Definitions

The terms *qualified domestic relations order*, *alternate payee*, and other such terms are not applicable to military retirement, whether enforceable under the USFSPA or not, and should not be used in an order dividing military retirement. Because military retirement does not come within the purview of ERISA, a division order can never be a "qualified" order; instead, "Military Retirement Pension Division Order" (MRPDO) should be used. Additionally, the following terms, as defined in the USFSPA, should be used in the MRPDO.

Court order: As applicable in Texas, the term *court order* means a final decree of divorce, dissolution, or annulment issued by a Texas court under Texas law that divides the military retirement benefit, including a property settlement incident to the decree and approved by the court. The division of the retirement benefit may be expressed in dollars or as a percentage of the disposable retired pay of a member to be paid to the spouse or former spouse of the member. *See* 10 U.S.C. § 1408(a)(2).

Final decree: The term *final decree* means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking appeal or a decree from which an appeal has been taken and finally decided. 10 U.S.C. § 1408(a)(3).

Disposable retired pay: The term *disposable retired pay* means the total monthly retired pay to which a member is entitled (called "gross retired pay" on the member's retiree account statement) less several items involving money owed or forfeited to the government. In determining the disposable retired pay, the "total monthly retired pay to which the member is entitled" is the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the divorce, as increased by each cost-of-living adjustment that occurs between the time of the divorce and the time of the member's retirement. 10 U.S.C. § 1408(a)(4)(A), (a)(4)(B); *see* 10 U.S.C. § 1401a(b). Under the USFSPA, military retirement benefits are generally divisible at divorce if they are community property. 10 U.S.C. § 1408(c)(1); *Mansell v. Mansell*, 490 U.S. 581, 584 (1989). However, divisible benefits are limited to "disposable retired pay," which is defined to exclude, among other things, disability pay, including retired pay that may be waived in order to receive VA disability compensation and those computed using the percentage of disability on the date a person in the military is placed on the Temporary Disability Retirement List or on permanent disability. 10 U.S.C. § 1408(a)(4)(C); *Mansell*, 490 U.S. at 589; *Thomas v. Piorkowski*, 286 S.W.3d 662, 666 (Tex. App.—Corpus Christi–Edinburg 2009, no pet.); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 16–17 (Tex. App.—Waco 2002, no pet.). Combat-related special compensation (CRSC) is a form of disability pay that an eligible member can elect to receive in lieu of full retirement pay and concurrent retirement disability pay. CRSC, like VA disability benefits, is not disposable retired pay and, under federal preemption, cannot be divided by a state court. *Jackson v. Jackson*, 319 S.W.3d 76 (Tex. App.—San Antonio 2010, no pet.); *Sharp v. Sharp*, 314 S.W.3d 22 (Tex. App.—San Antonio 2009, no pet.).

Member: The term *member* includes a former member entitled to retired pay. 10 U.S.C. § 1408(a)(5).

Spouse or former spouse: The term *spouse or former spouse* means the husband or wife or former husband or wife of a member who, on or before the date of a court order, was married to that member. 10 U.S.C. § 1408(a)(6).

§ 25.73 Divisible Benefits

A court may treat (that is, may consider and divide or apportion) disposable retired pay payable to a member as property of the member and spouse in accordance with Texas law. 10 U.S.C. § 1408(c)(1). The court may not so treat (that is, may not divide or apportion) the retired pay if the divorce was granted before June 25, 1981, and the retired pay was not divided or otherwise reserved for future treatment or division. *Havlen v. McDougall*, 22 S.W.3d 343, 346–48 (Tex. 2000).

Disposable retired pay does *not* include retired pay waived to receive veterans disability compensation; the USFSPA does not grant state courts the power to treat as property divisible on divorce military retired pay that has been waived to receive veterans disability benefits. *Mansell v. Mansell*, 490 U.S. 581, 589 (1989). Veterans disability benefits have not been divisible in Texas (that is, they have been the member's separate property) since at least 1979. *Hagen v. Hagen*, 282 S.W.3d 899, 903 (Tex. 2009); *Ex parte Burson*, 615 S.W.2d 192, 194–95 (Tex. 1981) (orig. proceeding); *Ex parte Johnson*, 591 S.W.2d 453, 454 (Tex. 1979) (orig. proceeding). As such, a state court is without the power or authority to enter an order that prohibits a service member from waiving retired pay to receive veterans disability compensation, such as prohibiting the service member, postdivorce, from making any election of benefits that may reduce the amount of the benefit the court has awarded the spouse. *See* 10 U.S.C. § 1408(c)(1); *Mansell*, 490 U.S. at 589; *Ex parte Burson*, 615 S.W.2d at 196; *Gillin v. Gillin*, 307 S.W.3d 395 (Tex. App.—San Antonio 2009, no pet.); *Loria v. Loria*, 189 S.W.3d 797 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Freeman v. Freeman*, 133 S.W.3d 277 (Tex. App.—San Antonio 2003, no pet.); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 16–17 (Tex. App.—Waco 2002, no pet.); *Press v. Press*, No. 03-97-00432-CV, 1998 WL 271054 (Tex. App.—Austin May 29, 1998, no pet.) (mem. op., not designated for publication); *Wallace v. Fuller*, 832 S.W.2d 714, 719 (Tex. App.—Austin 1992, no writ); *Gallegos v. Gallegos*, 788 S.W.2d 158, 160 (Tex. App.—San Antonio 1990, no writ).

In *Hagen*, the Texas Supreme Court, while reaffirming that veterans disability benefits are not divisible, went even further, holding that the term *military retired pay*, even when used in an agreed divorce decree, does not include retired pay that a service member may, long after the parties' divorce decree is signed, waive to elect veterans disability compensation. *Hagen*, 282 S.W.3d at 905–06. Furthermore, the United States Supreme Court has held that state courts "may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits." *Howell v. Howell*, 137 S. Ct. 1400 (2017).

However, in *Rudolph v. Jamieson*, No. 03-17-00693-CV, 2018 WL 2648514 (Tex. App.—Austin June 5, 2018, pet. denied) (mem. op.), the parties' agreed divorce decree awarded the wife a portion of the husband's *disposable retired pay*. The decree specified that this award included "all amounts of retired pay [husband] actually or constructively waives or forfeits in any manner and for any reason or purpose" and "any sum taken by [husband] in addition to or in lieu of retirement benefits, including . . . any other form of compensation attributable to separation from military service instead of or in addition to payment of the military benefits normally payable to a retired member." Due to injuries sustained in combat, the husband was later determined to be disabled and placed on the Army's Permanent Disability Retired List, and he retired. As a result of the veterans disability benefits paid to the husband, he did not receive any of the *disposable retired pay* that he ordinarily would have received based on his years of service. The wife later filed suit for enforcement, alleging that the husband had not paid her any portion of his retirement benefits. The trial court rendered an order clarifying and enforcing the divorce decree, and the husband appealed. Although the husband cited federal case law supporting his argument that state courts are prohibited from dividing a military retiree's retirement pay waived in order to receive veterans disability benefits, the court of appeals affirmed the trial court's ruling because the husband agreed to the provisions of the divorce decree and did not appeal the divorce decree. Therefore, the husband could not collaterally attack the division of his retirement pay after the appellate deadlines passed, even if the division provided by the decree was allegedly unlawful.

Similarly, combat-related special compensation (CRSC) elected under 10 U.S.C. 1413a is not retirement pay and is not divisible. *Sharp v. Sharp*, 314 S.W.3d 22 (Tex. App.—San Antonio 2009, no pet.). A servicemember's election to receive CRSC does not constitute a breach of fiduciary duty or other obligation created by a divorce decree awarding the former spouse an interest in the servicemember's disposable retired or retainer pay if, as, and when received and appointing the servicemember a trustee of that entitlement to the extent it was not paid to the former spouse by DFAS. *Jackson v. Jackson*, 319 S.W.3d 76 (Tex. App.—San Antonio 2010, no pet.).

The National Defense Authorization Act (NDAA) for Fiscal Year 2017 required that court orders for the division of military retirement (for active duty or reserve members entering after September 8, 1980) contain the High-36 calculation of the hypothetical retired pay at the time of divorce for valuation purposes. *See* Pub. L. No. 114-328, § 641, 130 Stat. 2164 (2016); 10 U.S.C. § 1408(a)(4)(B).

The NDAA for Fiscal Year 2016 created the new Blended Retirement System for servicemembers entering service on or after January 1, 2018; for active duty servicemembers with twelve years or less of creditable service as of December 31, 2017, who opted in to the new retirement system by December 31, 2018; and for reservists who had earned fewer than 4,320 points as of December 31, 2017, who opted in by December 31, 2018. The Blended Retirement System makes significant changes to the former legacy retirement system by lowering the longevity percentage from 0.025 to 0.020 and providing for enhanced participation in the Thrift Savings Plan, the potential for a mid-career "continuation" bonus, and an option to receive a lump-sum amount of retired pay (subject to conditions) at retirement. *See* Pub. L. No. 114-92, §§ 631–35, 129 Stat. 842 (2015).

§ 25.74 Jurisdiction of Member

A court may not divide the disposable retired pay of a member unless the court has jurisdiction over the member by reason of residence, domicile, or his consent to the jurisdiction of the court. The residence is not sufficient for jurisdiction if it is because of military assignment in the territorial jurisdiction of the court. 10 U.S.C. § 1408(c)(4). However, if the member is the petitioner or appears but does not "specially appear" as to the military retirement, he has consented to the court's jurisdiction.

Special care should be taken to ensure that the trial court has "USFSPA jurisdiction" over the service member if a default divorce is being taken. If the record and findings do not reflect that the trial court had USFSPA jurisdiction over the service member, the DFAS will not honor the order if the former spouse is otherwise entitled to receive that former spouse's share of the retired pay directly from the DFAS. See section 25.75 below.

§ 25.75 Payment to Former Spouse

Payments by DFAS: When the court order has been properly served on the DFAS, the DFAS will make payments from the member's disposable retired pay to the former spouse in accordance with the court order. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, the payments shall begin no later than ninety days after the date on which the member first becomes entitled to receive retired pay. 10 U.S.C. § 1408(d)(1).

Ten-Year Rule: If the former spouse to whom the payments are to be made was not married to the member for a period of ten years or more during which the member per-

formed at least ten years of service creditable in determining the member's eligibility for retired pay, payments may not and will not be made to the former spouse by the DFAS. 10 U.S.C. § 1408(d)(2). This limitation does not mean that the retired pay is not divisible or is not payable as divided; it means only that the DFAS will not make the payments to the former spouse. The former spouse must obtain the awarded share of the retired pay directly from the member.

Monthly Payments: Payments by the DFAS shall not be made more frequently than once each month. The DFAS may not be required to vary normal pay and disbursement cycles for retired pay to comply with a court order. 10 U.S.C. § 1408(d)(3).

Termination of Payments: Payments shall terminate in accordance with the terms of the court order but not later than the date of death of the member or the date of death of the former spouse to whom the payments are being made, whichever occurs first. 10 U.S.C. § 1408(d)(4).

More Than One Order: The total amount of the disposable retired pay of a member payable under all court orders may not exceed 50 percent of the member's disposable retired pay. In the event of effective service of more than one court order providing for payment to a spouse and one or more former spouses or to more than one former spouse, the eligible disposable retired pay of the member shall be used to satisfy the court orders on a first-come, first-served basis. 10 U.S.C. § 1408(e)(1), (e)(2).

§ 25.76 Notice to Member

A person (DFAS employee) receiving effective service of a court order must, as soon as possible but not later than thirty days after the date on which effective service is made, send a written notice of the order (together with a copy of the order) to the member affected by the court order at the last known address of the member. 10 U.S.C. § 1408(g).

§ 25.77 Sending Order to DFAS

Payments to the former spouse are made by the DFAS. For additional information, see **www.dfas.mil/garnishment/usfspa/apply**.

To register an order that divides or partitions a portion of the member's military retirement to the former spouse for an active or reserve member, whether the member is presently retired and receiving retired pay or is still on active duty or is an active reservist

but expected to receive retired pay in the future, the former spouse should submit a "registration package" that includes (1) a completed Application for Former Spouse Payments from Retired Pay (DD Form 2293); (2) a copy of the operative order that has been certified within ninety days preceding its receipt by the DFAS; (3) a Certificate of Finality, which is a certification by the former spouse or the former spouse's attorney that the operative order is a "final judgment"; (4) a W-4 Employee's Withholding Allowance Certificate or a W-4P Withholding Certificate for Pension or Annuity Payments; and (5) a Former Spouse Direct Deposit form. These forms, in a fillable PDF format, are available and can be downloaded from the DFAS website.

The application package, when assembled, should be sent to the following offices, as applicable:

Army, Navy, Air Force, Marine Corps: Attn: DFAS-HGA-CL, Assistant General Counsel for Garnishment Operations, P.O. Box 998002, Cleveland, OH 44199-8002. The application package can be served by fax to 877-622-5930 (toll free). The DFAS may be contacted by telephone at 877-332-7411.

U.S. Coast Guard: Commanding Officer (1GL), United States Coast Guard Personnel Service Center, 444 SE Quincy Street, Topeka, KS 66683-3591. The application package can also be served by fax to 785-339-3788. This office may be contacted by telephone at 800-772-8724.

U.S. Public Health Service: Attn: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001.

National Oceanic and Atmospheric Administration: The same address as for the U.S. Coast Guard should be used.

Survivor Benefit Plan: To register an order for SBP coverage for the former spouse of an Army, Navy, Air Force, or Marine Corps member: Defense Finance and Accounting Service, U.S. Military Retirement Pay, 8899 E. 56th Street, Indianapolis IN 46249-1200; telephone: 800-321-1080. The SBP registration request must be received by the DFAS' office within one year of the date the order awarding the former spouse coverage is signed.

§ 25.78 Benefits to Abuse Victims

Retired pay benefits are available for abuse victims even if the right to receive retired pay of the member has been forfeited because of abuse of the spouse or dependent child. 10 U.S.C. § 1408(h). Thus, abuse victim retired pay benefits are available to the abuse victim spouse if the member or former member, while a member of the armed forces and after becoming eligible to retire, engaged in abuse of the spouse or of a dependent child of the member and the spouse and if that member was required to forfeit retired pay entitlement *because of* the abusive conduct. 10 U.S.C. § 1408(h). For instance, if a military court-martial found the retirement-eligible member guilty of abusive conduct toward the member's then spouse or child and, as a sentence, ordered the member's discharge (probably dishonorable) and the forfeiture of the member's retired pay entitlement, the abused spouse or the nonmember spouse parent of the abused child would be entitled to retired pay under this provision.

§ 25.79 Survivor Benefit Plan

If elected, the SBP provides a monthly annuity to survivors of deceased military retiree participants. The "premium" for the plan is 6.5 percent of the selected base amount and is deducted from the gross retired pay. If the plan is not elected, retired pay payments to the former spouse cease at the military retiree's death; if the plan is elected, the designated beneficiary will continue to receive a portion of the retired pay—that is, presumptively 55 percent of the base amount—in the form of a monthly SBP annuity. The minimum base amount is $300 per month.

In a divorce, dissolution, or annulment proceeding, the court may order a person to elect (or to enter into an agreement to elect) SBP coverage to provide an annuity to a former spouse (or to both a former spouse and a child). 10 U.S.C. § 1450(f)(4). Additionally, a member may voluntarily elect under certain circumstances to provide an annuity to a former spouse (or former spouse and child) (10 U.S.C. § 1448(b)(2), (b)(3)(A), (b)(3)(B), (b)(4)); to a special needs trust (10 U.S.C. § 1448(b)(6)); or to a person with a natural insurable interest (10 U.S.C. § 1448(b)(1)).

If a service member has elected to provide an annuity to a former spouse, whether the election was under a court order or a voluntary written agreement, the member (although it may be done by the attorney for the former spouse or by the former spouse) must provide the DFAS with a written statement in the form prescribed by the DFAS (DD Form 2656-1) and signed by both the member and the former spouse setting forth

whether the election was made under the requirement of a court order or under a voluntary written agreement. 10 U.S.C. § 1448(b)(5).

If the service member entered into a voluntary written agreement to elect to provide the survivor annuity to a former spouse and the agreement has been incorporated in or ratified by court order or if the service member has been required by court order to make the election and he fails or refuses to do so, the member will be deemed to have made the election if the DFAS receives a written request on the form prescribed by the DFAS (DD Form 2656-10) from the former spouse requesting that the election be deemed to have been made. The DFAS must also receive a certified copy of the court order, regular on its face, that requires the election or incorporates, ratifies, or approves the written agreement for the service member to make the election. 10 U.S.C. § 1450(f)(3)(A).

The election will not be deemed to have been made unless the DFAS receives DD Form 2656-10, together with a certified copy of the operative court order, from the former spouse within one year of the date of the court order authorizing or requiring the election. 10 U.S.C. § 1450(f)(3)(C). If the request to deem the election is not timely made—that is, is not made within one year of the date of the divorce decree—the DFAS will refuse to deem the election, and the former spouse's entitlement will fail as a matter of federal law.

§ 25.80 Medical and Commissary Benefits for Former Spouse

Medical and Dental Benefits for Former Spouses of Active Duty Members: Dependents are entitled to receive the types of medical and dental care listed in 10 U.S.C. § 1077 in medical and dental facilities of the uniformed services subject to availability of space and facilities and the capabilities of the medical and dental staff. 10 U.S.C. § 1076. The Code lists three categories of former spouses who qualify as "dependents."

The first category applies to an unremarried former spouse of a service member or former service member who, on the date of the final decree of divorce, dissolution, or annulment, had been married to the service member for a period of at least twenty years, during which period the service member performed at least twenty years of creditable service, and who does not have medical coverage under an employer-sponsored health plan. 10 U.S.C. § 1072(2)(F). These unremarried former spouses are sometimes called "20-20-20" former spouses. On remarriage, this category of former spouse will lose entitlement to these medical benefits forever and cannot have them reinstated.

The second category applies to an unremarried former spouse whose date of final decree of divorce, dissolution, or annulment was *before* April 1, 1985; who was previously married to a service member or former service member who performed at least twenty years of creditable service; whose marriage to the service member lasted for a period of at least twenty years, of which at least fifteen but fewer than twenty were during the period when the service member performed creditable service toward retirement; and who does not have medical coverage under an employer-sponsored health plan. 10 U.S.C. § 1072(2)(G). On remarriage, this category of former spouse will also lose entitlement to these medical benefits forever and cannot have them reinstated.

The third category applies to an unremarried former spouse whose date of decree of divorce, dissolution, or annulment was *on or after* April 1, 1985; who was previously married to a service member or former service member who performed at least twenty years of creditable service; whose marriage to the service member lasted for a period of at least twenty years, of which at least fifteen but fewer than twenty were during the period when the service member performed creditable service toward retirement; and who does not have medical coverage under an employer-sponsored health plan. The entitlement of such an unremarried former spouse (that is, one whose divorce occurred *on or after* April 1, 1985) to medical benefits ends after a one-year period beginning on the date of the final decree. 10 U.S.C. § 1072(2)(H).

Former spouses who do not qualify for medical coverage pursuant to the foregoing provisions may be entitled to coverage through the Continued Health Care Benefit Plan (CHCBP) for a period of up to thirty-six months from the later of the date the divorce occurs (that is, the effective date of divorce on the divorce decree) and, if applicable, the date the one-year coverage under section 1072(2)(H) expires. 10 U.S.C. § 1078a. DD Form 2837 is used to apply for this coverage.

Medical and Dental Benefits for Former Spouses of Reserve Component Members: Former spouses who qualify as dependents under the provisions of section 1072(2)(F) are entitled to the same medical and dental care as a former spouse (dependent) of an active duty member once the reserve component member attains age sixty. 10 U.S.C. § 1076(b)(1).

If the reserve component member dies before attaining age sixty, but, at the time of the reserve component member's death, the member was not eligible for retired pay solely because he was under sixty years of age, the former spouse becomes entitled to medical and dental care to the same extent as a dependent described in section 1072(2)(F) when the reserve component member would have attained age sixty. 10 U.S.C. § 1076(b)(2).

Medical, Dental, and Vision Benefits for Former Spouses of Retirees: For former spouses who meet the requirements for continued medical and dental benefits, vision coverage became available through the Office of Personnel Management Federal Employees Dental and Vision Insurance Program effective on January 1, 2019. See **www.benefeds.com**.

Commissary and Exchange Privileges for Former Spouses: The unremarried former spouse is entitled to commissary and military exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the Uniformed Services if, on the date of the final decree of divorce, dissolution, or annulment, the unremarried spouse had been married to the member or former member for a period of at least twenty years, during which period the member or former member performed at least twenty years of creditable service toward eligibility for retired or retainer pay. *See* 10 U.S.C. §§ 1062, 1072(2)(F). The rule for commissary and exchange privilege benefits for former spouses is often referred to as the 20-20 Rule or the 20-20-20 Rule—twenty years of creditable or qualifying military service, twenty years of marriage, and twenty years of overlap or concurrence of the two.

Date of Final Decree: The term *date of final decree of divorce, dissolution, or annulment* is the date the decree was signed or is the date the decree was judicially rendered if the decree is "ministerially signed" on a later date and the decree so provides. The former choice of "signing dates" is the better choice for a former spouse desiring extended medical coverage when not a 20-20-20 former spouse.

§ 25.81 Military Retirement Resources

For an in-depth discussion of military retirement benefits, see the articles by James N. Higdon in the course books for the 2018 State Bar of Texas Marriage Dissolution Institute (chapter 25.1), the 2013 Advanced Family Law Drafting Course (chapter 20); the 2009 and 2007 State Bar of Texas Advanced Family Law Courses (chapters 63 and 55.3, respectively); and the 2010 and 2008 State Bar of Texas Marriage Dissolution Courses (chapters 12 and 15, respectively). These articles address the military retired pay benchmarks necessary to calculate retired pay for an active duty member and for a member of the reserve component, as well as the information needed not only at trial but also to prepare a domestic relations order for an active duty member, a retired active duty member, a reserve component/national guard member, and a retired reserve component/national guard member. Explanations are given on how to calculate gross retired pay and disposable retired pay. The articles contain a thorough analysis of cost-of-living adjustments, the SBP, and medical and commissary benefits, as well as very use-

ful appendices. A careful and complete study of these articles is necessary to adequately represent a service member or the spouse of a service member.

For a comprehensive discussion of the recent changes to the laws concerning military retirement benefits, including the Blended Retirement System, see the article entitled "Winds of Change: New Rules for Dividing the Military Pension at Divorce," by Brentley Tanner and Amelia Kays, published in volume 30 (2018) of the *Journal of the American Academy of Matrimonial Lawyers*, available at **https://cdn.ymaws.com/aaml.org/resource/collection/B64341B0-6413-4F0B-AF32-DA6037C2AEAD/MAT206_9.pdf**.

Additional information can be obtained by reading the articles comprising the *Symposium on Military Law* published in the 2009 Summer (Vol. 43, No. 2) and Fall (Vol. 43, No. 3) editions of the ABA Family Law Quarterly, as well as Mark Sullivan's *The Military Divorce Handbook* and Marshal S. Willick's *Military Retirement Benefits in Divorce*, all published by and available from the ABA Family Law Section.

[Sections 25.82 through 25.90 are reserved for expansion.]

VIII. Civil Service Retirement System and Federal Employees Retirement System

§ 25.91 CSRS and FERS Generally

Federal retirement benefits under the Civil Service Retirement System and the Federal Employees Retirement System are community property and are divisible on divorce. *Valdez v. Ramirez*, 574 S.W.2d 748, 749 (Tex. 1978); *Hoppe v. Godeke*, 774 S.W.2d 368, 370 (Tex. App.—Austin 1989, writ denied). The payment of those benefits under the divorce court order is governed by the appropriate federal statutes. The Civil Service Retirement System (CSRS) is governed by 5 U.S.C. §§ 8301–8351. The Federal Employees Retirement System (FERS) is governed by 5 U.S.C. §§ 8401–8480. Both systems are administered by the Office of Personnel Management. 5 U.S.C. § 8347(a) (CSRS), § 8461 (FERS). Administration of the two systems is virtually identical. (Members of Congress are covered in these retirement systems, but the provisions relating to them are not discussed here.)

§ 25.92 Definitions

The terms *qualified domestic relations order*, *alternate payee*, and other such terms are not applicable under the CSRS and the FERS and should not be used in an order dividing federal retirement benefits. (In fact, using the term *qualified domestic relations order* to describe the order dividing civil service retirement might result in rejection of that order by the Office of Personnel Management. *See* 5 C.F.R. § 838.302(a).)

The following definitions, based on the statutes and regulations, should be used in an order dividing these benefits.

Court order: The term *court order* means any judgment or property settlement issued or approved by any court of any state in connection with, or incident to, the divorce or annulment of a federal employee or retiree. 5 C.F.R. § 838.103.

Court order acceptable for processing: The term *court order acceptable for processing* means a court order that meets the requirement in the Code of Federal Regulations for dividing retirement benefits under the CSRS or the FERS. 5 C.F.R. § 838.103.

Former spouse: The term *former spouse* means a former spouse of an individual if the individual was an employee, as defined below, who has performed at least eighteen months of service and if the former spouse was married to the individual for at least nine months. 5 U.S.C. §§ 8331(23), 8401(12); *see also* 5 C.F.R. § 838.103.

Annuity: The term *annuity* is often used in the statutes but is not defined. The plan whereby monthly retirement benefits are paid is referred to as an annuity. See, for instance, U.S.C. title 5, sections 8331(9) and 8401(2), which define an annuitant as one who meets all requirements for entitlement to an annuity and files a claim for an annuity; sections 8331(10) and 8401(28), which define a "survivor" as an individual entitled to an annuity based on the service of a deceased employee or annuitant; and sections 8345, 8433, and 8434, which concern the benefits to be paid as an annuity.

Employee: An *employee* is an individual covered by the CSRS, as described in 5 U.S.C. § 8331(1), or an employee covered by the FERS, as described in 5 U.S.C. § 8401(11). *See also* 5 C.F.R. § 838.103.

Annuitant: The term *annuitant* means a former employee who, on the basis of service, meets the requirements for entitlement to an annuity and files a claim for that annuity. 5 U.S.C. §§ 8331(9), 8401(2).

Gross annuity: The term *gross annuity* means the amount of monthly annuity payable after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deductions. Unless the court order expressly provides otherwise, the term *gross annuity* also includes any lump-sum payments made to the retiree under 5 U.S.C. sections 8343a or 8420a. 5 C.F.R. § 838.103.

Net annuity: The term *net annuity* means the amount of monthly annuity after deducting from the gross annuity any amounts that are (1) owed by the retiree to the United States; (2) deducted for health benefit premiums under 5 U.S.C. § 8906 and 5 C.F.R. §§ 891.401 and 891.402; (3) deducted for life insurance premiums under 5 U.S.C. § 8714a(d); (4) deducted for Medicare premiums; (5) properly withheld for federal or state income taxes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which the retiree was entitled; or (6) already payable to another person based on a court order acceptable for processing or a child-abuse judgment enforcement order. Unless the court order expressly provides otherwise, the term *net annuity* also includes any lump-sum payments made to the retiree under 5 U.S.C. sections 8343a or 8420a. 5 C.F.R. § 838.103.

Self-only annuity: The term *self-only annuity* means the recurring payments under the CSRS or the FERS to a retiree who has elected not to provide a survivor annuity to anyone. *See* 5 C.F.R. § 838.103.

Survivor: The term *survivor* means an individual entitled to an annuity based on the service of a deceased employee or annuitant. 5 U.S.C. §§ 8331(10), 8401(28).

Survivor annuitant: The term *survivor annuitant* means a survivor who files a claim for an annuity. 5 U.S.C. § 8331(11).

Qualifying retirement benefits court order: The term *qualifying retirement benefits court order* refers to an order dividing an account under the Thrift Savings Plan. *See* 5 C.F.R. § 1653.2. Note that this term is used only under the Thrift Savings Plan and does not apply to an annuity under the CSRS or the FERS. See section 25.95 below.

Participant: The term *participant* under the Thrift Savings Plan means an individual for whom an account has been established under the plan. 5 U.S.C. § 8471(3).

Pro rata share: The term *pro rata share* means one-half of the fraction whose numerator is the number of months of federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of federal civilian and military service performed by the employee. 5 C.F.R. § 838.621(a).

§ 25.93 Payments under Court Order

Payments under the CSRS or the FERS that would otherwise be made to an employee or annuitant based on service shall be paid (in whole or in part) to another person in accordance with a proper state court order. In Texas, the order is a decree of divorce or annulment; a court order approving a property settlement agreement on divorce or annulment; a court order specifically treating the benefit, such as a domestic relations order signed in conjunction with a decree of divorce or annulment, incorporated by reference in such a decree, or both; or a court order or similar process in the nature of garnishment for the enforcement of a judgment rendered against the employee or annuitant for child abuse. Payments are required only after the court order or other process has been received by the Office of Personnel Management. 5 U.S.C. §§ 8345(j)(1), (j)(2), 8467(a), (b).

§ 25.94 Survivor Annuities

Both the CSRS and the FERS provide for survivor annuities. *See* 5 U.S.C. §§ 8341, 8441–8445. A survivor annuity may be paid whether the employee dies before or after retirement. A former spouse is entitled to a portion of that survivor annuity to the extent provided in any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to the divorce. 5 U.S.C. §§ 8341(h), 8445. The maximum amount of the survivor annuity is 55 percent of the annuity the employee would have been entitled to receive if retired on the date of death or the annuity being paid on the date of the employee annuitant's death under CSRS and 50 percent under FERS. 5 U.S.C. §§ 8341(b), (h)(2), 8445(b); 5 C.F.R. § 831.641(a).

§ 25.95 Thrift Savings Plan

The Federal Employees' Retirement System Act of 1986 also includes a Thrift Savings Plan. *See* 5 U.S.C. § 8437. The Thrift Savings Plan is a defined contribution plan. All amounts contributed by an employee or by the governmental agency are held in trust for the employee in an individual account identified by name and Social Security number. The Thrift Savings Plan is administered by the Federal Retirement Thrift Investment Board. 5 U.S.C. § 8472.

An order dividing an account with the Thrift Savings Plan is called a "qualifying retirement benefits court order." *See* 5 C.F.R. § 1653.2. The community property amount in the account can be divided between the parties, and, as a general rule, no formulas are required.

§ 25.96 Addresses for Sending Court Orders

The address for sending CSRS and FERS court orders by mail is:

Office of Personnel Management
Court Ordered Benefits Branch
P.O. Box 17
Washington, DC 20044-0017

The address for delivery of court orders by process servers, express carriers, or other forms of handcarried delivery is:

United States Office of Personnel Management
Court-Ordered Benefits Section
1900 E Street, NW
Washington, DC 20415-0002

5 C.F.R. app. A to subpt. A of pt. 838.

[Sections 25.97 through 25.100 are reserved for expansion.]

IX. Railroad Retirement

§ 25.101 Railroad Retirement Generally

The Railroad Retirement Act of 1974, title 45, chapter 9, subchapter IV, of the United States Code, governs the various federal retirement benefits available to railroad employees. *See* 45 U.S.C. ch. 9, subch. IV. The railroad retirement system provides two levels of benefits called "tiers." Tier I is calculated using Social Security benefit formulas and includes earnings both in the railroad industry and in employment covered by the Social Security Act. Tier II is based on railroad earnings alone. *See* 45 U.S.C. §§ 231a(a), 231b.

Tier I benefits are not divisible on divorce. 45 U.S.C. § 231m; *Kamel v. Kamel*, 721 S.W.2d 450, 452–53 (Tex. App.—Tyler 1986, no writ). Tier II benefits under the railroad retirement system may be divided in a decree of divorce or annulment or in a court-approved property settlement incident to such a decree. 45 U.S.C. § 231m. The decree must be a final decree. 20 C.F.R. § 295.2.

Citations from the Railroad Retirement Act for those components of a railroad retirement annuity that may be divided in connection with a proceeding for dissolution of marriage are as follows:

1. The tier II annuity component is provided for in section 3(b) of the Act (45 U.S.C. § 231b(b)).

2. The vested dual benefit is provided for in section 3(h) of the Act (45 U.S.C. § 231b(h)).

3. The supplemental annuity is provided for in section 3(e) of the Act (45 U.S.C. § 231b(e)).

4. The overall minimum increase is provided for in section 3(f)(1) of the Act (45 U.S.C. § 231b(f)(1)).

Additionally, a divorced spouse who is not remarried is eligible for a divorced spouse annuity separate from the tier II benefits awarded to that spouse if that spouse meets the requirements of section 216(d) of the Social Security Act (42 U.S.C. § 416(d)) and section 202(b) of the Social Security Act (42 U.S.C. § 402(b)). The divorced spouse annuity is not divisible on divorce but is automatically payable to the divorced spouse if the spouse is eligible and makes application for payment. Basically, the spouse must be married to the railroad employee for a minimum of ten years at divorce to be eligible. The eligibility requirements are the same as those for a divorced spouse benefit under the Social Security Act. Railroad retirement is administered by the Railroad Retirement Board. 45 U.S.C. § 231f. The Railroad Retirement Board will provide on written request a statement showing the amount of tier I and tier II benefits earned by the railroad employee and the amount of the divorced spouse benefit to be paid to the divorced spouse.

See Railroad Retirement Board form IB-2 (2-11), Railroad Retirement and Survivor Benefits, available at **www.rrb.gov/sites/default/files/2021-02/IB-2%28web%29.pdf**.

§ 25.102 Definitions

The vocabulary used in the railroad retirement system is different from that used in any other retirement system. The following terms are used by the Railroad Retirement Board and in the regulations governing railroad retirement.

Annuity: The term *annuity* means a monthly sum that is payable on the first day of each calendar month for the accrual during the preceding calendar month. 45 U.S.C. § 231(p).

Tier I: Annuities under the Railroad Retirement Act are composed of independently calculated segments known as "tiers." Tier I is calculated using Social Security benefit formulas and includes earnings in the railroad industry and in employment covered by the Social Security Act. *See* 45 U.S.C. § 231b.

Tier II: Tier II is an annuity based on railroad retirement earnings alone. *See* 45 U.S.C. § 231b.

Employee: The term *employee* means the employee under the railroad retirement system. 45 U.S.C. § 231(b); 20 C.F.R. § 295.2.

Spouse or former spouse: The term *spouse or former spouse* means the husband or wife or former husband or wife of an employee who, on or before the date of a court order, was married to the employee. 20 C.F.R. § 295.2.

Court: As applicable in this discussion, the term *court* means a court with jurisdiction to hear divorce cases. *See* 20 C.F.R. § 295.2.

Court decree: The term *court decree* means a final decree of divorce, dissolution, or annulment in accordance with state law. 20 C.F.R. § 295.2.

Final decree: The term *final decree* means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the applicable laws or from which an appeal has been taken and finally decided. 20 C.F.R. § 295.2.

Property settlement: The term *property settlement* means an agreement between the parties to a suit for divorce, dissolution, or annulment in which they expressly agree to a division of their property rights and which is incorporated in the final decree. The property settlement must be filed with the court in connection with the suit or otherwise presented to the court in a suit in accordance with the law of the jurisdiction. An agreement assigning or transferring property between spouses is not a property settlement unless it is subsequently approved by a court in connection with a divorce, dissolution, or annulment. 20 C.F.R. § 295.2.

§ 25.103 Requirements for Court Decree

The Railroad Retirement Board will honor a court decree or a property settlement that meets the following criteria:

1. *Award of benefits.* The court decree or property settlement must provide that the spouse or former spouse is awarded payments from railroad retirement annuities payable to the railroad employee. 20 C.F.R. § 295.3(a)(1).
2. *Specific amount.* The court decree or property settlement must specify an amount to be paid to the spouse or former spouse. 20 C.F.R. § 295.3(a)(2).
3. *Obligation of board to pay.* The court decree or property settlement must obligate the Railroad Retirement Board to make payments directly to the spouse or former spouse. 20 C.F.R. § 295.3(a)(3).
4. *Identification of parties.* The court decree or property settlement must clearly identify both the employee and the spouse or former spouse to whom payments are to be made. 20 C.F.R. § 295.3(a)(4).
5. *Recently certified copy.* The court decree or property settlement submitted to the Railroad Retirement Board must be a recently certified copy of the document filed with the court. In the case of a court-approved property settlement, both the settlement and any decree or order incorporating or approving the settlement must be provided. 20 C.F.R. § 295.3(a)(5).

The court decree should state the date on which it was signed. *See* 20 C.F.R. § 295.3(b); Tex. R. Civ. P. 306a. See Railroad Retirement Board form G-177d (09/10), Partition of Annuities by Court Decree, available at **www.rrb.gov/Benefits/G-177D**.

§ 25.104 Procedure

The division of railroad retirement non–tier I benefits can be included in the body of the decree of divorce or the property settlement agreement. The property settlement agreement must be on file and approved by the court granting the divorce. Also, the division can be accomplished by a separate order. The Railroad Retirement Board has an approved order dividing railroad retirement benefits available on request.

Warning: It is important that the divisible benefits be identified in the order as "non–tier I" benefits instead of "tier II" benefits only. The former identification allows the ex-spouse of the railroad employee to receive that person's share of all divisible components under the Railroad Retirement Act, that is, the tier II component, the supplemen-

tal annuity (if the railroad employee is eligible), the vested dual benefit (if the railroad employee is eligible), and any overall minimum increase in the annuity. If the divided benefits are identified only as tier II benefits in the order, the divorced spouse is limited to receiving only a portion of the tier II benefits and will not receive any of the other divisible components even if the employee is eligible for these benefits.

If the non–tier I benefits are divided in the actual decree of divorce or property settlement agreement, a certified copy of the divorce decree and property settlement agreement (if the division is made in that instrument) must be submitted to the General Counsel, Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611-1275. 20 C.F.R. § 295.3(d).

If the division is made in a separate order, a certified copy of the order must also be submitted to the above address. Currently, preapproval may be obtained by faxing the proposed order to 312-751-7102.

§ 25.105 Private Retirement Plans Associated with Railroad Employees

In addition to the federally created railroad retirement benefits, each union and each railroad may have additional private plans that involve significant assets and that should not be overlooked.

§ 25.106 Cessation of Divorced Spouse Benefits

Benefits for the divorced spouse end—

1. on the last day of the month before the month in which the divorced spouse dies;
2. on the date on which the employee annuity terminates;
3. on the date required by the court decree or property settlement;
4. when the employee dies (the divorced spouse may qualify for a surviving divorced spouse annuity at this time);
5. when the divorced spouse remarries;
6. when the divorced spouse becomes entitled to a Social Security benefit based on the divorced spouse's own earnings and on which the Social Security benefit (before any reductions are made) is greater than the maximum amount of the annuity that he was entitled to receive; or

7. when the divorced spouse becomes entitled to a spouse's annuity, a remarried widow(er)'s annuity, or a surviving divorced spouse's annuity under a different Railroad Retirement Board claim number that is greater than the amount that he was entitled to as a divorced spouse.

See 20 C.F.R. § 295.5; General Conditions under Which a Person Is Entitled to a Railroad Retirement Divorced Spouse Annuity (G-177C (08-07)), available at **www.rrb.gov/Benefits/G-177C**.

§ 25.107 Conversion of Annuity Received as Divorced Spouse to Annuity Received as Surviving Spouse

There is no need for the surviving divorced spouse to file a new application if the divorced spouse was in receipt of an annuity in the month before the month in which the employee dies. *See* 20 C.F.R. § 217.8(o). On notification of the death of an employee, the divorced spouse's annuity will be converted to a surviving divorced spouse's annuity, if survivor benefits are payable by the board. If not, the case will be transferred to the Social Security Administration for payment of a surviving divorced spouse's annuity under the Social Security Act.

§ 25.108 Entitlement as Remarried Widow(er)

Section 216.63 of the Railroad Retirement Board's regulations defines a remarried widow(er) as a widow(er) of a railroad employee with at least ten years of service and who had a current connection with the railroad industry and—

1. has remarried either after attaining age sixty (or age fifty if disabled) or before age sixty if the marriage has terminated;
2. is not entitled to a Social Security benefit that is equal to or higher than the remarried widow(er)'s benefit;
3. has attained retirement age;
4. is at least age fifty but less than age sixty if disabled;
5. has not attained retirement age but has a minor or disabled child of the employee in her or his care or custody; or
6. is at least age sixty but has not attained retirement age (in which case the annuity is reduced for age).

20 C.F.R. § 216.63(a).

§ 25.109 Other Documentation

On request, the former spouse must submit additional documentation the board requires, including but not limited to—

1. identifying information concerning the employee, such as Social Security number, railroad retirement claim number, full name, date of birth, and current address;

2. identifying information concerning the former spouse, such as Social Security number, full name, and current address;

3. a statement that no condition of the law of the jurisdiction in which the decree was entered or the property settlement approved and no condition contained in the decree or agreement that requires termination of payment has occurred and, if any such condition does occur, that the former spouse will immediately notify the Railroad Retirement Board; and

4. a statement that the spouse agrees to repay any erroneous payment arising from the occurrence of any such condition.

20 C.F.R. § 295.3(c).

§ 25.110 Delivery of Court Decree to Board

Any court decree or property settlement must be delivered to the General Counsel of the Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611. 20 C.F.R. § 295.3(d).

[Sections 25.111 through 25.120 are reserved for expansion.]

X. Use of QDRO for Payment of Spousal Maintenance

§ 25.121 Continuing Jurisdiction for Order for Payment of Spousal Maintenance

Subchapter H of chapter 8 of the Texas Family Code concerns the use of qualified domestic relations orders or similar orders (QDROs) for the payment of court-ordered spousal maintenance. The court shall liberally construe subchapter H to effect payment of pension, retirement plan, or other employee benefits for the satisfaction of the obligor's maintenance obligation. Tex. Fam. Code § 8.356. To the extent subchapter H conflicts with chapter 804 of the Texas Government Code or with federal law, the latter prevails. Tex. Fam. Code § 8.359.

The court that rendered an order for the payment of maintenance, or the court that obtains jurisdiction to enforce a maintenance order, has continuing jurisdiction to render enforceable QDROs permitting payment of pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee to satisfy amounts due under the maintenance order. A maintenance order includes a temporary or final order for maintenance and arrears and interest with respect to that order. Unless prohibited by federal law, a suit seeking such an order applies to a pension, retirement plan, or other employee benefit, regardless of whether the plan or benefit is private, state, or federal; is subject to another QDRO; is property that is the subject of a pending proceeding for dissolution of a marriage; is property disposed of in a previous decree for dissolution of a marriage; or is the subject of a premarital or marital property agreement under chapter 4 of the Texas Family Code. The court retains jurisdiction to render a QDRO until all maintenance due under the maintenance order, including arrearages and interest, has been paid. Tex. Fam. Code § 8.351. Payments under a QDRO under subchapter H may be made by direct payment or other method ordered by the court. Tex. Fam. Code § 8.358.

A party to a maintenance order may petition the court for a QDRO in an original suit or in an action for enforcement of the maintenance order. Each party whose rights may be affected by the petition is entitled to receive notice. Tex. Fam. Code § 8.352.

While a suit for a QDRO is pending or during the appeal of an enforcement order, on a party's motion or the court's own motion and after notice and hearing, the court may render an appropriate order for the preservation of the pension, retirement plan, or other employee benefits and protection of the parties as the court considers necessary. Such

an order may include the granting of a temporary restraining order and temporary injunction and is not subject to interlocutory appeal. Tex. Fam. Code § 8.353.

If the QDRO has been rejected by the plan or agency, the court retains continuing jurisdiction to render a corrected QDRO that will qualify with the plan. Tex. Fam. Code § 8.354.

Amendment of QDRO: A court that renders a QDRO retains continuing jurisdiction to amend the order to correct it *or* clarify its terms *or* add language to provide for the collection of maintenance. The court also retains continuing jurisdiction to convert the amount or frequency of payments under the order to a formula that complies with the terms of the plan or to vacate or terminate the order. Such an amended domestic relations order must be submitted to the plan administrator or equivalent to determine whether the amended order satisfies the requirements of a QDRO. If the order is rejected by the plan, the court retains continuing jurisdiction to render a corrected QDRO that will qualify with the plan. Tex. Fam. Code § 8.355; *see* Tex. Fam. Code § 8.354.

Attorney's Fees: In a proceeding under subchapter H, the court may order the obligor to pay reasonable attorney's fees incurred by a party to obtain the order, all court costs, and all fees charged by a plan administrator for the QDRO. The fees and costs may be enforced by any means available for the enforcement of a judgment for debt. Tex. Fam. Code § 8.357.

§ 25.122 Practical Considerations

In using a QDRO to collect spousal maintenance, it is important to remember several facts. Most important is that the QDRO cannot require a plan to provide any type or form of benefit or option not provided under the plan. Thus, a QDRO for a defined benefit plan with a monthly benefit may not be used if collection of a lump sum for arrearages is sought. A defined contribution plan, such as a 401(k), would be the proper plan to use to collect a lump sum.

When requesting the amount owed, it is important to remember that the spouse receiving the spousal maintenance is to receive those payments tax free. When retirement plans make a distribution to the alternate payee, they will almost always automatically withhold 20 percent of the distribution as federal withholding. Thus, an amount over and above the arrearage (or monthly maintenance amount) should be requested to cover the tax withholding.

A QDRO for spousal maintenance (referred to as alimony in ERISA) is very similar to a QDRO for marital property rights. The main difference in drafting a QDRO for a defined contribution plan is that instead of stating that the QDRO "relates to the provision of marital property rights," the order should state that it "relates to the provision of alimony payments." For a defined benefit plan, in addition to that change, an end date to the payments should be provided in the QDRO.

[Sections 25.123 through 25.130 are reserved for expansion.]

XI. Use of QDRO for Payment of Child Support

§ 25.131 Continuing Jurisdiction for Order for Payment of Child Support

Subchapter J of chapter 157 of the Texas Family Code concerns the use of qualified domestic relations orders or similar orders (QDROs) for the payment of child support. The court shall liberally construe subchapter J to effect payment of pension, retirement plan, or other employee benefits for the satisfaction of the obligor's child support obligation. Tex. Fam. Code § 157.506. To the extent subchapter J conflicts with chapter 804 of the Texas Government Code or with federal law, the latter prevails. Tex. Fam. Code § 157.508.

The court that rendered an order for the payment of child support, or the court that obtains jurisdiction to enforce a child support order under chapter 159 of the Family Code, has continuing jurisdiction to render enforceable QDROs permitting payment of pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee to satisfy amounts due under the child support order. A child support order includes a temporary or final order for child support, medical support, or dental support and arrears and interest with respect to that order. Unless prohibited by federal law, a suit seeking such an order applies to a pension, retirement plan, or other employee benefit, regardless of whether the plan or benefit is private, state, or federal; is subject to another QDRO; is property that is the subject of a pending proceeding for dissolution of a marriage; is property disposed of in a previous decree for dissolution of a marriage; or is the subject of a premarital or marital property agreement under chapter 4 of the Family Code. The court retains jurisdiction to render a QDRO until all child support due under the child support order, including arrearages and interest, has been paid. Tex. Fam. Code § 157.501.

A party to a child support order, or the title IV-D agency in a title IV-D case, may petition the court for a QDRO in an original suit or in an action for child support enforcement. Each party whose rights may be affected by the petition is entitled to receive notice. Tex. Fam. Code § 157.502.

While a suit for a QDRO is pending or during the appeal of an enforcement order, on a party's motion or the court's own motion and after notice and hearing, the court may render an appropriate order for the preservation of the pension, retirement plan, or other employee benefits and protection of the parties as the court considers necessary. Such an order may include the granting of a temporary restraining order and temporary injunction and is not subject to interlocutory appeal. Tex. Fam. Code § 157.503.

If the QDRO has been rejected by the plan or agency, the court retains continuing jurisdiction to render a corrected QDRO that will qualify with the plan. Tex. Fam. Code § 157.504.

Amendment of QDRO: A court that renders a QDRO retains continuing jurisdiction to amend the order to correct it *or* clarify its terms *or* add language to provide for the collection of child support. The court also retains continuing jurisdiction to convert the amount or frequency of payments under the order to a formula that complies with the terms of the plan or to vacate or terminate the order. Such an amended domestic relations order must be submitted to the plan administrator or equivalent to determine whether the amended order satisfies the requirements of a QDRO. If the order is rejected by the plan, the court retains continuing jurisdiction to render a corrected QDRO that will qualify with the plan. Tex. Fam. Code § 157.505; *see* Tex. Fam. Code § 157.504.

Attorney's Fees: In a proceeding under subchapter J, the court may order the obligor to pay reasonable attorney's fees incurred by a party to obtain the order, all court costs, and all fees charged by a plan administrator for the QDRO. The fees and costs may be enforced by any means available for the enforcement of child support, including contempt. Tex. Fam. Code § 157.507.

§ 25.132 Practical Considerations

When using a QDRO for the payment of child support, it is important to remember several facts. Most important is that the QDRO cannot require a plan to provide any type or form of benefit or option not provided under the plan. Thus, if collection of monthly child support is sought, the obligor must have a pension plan and be eligible to receive

benefits from that plan. On the other hand, if collection of a one-time lump-sum payment for past-due child support is sought, a defined contribution plan, such as a 401(k), would be the proper plan to use.

It is important to remember—for two reasons—that child support payments are taxable to the obligor. First, under a QDRO, benefits paid to a spouse or a former spouse are taxable to that person. To ensure that the child support benefits are taxed to the participant and that the IRS Form 1099-R is issued to the participant, not to the obligee, the person named as the alternate payee in the QDRO must be the child, even if the parent is the one technically receiving the payments. The QDRO should list the parent as the legal representative or guardian and have payments and correspondence directed to that parent. In the section of the QDRO addressing taxes, it should also be made clear that taxes are the responsibility of the participant.

Second, even though the Form 1099-R and ultimate tax bill will be the responsibility of the participant, the plan will almost always still deduct 20 percent for federal withholding from the payment to the alternate payee. Thus, an amount over and above the arrearage (or monthly child support amount) should be requested to cover the tax withholding.

In drafting a QDRO for child support for a defined contribution plan, instead of stating that the QDRO "relates to the provision of marital property rights," the order should state that it "relates to the provision of child support." For a defined benefit plan, in addition to that change, an end date to the payments should be provided in the QDRO.

[Sections 25.133 through 25.140 are reserved for expansion.]

XII. Stock Options and Restricted Stock

§ 25.141 Stock Options and Restricted Stock

Section 3.007 of the Family Code provides guidance about how to characterize an employee spouse's stock options or restricted stock when employment both during and outside the period of marriage is required to reap the benefit. The formula used to calculate the percentage of community interest is basically the same formula set forth in *In re Marriage of Nelson*, 177 Cal. App. 3d 150, 222 Cal. Rptr. 790 (1986).

The applicable methodology depends on the "grant date" of the option or restricted stock. If the date of grant occurs during the marriage but continued employment following the date of dissolution of the marriage is required for vesting or exercise, the calculation will yield the percentage of the separate interest, even though the right is not vested and the right to exercise has not yet occurred. *See* Tex. Fam. Code § 3.007(d)(2). If the date of grant occurred before marriage but continued employment during marriage is required for vesting or exercise, the character of the option or stock right will be calculated in a similar manner. *See* Tex. Fam. Code § 3.007(d)(1). The applicable formulas are shown below.

Grant before marriage (with required employment during marriage):

$$\text{Separate-property interest} = \frac{\text{Period from date of grant until marriage (}\textit{plus}\text{, if applicable, period from date of dissolution of marriage until date grant could be exercised or restriction removed)}}{\text{Period from date of grant until date grant could be exercised or restriction removed}}$$

Grant during marriage (with required employment after dissolution of marriage):

$$\text{Separate-property interest} = \frac{\text{Period from date of dissolution until date grant could be exercised or restriction removed}}{\text{Period from date of grant until date grant could be exercised or restriction removed}}$$

Obviously, the remaining percentage balance will be considered the community interest. It will be necessary to use the formulas above for each different set (grant dates) of stock options or restricted stock grants. The computations described above apply to each component of the benefit requiring varying periods of employment before the grant could be exercised or the restriction removed. Tex. Fam. Code § 3.007(e).

It is important to note that most stock plans (other than Employee Stock Ownership Plans) do not permit nonemployees to hold the unvested shares or options. Thus the employee spouse will not be able to transfer the award to the nonemployee spouse at the time of the divorce. To protect the nonemployee spouse, the award language in the decree should impose very detailed and enforceable obligations on the employee spouse, and a separate order dividing the stock and naming the employee as constructive trustee for the benefit of the nonemployee, along with additional provisions such as information on taxes, how the options are exercised, and the obligations of each party,

should be prepared. A mediated settlement agreement should also include detailed language regarding stock options and a separate constructive trust order.

[Sections 25.142 through 25.150 are reserved for expansion.]

XIII. Useful Websites

§ 25.151 Useful Websites

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

Defense Finance and Accounting Service (§ 25.77)
www.dfas.mil/garnishment/usfspa/apply

Railroad Retirement Board form IB-2 (2-05) ("Railroad Retirement and Survivor Benefits") (§ 25.101)
www.rrb.gov/sites/default/files/2021-02/IB-2%28web%29.pdf

Railroad Retirement Board form G-177d ("Partition of Annuities by Court Decree") (§ 25.103)
www.rrb.gov/Benefits/G-177D

Railroad Retirement Board form G-177C ("General Conditions under Which a Person Is Entitled to a Railroad Retirement Divorced Spouse Annuity") (§ 25.106)
www.rrb.gov/Benefits/G-177C

Court Orders and Powers of Attorney (Thrift Savings Plan)
www.tsp.gov/publications/tspbk11.pdf

Thrift Savings Plan Retirement Benefits Court Order Division Packet
www.tsp.gov/forms/tsp-92.pdf

A Handbook for Attorneys on Court-ordered Retirement, Health Benefits and Life Insurance Under the Civil Service Retirement Benefits, Federal Employees Retirement Benefits, Federal Employees Health Benefits, Federal Employees Group Life Insurance Program
www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf

QDROs—The Division of Retirement Benefits Through Qualified Domestic Relations Orders (Department of Labor)
www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf

Chapter 26

Posttrial Proceedings and Appeals

§ 26.1 Final Order 691

§ 26.2 Posttrial Pleadings 695

§ 26.3 New Trial 696

§ 26.3:1 Generally 696

§ 26.3:2 Format of Motion 697

§ 26.3:3 Filing for Appellate Purposes 697

§ 26.3:4 Newly Discovered Evidence 699

§ 26.3:5 After Default Judgment 700

§ 26.3:6 Time for Filing Motions 705

§ 26.3:7 Plenary Power 706

§ 26.3:8 Order on Motion for New Trial 707

§ 26.4 Motion to Modify, Correct, or Reform Judgment 708

§ 26.5 Request for Findings of Fact and Conclusions of Law 711

§ 26.6 Findings of Fact and Conclusions of Law 717

§ 26.7 Formal Bill of Exception 718

§ 26.8 Relief Pending Appeal 719

§ 26.9 Motion to Withdraw Exhibits 725

§ 26.10 Motion to Seal Court Documents 725

§ 26.11 Writ of Habeas Corpus Not Appealable Order 725

§ 26.12 Rules Governing Appeal 725

§ 26.13 Types of Appeals Available Other than Regular Appeal 726

§ 26.14 Notice of Appeal 729

§ 26.15 Time for Filing Notice of Appeal 731

§ 26.15:1 Deadline for Filing Accelerated Appeal 731

§ 26.15:2 Deadline for Filing Regular Appeal 732

§ 26.15:3 Deadline for Filing Restricted Appeal 733

§ 26.15:4 Citation by Publication 733
§ 26.15:5 Filing Notice of Appeal in Parental Notification Suit . . 734
§ 26.15:6 Extension of Time for Filing of Notice of Appeal 734
§ 26.15:7 Premature Filing of Notice of Appeal 736
§ 26.15:8 Appellee's Notice of Appeal 736
§ 26.16 Appeals in Parental Termination and Child Protection Cases 736
§ 26.17 Appointment of Attorney on Appeal 737
§ 26.18 Costs of Appeal—Indigence 738
§ 26.19 Appellate Record 741
§ 26.20 Limiting Scope of Appeal 743
§ 26.21 Docketing Statement 743
§ 26.22 Mediation 744
§ 26.23 Estoppel to Appeal 744
§ 26.24 Modification Suit Pending Appeal 747
§ 26.25 Bankruptcy during Appeal 748
§ 26.26 Family Law Appellate Timetable 749
§ 26.27 Effect of Remand 751
§ 26.28 Internet Resources 751
§ 26.29 Useful Websites 751

Chapter 26

Posttrial Proceedings and Appeals

§ 26.1 Final Order

Generally: There can be only one final judgment, which settles all legal issues and rights between the parties and which is appealable. Tex. R. Civ. P. 301; *Johnson v. Ventling*, 132 S.W.3d 173, 177 (Tex. App.—Corpus Christi–Edinburg 2004, no pet.). When the trial court renders a judgment after a conventional trial on the merits (whether by jury or bench trial) and there is no order for separate trials, there is a presumption (known as the "*Aldridge* presumption") that the judgment disposes of all issues and parties. *John v. Marshall Health Services*, 58 S.W.3d 738, 740 (Tex. 2001) (per curiam); *North East ISD v. Aldridge*, 400 S.W.2d 893, 897–98 (Tex. 1966). When the *Aldridge* presumption applies, the judgment is treated as final for purposes of appeal. *See John*, 58 S.W.3d at 740; *see, e.g.*, *Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d 621, 627 (Tex. App.—Dallas 2001, pet. denied) (judgment ostensibly rendered after full trial on merits, which contained Mother Hubbard clause denying all relief not granted, was final). However, see further discussion regarding Mother Hubbard clauses below.

Judgment vs. Rendition: Before an appeal may be pursued, a final order must be signed by the court. A judgment routinely goes through three stages: rendition, reduction to writing, and entry. *Oak Creek Homes, Inc. v. Jones*, 758 S.W.2d 288, 290 (Tex. App.—Waco 1988, no writ).

Rendition of judgment occurs when the trial judge officially announces a decision on the law as to the matters at issue, either orally in open court or by written memorandum filed with the clerk. *Garza v. Texas Alcoholic Beverage Commission*, 89 S.W.3d 1, 6 (Tex. 2002).

The subsequent reduction of the pronouncement to writing, signed and dated by the court, is a ministerial act of the court. *Oak Creek Homes*, 758 S.W.2d at 290. The reduction of the pronouncement to writing does not change the date of a prior rendition to the date of the signing of the written draft. *Knox v. Long*, 257 S.W.2d 289, 292 (Tex. 1953), *overruled in part on other grounds*, *Jackson v. Hernandez*, 285 S.W.2d 184, 191 (Tex. 1955). After a trial judge orally renders judgment, the subsequent written judgment

may be signed by a different judge; this signing is a ministerial act and does not affect the rendition or the written judgment. *Townsend v. Vasquez*, 569 S.W.3d 796, 805 (Tex. App.—Houston [1st Dist.] 2018, pet. denied), *cert. denied*, 140 S. Ct. 478 (2019).

A judgment is "entered" when it is recorded on the minutes of the trial court by a purely ministerial act of the clerk of the court, and "entered" is synonymous with neither "signed" nor "rendered" when used in relation to a judgment or the date of the judgment. *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978).

The trial court's rendition is fully effective for all purposes, except calculation of the time by which an appeal must be perfected. Tex. R. App. P. 26.1; *see Galbraith v. Galbraith*, 619 S.W.2d 238, 240 (Tex. App.—Texarkana 1981, no writ). Once the trial court renders its decision, the court's orders are valid from that time forward until vacated or set aside. *Ex parte Cole*, 778 S.W.2d 599, 600 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding).

Oral rendition is proper if the words state the pronouncement to be a present rendition of judgment, not as an intent to perform a future act. *State v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015). The Texas Supreme Court has found that the court rendered judgment after approving a settlement agreement in open court. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874–75 (Tex. 1982) (per curiam). The Texas Supreme Court has also held that, when the trial court specifies the terms of the judgment on the docket sheet along with the words "decree to be entered," rendition has occurred. *See Burnaman v. Heaton*, 240 S.W.2d 288, 290–91 (Tex. 1951). Judges' oral pronouncements, however, are often necessarily tentative and may not cover all the details of a final decree, since judges know that they will review the draft of the judgment before signing it. *Stallworth v. Stallworth*, 201 S.W.3d 338, 349 (Tex. App.—Dallas 2006, no pet.) (judge orally announced fifty-fifty division of retirement benefits, but decree awarded each party own retirement benefits).

Trial courts sometimes issue memorandum or letter rulings that can raise questions regarding whether the ruling is a final judgment for appellate purposes. A memorandum ruling can be accorded final judgment status triggering appellate deadlines if (1) the ruling describes the decision with certainty as to the parties and effect, (2) it requires no further action to memorialize the ruling and contains the name and cause number of the case, (3) the court's diction is affirmative rather than anticipatory of a future ruling, (4) the ruling bears a date, (5) it was signed by the court, and (6) it was filed with the district clerk. *In re B.D.*, No. 05-17-00674-CV, 2017 WL 3765848 (Tex. App.—Dallas Aug. 31, 2017, no pet.) (mem. op.). However, orders following a conventional trial can

be ambiguous as to their finality, and, if there are doubts regarding finality, an appellate court should review the record to determine whether the trial court intended the order to be final. *In re R.R.K.*, 590 S.W.3d 535, 541 (Tex. 2019).

Docket sheet entries alone, without a decree of divorce or a record, are insufficient to constitute a judgment or decree of the court. A docket sheet entry is a memorandum made for the convenience of the trial court and the court clerk. Docket sheet entries are inherently unreliable because they lack the formality of orders and judgments. *Bailey-Mason v. Mason*, 122 S.W.3d 894, 897 (Tex. App.—Dallas 2003, pet. denied).

Agreed Judgments: An agreed judgment must be interpreted as if it were a contract between the parties, and its interpretation is governed by the laws relating to contracts, rather than laws relating to judgments. However, an agreed judgment is accorded the same degree of finality and binding force as a final judgment rendered at the conclusion of an adversary proceeding. *McCray v. McCray*, 584 S.W.2d 279, 281 (Tex. 1979) (per curiam). A court is bound by the express stated intent of the parties as manifested within the four corners of the instrument itself, absent any allegations of ambiguity. *See National Union Fire Insurance Co. v. CBI Industries*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam).

A Mother Hubbard clause is a clause in a judgment reciting that "all relief not expressly granted is denied" or containing similar language purporting to dispose of all parties and all issues in the suit. *In re J.G.W.*, 54 S.W.3d 826, 831, n.4 (Tex. App.—Texarkana 2001, no pet.). If a judgment contains language such as a Mother Hubbard clause that purports to grant or deny relief that disposes of all claims or parties, regardless of the intent of the parties or the trial court, that judgment may be presumed final as to all claims and all parties. *See In re J.G.W.*, 54 S.W.3d at 831. *But see In re R.R.K.*, 590 S.W.3d at 541–42, wherein the Texas Supreme Court holds that inclusion of a Mother Hubbard clause is not conclusive of finality and, in that case, omission from a trial court's memorandum ruling of matters that were otherwise required to be included in a final order pursuant to Family Code section 105.006 prevented the memorandum ruling from being a final, appealable judgment.

Final Order Signed by Presiding Judge vs. Associate Judge: An associate judge may "render" and "sign" final orders only when (1) the final order is agreed to in writing as to both form and substance and signed by all parties, (2) the final order is based on a default, or (3) the final order is in a case where a party has signed an unrevoked waiver pursuant to rule 119 of the Texas Rules of Civil Procedure that waives notice of the final hearing or waives the party's appearance at the final hearing. Tex. Fam. Code

§ 201.007(a)(14). In all other circumstances, an associate judge's pronouncement and signature on a proposed final order constitutes only a "recommendation," and the order does not become final until approved by the presiding judge. *Mathis v. Graves*, No. 01-18-00789-CV, 2019 WL 5606869, at *3 (Tex. App.—Houston [1st Dist.] Oct. 31, 2019, pet. denied) (mem. op.).

Bifurcated Trial: When issues in a case have been bifurcated, not severed, an order issued after a trial on only some of the bifurcated issues is not a final judgment and there will be no final judgment until such time as the remaining bifurcated issues have been resolved. *Wright v. Payne*, No. 02-19-00147-CV, 2019 WL 6003243, at *2 (Tex. App.—Fort Worth Nov. 14, 2019, no pet.) (mem. op.).

Attorney's Fees: A trial court's failure to include terms within a judgment either granting or denying an award of attorney's fees, when a claim for such relief was raised by the pleadings and evidence in a suit affecting the parent-child relationship, prevents the finality of that judgment. *In re K.M.B.*, 148 S.W.3d 618 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

COMMENT: Although the opinion in *In re K.M.B.* does not mention inclusion within the subject orders of a Mother Hubbard clause denying all relief not specifically granted, such terms would likely have resulted in finality, precluding dismissal on appeal for lack of jurisdiction in the case.

Pending Sanctions: A judgment need not resolve pending sanctions issues to be final, and sanctions may not be imposed after the expiration of a trial court's plenary jurisdiction. *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308, 311–12 (Tex. 2000).

Collateral Attack on Judgments: A collateral attack is an attempt to avoid the binding force of a judgment in a separate proceeding brought for some other purpose. *Johnson*, 132 S.W.3d at 177. To prevail in a collateral attack, a party to the original judgment must show that the complained-of judgment is void, not simply voidable. *Gainous v. Gainous*, 219 S.W.3d 97, 105 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In general, as long as the court that enters a judgment has jurisdiction of the parties and the subject matter and does not act outside its capacity as a court, the judgment is not void. *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003). All other errors make the judgment merely voidable so that it may be corrected only through a direct attack. *Reiss*, 118 S.W.3d at 443. One may raise a collateral attack challenging a void order at any time, and res judicata is not a bar to the attack. In a collateral attack the challenged

order is presumed valid, and the party challenging it has the burden to show that it is void. *Gainous*, 219 S.W.3d at 106.

For example, a husband should have been allowed to collaterally attack a final decree of divorce in a proceeding brought by his ex-wife to enforce that decree where the husband claimed that his marriage to the ex-wife was void from its inception as she remained married to a third party. *In re Athans*, No. 09-20-00074-CV, 2020 WL 1770903, at *2 (Tex. App.—Beaumont Apr. 9, 2020, orig. proceeding) (mem. op.) (per curiam).

In a collateral attack on a judgment, extrinsic evidence may not be used to establish a lack of jurisdiction. *Johnson*, 132 S.W.3d at 177–78. A collateral attack fails if the judgment contains jurisdictional recitals, even if other parts of the record show a lack of jurisdiction. *Johnson*, 132 S.W.3d at 178. Plain jurisdiction recitals of personal jurisdiction in a judgment must be accorded absolute verity. *Armentor v. Kern*, 178 S.W.3d 147 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A divorce judgment, unappealed and regular on its face, is not subject to a collateral attack in a subsequent suit. *Hardin v. Hardin*, 597 S.W.2d 347, 350 (Tex. 1980).

Collateral Attack on QDRO: The court that rendered a divorce decree or any other final order dividing property retains continuing, exclusive jurisdiction to render an enforceable qualified domestic relations order (QDRO) or similar order permitting payment of divisible pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee. As with any postdivorce enforcement or clarification order, a QDRO may not amend, modify, alter, or change the division of property made or approved in the decree. If the provisions of the QDRO and the divorce decree conflict, the QDRO's provisions are void, unenforceable, and subject to collateral attack. *See Gainous*, 219 S.W.3d at 106–07.

§ 26.2 Posttrial Pleadings

To preserve a complaint for appeal, a party must first have presented the complaint to the trial court through a timely, specific request, objection, or motion and obtained a ruling. *See* Tex. R. App. P. 33.1; *In re M.M.W.*, 536 S.W.3d 611 (Tex. App.—Texarkana 2017, no pet.) (objections must be sufficiently specific).

COMMENT: After the trial, the attorney must review the case and determine if the court did or did not do anything that his client wants to complain about on appeal. If the attorney failed to timely and specifically object or failed to obtain a ruling on an objec-

tion, the attorney may still be able to preserve the error through the use of a posttrial motion. Also, some complaints may be made for the first time only in a posttrial motion.

§ 26.3 New Trial

§ 26.3:1 Generally

A motion for new trial asks the trial court to reconsider and correct a trial error either in its rulings or in the jury's findings and to grant the movant a new trial. The primary reasons for filing a motion for new trial are to give the trial court a chance to correct any mistakes, to preserve error for appeal, and to extend the appellate deadlines.

New trials may be granted and judgment set aside for good cause on the motion of any party or on the court's own motion on the terms the court directs. If it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that the affected part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only. Tex. R. Civ. P. 320. Rule 320 applies to divorce cases, and a trial court may grant a partial new trial on property issues; however, these issues cannot be severed from the issue of divorce, *Herschberg v. Herschberg*, 994 S.W.2d 273, 277 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.), the parties remain married, and the community estate continues to exist until all issues subject to the new trial have been resolved. *Gathe v. Gathe*, 376 S.W.3d 308, 314–15 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Unlike the trial court, an appellate court may effectively sever the issues of divorce and division by affirming a divorce while reversing and remanding the division of property. In that circumstance, the marriage relationship is not prolonged until the property issues are decided on remand. *Herschberg*, 994 S.W.2d at 277.

A trial court in a divorce proceeding has discretion to grant a new trial within the time frame that the court has plenary jurisdiction, even if one party dies after the divorce decree is entered. *Nichols v. Nichols*, 907 S.W.2d 6, 10 (Tex. App.—Tyler 1995, writ denied). The negligence, inadvertence, or mistake of an attorney is attributable to his client so that the attorney's failure to defend the case properly or to develop fully the available evidence does not constitute "good cause" authorizing a new trial. A motion for new trial may not be used as a vehicle by which the case may be tried over and differently. *Scheffer v. Chron*, 560 S.W.2d 419, 420 (Tex. App.—Beaumont 1977, writ ref'd n.r.e.). A motion for new trial may be filed only by a party to the underlying suit. *In re Trevino*, 329 S.W.3d 906 (Tex. App.—Dallas 2010, orig. proceeding).

Granting a new trial has the legal effect of vacating the original judgment and returning the case to the trial docket as though there had been no previous trial or hearing; the original judgment is set aside, and the parties may proceed without prejudice from previous proceedings. *Markowitz v. Markowitz*, 118 S.W.3d 82, 88 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Thus, when the trial court grants a motion for new trial, the court essentially wipes the slate clean and starts over. *Wilkins v. Methodist Health Care System*, 160 S.W.3d 559, 563 (Tex. 2005).

§ 26.3:2 Format of Motion

The motion must be in writing and signed by the attorney or the party. Tex. R. Civ. P. 320. Each point relied on in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given the jury or charge refused, admission or rejection of evidence, or other proceedings that are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court. Tex. R. Civ. P. 321. Grounds of objection couched in general terms shall not be considered by the court. Tex. R. Civ. P. 322. The motion must specifically request a new trial; if the request is for a different judgment, it is not a motion for new trial. *See Mercer v. Band*, 454 S.W.2d 833, 836 (Tex. App.—Houston [14th Dist.] 1970, no writ).

Motions for new trial on which evidence must be heard, such as those based on newly discovered evidence or jury misconduct, require a verification and one or more affidavits or, in the case of jury misconduct, a reasonable explanation and excuse why an affidavit may not be secured. *See Zuniga v. Zuniga*, 13 S.W.3d 798, 803 n.4 (Tex. App.—San Antonio 1999, no pet.), *disapproved on other grounds*, *In re Z.L.T.*, 124 S.W.3d 163, 166 (Tex. 2003); *Brown v. Hopkins*, 921 S.W.2d 306, 310–11 (Tex. App.—Corpus Christi–Edinburg 1996, no writ) (newly discovered evidence); *Ramsey v. Lucky Stores, Inc.*, 853 S.W.2d 623, 636 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (jury misconduct).

§ 26.3:3 Filing for Appellate Purposes

A motion for new trial is not necessary to preserve error in either a jury or a nonjury case, except under very limited circumstance. *See* Tex. R. Civ. P. 324(a). After either a jury or a nonjury trial, a motion for new trial is necessary to preserve posttrial complaints on which evidence must be heard, such as newly discovered evidence or failure to set aside a default judgment (Tex. R. Civ. P. 324(b)(1)) and complaints that were not brought to the trial court's attention during the trial (Tex. R. Civ. P. 324(b)(2)–(5)).

The motion for new trial, however, does not negate the need for the party to have objected at trial.

After a jury trial, a party must file a motion for new trial to preserve certain types of complaints on appeal, including the following:

1. Posttrial complaints on which evidence must be heard (such as jury misconduct). Tex. R. Civ. P. 324(b)(1).
2. Complaints of incurable jury argument if the trial court has not otherwise made a ruling on it. Tex. R. Civ. P. 324(b)(5).
3. Complaints of factual insufficiency of the evidence to support a jury finding or that the jury finding is against the great weight and preponderance of the evidence. Tex. R. Civ. P. 324(b)(2), (b)(3); *In re A.B.*, 548 S.W.3d 81, 83–84 (Tex. App.—Beaumont 2018, no pet.); *In re A.M.*, 385 S.W.3d 74, 79 (Tex. App.—Waco 2012, pet. denied).
4. Complaints of legal insufficiency. *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988). However, if a party raises legal insufficiency for the first and only time in a motion for new trial, the party is not entitled to a rendition by the appellate court, only to a remand to the trial court. *Horrocks v. Texas Department of Transportation*, 852 S.W.2d 498, 499 (Tex. 1993) (per curiam).
5. Complaints that the jury's damages are inadequate or excessive. Tex. R. Civ. P. 324(b)(4).

If a motion for new trial is a prerequisite of appeal, error not complained of in the motion is waived. *Beacon National Insurance Co. v. Young*, 448 S.W.2d 812, 814 (Tex. App.—Dallas 1969, writ ref'd n.r.e.). A party whose motion for judgment on verdict of a jury is denied may forgo the filing of a motion for new trial and predicate his points of error on appeal on matters included in the motion. The party following that course may complain on appeal only of denial of the motion for judgment. *Abbott v. Earl Hayes Chevrolet Co.*, 384 S.W.2d 782, 784 (Tex. App.—Tyler 1964, no writ).

The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, regardless of whether there is any sound or reasonable basis for the conclusion that a further motion is necessary. *Old Republic Insurance Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993) (per curiam).

§ 26.3:4 Newly Discovered Evidence

A party seeking a new trial on the ground of newly discovered evidence must establish that (1) the evidence has come to the party's knowledge since the trial, (2) the failure to discover the new evidence was not for want of due diligence, (3) it is not cumulative evidence, and (4) the evidence is so material that it would probably produce a different result if a new trial were granted. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983), *overruled on other grounds*, *Moritz v. Preiss*, 121 S.W.3d 715, 720–21 (Tex. 2003). *See, e.g., In re Calzadias*, 484 S.W.3d 574, 576 (Tex. App.—Amarillo 2016, orig. proceeding) (new evidence strongly showed original order would seriously and adversely affect interest and welfare of children, and presentation of that evidence at another trial would probably change result). The granting of a motion for new trial on the ground of newly discovered evidence will not be disturbed on appeal absent an abuse of discretion.

In denying a motion for new trial on the ground of newly discovered evidence, the trial court should take into consideration the weight and the importance of the new evidence and its bearing in connection with the evidence received at trial. The inquiry is not whether, according to the evidence in the record, the request for new trial should have been granted in the particular case, but whether the refusal to grant the request has involved the violation of a clear legal right or a manifest abuse of judicial discretion. Every reasonable presumption will be made on review in favor of orders of the trial court refusing new trials. *Jackson*, 660 S.W.2d at 809. In reviewing a trial court's decision refusing a new trial, appellate courts recognize the well-established principle that courts do not favor motions for new trial on the ground of newly discovered evidence, and such motions are reviewed with careful scrutiny. *Brown v. Hopkins*, 921 S.W.2d 306, 311 (Tex. App.—Corpus Christi–Edinburg 1996, no writ). Review of a trial court's action under the abuse of discretion criteria is a question of law. *Jackson*, 660 S.W.2d at 809.

Each element of a motion for new trial on the ground of newly discovered evidence must be established by affidavit. *Brown*, 921 S.W.2d at 310–11; *Fulton v. Duhaime*, 525 S.W.2d 62, 64 (Tex. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). This is true even though the motion is verified and not controverted. *Steelman v. Rosenfeld*, 408 S.W.2d 330, 335 (Tex. App.—Dallas 1966, no writ). Specifically, the attached affidavit must contain a statement that, with the exercise of due diligence, the newly discovered evidence could not have been discovered before the hearing. *Jackson*, 660 S.W.2d at 810. Furthermore, the motion must be accompanied by an affidavit of the person by whom

the expected proof is to be made, and that witness must be called to testify on the hearing of the motion. *Steelman*, 408 S.W.2d at 335.

§ 26.3:5 After Default Judgment

Generally, there are two types of default judgments: (1) those granted without the respondent's receiving proper notice of the suit, hearing, or trial and (2) those granted after the respondent receives proper notice of the suit, hearing, or trial but fails to appear because of a mistake or accident.

Improper Service: If the trial court grants a default judgment without the defendant's receiving proper service, the defendant should challenge any deficiencies in the citation (*see* Tex. R. Civ. P. 15, 99), the service (*see Wood v. Brown*, 819 S.W.2d 799, 800 (Tex. 1991) (per curiam)), the return (*see* Tex. R. Civ. P. 107), and the petitioner's pleadings (*see Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494 (Tex. 1988)). There are no presumptions in favor of valid issuance, service, or return of citation. *Creaven v. Creaven*, 551 S.W.3d 865, 870 (Tex. App.—Houston [14th Dist.] 2018, no pet.). A default judgment is improper against a defendant who has not been served in strict compliance with the law, even if he has actual knowledge of the lawsuit. *In re T.J.T.*, 486 S.W.3d 675, 678–79 (Tex. App.—Texarkana 2016, no pet.) (citation served on father failed to inform him that answer was required or that he would risk default judgment if he failed to answer); *Singh v. Gill*, No. 05-19-01146-CV, 2021 WL 194114, at *3–4 (Tex. App.—Dallas Jan. 20, 2021, no pet.) (mem. op.) (affidavits of wife and her attorney supporting substituted service did not comply with Tex. R. Civ. P. 106(b), failing to demonstrate a diligent search to locate and attempts at personal service or by certified mail, making substituted service improper and negating personal jurisdiction over respondent). However, if the defendant's counsel appears at a motion to quash service, his client has entered an appearance, and a default judgment is proper if that party does not appear at trial. *In re A.M.*, 351 S.W.3d 395, 398 (Tex. App.—El Paso 2011, no pet.). Amended pleadings may be served on a defendant under rule 21a of the Texas Rules of Civil Procedure without the necessity of obtaining a new citation. *In re E.A.*, 287 S.W.3d 1, 4 (Tex. 2009).

In passing title 4 of the Family Code (Protective Orders and Family Violence), the legislature did not intend for rule 107(h) of the Texas Rules of Civil Procedure (requirement that return of service be on file for at least ten days before a proper default judgment may be rendered) to apply to family violence protective orders. Applying rule 107(h) to family violence protective orders would render meaningless the requirement of Family Code section 84.001(a) that a hearing be held "not . . . later than the 14th day

after the date the application is filed," would render meaningless section 84.004(a)'s requirement that a trial court reschedule hearings on a respondent's request when the respondent has been served with an application within the forty-eight hours before the time set for the hearing, would seek to insert the words *return of service* into section 82.043(c), and would generally thwart the purpose of title 4 by causing delay in what is meant to be an expedited process. Therefore rule 107(h) does not apply to family violence protective orders. *Johnson v. Simmons*, 597 S.W.3d 538, 545 (Tex. App.—Fort Worth 2020, no pet.). *But see Lancaster v. Lancaster*, No. 01-14-00845-CV, 2015 WL 9480098, at *4 (Tex. App.—Houston [1st Dist.] Dec. 29, 2015, no pet.) (mem. op.).

No Notice of Trial: Because, without notice, a respondent cannot intentionally or with conscious indifference fail to appear, if the respondent proves that a default judgment was granted without proper notice of the trial or hearing, he satisfies the first prong of the test set forth in *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124, 126 (Tex. 1939). *Texas Sting, Ltd. v. R.B. Foods*, 82 S.W.3d 644, 650–52 (Tex. App.—San Antonio 2002, pet. denied).

Proving lack of notice of the trial also relieves the respondent from needing to establish the remainder of the *Craddock* factors because, once the respondent enters an appearance, the respondent is entitled to notice of the trial setting as a matter of due process. *LBL Oil Co. v. International Power Services*, 777 S.W.2d 390, 390–91 (Tex. 1989) (per curiam).

Since a party has a right to raise defenses to the validity of a mediated settlement agreement before judgment, a hearing to prove up a mediated settlement agreement is considered a final hearing that requires at least forty-five days' notice under Tex. R. Civ. P. 245, and a default judgment without such notice is improper. *M.B. v. R.B.*, No. 02-19-00342-CV, 2021 WL 2252792, at *5 (Tex. App.—Fort Worth June 3, 2021, no pet. h.) (mem. op.).

Failure to Appear after Receipt of Proper Notice of Trial: A defendant challenging a default judgment must show that (1) the failure of the defendant to answer before judgment was not intentional or the result of conscious indifference but was due to a mistake or an accident, (2) the motion for new trial set up a meritorious defense, and (3) the motion was filed at a time when to grant it would cause no delay or otherwise work an injury to the plaintiff. *Bank One, Texas v. Moody*, 830 S.W.2d 81, 82–83 (Tex. 1992) (interpreting three-pronged test set out in *Craddock*, 133 S.W.2d at 126).

But *Craddock* applies only to default judgments and not to judgments rendered after an adversarial trial, even when a party participates in the trial without his lawyer because of a calendaring error. *In re G.B.A.*, 528 S.W.3d 815 (Tex. App.—Texarkana 2017, no pet.).

Conscious Indifference: "Conscious indifference" means a failure to take some action that would seem indicated to a person of reasonable sensibilities under the same or similar circumstances. *Sharpe v. Kilcoyne*, 962 S.W.2d 697, 701 (Tex. App.—Fort Worth 1998, no pet.) A failure to appear is not due to conscious indifference merely because it was intentional or deliberate; it must also be without adequate justification. *State v. Sledge*, 982 S.W.2d 911, 914 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

The courts have liberally interpreted the first *Craddock* prong in favor of the movant. *See Gotcher v. Barnett*, 757 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ). The absence of a purposeful or bad-faith failure to answer is the "controlling fact" and is satisfied by even a slight excuse. *Gotcher*, 757 S.W.2d at 401. Negligence alone will not preclude setting aside a default judgment. *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966); *Ferguson & Co. v. Roll*, 776 S.W.2d 692, 697 (Tex. App.—Dallas 1989, no writ); *see also* Michael A. Pohl and David Hittner, *Judgment by Default in Texas*, 37 Sw. L.J. 421, 433 (1983) ("[t]he defendant's burden of demonstrating the accidental or mistaken nature of his failure to answer may often result in an admission of negligence."). Thus, it appears that some excuse, even if not strong, is sufficient under the *Craddock* rationale to warrant setting aside a default judgment, provided that the defendant's failure to answer was, in fact, accidental. *Craddock*, 133 S.W.2d at 125; *Ferguson*, 776 S.W.2d at 695.

Evidence of extrinsic fraud also satisfies the first *Craddock* prong. *See Rhamey v. Fielder*, 203 S.W.3d 24, 29 (Tex. App.—San Antonio 2006, no pet.). Extrinsic fraud is wrongful conduct practiced outside the adversary trial, such as keeping a party away from court or making false promises of compromise, that affects the manner in which the judgment is procured. *Rhamey*, 203 S.W.3d at 29; *see also Browning v. Prostok*, 165 S.W.3d 336, 347 (Tex. 2005).

A party's failure to answer because of a heavy workload or preoccupation with other activities can satisfy *Craddock*'s first prong. *See Southland Paint Co. v. Thousand Oaks Racket Club*, 724 S.W.2d 809, 811 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (late answer due to staff shortage at defendant's insurance broker's office); *Evans v. Woodward*, 669 S.W.2d 154, 155 (Tex. App.—Dallas 1984, no writ) (no conscious indifference when answer not filed due to confusion in attorney's office); *Drake v.*

McGalin, 626 S.W.2d 786, 788 (Tex. App.—Beaumont 1981, no writ) (failure to answer due to accident or mistake when answer prepared by secretary presumably lost by volunteer exchange student who was assisting defendant's attorney as an "office boy"); *Dallas Heating Co. v. Pardee*, 561 S.W.2d 16, 19 (Tex. App.—Dallas 1977, writ ref'd n.r.e.) (suit papers inadvertently misplaced in defendant's office sufficient to negate conscious indifference); *Leonard v. Leonard*, 512 S.W.2d 771, 773 (Tex. App.—Corpus Christi–Edinburg 1974, writ dism'd w.o.j.) (no conscious indifference when attorney misplaced file); *Schindler v. Schindler*, No. 13-16-00483-CV, 2018 WL 3151857 (Tex. App.—Corpus Christi–Edinburg June 28, 2018, no pet.) (mem. op.) (finding of conscious indifference affirmed when husband failed to appear after being properly served and complying with court's temporary orders).

Meritorious Defense: To set up a meritorious defense, the motion must allege facts that in law would constitute a defense to the cause of action asserted by the plaintiff, and it must be supported by affidavits or other evidence proving prima facie that the defendant has such a meritorious defense. *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993) (quoting *Ivy*, 407 S.W.2d at 214). The movant must do more than merely assert that it has a meritorious defense, *Ivy*, 407 S.W.2d at 214; however, it need not prove the defense in order to meet *Craddock*'s second prong. *In re Marriage of Sandoval*, 619 S.W.3d 716, 722–23 (Tex. 2021) (per curiam) (husband's affidavit stating facts that established house awarded to wife was his separate property sufficiently set up meritorious defense and sufficiently explained his failure to answer based on mistaken belief that divorce decree could not distribute this property in his absence).

To satisfy this requirement, the defaulting party need only assert, but not prove, facts that, if true, would cause a different result on retrial. *Gotcher*, 757 S.W.2d at 403. A meritorious defense, however, is not limited to one that, if proved, would lead to an entirely opposite result. It is sufficient if at least a portion of the judgment would not be sustained at retrial. *HST Gathering Co. v. Motor Service, Inc.*, 683 S.W.2d 743, 745 (Tex. App.—Corpus Christi–Edinburg 1984, no writ).

The trial court may not try the defensive issues in deciding whether to set aside the default judgment and should not consider counter affidavits or conflicting testimony offered to refute the movant's factual allegations. *Estate of Pollack*, 858 S.W.2d at 392.

If a defendant had no actual or constructive notice of a trial setting and a default judgment is entered against him, he is not required to show that he had a meritorious defense, because such a requirement violates his due-process rights under the Four-

teenth Amendment to the United States Constitution. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86–87 (1988).

No Delay or Injury: To set aside a default judgment, the defendant must also prove that a new trial would occasion no delay or otherwise work an injury to the plaintiff. *Craddock*, 133 S.W.2d at 126. In determining whether the granting of a new trial would injure the plaintiff or occasion delay, the court should deal with the facts on a case-by-case basis. *Angelo v. Champion Restaurant Equipment Co.*, 713 S.W.2d 96, 98 (Tex. 1986). One way a defendant may show that the granting of a new trial will not injure the plaintiff is by showing that he is ready to proceed to trial and that he has offered to reimburse the plaintiff for expenses incurred in obtaining the default judgment. *Gotcher*, 757 S.W.2d at 404. Although reimbursement of costs in obtaining default judgment and the defendant's ability to go to trial immediately may both be important factors in avoiding delay or injury to a plaintiff, neither factor is so indispensable that a new trial cannot be granted without it. *Angelo*, 713 S.W.2d at 98.

In determining whether to grant a motion for new trial, the court may not consider expenses accrued by a party after the filing of the opponent's motion for new trial. The court similarly may not consider a change of position to the nonmovant's detriment if that change of position relied on the validity of the judgment after the filing of the motion for new trial. *Burns v. Burns*, 568 S.W.2d 669, 672 (Tex. App.—Fort Worth 1978, writ ref'd n.r.e.).

After Service by Publication: When a default judgment is sought after service by publication, the trial court must appoint an attorney ad litem to defend the case and that attorney must be paid a reasonable fee for his services for the trial. Tex. R. Civ. P. 244. After the court renders judgment, the court must also approve and sign a statement of evidence, which is separate and apart from the reporter's record. Tex. R. Civ. P. 244; *Montgomery v. R.E.C. Interests, Inc.*, 130 S.W.3d 444, 446–47 (Tex. App.—Texarkana 2004, no pet.). A motion for new trial after service by publication is equivalent to an equitable bill of review and must be verified by affidavit. Tex. R. Civ. P. 329; *Stock v. Stock*, 702 S.W.2d 713, 714 (Tex. App.—San Antonio 1985, no writ).

Respondent in Military Service: A person against whom a default judgment is entered in a proceeding during the person's period of military service or within sixty days thereafter may apply to the court to reopen the judgment for the purpose of allowing the servicemember to defend the action. The servicemember must show a meritorious or legal defense and that the servicemember's ability to defend the action was materially affected by the military service. The application must be filed within ninety

days after military service ends. *See* 50 U.S.C. § 3931(g). A servicemember of the Texas military forces who is ordered to state active duty or to state training and other duty is entitled to the same benefits and protections provided to U.S. military servicemembers by the foregoing provisions of 50 U.S.C. § 3931. Tex. Gov't Code § 437.213.

§ 26.3:6 Time for Filing Motions

A motion for new trial must be filed before or within thirty days after the judgment or other order complained of is signed. Tex. R. Civ. P. 329b(a). Within that same thirty-day period, a party may file one or more amended motions for new trial without leave of court as long as the trial court has not already overruled an earlier motion for new trial. Tex. R. Civ. P. 329b(b). With leave of the court, a party may file an amended motion even if the court has overruled an earlier motion for new trial. This rule also applies to supplemental motions. *See Equinox Enterprises, Inc. v. Associated Media, Inc.*, 730 S.W.2d 872, 875 (Tex. App.—Dallas 1987, no writ).

Motions, whether original, amended, or supplemental, filed after this thirty-day period are a nullity and cannot be considered by appellate courts. *Equinox*, 730 S.W.2d at 875. A court may not lengthen the period for taking any action under the Texas Rules of Civil Procedure relating to new trials except as stated in those rules. Tex. R. Civ. P. 5. A court is without authority to grant leave to file an amended motion for new trial after this thirty-day period. *Lind v. Gresham*, 672 S.W.2d 20, 22 (Tex. App.—Houston [14th Dist.] 1984, no writ). Although a motion for new trial filed more than thirty days after the trial court signs its judgment is untimely, a trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before it loses plenary power. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003). A prematurely filed motion for new trial is deemed to be filed on the date of, but subsequent to, the time that the court signs the judgment. Tex. R. Civ. P. 306c. The judgment date still serves as the date from which the appellate timetable begins.

COMMENT: Although the Texas Rules of Civil Procedure require that a motion for new trial be filed within thirty days of the judgment, the rules do not address the filing of a brief in support of the motion. Therefore, the practitioner should consider filing such a brief if it is later determined that more detail or explanation is needed that was inadvertently omitted from the motion for new trial.

Exceptions to the general rule requiring filing of the motion within thirty days of the signing of the judgment apply when a party receives a late notice of judgment (*see* Tex. R. Civ. P. 306a), when the trial court signs a judgment rendered after citation by publi-

cation (*see* Tex. R. Civ. P. 329(a)), or when a party files an original petition in a Texas court to enforce a foreign judgment (*see* Tex. Civ. Prac. & Rem. Code § 35.003(b), (c)).

To invoke the extended deadline to file a motion for new trial due to receiving late notice of judgment under Tex. R. Civ. P. 306a(4), a movant must establish a specific date on which he or his attorney received notice or obtained actual knowledge of the judgment. The deadline to file a motion for new trial "runs from the date the party or the party's attorney receives notice from the clerk of the court or acquires actual knowledge that the trial court signed the order, whichever occurs first, as long as that date is not more than ninety days after the trial court signed the order." *In re Mitchell*, No. 05-17-00734-CV, 2017 WL 3392768, at *2 (Tex. App.—Dallas Aug. 8, 2017, orig. proceeding) (mem. op.).

Citation by Publication: A motion for new trial after citation by publication, if the defendant has not appeared, is timely if filed within two years after the judgment is signed. Tex. R. Civ. P. 329(a). However, the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed. Tex. Fam. Code § 161.211(b).

COMMENT: Since it is unclear whether Tex. Fam. Code § 161.211(b) applies to both motions for new trial and bills of review or just to motions for new trial, if the six-month period has ended and there has been clear extrinsic fraud, the practitioner should consider filing a bill of review.

§ 26.3:7 Plenary Power

The trial court has thirty days from the date a final order is signed, without a motion, to change any part of the order. Tex. R. Civ. P. 329b(d). This plenary power may be extended in certain instances. Tex. R. Civ. P. 329b(c), (g) (motion for new trial or to modify, correct, or reform a judgment), 306a(4) (no notice of judgment). Judicial action taken after the court's jurisdiction over a cause has expired is a nullity. *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 485–86 (Tex. 1995) (per curiam).

Only a motion for new trial or a motion to modify, correct, and reform judgment filed by a party of record automatically extends the trial court's plenary power. A motion for new trial filed by a nonparty is simply an unofficial plea to the trial court to exercise its discretion allowed under rule 320 to set aside the judgment during the court's plenary power. *State & County Mutual Fire Insurance Co. v. Kelly*, 915 S.W.2d 224, 227 (Tex.

App.—Austin 1996, no writ). If a motion for new trial is denied on the same day the judgment is signed, the trial court loses plenary power thirty days later unless another motion extending plenary power (for example, a motion to modify, correct, or reform the judgment) is filed. *In re Brookshire Grocery Co.*, 250 S.W.3d 66 (Tex. 2008) (orig. proceeding).

Even after a trial court's plenary power has expired, a court may still sign an order in that case under the following limited circumstances:

1. the order is a judgment nunc pro tunc to correct a clerical error (Tex. R. Civ. P. 316); or
2. the order declares the prior judgment void because—
    a. the prior order was signed after the expiration of the court's plenary power;
    b. the court lacked subject-matter jurisdiction to render the judgment;
    c. a complete failure or lack of service violated due process; or
    d. there is any ground allowing a collateral attack on the judgment.

In re Martinez, 478 S.W.3d 123, 127–28 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding).

§ 26.3:8 Order on Motion for New Trial

An order granting a motion for new trial must be written and signed. *In re Lovito-Nelson*, 278 S.W.3d 773, 775–76 (Tex. 2009) (per curiam). A docket entry is not an order and may not be considered as part of the record. *Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Services*, 960 S.W.2d 334, 336 (Tex. App.—Corpus Christi–Edinburg 1997, pet. denied). An order granting a new trial must be entered before the trial court loses plenary power. An order is insufficient unless it clearly states that the trial court has granted the motion for new trial. *See In re Nguyen*, 155 S.W.3d 191, 194 (Tex. App.—Tyler 2003, orig. proceeding) ("Here, the scheduling order does not contain any reference to the pending motion for new trial and does not expressly grant a new trial. Consequently, we conclude that the scheduling order does not constitute a written, signed order granting a new trial."). A letter ruling stating the court "will sign" an order granting motion for new trial may also be insufficient. *See, e.g., In re Johnson*, 557 S.W.3d 740 (Tex. App.—Waco 2018, orig. proceeding).

The order on the motion for new trial must specifically state the reason for the granting of the new trial. An order that attempts to set aside a jury verdict is insufficient if it simply states that the new trial has been granted "in the interests of justice and fairness." *In re Columbia Medical Center of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 211 (Tex. 2009) (orig. proceeding).

A trial court retains the power to vacate or "ungrant" a new trial and reinstate the original judgment at any time. *In re Baylor Medical Center at Garland*, 280 S.W.3d 227 (Tex. 2008).

§ 26.4 Motion to Modify, Correct, or Reform Judgment

A motion to modify, correct, or reform the judgment is filed to request the trial court to change its judgment. *See* Tex. R. Civ. P. 329b(g). It should be filed to correct any error in the judgment, such as when the trial court does not award attorney's fees or does not award the correct amount of attorney's fees (*see Texas Education Agency v. Maxwell*, 937 S.W.2d 621, 623 (Tex. App.—Eastland 1997, writ denied)) or when the judgment does not award costs or awards an incorrect amount (*see Portland Savings & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 541 (Tex. App.—Corpus Christi–Edinburg 1985, writ ref'd n.r.e.), *overruled on other grounds*, *Dawson-Austin v. Austin*, 968 S.W.2d 319, 323 (Tex. 1998)).

Format of Motion: The motion must be in writing and signed by the party or his attorney and must specify what aspects of the judgment should be modified, corrected, or reformed. Tex. R. Civ. P. 329b(g).

Filing Motion: The motion to modify, correct, or reform the judgment must be filed within thirty days of the date the court signed the judgment. Tex. R. Civ. P. 329b(g). A party may file a motion to modify, correct, or reform the judgment even if the court has already overruled a motion for new trial as long as it is filed within the thirty-day period following the court's signing of the judgment. *L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 443 (Tex. 1996) (per curiam).

Motion to Modify, Correct, or Reform Judgment vs. Motion for Judgment Non Obstante Veredicto: Although a motion for judgment non obstante veredicto is not one of the motions listed in rule 26.1 of the Texas Rules of Appellate Procedure, one court has held that such a motion extends the appellate timetable. *Kirschberg v. Lowe*, 974 S.W.2d 844, 847–48 (Tex. App.—San Antonio 1998, no pet.); *see also In re Brookshire Grocery Co.*, 250 S.W.3d 66, 74 n.5 (Tex. 2008) (Hecht, J., dissenting).

COMMENT: The better practice is to clearly delineate these motions, especially if the practitioner is relying on the motion to modify, correct, or reform the judgment to extend the appellate timetable.

Motion to Modify, Correct, or Reform vs. Motion to Clarify: A motion to modify differs from a motion to clarify. A court may clarify an order rendered by the court if the court finds, on the motion of a party or on the court's own motion, that the order is not specific enough to be enforced by contempt. Tex. Fam. Code §§ 9.008, 157.421(a); *Lundy v. Lundy*, 973 S.W.2d 687, 688 (Tex. App.—Tyler 1998, pet. denied). A court, however, may not change the substantive provisions of an order to be clarified, and a substantive change is not enforceable. Tex. Fam. Code § 157.423; *Lundy*, 973 S.W.2d at 688; *see* Tex. Fam. Code § 9.006.

COMMENT: Under Family Code chapter 9, a statutory motion to clarify an order may be filed when necessary.

The only basis for clarifying a prior decree is when a provision is ambiguous and non-specific. *Lundy*, 973 S.W.2d at 688; *see Bina v. Bina*, 908 S.W.2d 595, 598 (Tex. App.—Fort Worth 1995, no writ). In the absence of an ambiguity, the trial court is without authority to modify the judgment. *Lundy*, 973 S.W.2d at 688–89. A court may not modify the original judgment under the guise of clarification. *Dunn v. Dunn*, 708 S.W.2d 20, 23 (Tex. App.—Dallas 1986, no writ), *citing McGehee v. Epley*, 661 S.W.2d 924, 925 (Tex. 1983) (per curiam). A motion to clarify does not extend the time to file the notice of appeal. *See* Tex. R. App. P. 26.1. A motion to clarify is analogous to a judgment nunc pro tunc in that it may not substantively change a final order. *In re Marriage of Ward*, 137 S.W.3d 910, 913 (Tex. App.—Texarkana 2004, no pet.).

Clarifying orders may more precisely specify the manner of carrying out the property division previously ordered, as long as the substantive division of the property is not altered. Tex. Fam. Code § 9.006(b); *In re Marriage of McDonald*, 118 S.W.3d 829, 832 (Tex. App.—Texarkana 2003, pet. denied).

The trial court may not render an order to clarify the property division made or approved in the decree before the thirtieth day after the date the final judgment is signed. If a timely motion for new trial or to vacate, modify, correct, or reform the decree is filed, the trial court may not render an order to clarify the property division before the thirtieth day after the date the order overruling the motion is signed or the motion is overruled by operation of law. Tex. Fam. Code § 9.007(c).

Motion to Modify, Correct, or Reform vs. Judgment Nunc Pro Tunc: A motion to modify, correct, or reform the judgment may be filed within the first thirty days following entry of the judgment to correct either a judicial error or a clerical error. After the trial court's plenary power expires, an order entered to correct a judicial error in the guise of judgment nunc pro tunc is void. The only ground for a motion for judgment nunc pro tunc is to correct a clerical error made in entering the judgment as opposed to a judicial error made in rendering the judgment. *See Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). A clerical error may be corrected at any time. *See* Tex. R. Civ. P. 316. If it is corrected after the court loses plenary jurisdiction, the appellate timetable is not extended for any complaint about the original judgment. Tex. R. Civ. P. 306a(6).

A clerical error is a discrepancy between the entry of a judgment in the official record and the judgment as it was actually rendered. *Universal Underwriters Insurance Co. v. Ferguson*, 471 S.W.2d 28, 29–30 (Tex. 1971) (orig. proceeding). A clerical error does not result from judicial reasoning or determination. *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986) (per curiam). A clerical error includes a variance between the judgment signed and the judgment the court intended to sign. *Delaup v. Delaup*, 917 S.W.2d 411, 413 (Tex. App.—Houston [14th Dist.] 1996, no writ) (judgment did not reflect settlement agreement made in open court).

When deciding whether an error in a judgment is clerical or judicial, the court must look to the judgment actually rendered and not the judgment that should have been rendered. Whether an error is judicial or clerical is a question of law. *Escobar*, 711 S.W.2d at 231–32. A split of authority exists as to what amount of evidence is required to prove that the error was clerical rather than judicial. *Woodward v. Woodward*, No. 14-18-00039-CV, 2019 WL 3943020, at *3 (Tex. App.—Houston [14th Dist.] Aug. 20, 2019, no pet.) (mem. op.) (applying "some probative evidence" standard articulated in *Escobar*, while noting that First and Thirteenth Courts of Appeals have applied "clear and convincing evidence" standard).

In *In re A.M.R.*, 528 S.W.3d 119 (Tex. App.—El Paso 2017, no pet.), the trial court orally granted the father's request to impose a geographic restriction on the child's residence to El Paso County, Texas. The trial court subsequently entered a final written order that stated the geographic restriction would be lifted if the father failed to reside within El Paso County, Texas. The father filed a motion for judgment nunc pro tunc and requested the provision be removed because he did not live in El Paso County, Texas, and the court's oral rendition of judgment did not contain such a stipulation on the child's geographic restriction. The trial court granted the request and entered a judgment nunc pro tunc that deleted the contested provision. The mother appealed, arguing

the judgment nunc pro tunc was void because it impermissibly corrected a judicial error rather than clerical error. The appellate court affirmed, holding that the trial court's removal of the provision lifting the geographic restriction if the father did not live in El Paso County constituted clerical error, not a judicial error, because the trial court did not intend for the geographic restriction to be conditioned on the father's residence when the court orally rendered judgment.

Correction of the start date for child support to comport with the date of divorce is a correction of a judicial error, not of a clerical error. *Rawlins v. Rawlins*, 324 S.W.3d 852, 856–57 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding).

§ 26.5 Request for Findings of Fact and Conclusions of Law

A trial judge has the authority and duty to file requested findings of fact and conclusions of law where there has been an evidentiary hearing to the court or a bench trial on the merits. This duty does not extend to requests for findings and conclusions from postjudgment hearings. Also, a dismissed complaint imposes no duty on the trial judge to file findings of fact and conclusions of law. *Zimmerman v. Robinson*, 862 S.W.2d 162, 164 (Tex. App.—Amarillo 1993, no writ). If the case is tried in part to a jury and in part to the court, findings and conclusions are available in the nonjury portion of the trial. Additionally, when the judgment of the court differs substantially from or exceeds the scope of the jury verdict, findings are available. *Roberts v. Roberts*, 999 S.W.2d 424, 433 (Tex. App.—El Paso 1999, no pet.).

If the trial judge dies before filing findings of fact and conclusions of law in a case pending at his death, the judge's successor may file them. Tex. Civ. Prac. & Rem. Code § 30.002(b). A successor judge may make findings of fact and conclusions of law when the preceding judge has died, resigned, or become disabled during his term of office. *See* Tex. R. Civ. P. 18. However, a successor judge who takes the bench after defeating his predecessor in an election lacks authority to issue findings of fact and conclusions of law for a trial heard by his predecessor. *Ad Villarai, LLC v. Pak*, 519 S.W.3d 132 (Tex. 2017) (per curiam).

The Government Code defines "retired judge" to mean a person who has retired under one of the judicial retirement systems of Texas (i.e., a "retiree") or the county and district retirement system. Tex. Gov't Code § 74.041(3), (6). A "former judge," on the other hand, is a person who has served as an active judge in Texas but is *not* a retired judge. Tex. Gov't Code § 74.041(5). Any retiree may elect to be a judicial officer and is then designated a "senior judge." Tex. Gov't Code § 75.001. A former appellate judge

may also elect to serve as a judicial officer, but a senior appellate judge can be assigned to more courts in a broader geographic area. *Compare* Tex. Gov't Code § 75.002 (assignment of retiree) *and* Tex. Gov't Code § 75.003 (assignment of former judge). A judge's status is fixed when he leaves office. If neither article 30.002 nor rule 18 applies to a case that requires findings of fact and conclusions of law, the case must be remanded for a new trial. *In re J.D.H.*, No. 05-14-00504-CV, 2016 WL 3946822, at *6 (Tex. App.—Dallas July 18, 2016, no pet.) (mem. op.).

In a nonjury trial, findings of fact serve the same purpose that the jury's answers to the jury's questions do; they resolve the factual disputes in the case. Conclusions of law are the court's statement of the legal bases that it applied to resolve the facts in the case. Findings of fact governed by rule 296 of the Texas Rules of Civil Procedure should be requested by the party who loses; otherwise, facts are deemed in favor of the judgment. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam).

When It Is Necessary to Request Findings of Fact: Requests for findings of fact are necessary (1) in any case tried without a jury (Tex. R. Civ. P. 296), (2) in a nonjury case that is resolved by a judgment after the petitioner rests (*Qantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988)), and (3) when the jury omits elements of an issue (*see* Tex. R. Civ. P. 296). When part of the case is tried to a jury and part is tried to the court, findings of fact should be requested on the issues decided by the court. *Roberts*, 999 S.W.2d at 433–34.

When Findings of Fact Are Helpful: Findings of fact are helpful (1) when the court rules on jurisdiction challenges after an evidentiary hearing (*see Goodenbour v. Goodenbour*, 64 S.W.3d 69, 76 (Tex. App.—Austin 2001, pet. denied)), (2) after the court holds a hearing on motion to transfer venue (*see Challenger Sales & Supply v. Haltenberger*, 730 S.W.2d 453, 455 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.)), and (3) after an evidentiary hearing on a motion for new trial (*see Higginbotham v. General Life & Accident Insurance Co.*, 796 S.W.2d 695, 695 (Tex. 1990)).

When Findings of Fact Are Inappropriate: Findings of fact are inappropriate and will not extend the time within which to perfect the appeal (1) when issues are tried to a jury, (2) when the court renders a summary judgment, (3) when the court grants a directed verdict in a jury trial, and (4) when the court grants a judgment non obstante veredicto. *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997).

When Request for Findings of Fact Should Be Made:

Child support: Without regard to rules 296 through 299 of the Texas Rules of Civil Procedure, in rendering an order of child support, the court shall make findings of fact if (1) a party files a written request with the court before the final order is signed, but not later than twenty days after the date of rendition of the order, (2) a party makes an oral request in open court during the hearing, or (3) the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines under section 154.125 or 154.129, as applicable. Tex. Fam. Code § 154.130(a). Findings under section 154.130 are not required if a trial court merely denies a request for modification of child support. *Hardin v. Hardin*, 161 S.W.3d 14, 19–20 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

COMMENT: Section 154.130 is unclear as to the mechanism by which a party should obtain the mandatory findings when the amount of the child support order varies from the amount computed by applying the percentage guidelines. Since without the findings an appellate court will not know the basis of the court order or that the child support order varies, to preserve error a written request for the findings should be requested before the order is signed, as part of a rule 296 request, or in a motion to modify, correct, and reform the judgment.

Possession: In all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, including a possession order for a child under three years of age, on request by a party, the court shall state in writing the specific reasons for the variance from the standard order. A request for findings of fact under this provision must conform to the Texas Rules of Civil Procedure. Tex. Fam. Code § 153.258. A party may ask for these findings any time the trial court's possession order varies from the standard possession order. *See In re Rangel*, No. 04-17-00060-CV, 2017 WL 1161173, at *2 (Tex. App.—San Antonio Mar. 29, 2017, orig. proceeding) (mem. op.) (despite timely request, trial court failed to include mandatory findings in temporary order that varied from standard possession order). Under the rules, the first request for findings of fact must be filed within twenty days of the date that the court signs the judgment. *See* Tex. R. Civ. P. 296.

On a party's request, the court shall make findings of fact and conclusions of law with respect to an order under Family Code section 153.3171, which concerns alterations of the standard possession order to provide alternative beginning and ending possession times without an election when the possessory conservator resides not more than fifty miles from the child's primary residence. Tex. Fam. Code § 153.3171(c).

Marital property: Like findings of fact for child support and possession, specific findings of fact associated with disputed issues involving characterization, valuation, and division of the marital estate are authorized by section 6.711 of the Texas Family Code. *See* Tex. Fam. Code § 6.711. Under section 6.711, the timetables for seeking such findings are the same as those set forth in rule 296 of the Texas Rules of Civil Procedure, and the first request for findings of fact must be filed within twenty days of the date that the court signs the judgment. *See* Tex. R. Civ. P. 296.

Trial Court's Response: On receipt of a request for findings, it is the clerk's duty to immediately call the request to the attention of the judge who tried the case. Tex. R. Civ. P. 296. The trial court shall file findings of fact within twenty days of receiving the request. Tex. R. Civ. P. 297.

The courts of appeals are split on whether an appellate court may consider findings included in the final order but not in findings of fact and conclusions of law. The Amarillo court of appeals in *Hill* held that if the findings in the judgment do not conflict with the findings of fact and conclusions of law, those in the judgment have effect. *Hill v. Hill*, 971 S.W.2d 153, 157 (Tex. App.—Amarillo 1998, no pet.). A Houston court of appeals reached a different conclusion, stating that the purpose of rule 299a is clear. Findings of fact and conclusions of law shall not be recited in a judgment. If they are, they cannot form the basis of a claim on appeal. *Frommer v. Frommer*, 981 S.W.2d 811, 814 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd). In *Tate v. Tate*, the El Paso court of appeals noted that findings of fact and conclusions of law were not filed and that the appellee's attorney had drafted the decree that included the findings. The court therefore concluded that the appellee had waived any complaint regarding the invalidity of those findings. *Tate v. Tate*, 55 S.W.3d 1, 7 n.4 (Tex. App.—El Paso 2000, no pet.).

Second Request for Findings of Fact and Conclusions of Law: If the trial court fails to file findings of fact within twenty days after the first request, the requesting party has thirty days from the date of the original request to file a notice of past due findings of fact and conclusions of law. The clerk must immediately call the notice to the court's attention. Tex. R. Civ. P. 297. If the requesting party fails to file a notice of past due findings of fact and conclusions of law, the right to complain of the court's failure to file findings of fact and conclusions of law is waived. *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 231–32 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Once a party files a notice of past due findings of fact and conclusions of law, the trial court has forty days from the filing of the party's first request to file findings and conclusions. Tex. R. Civ. P. 297.

Appeal from Interlocutory Order: In an appeal from an interlocutory order, which is an accelerated appeal, the trial court need not file findings of fact and conclusions of law; however, it may file findings and conclusions within thirty days of the date of the signing of the order. *See* Tex. R. App. P. 28.1(c).

Request for Additional or Amended Findings of Fact and Conclusions of Law: Once the trial court files findings and conclusions, either party has ten days to request additional or amended findings or conclusions. Tex. R. Civ. P. 298. If the court omitted a finding on a material fact, the requesting party must submit a specific proposed finding. *See Alvarez v. Espinoza*, 844 S.W.2d 238, 241–42 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.) (per curiam).

Effect of Trial Court's Failure to File Findings of Fact and Conclusions of Law after Proper Request: If a party timely and properly files a request for findings of fact (including a notice of past-due findings as needed), the trial court has a mandatory duty to file findings of fact and harm will be presumed unless the record on appeal affirmatively shows no injury to the complaining party. *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989). If the record shows, however, that the appellant suffered no harm, this presumption may be rebutted. *Roberts*, 999 S.W.2d at 436–37. Whether the requesting party suffers harm rests on whether the circumstances of a particular case require an appellant to guess the reason or reasons that the trial court ruled against him. *See Thomas James Associates v. Owens*, 1 S.W.3d 315, 319 (Tex. App.—Dallas 1999, no pet.).

COMMENT: If findings of fact were timely requested by an appealing party but not filed, once the appeal is underway, the appealing party should file a motion in the court of appeals asking the court to abate the appeal and direct the trial court to issue findings. The motion should include proof demonstrating the date of the final order and the dates on which the original and second requests for findings were timely filed and request that the appealing party be permitted to seek additional or amended findings as needed pursuant to rule 298. Since injury is presumed, the appellate court should grant this motion, abate the appeal, and direct the trial court to issue findings. The appellate court should also give the appellant the opportunity to request additional or amended findings in accordance with the rules. However, note that in the unique circumstance where a trial judge's term expires and the judge is replaced as a result of an election, the failure of the trial judge to issue findings as timely requested may require reversal and remand to the new trial judge where an appellant is required to guess about the reasons for the former trial judge's rulings. *In re A.W.M.*, No. 04-20-00535-CV, 2021 WL 3516677, at *3–4 (Tex. App.—San Antonio Aug. 11, 2021, no pet. h.) (mem. op.).

Effect of Parties' Failure to Request Findings of Fact and Conclusions of Law: If no party requests findings of fact and conclusions of law, the appellate court is compelled to uphold the judgment of the trial court on any theory of law applicable to the case. All facts should be deemed found against the appealing party and in support of the portion of the judgment from which he appeals. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987) (per curiam). The appellate court can consider only the evidence most favorable to the implied factual findings and will disregard all opposing or contradictory evidence. *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (Tex. 1950).

Effect of Filing Request for Findings of Fact: In a case in which findings of fact are appropriate, a timely filed request for findings and conclusions extends the deadline for filing a notice of appeal. Tex. R. App. P. 26.1; *see also IKB Industries (Nigeria) Ltd.*, 938 S.W.2d at 443. A request for findings of fact, however, does not extend a trial court's plenary power. *In re Gillespie*, 124 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding); *see also Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308, 310 (Tex. 2000). After its plenary power has expired, the trial court is not prevented from entering properly requested findings and conclusions. *Robles v. Robles*, 965 S.W.2d 605, 610–11 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). *But see Sonnier v. Sonnier*, 331 S.W.3d 211, 214 (Tex. App.—Beaumont 2011, no pet.) (findings issued seven months after exclusive appellate jurisdiction attached considered nullity, but husband waived error regarding absence of findings because he did not timely file notice advising trial court that findings were past due).

Effect of Trial Court's Filing of Belated Findings of Fact and Conclusions of Law: The procedural rules establishing the time limits for the requesting and filing of findings of fact and conclusions of law do not preclude the trial court from issuing belated findings. *Robles*, 965 S.W.2d at 610. When a court files belated findings the only issue that arises is the injury to the appellant, not the trial court's jurisdiction to make the findings. *Morrison v. Morrison*, 713 S.W.2d 377, 381 (Tex. App.—Dallas 1986, writ dism'd). Unless they can show injury, litigants have no remedy if a trial court files untimely findings and conclusions. Injury may be in one of two forms: (1) the litigant was unable to request additional findings or (2) the litigant was prevented from properly presenting his appeal. If injury is shown, the appellate court may abate the appeal so as to give the appellant the opportunity to request additional or amended findings in accordance with the rules. *Robles*, 965 S.W.2d at 610.

§ 26.6 Findings of Fact and Conclusions of Law

Child Support: If findings are required, the court shall state whether the application of the guidelines would be unjust or inappropriate and shall state (1) the amount of the obligor's net resources per month, (2) the amount of the obligee's net resources per month, (3) the percentage applied to the obligor's net resources for child support, and (4) if applicable, the specific reasons the amount ordered varies from the amount computed by applying the percentage guidelines under section 154.125 or 154.129, as applicable. Tex. Fam. Code § 154.130(b). Findings concerning the amount of the obligee's net resources per month are required only if evidence of such resources has been offered. Tex. Fam. Code § 154.130(c).

COMMENT: If it becomes necessary to seek findings of fact in regard to the amount of child support, note that the monthly net resources of the obligee is a mandatory finding. Accordingly, such information should be sought and obtained during discovery in case it becomes an issue at trial. Typically, when this information is requested during discovery in cases in which the obligor is not seeking custody, a relevance objection is raised. However, this information is clearly relevant to an obligor's decision to seek a variance from guideline support.

The court's failure to make these findings on proper request constitutes reversible error. *Hanna v. Hanna*, 813 S.W.2d 626, 628 (Tex. App.—Houston [1st Dist.] 1991, no writ). The requirement to make these findings does not extend to orders denying a motion to modify child support and effectively ordering the continued payment of child support set in the original order. *In re Striegler*, 915 S.W.2d 629, 635 (Tex. App.—Amarillo, 1996, writ denied).

Possession: The requirement to make findings under sections 153.258 and 153.3171 is mandatory on proper request. *See* Tex. Fam. Code §§ 153.258, 153.3171. Under section 153.258, the trial court must state in writing specific reasons for the variance from the standard possession order. The court may not simply state that the special needs of the child render the application of the standard possession order unworkable and inappropriate. *Voros v. Turnage*, 849 S.W.2d 353, 354–55 (Tex. App.—Houston [1st Dist.] 1992) (per curiam), *on appeal after remand*, 856 S.W.2d 759 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Requiring a court to state specific reasons for variance is functionally equivalent to making findings of fact. *In re T.J.S.*, 71 S.W.3d 452, 458–59 (Tex. App.—Waco 2002, pet. denied). However, under rule 299a of the Texas Rules of Civil Procedure, findings of fact are not to be included in a final order except in limited circumstances; the inclusion of unrequired specific factual information—for example, a

parent's drug use—that has the potential to violate a child's privacy is improper, and such findings should be stricken. *In re Z.G.*, No. 02-19-00352-CV, 2021 WL 1229968, at *25 (Tex. App.—Fort Worth Apr. 1, 2021, no pet.) (mem. op.).

Property Division: In a suit for dissolution of marriage in which the court orders a division of the estate, on a party's request the court shall state in writing its findings of fact and conclusions of law, including the characterization and value of all assets, liabilities, claims, and offsets on which disputed evidence has been presented. The request for findings of fact and conclusions of law must conform to the Texas Rules of Civil Procedure. These findings of fact and conclusions of law are in addition to any other findings or conclusions required or authorized by law. Tex. Fam. Code § 6.711.

To determine whether the assets of the community estate were divided in a just and right manner, an appellate court must have the trial court's findings on the value of those assets. Without findings of fact, the appellate court does not know the basis for the division, the values assigned to the community assets, or the percentage of the marital estate that each party received. Property inventories filed by the parties cannot serve as a substitute for findings of fact by the trial court. In the absence of trial court findings, the appellate court presumes the trial court made all the necessary findings to support its judgment. Thus, if a party does not request findings of fact from the trial court, a party cannot establish whether the trial court intended the division to be equal or disproportionate and, if disproportionate, what factors the trial court found to warrant an unequal distribution if one was intended. *Brown v. Wokocha*, 526 S.W.3d 504, 507–08 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Tate v. Tate*, 55 S.W.3d 1, 10 (Tex. App.—El Paso 2000, no pet.).

Appointment of Receiver: Within seven days after appointing a receiver, the trial court shall issue, without request, written findings of fact and conclusions of law supporting the appointment. Tex. Fam. Code § 6.502(c).

§ 26.7 Formal Bill of Exception

To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception if no offer of proof was otherwise made during trial. Tex. R. App. P. 33.2. There is no specific form for the bill; however, the objection to the court's ruling must be stated with enough specificity to make the trial court aware of the complaint. Tex. R. App. P. 33.2(a). A formal bill of exception must be filed no later than thirty days after the filing party's notice of appeal is filed. Tex. R. App. P. 33.2(e).

§ 26.8 Relief Pending Appeal

Suspension of Judgment: The filing of the notice of appeal does not suspend enforcement of the judgment, and enforcement of the judgment may proceed, unless the judgment is superseded in accordance with rule 24 of the Texas Rules of Appellate Procedure. Tex. R. App. P. 25.1(h)(1). In a divorce action, a judgment requiring a party to take a specific action, such as signing a special warranty deed, stock transfers, a qualified domestic relations order, or any other type of document to effectuate a property transfer, or to pay a money judgment would need to be superseded in order to stay the enforcement of that judgment. A party has an absolute right to supersede a money judgment pending appeal. Tex. R. App. P. 24.1; *Ex parte Kimbrough*, 146 S.W.2d 371, 372 (Tex. 1941) (orig. proceeding); *State ex rel. State Highway & Public Transportation Commission v. Schless*, 815 S.W.2d 373, 375 (Tex. App.—Austin 1991, orig. proceeding) (per curiam). The judgment debtor may supersede the judgment by (1) filing with the trial court clerk a written agreement with the judgment creditor for suspending the enforcement of the judgment, (2) filing with the trial court clerk a good and sufficient bond, (3) making a deposit with the trial court clerk in lieu of a bond, or (4) providing alternate security ordered by the court. Tex. R. App. P. 24.1(a). A party may also seek to suspend a judgment as part of temporary orders pending appeal pursuant to either section 6.709 or section 109.001 of the Family Code, discussed in greater detail below. Once a judgment is superseded, enforcement of a judgment is suspended and, if already begun, must cease. If execution has been issued, the clerk will promptly issue a writ of supersedeas. Tex. R. App. P. 24.1(f). However, if the clerk has not issued a writ of execution, the trial court has discretion in issuing a writ of supersedeas. *In re Fuentes*, 530 S.W.3d 244 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding).

The trial court may not render an order to assist in the implementation of or to clarify the property division made or approved in the decree before the thirtieth day after the date the final judgment is signed. If a timely motion for new trial or to vacate, modify, correct, or reform the decree is filed, the trial court may not render an order to assist in the implementation of or to clarify the property division made or approved in the decree before the thirtieth day after the date the order overruling the motion is signed or the motion is overruled by operation of law. Tex. Fam. Code § 9.007(c).

In a suit involving conservatorship or custody of a child, an appeal from a final order, with or without a supersedeas bond, does not suspend the order unless suspension is ordered by the court rendering the order. The appellate court, on a proper showing, may permit the order to be suspended except in proceedings to terminate the parent-child relationship brought by certain governmental agencies. Tex. Fam. Code § 109.002(c);

Tex. R. App. P. 24.2(a)(4); *Nixon v. Attorney General*, No. 05-17-01080-CV, 2018 WL 2126823, at *1 (Tex. App.—Dallas May 8, 2018 [mand. denied]) (mem. op.) (father claimed he would suffer irrevocable harm and hardship without suspension of judgment but did not elaborate on claim, so no abuse of discretion in not suspending enforcement).

Temporary Orders Pending Appeal in Suits for Divorce, for Annulment, or to Declare Marriage Void: On the court's motion or on that of a party and after notice and hearing, the trial court may render a temporary order as considered equitable and necessary for the preservation of the property and for the protection of the parties during an appeal, including an order directed toward one or both parties. In addition to other matters, an order may require the support of either spouse, require the payment of reasonable and necessary attorney's fees and expenses, appoint a receiver for the preservation and protection of the parties' property, award one spouse exclusive occupancy of the parties' residence pending the appeal, enjoin a party from dissipating or transferring the property awarded to the other party in the trial court's property division, or suspend the operation of all or part of the property division that is being appealed. Tex. Fam. Code § 6.709(a).

A motion seeking an original temporary order under section 6.709 may be filed before trial and may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(h). The trial court retains jurisdiction to conduct a hearing and sign an original temporary order until the sixtieth day after the date any eligible party has filed a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(i). The trial court retains jurisdiction to modify and enforce a temporary order unless the appellate court, on a proper showing, supersedes the trial court's order. Tex. Fam. Code § 6.709(j).

On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the preservation of the property or for the protection of the parties during the appeal. Tex. Fam. Code § 6.709(k). A party may seek review of the trial court's temporary order by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case, proper assignment in the party's brief, or petition for writ of mandamus. Tex. Fam. Code § 6.709(*l*). A temporary order rendered under section 6.709 is not subject to interlocutory appeal. Tex. Fam. Code § 6.709(m).

A temporary order pending appeal enjoining a party from dissipating or transferring the property awarded to the other party in the trial court's property division may be rendered without the issuance of a bond between the spouses or an affidavit or a verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result. The temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. The temporary order may not prohibit a party's use, transfer, conveyance, or dissipation of the property awarded to the other party in the trial court's property division if the use, transfer, conveyance, or dissipation of the property is for the purpose of suspending the enforcement of the property division that is the subject of the appeal. Tex. Fam. Code § 6.709(b).

A temporary order that suspends the operation of all or part of the property division that is the subject of the appeal may not be rendered unless the trial court takes reasonable steps to ensure that the party awarded property in the trial court's property division is protected from the other party's dissipation or transfer of that property. Tex. Fam. Code § 6.709(c). In considering a party's request to suspend the enforcement of the property division, the trial court shall consider whether any relief granted under section 6.709(a) is adequate to protect the party's interest in the property awarded to the party or the party who was not awarded the property should also be required to provide security for the appeal in addition to any relief granted under section 6.709(a). Tex. Fam. Code § 6.709(d).

If the trial court determines that the party awarded the property can be adequately protected from the other party's dissipation of assets during the appeal only if the other party provides security for the appeal, the trial court shall set the appropriate amount of security, taking into consideration any relief granted under section 6.709(a) and the amount of security that the other party would otherwise have to provide by law if relief under section 6.709(a) was not granted. Tex. Fam. Code § 6.709(e).

In rendering a temporary order that suspends enforcement of all or part of the property division, the trial court may grant any relief under section 6.709(a), in addition to requiring the party who was not awarded the property to post security for that part of the property division to be suspended. The trial court may require that the party who was not awarded the property post all or only part of the security that would otherwise be required by law. Tex. Fam. Code § 6.709(f).

Section 6.709 does not prevent a party who was not awarded the property from exercising that party's right to suspend the enforcement of the property division as provided by

law, which would include the available methods for superseding a judgment under rule 24 of the Texas Rules of Appellate Procedure. *See* Tex. Fam. Code § 6.709(g).

Temporary orders pending appeal must be supported by the evidence presented at the temporary order hearing. *See In re Fuentes*, No. 01-16-00951-CV, 2017 WL 3184760 (Tex. App.—Houston [1st Dist.] July 27, 2017, orig. proceeding) (mem. op.) (temporary spousal support not required to maintain party's standard of living); *In re Fuentes*, 506 S.W.3d 586, 593–94 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

A relator may challenge temporary orders pending appeal obtained pursuant to section 6.709 by mandamus only if the trial court's order constitutes an abuse of discretion and the pending appeal provides an inadequate remedy. *In re Merriam*, 228 S.W.3d 413 (Tex. App.—Beaumont 2007, orig. proceeding) (per curiam).

If a party fails to comply with temporary orders pending appeal, the court of appeals may dismiss the appeal. *Rodriguez v. Borrego*, 536 S.W.3d 16 (Tex. App.—El Paso 2016, pet. denied) (appeal dismissed after husband given multiple opportunities to comply with temporary orders pending appeal failed to do so).

Temporary Orders Pending Appeal in Suits Affecting Parent-Child Relationship: The court may, on its own motion or that of any party and after notice and hearing, make any order necessary to preserve and protect the safety and welfare of the child during the pendency of an appeal as the court may deem necessary and equitable. To establish that the temporary orders are for the safety and welfare of the child, the requesting party need only show that the party "has primary responsibility of the children and for the care and upkeep of and the debt on the children's principal home." *Marcus v. Smith*, 313 S.W.3d 408, 418 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

In addition to other matters, an order may appoint temporary conservators for the child and provide for possession of the child, require the temporary support of the child by a party, enjoin a party from molesting or disturbing the peace of the child or another party, prohibit a person from removing the child beyond a geographical area identified by the court, require payment of reasonable and necessary attorney's fees and expenses, or suspend the operation of the order or judgment that is being appealed (except an order or judgment terminating the parent-child relationship in a suit brought by certain governmental agencies). Tex. Fam. Code § 109.001(a), (d).

A temporary order pending appeal enjoining a party from molesting or disturbing the peace of the child or another party may be rendered without the issuance of a bond between the parties or an affidavit or a verified pleading stating specific facts showing

that immediate and irreparable injury, loss, or damage will result. The temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. Tex. Fam. Code § 109.001(b).

A motion seeking an original temporary order under section 109.001 may be filed before trial and may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.001(b–1). The trial court retains jurisdiction to conduct a hearing and sign a temporary order until the sixtieth day after the date any eligible party has filed a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 109.001(b–2).

The court retains jurisdiction to modify and enforce these orders unless the appellate court, on a proper showing, supersedes the court's order. Tex. Fam. Code § 109.001(b–3). On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the safety and welfare of the child. Tex. Fam. Code § 109.001(b–4).

The temporary orders rendered by the trial court pending appeal are not subject to interlocutory appeal. Tex. Fam. Code § 109.001(c). A party may seek review of the trial court's temporary order under section 109.001 by petition for writ of mandamus or proper assignment in the party's brief. Tex. Fam. Code § 109.001(b–5).

Attorney's Fees on Appeal: The trial court has the discretion to order one spouse to pay the other spouse attorney's fees pending appeal from a final judgment in a suit for dissolution of the marriage. Tex. Fam. Code § 6.709(a)(2); *see Love v. Bailey-Love*, 217 S.W.3d 33, 36 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The trial court has the same authority in appeals from final orders signed in suits affecting the parent-child relationship. Tex. Fam. Code § 109.001(a)(5).

In a suit for dissolution of marriage, the award of appellate attorney's fees to the appellee must be conditioned on an appellant's unsuccessful appeal. *Moroch v. Collins*, 174 S.W.3d 849, 870 (Tex. App.—Dallas 2005, pet. denied). Further, in a suit for dissolution of marriage, a trial court may not order a party to prepay the other party's conditional appellate attorney's fees into the registry of the court or include an unconditional award of appellate attorney's fees in the amount of a supersedeas bond. *In re Chris-*

tensen, No. 01-16-00893-CV, 2017 WL 1485574 (Tex. App.—Houston [1st Dist.] Apr. 25, 2017, orig. proceeding) (mem. op.). An unconditional award of appellate attorney's fees serves as an improper deterrent to appellate review. *In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding). Further, such a penalty improperly chills a party from exercising his legal rights. *Ford Motor Co.*, 988 S.W.2d at 722. A party may not be penalized for taking a successful appeal. *Siegler v. Williams*, 658 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1983, no writ).

An appellee may not recover attorney's fees for work performed on any issue of the appeal where the appellant was successful. However, an appellee may still recover attorney's fees for work performed on any issue of the appeal where the appellant was unsuccessful. If a party is entitled to attorney's fees from the adverse party on one claim but not another, the party claiming attorney's fees must segregate the recoverable fees from the unrecoverable fees. *Robertson v. Robertson*, No. 13-16-00309-CV, 2017 WL 6546005, at *5 (Tex. App.—Corpus Christi–Edinburg Dec. 21, 2017, no pet.) (mem. op.).

In a suit affecting the parent-child relationship, an award of appellate attorney's fees is not required to be conditioned on a successful appeal. *In re Mansour*, 360 S.W.3d 103, 108–09 (Tex. App.—San Antonio 2020, orig. proceeding); *In re Jafarzadeh*, No. 05-14-01576-CV, 2015 WL 72693, at *2 (Tex. App.—Dallas Jan. 2, 2015, orig. proceeding) (mem. op.).

In *In re Jafarzadeh*, while acknowledging that at least three other courts of appeal have reached a contrary conclusion, the Dallas court of appeals held that in a suit affecting the parent-child relationship (SAPCR) deferring the fee award until resolution of an appeal is impractical because it fails to provide the resources necessary to the appellee to defend the appeal. An award of attorney's fees in a SAPCR, unlike in other civil cases, is not based on a punitive or damages rationale, but rather on the rationale that the award is in the best interest of the child. Because both parents are responsible for providing for the child's needs, attorney's fees in a SAPCR may be imposed on either parent. Conditioning the award on an unsuccessful appeal may defeat the ability of the parent who prevailed in the trial court from defending an order that was in the best interest of the child. *In re Jafarzadeh*, 2015 WL 72693, at *2.

Attorney's fees on appeal are more fully discussed in section 20.23 in this manual.

§ 26.9 Motion to Withdraw Exhibits

The court may order a filed exhibit to be withdrawn by any party only on the party's leaving on file a certified copy, photocopy, or other reproduced copy of the exhibit. Tex. R. Civ. P. 75b.

§ 26.10 Motion to Seal Court Documents

The provisions of rule 76a of the Texas Rules of Civil Procedure concerning the sealing of court records specifically exclude documents filed in an action originally arising under the Family Code. Tex. R. Civ. P. 76a(2)(a)(3). The court, on the motion of a party or on the court's own motion, may order the sealing of the file, the minutes of the court, or both, in termination and adoption suits. *See* Tex. Fam. Code §§ 161.210, 162.021(a).

§ 26.11 Writ of Habeas Corpus Not Appealable Order

A writ of habeas corpus for the return of a child pursuant to section 157.372 of the Family Code is reviewable only by mandamus.

> [T]he Legislature intended to effect a substantial change in the prior practice which permitted a habeas corpus proceeding to put in issue anew the right to custody. The Legislature intended a limited habeas corpus proceeding to compel obedience to existing court orders. *Standley v. Stewart*, 539 S.W.2d 882 (Tex. 1976); *Lamphere v. Chrisman*, 554 S.W.2d 935 (Tex. 1977); *McElreath v. Stewart*, 545 S.W.2d 955 (Tex. 1977); *Saucier v. Pena*, 559 S.W.2d 654 (Tex. 1978); *Trader v. Dear*, 565 S.W.2d 233 (Tex. 1978). It is for this reason, no doubt, that the Legislature did not provide for an appeal from such orders. The time exhausted by an appeal would tend to thwart the purpose of a limited proceeding.

Gray v. Rankin, 594 S.W.2d 409, 409 (Tex. 1980) (per curiam).

§ 26.12 Rules Governing Appeal

Rules of Appellate Procedure: The rules of appellate procedure govern procedure in appellate courts and before appellate judges. Tex. R. App. P. 1.1. Although an appellate court may not alter the time for perfecting an appeal in a civil case, it may on a party's motion or on its own initiative suspend a rule's operation in a particular case and order a different procedure. Tex. R. App. P. 2.

Local Rules: A court of appeals may promulgate rules governing its practice that are not inconsistent with the rules of appellate procedure. Tex. R. App. P. 1.2(a). A majority of the fourteen courts of appeal in Texas have local rules of which attorneys must be aware when filing appeals in those courts. Normally, when an appeal is initiated in any court, the clerk will send out formal correspondence to all parties providing general information regarding court policies, practices, and local rules. Local rules for the various courts may be found on the website for each specific court (**www.txcourts.gov**). A court of appeals must not dismiss an appeal for noncompliance with a local rule without giving the noncomplying party notice and reasonable opportunity to cure the noncompliance. Tex. R. App. P. 1.2(c).

§ 26.13 Types of Appeals Available Other than Regular Appeal

Interlocutory Appeals: An interlocutory appeal is filed during the course of the proceedings. It has a very limited application, especially in family law cases. Section 51.014 of the Texas Civil Practice and Remedies Code sets forth the rules from which a party may file an interlocutory appeal. Tex. Civ. Prac. & Rem. Code § 51.014. Except in the rarest of cases the only orders routinely entered in family law cases from which an interlocutory appeal may be taken are the appointment of a receiver or trustee or the overruling of a motion to vacate an order that appoints a receiver or trustee. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(1), (a)(2). In these instances, the filing of an interlocutory appeal will stay the commencement of a trial in the trial court pending resolution of the appeal. Tex. Civ. Prac. & Rem. Code § 51.014(b). An appeal from an interlocutory order, when allowed, will be accelerated. Tex. R. App. P. 28.1(a). Provisions for permissive appeals of interlocutory orders under Tex. Civ. Prac. & Rem. Code § 51.014(d) do not apply to actions brought under the Family Code. Tex. Civ. Prac. & Rem. Code § 51.014(d–1).

Accelerated Appeal: Accelerated appeals are given preference over other appeals and are put on a faster track in the appellate court. *See* Tex. R. App. P. 26.1. An appeal from an interlocutory order, when allowed, must be accelerated. Tex. R. App. P. 28.1; *see Stanton v. University of Texas Health Sciences Center*, 997 S.W.2d 628, 629 n.1 (Tex. App.—Dallas 1998, pet. denied). Appeals required by statute to be accelerated or expedited and appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed are also accelerated appeals. Tex. R. App. P. 28.1(a). All appeals in parental termination and child protection cases are governed generally by the rules for accelerated appeals. Tex. R. App. P. 28.4. See the discussion at section 26.16 below. However, even though a bill of review challenges

the termination of a father's parental rights, because a bill of review is a separate cause of action, an appeal of the bill of review is not accelerated. *In re A.A.S.*, 367 S.W.3d 905, 909–10 (Tex. App.—Houston [14th Dist.] 2012, no pet.). An appeal from an enforcement order relating to the return of a child under the Hague Convention, issued in accordance with Texas Family Code chapter 152 (UCCJEA), subchapter D, is also considered an accelerated appeal. Tex. Fam. Code § 152.314.

COMMENT: If a case involves child custody or support issues, the appellant should consider the filing of an accelerated appeal, which, although it involves onerous deadlines, can decrease the time in the appellate court from approximately two years in the larger courts of appeal to six to eight months. *See Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (per curiam) (justice demands speedy resolution of child custody and child support issues) (although the case involved mandamus, the principles enunciated would also support acceleration in the interest of justice if an erroneous custody or possession order is not in the best interest of the child); Tex. Fam. Code § 105.004 (although the statute does not specifically relate to appeals, it clearly enunciates the legislature's intent to place cases involving the best interest of children before routine civil matters).

Restricted Appeal: Restricted appeals replace the prior procedure for writ of error appeals to the court of appeals. Statutes pertaining to writ of error appeals to the court of appeals are equally applicable to restricted appeals. Tex. R. App. P. 30. A restricted appeal is a direct attack on the judgment of a trial court. *See O'Neal v. O'Neal*, 69 S.W.3d 347, 348 (Tex. App.—Eastland 2002, no pet.). The requirements for the filing of a restricted appeal are jurisdictional "and will cut off a party's right to seek relief by way of a restricted appeal if they are not met." *Clopton v. Pak*, 66 S.W.3d 513, 515 (Tex. App.—Fort Worth 2001, pet. denied).

A restricted appeal requires that (1) the appellant filed notice within six months after the judgment or order appealed from was signed; (2) the appellant was a party to the underlying suit; (3) the appellant did not timely file a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; (4) the appellant did not participate, either in person or through counsel, in the actual trial of the case; and (5) the trial court erred, and the error is apparent from the face of the record. Tex. R. App. P. 30; *Wright Bros. Energy Inc. v. Krough*, 67 S.W.3d 271, 273 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see also* Tex. R. App. P. 26.1(c); *Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam).

Review by restricted appeal affords an appellant the same scope of review as an ordinary appeal, that is, a review of the entire case. The only restriction on the scope of the restricted appeal is that the error must appear on the face of the record. The face of the record consists of all the papers on file in the appeal, including the reporter's record. *In re E.M.V.*, 312 S.W.3d 288, 290 (Tex. App.—Dallas 2010, no pet.). A restricted appeal requires error that is *apparent*, not error that may be *inferred*. *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004) (per curiam).

In addition to citation and service issues, a restricted appeal confers jurisdiction on the appellate court to review whether the evidence is legally and factually sufficient to support the judgment. *Norman Communications*, 955 S.W.2d at 270. The record must affirmatively show strict compliance with the rules for service of citation in order for a default judgment to withstand a direct attack. If strict compliance is not affirmatively shown, the service of process is invalid. There are no presumptions in favor of valid issuance, service, or return of citation in the face of a restricted appeal attack on a default judgment. *Hercules Concrete Pumping Service, Inc. v. Bencon Management & General Contracting Corp.*, 62 S.W.3d 308, 309–10 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Additionally, the trial court's discretion to divide the community estate unequally must be supported by evidence at trial, including values of the divided property. *In re E.M.V.*, 312 S.W.3d at 291.

Participation in trial: The nature and extent of participation precluding a restricted appeal in any particular case is a matter of degree, because trial courts decide cases in a myriad of procedural settings. The issue is whether the appellant participated in the decision-making event resulting in the judgment adjudicating the appellant's rights. It is the fact of nonparticipation, not the reason for the nonparticipation, that determines the right to a restricted appeal. *Texaco, Inc. v. Central Power & Light Co.*, 925 S.W.2d 586, 589–90 (Tex. 1996). Courts must liberally construe the nonparticipation requirement for restricted appeals in favor of the right to appeal. *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014) (per curiam) (recitation in divorce decree that mother appeared conflicted with court's docket sheet and reporter's record).

The law is clear that signing a waiver of service alone is not sufficient to constitute participation for purposes of a restricted appeal. *See, e.g., Stubbs v. Stubbs*, 685 S.W.2d 643, 645 (Tex. 1985); *In re S.W.*, 614 S.W.3d 311 (Tex. App.—Fort Worth 2020, no pet.) (waiver included in affidavit relinquishing parental rights). This is true even when the language of the waiver indicates that by signing, one is entering an appearance as a substitute for going to trial, giving a judge permission to make decisions in the case without further notice to the signor, and waiving the making of a record of testimony. *In*

re Marriage of Butts, 444 S.W.3d 147, 151 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Postjudgment motion: If a postjudgment answer does not seek to set aside an existing judgment and request litigation of the issue, it does not constitute a motion for new trial or postjudgment motion that would preclude the filing of a restricted appeal. *See Barry v. Barry*, 193 S.W.3d 72, 74 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Error on face of record: If the return of service does not include an endorsement on the process of the day and hour of its receipt by the officer for service, there is error on the face of the record. *In re Z.J.W.*, 185 S.W.3d 905, 907 (Tex. App.—Tyler 2006, no pet.). If the court grants a party more relief than the party requested in his petition, there is error on the face of the record. *Binder v. Joe*, 193 S.W.3d 29, 33 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also In re B.M.*, 228 S.W.3d 462 (Tex. App.—Dallas 2007, no pet.) (father requested only temporary relief regarding conservatorship and custody, and trial court entered final order granting him sole managing conservatorship and custody of child). If the decree states that the parties waived the making of a record, but one party did not appear at trial, error is apparent on the face of the record. *Arbogust v. Graham*, No. 03-17-00800-CV, 2018 WL 3150996 (Tex. App.—Austin June 28, 2018, no pet.) (mem. op.). Service on a party's attorney who is not an attorney of record—that is, one who has filed pleadings or appeared in court—is not proper service and constitutes error on the face of the record. *Moreno v. Moreno*, No. 04-17-00586-CV, 2018 WL 3440713, at *2 (Tex. App.—San Antonio July 18, 2018, no pet.) (mem. op.).

The law presumes that a trial court hears a case only after proper notice to the parties. If the record is silent as to whether notice of a trial setting was given, no error appears on the face of the record. Absence of notice from the clerk's record of trial setting is not proof that a party did not get notice, especially when the judgment includes a recitation that due notice was given. *Richardson v. Sims*, No. 01-15-01115-CV, 2016 WL 5787291, at *2 (Tex. App.—Houston [1st Dist.] Oct. 4, 2016, no pet.) (mem. op.).

§ 26.14 Notice of Appeal

A party perfects an appeal by filing a written notice of appeal with the trial court clerk. If the party mistakenly files the notice of appeal with the appellate court, the notice is deemed to be filed with the trial court clerk on that same day, and the appellate clerk must immediately send the trial court clerk a copy of the notice. The filing of a notice of appeal invokes the jurisdiction of the appellate court. The party that is seeking to alter

the trial court's judgment is the person who files the notice of appeal. Parties whose interests are aligned may file a joint notice of appeal. Tex. R. App. P. 25.1(a)–(c). The notice of appeal may be combined with a motion for new trial. *In re J.M.*, 396 S.W.3d 528, 530 (Tex. 2013) (per curiam).

The notice should (1) identify the trial court and the cause number and style of the case; (2) state the date of judgment or order from which the party is appealing; (3) state that the party desires to appeal; (4) designate the court to which the appeal is taken, unless the appeal is to either the first or fourteenth court of appeals, in which case the notice must state that the appeal is to either of those courts; (5) state the name of each party filing the notice; and (6) state, if applicable, that the appellant is presumed indigent and may proceed without paying costs. Tex. R. App. P. 25.1(d)(1)–(5), (d)(8).

In an accelerated appeal, the notice must also state that the appeal is accelerated and state whether it is a parental termination or child protection case. Tex. R. App. P. 25.1(d)(6). In a restricted appeal, the notice must also state that the appellant is a party affected by the judgment but that he did not participate in the hearing resulting in the judgment; state that the appellant did not file a timely postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and be verified by the appellant if the appeal is pro se. Tex. R. App. P. 25.1(d)(7).

The appellant is not required to specify issues in a general or restricted notice of appeal under Tex. R. App. P. 25.1(d). *Vazquez v. Vazquez*, 292 S.W.3d 80 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

The appellant must serve the notice of appeal on all parties to the trial court's final judgment and deliver a copy of the notice of appeal to each court reporter responsible for preparing the reporter's record. Tex. R. App. P. 25.1(e).

Although a cost bond is not required, the court clerk and the court reporter are not responsible for preparing, certifying, and timely filing the record unless the appellant either has paid the fees, is entitled to appeal without paying the fees, or has "made satisfactory arrangements" to pay the fees. Tex. R. App. P. 35.3. Although it remains to be decided, a bond to secure payment should be a "satisfactory arrangement" in most cases. Supersedeas bonds, deposits in lieu of bond, and alternative security are allowed. *See* Tex. R. App. P. 24.1. If the appeal is from a money judgment, the bond, deposit, or security must include costs, but the amount may not exceed the lesser of 50 percent of the judgment debtor's current net worth or 25 million dollars. Tex. R. App. P. 24.2(a)(1).

Although the trial court clerk is responsible for timely filing the clerk's record and the official or deputy reporter is responsible for filing the reporter's record (Tex. R. App. P. 35.3), the appellate court may dismiss the appeal if the appellant is at fault for the failure to file. Tex. R. App. P. 37.3.

COMMENT: An amicus attorney represents the trial court, which is not a party to the suit. Therefore, an amicus attorney has no basis for filing a notice of appeal or filing a brief in the appellate court. *See O'Connor v. O'Connor*, 245 S.W.3d 511 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

§ 26.15 Time for Filing Notice of Appeal

Caution: Since all termination cases, all cases involving placement of children under the care of the Texas Department of Family and Protective Services (TDFPS), and all appeals from enforcement orders under subchapter D, chapter 152, of the Texas Family Code are subject to accelerated appeals, compliance with the applicable deadlines for filing the notice of appeal must be met or appellate rights are waived. See the deadlines set forth below in this section and the discussion in section 26.16 below.

§ 26.15:1 Deadline for Filing Accelerated Appeal

In an accelerated appeal, the notice of appeal must be filed within twenty days after the judgment or order is signed. Tex. R. App. P. 26.1(b). Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal within the time allowed by rule 26.1(b) or as extended by rule 26.3. Tex. R. App. P. 28.1(b). (Extension of time under rule 26.3 is discussed in section 26.15:6 below.) Filing a motion for new trial, any other posttrial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal. Tex. R. App. P. 28.1(b).

Certain statutes and rules mandate the acceleration of certain types of appeals and require that the appeal be placed on a shortened time-table for filing of the notice of appeal, filing of the record, briefs, and submission. There are two grounds for acceleration:

1. *Mandatory:* Acceleration of the appeal may be mandatory because of some statute or rule, including (1) appeals in suits in which termination of the parent-child relationship is ordered (*see* Tex. Fam. Code § 109.002; Tex. R. App. P. 28.4 (termination "at issue"); *In re J.C.*, 146 S.W.3d 741 (Tex. App.—Texarkana 2004, no pet.) (appeal dismissed because notice not filed within twenty

days of judgment)); (2) appeals of final orders rendered under chapter 263, placement of children under the care of TDFPS (*see* Tex. Fam. Code § 263.405(a); Tex. R. App. P. 28.4); (3) appeals of cases involving the Uniform Child Custody Jurisdiction and Enforcement Act, which must be in accordance with accelerated appellate procedures as in other civil cases (*see* Tex. Fam. Code § 152.314; *In re K.L.V.*, 109 S.W.3d 61, 67 (Tex. App.—Fort Worth 2003, pet. denied) (appeal dismissed because notice of appeal filed outside deadline provided by Texas Rules of Appellate Procedure)); and (4) appeals from interlocutory orders (*see* Tex. R. App. P. 28.1(a)). In the family law context, interlocutory orders would include (1) an order that appoints a receiver or trustee (*see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(1)); (2) an order that grants or denies a temporary injunction (*see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(4)); and (3) an order denying the intervention or joinder of parties (*see* Tex. Civ. Prac. & Rem. Code § 15.003).

2. *Preference in Interests of Justice:* Appeals may also be accelerated in the interests of justice. The Texas Supreme Court has held that justice demands a speedy resolution of child custody and child support issues. *See Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (per curiam). Although *Proffer* involved a mandamus, the principles enunciated would also support acceleration in the interest of justice if an erroneous custody or possession order is not in the best interest of the child. The Family Code also recognizes that, in cases involving children, if ordinary scheduling practices will unreasonably affect the best interest of the children, the case should be given a preferential setting. *See* Tex. Fam. Code § 105.004. Although the statute does not specifically relate to appeals, it clearly enunciates the legislature's intent to place cases involving the best interest of children before routine civil matters.

COMMENT: In cases involving children, the attorney should always consider requesting that the appeal be accelerated in the interests of justice. Although the rules of appellate procedure do not expressly address how to obtain an accelerated appeal on this basis, it is suggested that the practitioner file a verified motion or attach an affidavit setting forth facts that would warrant an acceleration of the appeal in the interests of justice.

§ 26.15:2 Deadline for Filing Regular Appeal

Usually, a notice of appeal must be filed within thirty days after the judgment is signed. However, the notice must be filed within ninety days after the judgment is signed if any

party timely files a motion for new trial, a motion to modify the judgment, a motion to reinstate after a dismissal for want of prosecution, or a request for findings of fact and conclusions of law if findings and conclusions are required by the rules of civil procedure or, if not required, could be properly considered by the appellate court. Tex. R. App. P. 26.1(a).

Specifically, under the following circumstances, findings of fact and conclusions of law are not appropriate and the time to file the notice of appeal will not be extended beyond thirty days: (1) after a jury trial, on issues tried to the jury, *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997); (2) after the trial court renders a summary judgment, *IKB*, 938 S.W.2d at 441–42; (3) in a case tried to a jury but resolved by a directed verdict, *IKB*, 938 S.W.2d at 443; (4) after the trial court renders a judgment notwithstanding the verdict, *IKB*, 938 S.W.2d at 443; or (5) after the trial court renders a judgment based upon an agreed statement of facts as provided under rule 263 of the Texas Rules of Civil Procedure, *City of Galveston v. Giles*, 902 S.W.2d 167, 170 n.2 (Tex. App.—Houston [1st Dist.] 1995, no writ).

An appellant is not required to wait for a ruling on his motion for new trial before filing his notice of appeal. *In re Norris*, 371 S.W.3d 546, 553 (Tex. App.—Austin 2012, orig. proceeding).

§ 26.15:3 Deadline for Filing Restricted Appeal

In a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed. Tex. R. App. P. 26.1(c). A party who did not participate, either in person or through counsel, in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request findings of fact and conclusions of law or a notice of appeal within the deadlines set forth in rule 26.1(a) may file a restricted appeal. Tex. R. App. P. 30.

§ 26.15:4 Citation by Publication

The time to file a notice of appeal on a motion for new trial filed more than thirty days after judgment following citation by publication runs as if the judgment were signed on the date the motion for new trial was filed. Tex. R. App. P. 4.4; Tex. R. Civ. P. 306a(7). The parties adversely interested shall be cited as in other cases. Tex. R. Civ. P. 329(a). The citation form would ordinarily require an answer on the "Monday next following the expiration of twenty days" after service. *See* Tex. R. Civ. P. 99(c).

COMMENT: The trial court may not be able to grant a new trial because of service problems, but the rules do not excuse the movant from filing the notice of appeal within ninety days of filing the motion for new trial.

§ 26.15:5 Filing Notice of Appeal in Parental Notification Suit

A minor whose application to allow consent for an abortion without notification to or consent of a parent, managing conservator, or guardian has been denied may appeal to the court of appeals having jurisdiction over civil matters in the county in which the application is filed. On receipt of a notice of appeal, the clerk of the court that denied the application shall deliver a copy of the notice of appeal and record on appeal to the clerk of the court of appeals. On receipt of the notice and record, the clerk of the court of appeals shall place the appeal on the docket of the court. Tex. Fam. Code § 33.004(a). The court of appeals shall rule on such an appeal not later than 5:00 P.M. on the fifth business day after the date the notice of appeal is filed with the court denying the application unless the minor requests an extension. Tex. Fam. Code § 33.004(b). An expedited appeal shall be available to any pregnant minor to whom a court of appeals denies an application to authorize the minor to consent to the performance of an abortion without notification to or consent of a parent, managing conservator, or guardian. Tex. Fam. Code § 33.004(f).

COMMENT: The Texas Rules of Appellate Procedure do not address parental notification suits and contain no designated deadlines for filing the notice.

§ 26.15:6 Extension of Time for Filing of Notice of Appeal

The appellate court may extend the time to file the notice of appeal, including those for restricted appeals, if, within fifteen days after the deadline for filing the notice of appeal, the party files in the trial court the notice of appeal and files in the appellate court a motion requesting the extension. Tex. R. App. P. 26.3; *Wray v. Papp*, 434 S.W.3d 297, 299 (Tex. App.—San Antonio 2014, no pet.). Filing of the notice of appeal within fifteen days of the date that it was due implies a motion requesting an extension. The appellant, however, must still provide a reasonable explanation for the late filing. *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). A reasonable explanation means any plausible statement of circumstances indicating that the failure to file within the required time period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance. Any conduct short of deliberate or intentional noncompliance—even if that conduct can be characterized as professional negligence—qualifies

as inadvertence, mistake, or mischance and would be accepted as a reasonable explanation. *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669–70 (Tex. 1989). General allegations of workload, standing alone, do not constitute good cause for an extension of time to file a brief and, therefore, may not constitute good cause for filing an extension of time to file the notice of appeal. *See Pool v. Texas Department of Family & Protective Services*, 227 S.W.3d 212 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

In *Weik v. Second Baptist Church of Houston*, 988 S.W.2d 437 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), the appellant's explanation for failing to timely file the notice of appeal was based on advice from his attorney. The attorney told the appellant that, if he appealed while the trial court still had authority to reinstate the case and it did reinstate the case, the appellant would have a difficult time prosecuting his claim because of the trial court's displeasure. The attorney agreed to file the motion only after the trial court's plenary power expired. The court held this showed an intentional decision by the appellant to delay filing. Accordingly, the court dismissed the appeal for want of jurisdiction. *Weik*, 988 S.W.2d at 439.

In *Rodman v. State*, 47 S.W.3d 545 (Tex. App.—Amarillo 2000, no pet.), the court of appeals found the appellant's excuse was not reasonable when, after the state disclosed its intent to indict the appellant for other crimes after expiration of the time for giving notice of appeal, the appellant decided to appeal and preserve his eligibility for probation in the upcoming trials. The court found this demonstrated the appellant's intentional, deliberate decision not to file a notice of appeal within the time frame required by the rules. *Rodman*, 47 S.W.3d at 548.

In *Hykonnen v. Baker Hughes Business Support Services*, 93 S.W.3d 562 (Tex. App.—Houston [14th Dist.] 2002, no pet.), the appellate court held that the inability of the appellant to retain counsel to represent him on appeal due to a lack of funds was not a reasonable explanation for the need to obtain an extension of time to file his notice of appeal since the appellant did not contend he did not know of the deadline; rather, the appellant deliberately failed to file the notice until he found an attorney willing to represent him at little or no cost. The appellant presented no evidence of his diligence in securing counsel, and the notice of appeal was filed on the last day of the grace period. Additionally, the appellant had other options available, such as filing a pro se notice of appeal instead of seeking an extension of the due date. *Hykonnen*, 93 S.W.3d at 563–64.

Restricted appeals are exempted from the rule allowing for an extension of time for perfecting the appeal beyond the six-month period. Tex. R. App. P. 4.2(a)(2); *Maldonado v. Macaluso*, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.) (per curiam).

§ 26.15:7 Premature Filing of Notice of Appeal

"In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal." Tex. R. App. P. 27.1(a).

§ 26.15:8 Appellee's Notice of Appeal

If a party timely files a notice of appeal, any other party may file a notice of appeal within the applicable period, as provided in rule 26.1(a)–(c), or fourteen days after the first filed notice of appeal, whichever is later. Tex. R. App. P. 26.1(d).

§ 26.16 Appeals in Parental Termination and Child Protection Cases

The Texas Family Code provides that an appeal of a final order rendered under chapter 263, which addresses the placement of children under the care of the Texas Department of Family and Protective Services, is governed by the procedures for accelerated appeals in civil cases under the Texas Rules of Appellate Procedure. *See* Tex. Fam. Code § 263.405(a). A final order rendered under chapter 263 must contain a statement prescribed in section 263.405 regarding the right to appeal, application of the rules for accelerated appeals, and the possible result of failure to follow those rules. *See* Tex. Fam. Code § 263.405(b).

Amendments to the Texas Rules of Appellate Procedure made in accordance with these provisions of the Family Code provide that appeals in *all* parental termination cases (not just those brought by a governmental agency) and child protection cases are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Tex. R. App. P. 28.4. *See* Tex. R. App. P. 28.4(a)(1). A "parental termination case" is a suit in which termination of the parent-child relationship is in issue. Tex. R. App. P. 28.4(a)(2)(A). A "child protection case" is a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship. Tex. R. App. P. 28.4(a)(2)(B).

In an accelerated appeal, notice of appeal in compliance with Tex. R. App. P. 25.1 must be filed within the time allowed by Tex. R. App. P. 26.1(b) (twenty days after the judgment or order is signed) or as extended by Tex. R. App. P. 26.3. Tex. R. App. P. 28.1(b). (Extension of time is discussed in section 26.15:6 above.) The appellate record must be filed within ten days after the notice of appeal is filed. Tex. R. App. P. 35.1(b). The trial and appellate courts are jointly responsible for ensuring that the appellate record is

timely filed and may extend the time if requested by the clerk or reporter; each extension must not exceed ten days. Tex. R. App. P. 35.3(c).

Several exceptions to the general rules for accelerated appeals apply to appeals in a parental termination or child protection case. The cumulative extensions of time to file the appellate record under Tex. R. App. P. 35.3(c) may not exceed sixty days unless there are extraordinary circumstances. Tex. R. App. P. 28.4(b)(2). When the reporter's responsibility to prepare, certify, and timely file the reporter's records arises under Tex. R. App. P. 35.3(b), the trial court must direct the reporter to immediately commence preparing the reporter's record and must arrange for a substitute reporter, if necessary. Tex. R. App. P. 28.4(b)(1). The restrictions in Tex. Civ. Prac. & Rem. Code § 13.003 on provision of a free statement of facts and transcript do not apply to these appeals. Tex. R. App. P. 28.4(b)(3).

If the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to begin the new trial no later than 180 days after the appellate court mandate is issued. Tex. R. App. P. 28.4(c).

The appellate courts should, as far as reasonably possible, ensure that the appeal of a parental termination or child protection suit is brought to final disposition (1) in the court of appeals, within 180 days of the date the notice of appeal is filed, and (2) in the Texas Supreme Court, within 180 days of the date the petition for review is filed. Tex. R. Jud. Admin. 6.2.

§ 26.17 Appointment of Attorney on Appeal

In cases filed by a governmental entity under subtitle E of title 5 of the Family Code in which termination of the parent-child relationship or appointment of a conservator is requested, the court must appoint an attorney ad litem to represent a parent in certain circumstances, including indigency. Tex. Fam. Code § 107.013(a). In such cases, the court must require a party who claims indigency to file an affidavit of indigency (now called a statement of inability to afford payment of court costs) in accordance with rule 145(b) of the Texas Rules of Civil Procedure before the court may conduct a hearing to determine the parent's indigence. The court may consider additional evidence at the hearing and, if it determines that the parent is indigent, must appoint an attorney ad litem. Tex. Fam. Code § 107.013(d). A parent determined to be indigent is presumed to remain indigent for the duration of the suit and any appeal, unless the court on later motion determines that the parent is no longer indigent due to a material and substantial change in the parent's financial circumstances. Tex. Fam. Code § 107.013(e); *see* Tex.

R. App. P. 20.1(b). The attorney ad litem continues to serve throughout the appeal process unless relieved of his duties or replaced. *See* Tex. Fam. Code § 107.016; *In re G.P.*, 501 S.W.3d 252, 253 (Tex. App.—Texarkana 2016, no pet.) (appointed counsel's duty extends through exhaustion or waiver of all appeals); *In re A.M.*, 495 S.W.3d 573, 582 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (appointed counsel's duty extends through exhaustion or waiver of all appeals). The attorney ad litem appointed under these provisions is entitled to reasonable fees and expenses. Tex. Fam. Code § 107.015(a), (c). No other provision in the Family Code provides for the appointment or payment of an attorney on appeal to assist an indigent parent.

The right to counsel under Family Code section 107.013(a)(1) through the exhaustion of appeals under section 107.016(2)(B) includes all proceedings in both the court of appeals and the Texas Supreme Court, including the filing of a petition for review. Once appointed by the trial court, counsel should be permitted to withdraw only for good cause and on appropriate terms and conditions. Mere dissatisfaction of counsel or client with each other is not good cause. Nor is counsel's belief that the client has no grounds to seek further review from the court of appeals' decision. *In re P.M.*, 520 S.W.3d 24, 27–28 (Tex. 2016).

Counsel's obligation to the client may still be satisfied by filing an appellate brief meeting the standards set in *Anders v. California*, 386 U.S. 738 (1967), that includes an assertion that on examination of the record and applicable law, the attorney has concluded that the appeal was frivolous. *See In re N.F.M.*, 582 S.W.3d 539, 545–46 (Tex. App.—San Antonio 2018, no pet.) (striking *Anders* brief because it failed to meet briefing requirements). An *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature. *See, e.g.*, *In re J.S.*, 584 S.W.3d 622, 639 (Tex. App.—Houston [1st Dist.] 2019, no pet.). Courts have a duty to see that withdrawal of counsel will not result in foreseeable prejudice to the client. If a court of appeals allows an attorney to withdraw, it must provide for the appointment of new counsel to pursue a petition for review. In the Texas Supreme Court, appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief. *In re P.M.*, 520 S.W.3d at 27–28.

§ 26.18 Costs of Appeal—Indigence

Rule 20.1 of the Texas Rules of Appellate Procedure provides rules under which indigent parties may proceed without payment of filing fees in the appellate court. Fees

charged for preparation of the appellate record are governed by rule 145 of the Texas Rules of Civil Procedure. Tex. R. App. P. 20.1(a).

Filing Fees in Appellate Court: A determination of indigence in the trial court carries forward to appeal in all cases, and there are also some other circumstances in which a party may be allowed to proceed in the appellate court without paying filing fees.

If statement was filed in trial court: A party who filed a statement of inability to afford payment of costs in the trial court under rule 145 of the Texas Rules of Civil Procedure is not required to pay filing fees in the appellate court unless the trial court overruled the party's claim of indigence in an order complying with rule 145, and the party is not required to pay the fees if the trial court ordered the party to pay partial costs or to pay costs in installments. Tex. R. App. P. 20.1(b)(1). Rule 145 allows a party, the reporter, or the clerk to file a motion to require the party to pay costs. *See* Tex. R. Civ. P. 145(e). If, after written notice and hearing, the party is ordered to pay costs, the trial court's order must be supported by detailed findings that the defendant can afford to pay costs. Tex. R. Civ. P. 145(f)(1), (f)(2). The burden is on the party to provide the inability to pay costs. Tex. R. Civ. P. 145(f)(1). A contest may be sustained when the allegedly indigent party presents no evidence indicating that payment of the costs would affect his ability to meet his own basic needs. *In re J.S.*, No. 05-17-00341-CV, 2017 WL 1455406 (Tex. App.—Dallas Apr. 20, 2017, no pet.) (mem. op.).

Thus, no new statement is required to be filed in the appellate court unless the trial court made affirmative findings under rule 145 that the party is able to afford all court costs and to pay those costs as they are incurred, and there is no provision in rule 20.1 for contesting the party's indigence. In an appeal from the trial court, the party must communicate in writing to the appellate court clerk—in the notice of appeal and in the docketing statement—that the party is presumed indigent. Tex. R. App. P. 20.1(b)(2).

A party who does not qualify under rule 20.1(b)(1) may proceed without paying filing fees if he establishes that his financial circumstances have materially changed since the date of the trial court's order under rule 145. The party must file a motion in the appellate court alleging that his financial circumstances have materially changed and file a *current* statement of inability to afford payment of court costs that complies with rule 145. (The statement filed in the trial court does not suffice.) The appellate court may decide the motion based on the record or may refer the motion to the trial court with instructions to hear evidence and issue findings of fact. In the latter situation, the appellate court must review the trial court's findings and the record of the hearing before ruling on the motion. Tex. R. App. P. 20.1(b)(3).

If no statement was filed in trial court: The appellate court may permit a party who did not file a statement of inability to afford payment of court costs in the trial court to proceed without paying filing fees. The appellate court may require the party to file such a statement in the appellate court. If the appellate court denies the party's request to proceed without paying filing fees, the court must do so in a written order. Tex. R. App. P. 20.1(c).

Preparation of Appellate Record: Rule 145 of the Texas Rules of Civil Procedure provides rules under which a party may proceed without paying costs. Costs addressed in rule 145 include fees charged by the clerk or court reporter for preparation of the appellate record. *See* Tex. R. Civ. P. 145(a).

The party must file the Statement of Inability to Afford Payment of Court Costs approved by the Texas Supreme Court or another sworn document containing the same information. The statement must be signed before a notary or made under penalty of perjury. Tex. R. Civ. P. 145(b).

The clerk may return a statement for correction only if it is not sworn—not for failure to attach evidence or any other reason. Tex. R. Civ. P. 145(c)(2).

The declarant—the person filing the statement—should submit with the statement any available evidence of the declarant's inability to afford payment of costs. An attachment that demonstrates any of the following is prima facie evidence of inability: (1) that the declarant or the declarant's dependent receives benefits from a means-tested government entitlement program; (2) that the declarant is being represented by an attorney providing legal services through a provider funded by the Texas Access to Justice Foundation or the Legal Services Corporation or through a nonprofit providing civil legal services to those meeting certain poverty standards; or (3) the declarant has applied for free legal services through a provider described in (2) and was found financially eligible but was declined representation. Tex. R. Civ. P. 145(b), (d).

A motion to require the declarant to pay costs must meet certain requirements. A motion filed by the clerk, the court reporter, or a party must contain sworn evidence—not merely allegations—that the statement of inability to afford payment of costs was materially false when made or that, because of changed circumstances, it is no longer true. The court on its own may require the declarant to prove the inability to afford costs if evidence comes before the court that the declarant may be able to afford costs or when an officer or professional must be appointed in the case. Tex. R. Civ. P. 145(e).

Before the declarant may be required to pay costs, certain procedural requirements must be satisfied. There must be an oral evidentiary hearing, with ten days' notice to the declarant, either written and served in accordance with rule 21a or given in open court. At the hearing, the burden is on the declarant to prove the inability to afford costs. An order requiring payment of costs must be supported by detailed findings that the declarant can afford to pay costs. The court may order that the declarant pay part of the costs or pay in installments, but the court may not delay the case if payment is made in installments. An order requiring the declarant to pay costs must contain, in conspicuous type, a prescribed notice of the right to appeal. Tex. R. Civ. P. 145(f).

Only the declarant may challenge a trial court order under rule 145. On this challenge, accomplished by motion filed in the court of appeals, neither related filing fees nor costs for providing the record on the trial court proceedings on the claim of indigence may be charged. Tex. R. Civ. P. 145(g).

In addition to the requirements of rule 145, a party seeking to obtain free or reduced-cost clerk's and reporter's records must also comply with section 13.003 of the Civil Practice and Remedies Code. *See Pena v. Garza*, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.) (rules of procedure are general rules; statutes are specific). A court reporter shall provide without cost a statement of facts and a clerk of a court shall prepare a transcript for appealing a judgment from the court only if (1) an affidavit of inability to pay the cost of the appeal has been filed under the Texas Rules of Appellate Procedure and (2) the trial judge finds that the appeal is not frivolous and that the statement of facts and the clerk's transcript are needed to decide the issue presented by the appeal. Tex. Civ. Prac. & Rem. Code § 13.003(a). In determining whether an appeal is frivolous, a judge may consider whether the appellant has presented a substantial question for appellate review. Tex. Civ. Prac. & Rem. Code § 13.003(b). A proceeding is "frivolous" when it lacks an arguable basis either in law or in fact. *See* Tex. Civ. Prac. & Rem. Code § 13.001(b)(2); *Johnson v. Lynaugh*, 796 S.W.2d 705, 706 (Tex. 1990). Necessarily, therefore, both questions of fact and questions of law may be involved in a determination that an appeal is frivolous. *De La Vega v. Taco Cabana*, 974 S.W.2d 152, 154 (Tex. App.—San Antonio 1998, no pet.).

§ 26.19 Appellate Record

The appellate record consists of the clerk's record and, if necessary, the reporter's record. Tex. R. App. P. 34.1.

Clerk's Record: The trial court clerk, or in some counties the district clerk, is responsible for preparing, certifying, and timely filing the clerk's record if a notice of appeal has been filed and the appellant has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee. Tex. R. App. P. 35.3(a). The appellate court may dismiss the appeal for want of prosecution if the appellant has failed to pay or make arrangements to pay the clerk to prepare the record. Tex. R. App. P. 37.3(b).

The clerk's record must include all pleadings on which the trial was held; the court's docket sheet; the jury charge and verdict or the court's findings of fact and conclusions of law; the court's judgment or other order that is being appealed; any request for findings of fact and conclusions of law, any postjudgment motion, and the court's order on the motion; the notice of appeal; any formal bill of exception; any request for a reporter's record; any request for preparation of the clerk's record; and a certified bill of costs, including the cost of preparing the clerk's record, showing credit for payments made. Tex. R. App. P. 34.5.

At any time before the clerk's record is prepared, any party may file with the trial court clerk (or in some counties the district clerk) a written designation of the specific items to be included in the clerk's record. *See* Tex. R. App. P. 34.5(b), (c). No formal request is required for the preparation of this record, but the clerk may consult with the parties concerning the contents of the record. *See* Tex. R. App. P. 34.5(h).

Reporter's Record: A record should be made as in civil cases generally unless waived by the parties with the consent of the court. Tex. Fam. Code § 105.003(c). A party may waive the making of a record by express written agreement or by failing to object to the lack of a record during the hearing. If a party does not appear at a hearing he is unable to object, and his absence cannot be construed as a waiver to the making of a record. One party cannot waive another party's right to a record. Without a reporter's record, a defendant would be unable to obtain a record of the evidence to present to an appellate court for review. *Thompson v. Thompson*, No. 02-13-00292-CV, 2014 WL 3865951 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.).

If the proceedings were stenographically recorded, the reporter's record consists of the court reporter's transcription of so much of the proceedings, and any of the exhibits, that the parties to the appeal designate. Tex. R. App. P. 34.6(a)(1). At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter prepare the reporter's record, must designate the exhibits to be included, and must designate the portions of the proceedings to be included. Tex. R. App. P. 34.6(b)(1). If only

a partial reporter's record has been transcribed, the appellant cannot appeal based on legal or factual sufficiency of the evidence. *Sareen v. Sareen*, 350 S.W.3d 314, 316–17 (Tex. App.—San Antonio 2011, no pet.). In the complete absence of a reporter's record, the appellate court must presume that the trial court heard sufficient evidence to support its judgment. *De Vega v. Munoz*, 623 S.W.3d 565, 567 (Tex. App.—El Paso 2021, no pet.).

§ 26.20 Limiting Scope of Appeal

An appellant may request a partial reporter's record; if he does so, the appellant must include in the request a statement of the points or issues relied on and will then be limited to those points or issues. Tex. R. App. P. 34.6(c)(1); *see also Melton v. Toomey*, 350 S.W.3d 235 (Tex. App.—San Antonio 2011, no pet.). Other parties may request other parts of the record. Tex. R. App. P. 34.6(c)(2). Additions requested by another party must be included in the reporter's record at the appellant's cost. But if the trial court finds that all or part of the designated additions are unnecessary to the appeal, the trial court may order the other party to pay the costs for the preparation of the unnecessary additions. The appellate court, however, may tax costs differently. Tex. R. App. P. 34.6(c)(3). The appellate court "must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues." Tex. R. App. P. 34.6(c)(4).

There is no specific requirement that the request for preparation of the reporter's record be served on other parties, but it must be filed with the trial court clerk (Tex. R. App. P. 34.6(b)(2)) and included in the clerk's record. Tex. R. App. P. 34.5(a)(9). The record may be freely supplemented without motion or leave of the appellate court. Tex. R. App. P. 34.6(d), 37.2.

§ 26.21 Docketing Statement

The appellant, promptly upon filing the notice of appeal, must file with the court of appeals a docketing statement containing specified information. Tex. R. App. P. 32.1. The rules do not prescribe a standard form for the statement, and the courts of appeals have developed various forms, which can be downloaded from the websites of the individual courts of appeals. (See section 26.28 below.) The rules do not provide a specific process for compelling the filing of the docketing statement. If the appellant's failure to file the docketing statement is deemed to constitute want of prosecution or a failure to comply with a requirement of the appellate rules, a court order, or a deadline of the

appellate court, dismissal of the appeal or affirmance of the appealed judgment or order may be ordered. *See* Tex. R. App. P. 42.3.

§ 26.22 Mediation

In accordance with the general policy of the state of Texas, mediation is also an option at the appellate level. For example, the Dallas court of appeals, as a part of the docketing statement, asks whether the parties have mediated and, if so, the name of the mediator and whether mediation would be appropriate at this stage of the litigation. Several of the courts of appeals will order the parties to mediation even over the objection of the appellee. Other appellate courts ask the parties if they want to mediate and will order it unless a party objects. Many appellate courts also require the appellee to file a mediation docketing statement, specifically to identify what, if any, alternative dispute resolution proceedings took place in the trial court and whether a referral to ADR by the appellate court is warranted or, if not, why not. The attorney for both appellant and appellee should check each court's local rules in this regard at the specific court's website. See section 26.28 below.

§ 26.23 Estoppel to Appeal

Estoppel to appeal is also known as the "acceptance-of-benefits doctrine." A litigant cannot treat a judgment as both right and wrong. Thus, a party who has voluntarily accepted the benefits of a judgment cannot appeal from that judgment. *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950); *see Texas State Bank v. Amaro*, 87 S.W.3d 538, 544 (Tex. 2002). The acceptance-of-benefits doctrine applies in direct appeals, direct appeals by writ of error (now restricted appeals), and equitable bill of review proceedings. *See Carle*, 234 S.W.2d at 1003 (direct appeal); *Bloom v. Bloom*, 935 S.W.2d 942, 946–47 (Tex. App.—San Antonio 1996, no writ) (direct appeal by writ of error); *Biggs v. Biggs*, 553 S.W.2d 207, 209 (Tex. App.—Houston [14th Dist.] 1977, writ dism'd) (bill of review).

The burden is on the appellee to prove that the appellant is estopped by the acceptance-of-benefits doctrine. *See Gonzalez v. Gonzalez*, 614 S.W.2d 203, 204 (Tex. App.—Eastland 1981, writ dism'd); *Mallia v. Mallia*, No. 14-07-00695-CV, 2009 WL 909588, at *1 (Tex. App.—Houston [14th Dist.] Apr. 5, 2009, no pet.) (mem. op.). For the court to consider whether a party is estopped from appealing, the record must reflect the relevant facts showing voluntary acceptance of the benefits of the judgment.

Rogers v. Rogers, 806 S.W.2d 886, 889 (Tex App.—Corpus Christi–Edinburg 1991, no writ); *Miller v. Miller*, 569 S.W.2d 592, 593 (Tex. App.—San Antonio 1978, no writ).

The acceptance-of-benefits doctrine frequently arises in divorce cases, because a spouse tends to take and use the property awarded to him or her in the divorce while appealing from the divorce judgment. *See, e.g., Roye v. Roye*, 531 S.W.2d 242 (Tex. App.—Tyler 1975, no writ). However, even if an appealing party accepts a portion of a divorce judgment, the appealing party is not necessarily estopped from appealing the entire judgment. In *Roa v. Roa*, 970 S.W.2d 163, 166 (Tex. App.—Fort Worth 1998, no pet.), the appellate court held that even though the appealing party had accepted the decree of divorce and division of property, she had not accepted those portions of the judgment addressing child custody, visitation, and support. The appellate court also recognized that issues related to the custody of children are severable from the remainder of a divorce decree. *Roa*, 970 S.W.2d at 166.

In *Kramer v. Kastleman*, 508 S.W.3d 211 (Tex. 2017), the Texas Supreme Court examined the acceptance-of-benefits doctrine in a marital dissolution case for the first time in over sixty-five years since its decision in *Carle*, 234 S.W.2d 1002. In *Kramer*, the wife had appealed a final decree of divorce that divided the parties' $30 million marital estate. Before the appeal was final, the wife collected rental income of over $20,000 per month that was generated by properties awarded to her in the divorce decree. She also refinanced loans secured by properties allocated to her in the decree, among other things. The husband moved to dismiss the appeal based on the wife's acceptance of benefits under the divorce decree. The court of appeals granted the motion and dismissed the wife's appeal without reaching the merits. *Kastleman v. Kastleman*, No. 03-13-00133-CV, 2014 WL 3809759 (Tex. App.—Austin July 30, 2014) (mem. op.), *rev'd*, *Kramer*, 508 S.W.3d 211. In reversing, the supreme court found that in the years since *Carle*, the doctrine had been "applied irregularly," that it had "become unmoored from its equitable underpinnings," and that "[t]he jurisprudence trends away from the doctrine's root principles." *Kramer*, 508 S.W.3d at 213. The court acknowledged that the doctrine is a fact-dependent, estoppel-based doctrine that should be focused on preventing unfair prejudice to the opposing party, stating:

> [B]efore denying a merits-based resolution to a dispute, courts must evaluate whether, by asserting dominion over assets awarded in the judgment under review, the appealing party clearly intended to acquiesce in the judgment; whether the assets have been so dissipated as to prevent their recovery if the judgment is reversed or modified; and whether the opposing party will be unfairly prejudiced. Equity simply will not tolerate a Catch-22 that involves

> a choice between relinquishing possession and control of community property and relinquishing the right to appeal.

Kramer, 508 S.W.3d at 227.

The court held that the following nonexclusive factors inform the estoppel inquiry: (1) whether acceptance of benefits was voluntary or was the product of financial duress; (2) whether the right to joint or individual possession and control preceded the judgment on appeal or exists only by virtue of the judgment; (3) whether the assets have been so dissipated, wasted, or converted as to prevent their recovery if the judgment is reversed or modified; (4) whether the appealing party is entitled to the benefit as a matter of right or by the nonappealing party's concession; (5) whether the appeal, if successful, may result in a more favorable judgment but there is no risk of a less favorable one; (6) if a less favorable judgment is possible, whether there is no risk the appellant could receive an award less than the value of the assets dissipated, wasted, or converted; (7) whether the appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment; (8) whether the issue on appeal is severable from the benefits accepted; (9) the presence of actual or reasonably certain prejudice; and (10) whether any prejudice is curable. *Kramer*, 508 S.W.3d at 228–29.

COMMENT: An appellant might be able to avoid the acceptance-of-benefits doctrine by asking for temporary orders pending appeal that allow the use of certain monies or property during the pendency of the appeal for living expenses and attorney's fees. In any case, the appellant could put on evidence that without the use of some of the monies or property awarded to him or her, he or she will not be able to pay necessary living expenses and attorney's fees needed to pursue an appeal. Therefore, if the acceptance is subsequently raised by the appellee, the appellant can justify by citation to the record.

Some Texas courts have declined to consider an appeal from a custody decree when the appealing party refuses to obey the adverse judgment. *See Baker v. Baker*, 588 S.W.2d 677 (Tex. App.—Eastland 1979, writ ref'd n.r.e.). In *Baker*, after the wife filed suit and the husband answered, the husband absconded from the state with the minor child and continued to withhold the child from the wife, who had been named managing conservator. The husband did not personally appear at the hearing but appeared by attorney of record. Under these circumstances, the appellate court dismissed the husband's appeal. *Baker*, 588 S.W.2d at 678. For similar decisions in other appellate courts, see *Velasco v. Ellis*, No. 01-10-00073-CV, 2011 WL 2118865 (Tex. App.—Houston [1st Dist.] May 26, 2011, no pet.) (mem. op.); *Eberle-Adams v. Adams*, No.

14-96-00432-CV, 1996 WL 307488 (Tex. App.—Houston [14th Dist.] June 6, 1996, no writ) (not designated for publication); *Alexander v. Gunning*, 572 S.W.2d 34 (Tex. App.—Houston [1st Dist.] 1978, no writ); *O. v. P.*, 560 S.W.2d 122 (Tex. App.—Fort Worth 1977, no writ); *Strange v. Strange*, 464 S.W.2d 216 (Tex. App.—Fort Worth 1970, writ dism'd w.o.j.) (per curiam); and *Hays v. Brandon*, 245 S.W.2d 381 (Tex. App.—Fort Worth 1951, no writ).

§ 26.24 Modification Suit Pending Appeal

Generally, a trial court has no jurisdiction to vacate or change a judgment once the case has been appealed. *Robertson v. Ranger Insurance Co.*, 689 S.W.2d 209, 210 (Tex. 1985) (per curiam). The Family Code, however, expressly provides a trial court with continuing, exclusive jurisdiction to modify an order regarding child-related issues even if that order has been appealed. Tex. Fam. Code Ann. §§ 155.003(a), 156.001; *In re Reardon*, 514 S.W.3d 919, 922–24 (Tex. App.—Fort Worth 2017, orig. proceeding); *Blank v. Nuszen*, No. 01-13-01061-CV, 2015 WL 4747022 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.); *Hudson v. Markum*, 931 S.W.2d 336 (Tex. App.—Dallas 1996, no pet.). *But see In re E.W.N.*, 482 S.W.3d 150, (Tex. App.—El Paso 2015, no pet.).

In *Hudson* the mother sued the father to establish paternity of her minor daughter and for child support and other damages. While that case was pending on appeal, the father filed a motion to modify child support payments in the trial court. The trial court dismissed the motion for want of jurisdiction, and the father appealed. *Hudson*, 931 S.W.2d at 336. The Dallas court of appeals held that the father's motion to modify filed during the pendency of his appeal from the order he sought to modify did not alter the trial court's jurisdiction. Because the Family Code vested the trial court with continuing, exclusive jurisdiction to hear the father's motion to modify child support, the trial court erred in dismissing the motion. *Hudson*, 931 S.W.2d at 338.

Further, a petition to modify an existing order affecting the parent-child relationship is a new lawsuit. Tex. Fam. Code Ann. § 156.004; *Normand v. Fox*, 940 S.W.2d 401, 403 (Tex. App.—Waco 1997, no writ); *Hudson*, 931 S.W.2d at 338 n.5 (noting that 1995 recodification of Family Code refers to "a suit for modification" rather than "a motion to modify," which emphasized that legislature intended trial courts to continue to treat motions to modify as original lawsuits). The entry of an appealable order in a previous modification proceeding concludes those proceedings, and each subsequent filing of a new motion to modify requires issuance of citation and observation of the formalities

of due process. *See* Tex. Fam. Code Ann. §§ 156.003, 156.004; *Rose v. Rose*, 117 S.W.3d 84, 88 (Tex. App.—Waco 2003, no pet.) (distinguishing motions to enforce existing judgments from motions to modify SAPCRs).

On the other hand, in *In re E.W.N.* the trial court appointed the parents joint managing conservators and ordered the father to pay child support. He appealed. While his appeal was pending, he filed a petition in the trial court to reduce his child support obligation, and the trial court entered temporary orders. On the mother's motion, the trial court dismissed the father's modification without prejudice because the appellate court had the exclusive "power" of the cause. The father appealed, arguing that because the trial court had continuing, exclusive jurisdiction, it had jurisdiction over the parent-child relationship regardless of whether an appeal was pending. *In re E.W.N.*, 482 S.W.3d at 152.

The El Paso court of appeals affirmed the trial court, reasoning that section 109.001 of the Family Code authorizes a trial court to enter temporary orders during the pendency of an appeal under certain circumstances. If the continuing, exclusive jurisdiction of a trial court to enter orders affecting a child was automatically retained during the pendency of an appeal, section 109.001 would be unnecessary. *In re E.W.N.*, 482 S.W.3d at 154.

The El Paso court of appeals also noted that there are remedies available to petitioners who need emergency relief to protect a child during the pendency of an appeal. For example, section 109.002 of the Family Code provides that an appellate court may, on a proper showing, permit the trial court's order to be suspended. Additionally, pursuant to Tex. R. App. P. 10, a litigant may file a motion with the court of appeals explaining the circumstances that require abatement of an appeal to permit the trial court to set an emergency hearing to protect the child. *In re E.W.N.*, 482 S.W.3d at 156–57.

§ 26.25 Bankruptcy during Appeal

During the pendency of the appeal, any party may file a notice that the party is in bankruptcy. Tex. R. App. P. 8.1. The filing of bankruptcy suspends the appeal and all time periods set forth in the Texas Rules of Appellate Procedure from the date when the bankruptcy petition is filed until the appellate court reinstates or severs the appeal. A period that had begun to run at the time of the filing of the appeal, but had yet to expire at the time the proceeding was suspended, begins anew when the proceeding is either reinstated or severed. A document filed by a party while the proceeding is suspended will be deemed to have been filed on the same day as, but after the time, that the court

reinstates or severs the appeal and will not be considered ineffective because it was filed while the proceeding was suspended. Tex. R. App. P. 8.2. If an appeal has been suspended by a bankruptcy filing, a party may move that the appellate court reinstate the appeal if allowed by federal law or the bankruptcy court. If the bankruptcy court has lifted or terminated the stay, a certified copy of the order must be attached to the motion. Tex. R. App. P. 8.3(a).

COMMENT: A motion to reinstate is the only method provided in the Texas Rules of Appellate Procedure to move the appeal along. Accordingly, if the party who filed the bankruptcy is the appellant and that party fails to file a motion to reinstate within a reasonable period of time following the termination or lifting of the stay, the appellee should consider filing a motion to dismiss the appeal.

§ 26.26 Family Law Appellate Timetable

TRIGGERING EVENT	STATUTE/RULE	PLEADING	FILING DEADLINE
Final trial or date court signs judgment	Tex. Fam. Code §§ 6.709, 109.001	Motion for temporary orders pending appeal	By date party required to file notice of appeal; may be filed before trial. Court retains jurisdiction to sign original temporary order pending appeal until 60th day after any eligible party has filed notice of appeal.
If child support ordered	Tex. Fam. Code § 154.130(a), without regard to Tex. R. Civ. P. 296–299	Findings of fact ("FOF")	Orally in court during hearing, or file written request with court not later than 20 days after date of rendition of order.
In all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, including order for child younger than three years	Tex. Fam. Code §§ 153.258, 153.3171(c)	FOF	Request conforming to Texas Rules of Civil Procedure.

TRIGGERING EVENT	STATUTE/RULE	PLEADING	FILING DEADLINE
Date court signs the judgment	Tex. R. Civ. P. 296	FOF and conclusions of law ("COL")	Written request within 20 days after judgment is signed. Court has 20 days from date of request to file FOF/COL.
	Tex. R. Civ. P. 297	Notice of past-due FOF/COL	If court doesn't file FOF/COL, attorney **must file** written request for past-due FOF/COL within 30 days of original request. Court has 40 days from date of original request to file FOF/COL.
	Tex. R. Civ. P. 298	Additional or amended FOF/COL	After court files FOF/COL, either party has 10 days from date of filing to file written request. Court has 10 days from date of request for additional or amended FOF/COL.
	Tex. R. Civ. P. 329b	Motion for new trial ("MNT")	Within 30 days after judgment or other order complained of is signed. No extensions available.
	Tex. R. Civ. P. 329b	Motion to modify/correct/reform judgment ("MCRJ")	Within 30 days after judgment or other judgment complained of is signed.
	Tex. R. App. P. 26.1	Notice of accelerated appeal	Within 20 days after judgment or order is signed.
	Tex. R. App. P. 26.1	Notice of appeal ("NOA")	If no FOF requested or MNT or MCRJ filed, within 30 days after judgment or order is signed. If FOF requested or MNT or MCRJ filed, within 90 days after judgment or order is signed.

§ 26.27 Effect of Remand

When an appellate court remands a case and limits a subsequent trial to a particular issue, the trial court is restricted to a determination of that particular issue. *In re Marriage of Stein*, 190 S.W.3d 73, 75 (Tex. App.—Amarillo 2005, no pet.). An appellate court cannot reverse only one piece of a property division but instead must remand the entire community estate for a new division. *Bufkin v. Bufkin*, 259 S.W.3d 343 (Tex. App.—Dallas 2008, pet. denied). The only relief that an appellate court may grant an appellant who argues factual insufficiency is a remand for a new trial; it may not reverse and render judgment in favor of the other party. *In re S.K.H.*, 324 S.W.3d 156, 159 (Tex. App.—El Paso 2010, no pet.).

COMMENT: If the appellate court orders a partial remand for a new trial, counsel should ensure that the appellate court affirms the granting of the divorce to avoid having that matter raised as an issue in the new trial.

§ 26.28 Internet Resources

The Office of Court Administration, in conjunction with the Judicial Committee on Information Technology, maintains a website with links to the Supreme Court of Texas, the Texas Court of Criminal Appeals, and all the appellate courts, which may be found at **www.txcourts.gov**.

§ 26.29 Useful Websites

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

Court of Criminal Appeals
www.txcourts.gov/cca.aspx

Links to individual Texas court sites (§ 26.28)
www.txcourts.gov

Texas appellate courts (§§ 26.12, 26.22)
www.txcourts.gov

Texas courts of appeals:

First Court of Appeals (Houston)
www.txcourts.gov/1stcoa.aspx

Second Court of Appeals (Fort Worth)
www.txcourts.gov/2ndcoa.aspx

Third Court of Appeals (Austin)
www.txcourts.gov/3rdcoa.aspx

Fourth Court of Appeals (San Antonio)
www.txcourts.gov/4thcoa.aspx

Fifth Court of Appeals (Dallas)
www.txcourts.gov/5thcoa.aspx

Sixth Court of Appeals (Texarkana)
www.txcourts.gov/6thcoa.aspx

Seventh Court of Appeals (Amarillo)
www.txcourts.gov/7thcoa.aspx

Eighth Court of Appeals (El Paso)
www.txcourts.gov/8thcoa.aspx

Ninth Court of Appeals (Beaumont)
www.txcourts.gov/9thcoa.aspx

Tenth Court of Appeals (Waco)
www.txcourts.gov/10thcoa.aspx

Eleventh Court of Appeals (Eastland)
www.txcourts.gov/11thcoa.aspx

Twelfth Court of Appeals (Tyler)
www.txcourts.gov/12thcoa.aspx

Thirteenth Court of Appeals (Corpus Christi)
www.txcourts.gov/13thcoa.aspx

Fourteenth Court of Appeals (Houston)
www.txcourts.gov/14thcoa.aspx

Texas Supreme Court
www.txcourts.gov/supreme.aspx

1 Ethics & Malpractice

2 Attorney-Client Relationship

3 Divorce Pleadings

4 Divorce—Temporary Orders

5 Discovery

6 Information Gathering

7 Inventory & Appraisement

8 Ancillary Motions & Proceedings

9 Child Support

13 Court-Ordered Representatives

14 Judicial Bypass

15 Collaborative Law

16 Parenting Plans, Coordinators & Facilitators

17 Protective Orders

18 ADR & Informal Settlement

19 Trial Proceedings

20 Attorney's Fees

23 Divorce—Decrees & Agreements

24 Closing Documents

25 Employment & Retirement Benefits

26 Posttrial Proceedings & Appeals

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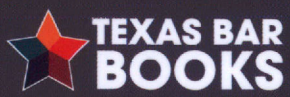
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