CASE LAW UPDATE

In Re C.J.N.-S., 540 S.W. 3d 589, (Tex. 2018)

The mother of the adult disabled child filed for support from the father pursuant to Family Code Section 154.302 after the child attained the age of 18. That section authorized a parent to be ordered to pay support for an adult child if that child requires substantial care an personal supervision because of a mental or physical disability existing on or before the date the child attains the age of 18. Section 154.303(a)(1) allows a suit to be filed by a parent of the child or another person who has physical custody or guardianship of the child under a court order. Mother did not have physical custody or guardianship of the child and the father challenged her standing to file the suit. Trial court agreed that mother had standing because the statute gave standing to a parent or another person with physical custody or guardianship. Court of Appeals reversed. Supreme Court reversed Court of Appeals and agreed with trial court the mother had standing because she was a parent and holding that the language "having physical custody or guardianship" found in Sec. 154.303(a)(1) applied only to the words "another person" and not also to the word "parent."

Office of the Attorney General of Texas v. C.W.H., 531 S.W.3d178 (Tex. 2017)

This case was decided by the Supreme Court in October, 2017. Father was sole managing conservator of the children under a district court order. Mother was ordered to pay child support. Father then left the children with mother's parents. At some later point he was arrested and imprisoned where he remained while this case was pending. The case was initiated by the Attorney General filing a "Notice of Status and Motion for Further Orders." That pleading asked to modify the conservatorship and support. Father filed an answer. Father asked to be bench warranted back for the hearing or for other alternative means to be heard. The IV-D judge did not bench warrant him back or provide other means for him to be heard and denied his request. The IV-D judge then the proceeded to default father and issued his order naming the mother and her parents as joint managing conservators. In that order mother's support obligation was modified so that she no longer was required to pay child support. Father appealed. Court of Appeals held that the IV-D judge had abused his/her discretion by failing to honor Father's request to participate in the hearing and further that the IV-D judge did not have authority to rule on conservatorship. The statute has now been modified to give a IV-D judge this power, but had not been at the time this case was tried at the trial court level. The Supreme Court stated that the IV-D judge had the power under the provisions of the Family Code as it existed at that time to make any order that is not a final order on the merits and to recommend to the referring court any order after a trial on the merits. The Supreme Court agreed that the trial court should have permitted the father to participate in the hearing and should not have defaulted father under these circumstances. The Supreme Court disagreed with the Court of Appeals and held that the IV-D judge did have the right to make an order regarding the conservatorship because that order would relate to the payment of child support. The case was remanded to the IV-D court on the ground that court failed to honor father's request to participate in the trial by alternative

means. The most salient part of the holding in this case at this time is the part of this decision which requires the trial court to provide alternative means for a prisoner to be heard if that request is made.

In re S.C., 61 Tex. Sup. Ct. J. 1821 (June 29, 2018)

Wife and Husband had entered into a premarital agreement which had a no-contest clause. The real lesson from this case–as it sometimes is in family law–is that pigs get fat and hogs get slaughtered. The premarital agreement provided that Husband would pay Wife $5 million dollars upon entry of a divorce decree between them. The agreement also provided that she would forfeit that $5 million if she tried to recover property covered by the agreement in a different manner than what was set out in the agreement. Husband missed some payments which he was required to make under the agreement. Wife sued him and enforced those payments. Wife then filed pleadings to rescind the premarital agreement contending that Husband had breached the agreement by failing to make those payments. The Supreme Court remarked that a successful recision of the agreement would increase her recovery in the divorce court. Trial court granted a partial summary judgment holding that Wife had violated the no-contest clause by filing suit to rescind. Court of Appeals agreed. Supreme Court agreed, pointing out that Wife had remedies other than rescission to enforce Husband's obligations this agreement. This cost her a guaranteed payment of $5 million. The Supreme Court's opinion has a discussion of several standard provisions in these premarital agreements which have adverse effects on an unsuccessful challenge to set aside one of these agreements.

Dalton v. Dalton, 61 Tex. Sup. Ct. J. 1737 (June 29, 2018)

Wife and Husband had signed a separation agreement in Oklahoma in which Husband agreed to pay Wife contractual alimony. The parties later both moved to Texas and filed for divorce in Texas. The Oklahoma separation agreement was incorporated in the decree. Husband quit paying the contractual alimony. Wife filed to enforce requesting a wage withholding order be issued and a QDRO transferring a portion of Husband's retirement benefits to Wife to satisfy the contractual alimony arrearages. The trial court ordered Husband's wages withheld to collect the contractual alimony and awarded a portion of Husband's retirement funds to Wife to satisfy the contractual alimony arrearages by use of a QDRO. The Court of appeals affirmed holding that the Oklahoma separation agreement was entitled to full faith and credit and ERISA permitted the trial court to use the QDRO to transfer a portion of Husband's retirement assets to Wife to satisfy these arrearages. Supreme Court reversed holding that a QDRO may not be used to enforce obligations for spousal support/alimony. Supreme Court held that a QDRO may only be used to enforce a property division. Because a QDRO had already been entered to divide the Husband's retirement benefits a second QDRO to enforce alimony arrearages with additional retirement funds was precluded under ERISA. The Supreme Court further held that wage withholding could only be used to collect court-ordered obligations which qualify as "spousal maintenance" under Chapter 8, Texas Family code and situation did not.

In Re K.S.L., 538 S.W.3d 107 (Tex. 2017)

This case and the case below were both decided in late December, 2017, and involve similar issues regarding termination of parental rights. In this case the parents both signed affidavits of relinquishment. Their rights were terminated. Both then appealed the termination of their parental rights, claiming that the evidence was factually and legally insufficient on the issue of the child's best interest. They did not challenge the validity of the affidavits of relinquishment. The trial court ruled against them. The Court of Appeals found for the parents and reversed the trial court. The Supreme Court reversed the Court of Appeals and affirmed the trial court's judgment. Mother and Father did not content that their affidavits were tainted by fraud, duress or coercion which are the reasons these affidavits could be set aside. Texas Family Code Sec. 161.211 (c) provides "A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit." The Supreme Court held that in the ordinary case a sworn, voluntary, and knowing relinquishment of parental rights where the parent expressly attests in that affidavit that termination is in the child's best interest, ordinarily satisfies by clear and convincing evidence the requirement contained in the statute that to do so is in the best interest of the children. The parents also asserted on appeal that section 151.211 of the Family Code violated their federal right to due process. The Court rejected that argument with a detailed analysis of due process, citing the many safeguards contained in the in the Texas Family Code.

In Re M.M., 538 S.W.3d 540 (Tex. 2017)

This case was decided by the Supreme Court on the same day as the above case. The mother appealed the termination of her parental rights based on her signing an affidavit of relinquishment. She made basically the same argument on appeal as in the above case. The Supreme Court addressed her complaints in the same manner, citing the above case.

In the Interest of A.C., (Tex. App. 2017) LEXIS 4014
Petition for Review granted by In the Interest of A.D., 2018 Tex. LEXIS 673 (Tex. June 29, 2018) This case was argued before the Supreme Court on September 10, 2018

This termination case was set for a jury trial, but the parties entered into a mediated settlement agreement which was proved up by the CPS caseworker. Mother appeared at the final hearing through her attorney. The trial court signed a decree which terminated mother's right, but appointed her a non-parent possessory conservator with supervised visitation. CPS was the managing conservator. Mother appealed saying that CPS had failed to introduce evidence that was factually sufficient to support the court's finding that termination was in the children's best interest by clear and convincing evidence. The appellate court ruled the evidence to be sufficient. The MSA which mother signed contained statements in three places that the agreement was in the best interest of the children.

Bos v. Smith, 61 Tex. Sup. Ct. J. 1334 (2018)

The Supreme Court decided this case in June, 2018. It involved a suit by the father of 4 children against the maternal grandparent for interference with child custody pursuant to Family Code Section 42.003. Father had difficulty exercising his possession of the children after divorce. The maternal grandparents had supported their daughter by babysitting the children while she worked. The behavior of the mother in interfering with the father's visitation was egregious. The mother had coached one of the children to make false sexual abuse allegations. She had violated father's rights to have possession of the children on numerous. She also started dating a psychologist who also got involved in the denial of father's visitations. She eventually relinquished her parental rights to avoid going to jail for contempt. Father claimed that the maternal grandparents aided their daughter in interfering with his custody rights, violated their duties to keep the children safe from their mother and for defamation, breach of fiduciary duty and negligence. The grandparents had babysat the children on an occasion when mother was denying father his visitation. The grandfather had also made statements to CPS regarding father which later proved to be false. Family Code Section 42.003 provides for a cause of action against a person who aids another person in interfering with custody rights if the person providing the aid either had actual notice of the contents and existence of a custody order or had reasonable cause to believe the child was subject to an order and that person's actions were likely to violate the order. Father obtained a $10.7 million dollar judgment against the grandparents at the trial court level. The Supreme Court affirmed in part and reversed in part. The Supreme Court reversed the $10.7 million dollar judgment and rendered a take-nothing judgment in favor of the grandparents. The Supreme Court held that babysitting would not support liability under that section of the Family Code because the grandparents would have no reasonable cause to believe that what they did would violate a court order. This case contains a discussion of the level of involvement it takes to be liable under this statute. The court did not reach the issues of fiduciary duty or ordinary care duty.

In Re H.S., 61 Tex. Sup. Ct. J. 1404 (2018)

This case was also decided in June and involves non-parent standing to bring a suit for custody. Texas Family Code Section 102.003(a)(9) confers standing on persons who have had the actual care, control, and possession of the child for at least 6 months ending not more than 90 days preceding the date of the filing of the petition. Mother and Father were joint managing conservators under the terms of the court order. Mother resided with her parents, but she left their home to go to a sober living facility. Everyone intended the children's residence with grandparents to be temporary. Mother, Father and maternal grandparents agreed the children would stay with the grandparents while Mother was away. Father exercised his visitation under the order and Mother visited the children. Right after six months had passed, the maternal grandparents filed to modify the order asking to have the exclusive right to designate the children's primary residence. The Supreme Court held that the statute's use of the modifier "actual" means the care, control, and possession must exist in fact. The court also noted that the statute makes no reference to the care, control and possession being exclusive. The Mother had retained the legal control over these children by virtue of the court order. This decision contains an extensive delineation of the type of

actual care, control and possession which would satisfy this statute. The court differentiated this case from the United States Supreme Court's holding in *Troxell v. Granville* because our statute does not allow just any nonparent to file a SAPCR.

Bradshaw v. Bradshaw, 61 Tex. Sup. Ct. J. 1679 (2018)

This was another June, 2018, decision. It involves the unequal division of property. This decision is based on a 3-judge plurality opinion, 2 justices concurring opinions and two dissents. The facts were egregious. Stepfather sexually abused one child in the marital home which appeared to be the main asset of the community. Stepfather was convicted of abusing that child while this was pending and was sentenced to 60 years in prison. Also while the case was pending other children revealed that he had also sexually abused them in the home. The trial court's division of property was appealed to the Court of Appeals and reversed and remanded. At the second trial, further sexual abuse of other girls perpetrated by the stepfather in the home was known because those children had come forward. The trial court awarded 80% of the home to the wife and 20% to the husband/stepfather. Wife appealed saying she should have been awarded 100% of the house. Court of Appeals affirmed. Wife appealed to the Supreme Court. The three-judge plurality reversed, holding that it was not a just and right division as a matter of law to award any part of this home to husband/stepfather. The plurality limited its decision to a case where the facts are as egregious as these and the family home is the only significant asset. The concurring justices agreed with the plurality's holding that the decision should be reversed , but should be reversed because of a lack of evidence to support the trial court's decision. The concurring justices found that there should have been an inventory to evidence the value of the entirety of the community estate.

Wheeler v. Wheeler, 2017 Tex. App. LEXIS 6868 (Tex. App.–Houston [1st Dist.] July 25, 2017)(mem. opinion)

Trial court ordered parties to pay the amicus attorney's fees. Husband failed to pay. This was a custody case. Trial court struck the jury demand made by Husband for failure to pay the cost deposit for these fees. Court of Appeals reversed holding that the trial court was not authorized to strike the jury demand as a sanction for failure to pay the cost deposit to the amicus attorney for the child when the issue to be tried is within the exclusive province of the jury and the party offers evidence creating genuine fact issues for the jury to decide.

Ishee v. Ishee, 2017 Tex. App. LEXIS 4761 (Tex. App.–Beaumont May 25, 2017) (mem. opinion)

Section 9.011, Texas Family Code creates a fiduciary duty when a divorce decree obligates one spouse to remit property to the other spouse upon receipt.

Willmore v. Alcover, 2018 Tex. App. LEXIS 2044 (Tex. App.–Corpus Christi*, March 22, 2018) (mem. opinion) *as transferred from Houston 1st District

Wife had deposited all of her paychecks during the marriage to an account which she did not disclose to Husband during the marriage. This case sets out the elements necessary to prove fraud in a family law case. (1) Wife failed to disclose an account; (2) Wife had a duty to disclose that account; (3) the account was material; (4) Wife knew that Husband was ignorant of the account; (5) Wife was deliberately silent; (6) by failing to disclose the account Wife intended to induce Husband to take some action or refrain from acting; (7) Husband relied on Wife's nondisclosure; and (8) Husband was injured as a result of acting without that knowledge.

In Re Marriage of Stegall, 2017 Tex. App. LEXIS 4397 (Tex. App.–Amarillo, May 12, 2017)

Tracing case. At the time of marriage husband owned at least 163 cows. At the time of divorce he owned 191 cows. He sought to claim that 163 of the cows at the time of divorce were his separate property because his herd had never dropped below that number, using the "minimum sum balance" tracing method. Court of Appeals held that this method could not apply to cattle in the same way that it applies to cash because cattle are not fungible. In this instance, the tracing method fails to recognize that there had been a significant number of cattle born during the marriage all of which were community property and all of which were commingled with the separate property cattle. The Court of Appeals found that the property in this circumstance defied segregation and the community property presumption prevails. The comment by a speaker was made that this case is applicable to mutual fund accounts wherein securities are bought and sold, dividends and interest are invested and reinvested in the purchase of securities to the point that the separate cannot be traced.

Miller v. Miller, 2018 Tex. App. LEXIS 4787 (Tex. App.–Houston [14th Dist]* June 28, 2018) *as transferred from Austin Court of Appeals

This case involved a physician who owned allergy clinics. Wife made claims of fraud. Court of Appeals held that although the fiduciary relationship of Husband and Wife ends upon the filing of divorce, in the midst of a divorce, the parties have a duty to provide complete disclosure to the discovery requests. The court held that while a spouse may not be fully informed as to the ongoing investments and matters relating to the community estate occurring during the marriage, the spouse has a right to rely on the fiduciary relationship shared with the other spouse during the marriage. Texas law does not require that the spouse demonstrate any diligence to understand the inner workings of the community estate .

Kramer v. Kastleman, 508 S.W.3d 211 (Tex. 2017)

The Supreme Court noted in this decision that it had been 65 years since it had discussed the application of the acceptance of benefits doctrine as it relates to appeals in divorce related cases. The Supreme Court then proceeded to set out a non-exclusive list of factors which should be

considered in applying the acceptance of benefits doctrine in divorce related cases. These are: (1) whether the acceptance of benefits was voluntary or the production of financial duress; (2) whether the right to joint or individual possession and control of an asset allegedly accepted preceded the judgment or exists only because of it; (3) whether the assets accepted have been so depleted, 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 is based on the opposing party's concession; (5) whether the appeal, if successful, may result in a more favorable judgment, but there is not risk of a less favorable one; (6) if a less favorable judgment is possible, whether there is no risk that the appealing party could receive an award that is less than the value of the assets dissipated, wasted or converted; (7) whether appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment; (8) whether the issues on appeal are severable from the benefits accepted; (9) the presence of actual or reasonably certain prejudice ; and (10) whether any prejudice is curable.

In Re E.B., 2017 Tex. App. LEXIS 9741 (Tex. App.–Tyler October 18, 2017, orig. proceeding) (mem. opinion)

A mandamus case. Parties attempted mediation which failed. They then participated in an informal settlement conference with the amicus attorney and entered into a "Rule 11/Informal Settlement Agreement." This agreement contained language stating that it was not revocable. Husband subsequently gave notice that he was revoking the agreement and the trial court denied the attempt. The Court of Appeals defined a mediator as a neutral third party and held that an amicus attorney is an advocate and is not neutral. There is also a discussion of the doctrine of accepting the benefits of the judgment. The Court of Appeals held that an agreement brokered by an amicus attorney may not be enforced as a mediated settlement agreement and a party can revoke consent before rendition because informal settlements are not authorized under Texas Family Code Title 5, only under Title 1.

In re McPeak, 525 S.W.3d 310, (Tex. App.–Houst6on [14th Dist.] 2017)

This is a mandamus case which holds that the standard for modifying temporary orders in a pending divorce action is not material and substantial change. Court of Appeals held that Chapter 156, Texas Family Code applies to modifications of final orders–not temporary orders. This opinion also held that it was an abuse of the trial court's discretion not to confer with a child 12 years of age or older.

In the Interest of C.F.M., 2018 Tex. App. LEXIS 2490 (Tex. App–Dallas April 9, 2018)(mem. opinion) (appeal of divorce case) and In the Interest of C.F.M., 2018 Tex. App. LEXIS_____(Tex. App.–Dallas, May 18, 2018) (appeal of modification case)

There are two of these cases appealed arising out of same original divorce case. The trial court's decision on the divorce was appealed and then issues arising out of the subsequent modification case were also appealed. In the appeal from the modification case the court was asked

to take judicial notice of the testimony from the original divorce proceedings. The appellate court held that a trial court cannot judicially notice the testimony from the prior trial or a prior hearing unless the testimony is authenticated and actually entered into evidence. In the appeal of the divorce case the appellate court includes a discussion of the disclosure of findings included in a temporary order. The appellate court refers to *In Re M.S., 114 S.W.3d 534 (Tex. 203)* wherein the Supreme Court stated that the findings contained in a trial court's temporary order are considered a comment on the weight of the evidence and should be redacted before admission as evidence for a jury if an objection is made.

In Re Minix, 2018 Tex. App. LEXIS 1489 (Tex. App.–Houstton [14th Dust.] February 27, 2018, orig. proceeding)

Father and mother entered into a fully compliant mediated settlement agreement regarding their children. No one asked to enter judgment on the MSA. Then some litigation ensued, but the parties both notified the trial judge that they had both agreed to set aside the MSA. The parties proceeded before the court and the court entered agreed temporary orders. Mother changed lawyers and her new lawyer filed a motion to enter judgment on the MSA. Trial Court denied her motion. Mother filed this mandamus. Mandamus was granted with a majority opinion, a concurring opinion and a dissenting opinion. The majority opinion held that a compliant MSA may only be set aside in limited circumstances and the trial court has no discretion to refuse to enter judgment on a compliant MSA unless those limited circumstances exist. The parties cannot use a stipulation or a Rule 11 Agreement to set aside the binding effects of a fully compliant MSA. This decision effectively says that parties cannot revoke their contract if it is an MSA under Texas Family Code Section 153.0071.

Williams v. Finn, 2018 Tex. App. LEXIS 5154 (Tex. App.–Houston [1st Dist.] July 10, 2018) (mem. opinion)

The trial court had signed a final order in a motion to modify subsequent to a divorce between the parties. Wife filed a motion for new trial which was granted, but she did not get a written order signed. The parties later entered into a mediated settlement agreement which was fully valid while the court still had plenary power over the original case.. The trial court subsequently lost plenary power with the original judgment standing because of the lack of a signed order granting the new trial. Wife then filed a new motion to modify asking the court to enforce the terms of the MSA. Husband gave notice attempting to revoke the MSA. The Court of Appeals held that the MSA was valid at the time it was executed, nothing in the terms of the MSA would have caused it to expire and that nothing in the governing statutes dictate that it becomes invalid when the trial court's plenary power expires.

In re A.E. 2017 Tex. App. LEXIS 3817 (Tex. App.–Beaumont April 27, 2017, pet. Filed July 12, 2017) (mem. opinion)

The holds that the United States Supreme Court's decision in *Obergefell* which recognized same sex marriage does not confer standing on the same sex partner to make a parentage claim, does not require a Texas court to act as the Legislature and re-write Texas statutes that define standing and does not require that every state law related to the marriage or parent-child relationship be treated as gender neutral.

In Re Payne 2018 Tex. App. LEXIS 2449 (Tex. App.–Austin, April 5, 2018)(mem. opinion)

Mandamus case. Holds that under Texas Family Code Section 105.001(a)(5) the trial court may award fees only if the party seeking fees establishes that they are necessary for the safety and welfare of the child. In this case no evidence was presented regarding the issues which would impact the safety and welfare of the child.

In Re Marriage of Harrison, 2018 Tex. App. LEXIS 4201 (Tex. App.–Houston [14th Dist.] June 12, 2018)

When the terms of a mediated settlement agreement are incorporated into temporary orders, the court has the right to modify the temporary orders as necessary to protect the best interest of the child and to issue final orders which are contrary to the MSA terms.

Waters v. Waters, 2017 Tex. App. LEXIS 11531 (Tex. App.–San Antonio, December 13, 2017) (mem. opinion)

In a situation where a third party involvement is warranted regarding possession of children, the trial court must issue specific guidelines or terms in the order under which the parent will know how to comply in order to be able to exercise possession or enforce the order if necessary.

In Re Charles, 2017 Tex. App. LEXIS 11234 (Tex. App.–Austin, December 1, 2017, orig. proceeding)n (mem. opinion)

The Court of Appeals held that although the motion to modify included an affidavit as required by Texas Family Code 156.006 to obtain temporary orders, the substance of the affidavit did not refer to the requirements of the stature, nor make any allegations as required by the statute or detail specific facts supporting the relief requested. The Court of Appeals held that the trial court abused its discretion in conducting a hearing, although the absence of a sufficient affidavit can prove harmless if the evidence at the hearing rises to a level establishing that the circumstances of the child would significantly impair the child's well-being.