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FAMILY LAW

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I. INTRODUCTION

This article reviews Texas family law cases from federal and Texas courts during the Survey period from December 1, 2016 through November 30, 2017. The article excludes cases involving the Texas Department of Family and Protective Services, the Texas Office of the Attorney General and county Domestic Relations Offices. The volume of Texas family matter case law increases most years and exceeds the authors' ability to report on them.[1] Accordingly, the authors have limited review to a few highlight cases and an examination of trends of the past year.

II. SAME-SEX MARRIAGE AND PARENTAGE

A. *Pavan v. Smith*

On the second anniversary of the *Obergefell v. Hodges* decision, the U.S. Supreme Court reversed an Arkansas Supreme Court ruling that denied married same-sex couples the right to both be listed on a child's birth certificate. *Pavan v. Smith* challenged an Arkansas statute under the Fourteenth Amendment rights to equal protection and due process for married same-sex couples.[2] The Arkansas trial court ruled that Arkansas Code Section 20-18-401 violated federal constitutional law, but the Arkansas Supreme Court reversed. In a per curiam decision, the U.S. Supreme Court found that same-sex couples should be afforded the "same terms and conditions as opposite-sex couples" to civil marriage.[3] The *Obergefell* decision expressly identified a parent's appearance on a child's birth certificate as a benefit of marriage, a point the *Pavan* opinion asserts was no accident.[4] The Court explained that the Arkansas statutes prescribing who is listed on a birth certificate confer legal recognition on the parents, recognition that is necessary to carry out basic parenting responsibilities like enrolling a child in school.[5] Same-sex parents who are not listed on the birth certificate do not receive that recognition, and such disparate treatment is prohibited under *Obergefell* because it denies same-sex couples the "constellation of benefits that the Stat[e] ha[s] linked to marriage."[6] The case was reversed and remanded since Arkan-

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1. Office of the Court Admin., Annual Statistical Report for the Texas Judiciary 6–9 (2016).

2. Pavan v. Smith, 137 S. Ct. 2075 (2017). The two Arkansas statutes examined in the opinion are Arkansas Code Section 20-18-401 (West 2018) that provides that a child's mother be listed on a birth certificate, along with the mother's husband, unless someone else's paternity has been established by a court, and Arkansas Code Section 9-10-201 (West 2018) that provides that a child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination. The petitioners only challenged Arkansas Code Section 20-18-401 in their pleadings.

3. *Pavan*, 137 S. Ct. at 2078 (slip op. at 1) (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015)).

4. *Id.* (citing *Obergefell*, 135 S. Ct. at 2601).

5. *Id.* at 2078.

6. *Id.* (quoting *Obergefell*, 135 S. Ct. at 2601).

sas Code Section 20-18-401 was determined to be unconstitutional.[7] The *Pavan* decision reaffirmed protection of the rights of married same-sex couples established by *Obergefell*, and may be viewed as expanding those rights by expressly recognizing parentage as a protected right of same-sex spouses. The Court's issuance of a per curiam decision without briefing and oral arguments suggests that a majority of the Justices considered the issue settled by *Obergefell*.[8]

B. *In re Ryan*

The Tyler Court of Appeals addressed conservatorship of married same-sex parents who were not parties to the formal adoption of their child in the mandamus case *In re Ryan*.[9] Mary and Lorna married in Connecticut in 2009. In March 2013, T.E.R. was born and placed with Mary and Lorna. Although Mary and Lorna both acted as parents to T.E.R., the Texas statutes in effect at the time of the January 2014 adoption prohibited both spouses of a same-sex union from being named as adoptive parents, and only Lorna was adjudicated as T.E.R.'s parent in the formal adoption proceeding. Then, in 2015, *Obergefell* granted full faith and credit retroactively to the Connecticut marriage by Texas. Mary filed for divorce in 2016. In her petition, she requested that she and Lorna be appointed joint managing conservators of T.E.R. Lorna filed a counter-petition and sought sole managing conservatorship. After a temporary orders hearing, the trial court appointed Lorna sole managing conservator and did not appoint Mary a conservator. Mary's motion to reconsider the temporary orders was denied, and she sought mandamus relief. The court of appeals found that the trial court abused its discretion by applying the parental presumption to determine conservatorship for Mary, when the correct standard is best interest of the child.[10] Under Texas Family Code Section 153.131(a), the parental presumption is the appropriate standard for determining managing conservator, but a possessory conservator may be named if it is in the child's best interest.[11] A party requesting conservatorship need not overcome the parental presumption for possessory

7. *Id.* at 2079. The Arkansas Supreme Court, as directed by the U.S. Supreme Court, held in *Pavan v. Smith* that Arkansas Code Section 20-18-401 was unconstitutional, and directed the lower court to provide declaratory and injunctive relief to extend the benefits of the statute to same-sex parents but cautioned the lower court not to rewrite the statute. Smith v. Pavan, 2017 Ark. 284, at *4 (2017).

8. The ruling was 6–3, with Chief Justice Roberts joining the five justices in the majority in *Obergefell*, and Justices Alito, Thomas, and Gorsuch in dissent. Justice Gorsuch's dissent argues that a summary reversal is not warranted in this case. *Pavan*, 137 S. Ct. at 2079. His opinion is a technical one questioning the power of the Court to expand statutes or review issues not before the Court. Gorsuch adopts the Arkansas Supreme Court's arguably stilted analysis of Arkansas Code Section 20-18-401 as a statute about biological paternity, and never expresses a view of *Obergefell*. *Id.* So, it remains to be seen whether this dissent signals judicial rigidity and/or possible opposition to *Obergefell* and its reach.

9. No. 12-16-00284, 2016 WL 6996639, at *1 (Tex. App.—Tyler Nov. 30 2016, orig. proceeding) (mem. op.).

10. *Id.* at *2.

11. Tex. Fam. Code Ann. § 153.002 (West 2017).

conservatorship. Since Mary may be appointed possessory conservator if it is in the best interest of the child, the court conditionally granted Mary's writ and directed the trial court to vacate the temporary orders and issue an order in compliance with their opinion.[12] While the court of appeals reached an equitable result by providing Mary the opportunity to be named a possessory conservator, Mary did not receive the full benefit a fit parent should receive. Under these facts, opposite-sex spouses would have the opportunity to be adjudicated as adoptive parents and, in turn, be named joint managing conservators. Mary should have the opportunity to receive the full rights and duties afforded a joint managing conservator. Until the full reach of *Obergefell* is codified or adjudicated, courts will continue to struggle with the application of pre-*Obergefell* Texas law to post-*Obergefell* cases. This decision was delivered in November 2016, seven months before the *Pavan* decision. The court's decision in *Ryan* should be applauded as a creative effort to apply the current statutes and remedy an inequitable trial court decision, but would a different result have been reached if the case was a post-*Pavan* one?

C. *In re A.E.*

Another pre-*Pavan* court of appeals case, *In re A.E.*, held that a non-genetic mother, C.W., did not have standing to bring a suit affecting parent child relationship (SAPCR) as to the child of the marriage born to her wife.[13] C.W. argued that as spouse of biological mother, M.N., she was a legal parent of the child, and failure to recognize her as such was prohibited under *Obergefell*. C.W. urged the court to construe the term "man" or "father" in the statutes as also applying to her as a spouse pursuant to *Obergefell*. She did not, however, argue the constitutionality of the family code paternity statutes, which have not been amended to incorporate same-sex spouses since *Obergefell*.[14] The biological mother successfully argued that C.W. is not a parent under the Texas Family Code, and that while providing the right to marry, *Obergefell* did not give her standing to maintain a SAPCR.[15] The underlying issue is whether the right to marry gives rise to a right of parentage and the other rights that would be afforded to an opposite sex couple.[16] *Pavan* strengthens the

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12. *Id.*
13. *In re* A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *10 (Tex. App—Beaumont Apr. 27, 2017, pet. filed) (mem. op.).
14. *See id.* at *3.
15. *Id.*
16. Texas is one of several states to consider parentage issues under *Obergefell*. The Arizona Supreme Court relies on *Pavan* in their *McLaughlin* opinion recognizing parentage rights of same-sex couples. McLaughlin v. Jones, 401 P.3d 492 (Ariz. 2017). The *McLaughlin* dissent agrees with the result, but questions the wisdom of rewriting the paternity statute. *Id.* at 503. Petition for writ of certiorari to the U.S. Supreme Court has been filed in *McLaughlin*. State legislatures need to expedite their review of family law statutes to address the changing definition of parent or parentage cases will increasingly end up in federal court. *See* Indiana's *Henderson v. Adams*, which has reached the 7th Circuit Court of Appeals after the U.S. District Court found Indiana birth statutes unconstitutional for failure to recognize a same-sex spouse as a legal parent who should be listed on a birth

argument that it does, but to invoke *Pavan,* it may be necessary to raise a constitutional challenge to the applicable state statutes. As noted in the Arkansas Supreme Court's opinion after remand, courts want to avoid the appearance of legislating from the bench when construing statutes, and prefer that the legislature rewrite the statutes to conform to *Obergefell*'s requirements.[17] Until the statutes are rewritten or declared unconstitutional, decisions like *In re A.E.* will continue to cause what some would say are inequitable results.

D. *Pigeon v. Turner*

The Texas Supreme Court deferred determining the scope of *Obergefell* protections when it remanded *Pidgeon v. Turner* to the Harris County 310th District Court. The supreme court reasoned that the parties should be given the opportunity to fully and fairly litigate the issue of whether governmental agencies are permitted, or indeed constitutionally compelled, to offer tax-funded benefits to same-sex spouses of government employees in light of *Obergefell*.[18] Houston taxpayers brought an action against the city, and Mayor Turner requested injunctive relief prohibiting the city from providing tax-funded benefits to partners of married same-sex employees. The trial court initially issued a temporary injunction prohibiting the city from offering the benefits and the city filed an interlocutory appeal. During the pendency of the appeal, the U.S. Supreme Court held that states are prohibited from "exclude[ing] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[19] The city then filed a supplemental brief asserting that *Obergefell* required the court of appeals to reverse the injunction. Pidgeon countered that while *Obergefell* compels the state to recognize same-sex marriages, it does not permit federal courts to "commandeer state spending decisions" or mandate extension of tax-funded state benefits to same-sex spouses.[20] The Fourteenth Houston Court of Appeals reversed the temporary injunction and remanded to the trial court, and Pidgeon filed a successful petition for supreme court review. The supreme court reversed the court of appeals decision, vacated the trial court decision, and remanded to allow the parties to fully develop and litigate their positions. It is significant that the supreme court initially declined to hear the case, but was moved to reopen the case after an amicus brief support-

certificate. Henderson v. Adams, 209 F. Supp. 3d 1059 (S.D. In. 2016). Indiana statutes provide for legal parentage for biological and adopted parents, but do not confer parentage based on a marital relationship with a legal parent. *Id.* at 1067–68. A Utah federal district court recognized the right of same-sex mothers to be listed on a child's birth certificate. Roe v. Patton, No. 2:15-CV-00253-DB, 2015 WL 4476734 (D. Utah July 22, 2015).

17. Arkansas Supreme Court, as directed by the U.S. Supreme Court, held in *Smith v. Pavan* that Arkansas Code Section 20-18-201 was unconstitutional and directed the lower court to provide declaratory and injunctive relief to extend the benefits of the statute to same-sex parents but cautioned the lower court not to rewrite the statute.

18. Pidgeon v. Turner, 538 S.W.3d 73, 87–89 (Tex. 2017).

19. Obergefell v. Hodges, 135 S. Ct. 2584, 2591 (2015).

20. *Pidgeon*, 538 S.W.3d at 89.

ing review was filed by Governor Greg Abbott, Lieutenant Governor Dan Patrick, and Texas Attorney General Ken Paxton. The supreme court's issuance of their decision on interlocutory appeal, rather than reviewing the case on the merits, may be viewed as a move to avoid U.S. Supreme Court review. Whether the decision opens up the need to litigate any right claimed as a benefit of same-sex marriage or, perhaps leads to a ruling that the Texas Defense of Marriage Act is unconstitutional, remains to be seen.[21]

III. MEDIATED SETTLEMENT AGREEMENTS

A. *Loya v. Loya*

Justice Lehrmann's opinion in *Loya v. Loya* holds that, "[l]ike any contract, the express terms of a mediated settlement agreement control."[22] Her opinion follows her previous ruling regarding strict adherence to the terms of mediated settlement agreements (MSAs).[23] Leticia and Miguel Loya signed an MSA on June 13, 2010. The agreement provided for partition of future income, stating "[a]ll future earnings from each party are partitioned to the person providing the services giving rise to the earnings."[24] The agreement also required the parties to attend binding arbitration if drafting or interpretation issues arose. Less than two weeks after execution of the MSA, disagreements over the interpretation of the future earnings provision arose, and the parties went to arbitration. At arbitration, the wife argued that the future earnings provision applied to earnings from services on or after June 13, 2010, the day the mediation settlement agreement was signed, while the husband's position was that it applied to all future earnings, period. The arbitrator verbally ruled that the future earnings provision should track the MSA language, and followed the ruling with an email directing the parties to include the following provision in the agreement incident to divorce: "All future income and earnings are partitioned as of June 13, 2010."[25] Leticia immediately moved to set aside the MSA, arguing the parties failed to reach mutual assent in the agreement as evidenced by the dispute over the future earnings. The trial court denied the motion and entered the final decree. Leticia did not appeal. After Miguel received his 2011 bonus, Leticia filed a petition for post-divorce division of property, asking for division of the 2011 community property bonus. Miguel filed for summary judgment, which the trial court granted. Leticia appealed.

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21. *See* Act of 1997, 75th Leg., R.S., ch. 7, § 1 (amending Tex. Fam. Code § 1.01).
22. Loya v. Loya, 526 S.W.3d 448, 453 (Tex. 2017).
23. *In re Lee* held that a trial court cannot use the best interest of the child determination to deny a motion for entry of a judgment on a MSA that meets the statutory requirements of Texas Family Code Section 153.0071(d), except in cases involving family violence. *In re* Lee, 411 S.W.3d 445, 453 (Tex. 2013).
24. *Loya*, 526 S.W.3d at 449.
25. *Id.* at 450; *see* Loya v. Loya, 473 S.W.3d 362, 370 (Tex. App.—Houston [14th Dist.] 2015, pet. granted), *rev'd*, Loya v. Loya, 526 S.W.3d 448 (Tex. 2017) (detailed discussion of the arbitrator's ruling).

The case was reversed and remanded after the Fourteenth Houston Court of Appeals concluded, first, that the bonus was not partitioned in the decree, second, that Leticia raised a fact question as to characterization of the bonus, and, finally, that the bonus should be characterized as community property.[26] Chief Justice Frost dissented, finding that whether the bonus was or was not community property was irrelevant, because under the "unambiguous language of the agreement" it was partitioned as future earnings, and the trial court properly entered a take-nothing judgment on Leticia's petition for post-divorce division of property.[27]

The Texas Supreme Court granted Miguel's petition for review and held, as Chief Justice Frost had, that the terms of the mediated settlement control so they need not reach the issue of characterization.[28] This case is a cautionary tale of the need for precision in drafting MSAs, particularly for division of complex estates. Miguel prevailed because the agreement expressly stated future earnings from the date of the agreement forward, so earnings attributable to a time period before the date of mediation, but received after the agreement was signed, were partitioned to him.

B. *In re C.C.E.*

Three Texas courts of appeals addressed issues of timing and content of MSAs this year. The Fourteenth Houston Court of Appeals held that an MSA that is "subject to the court's approval," does not leave the door opened for a party to withdraw their consent prior to entry of an order, and affirmed the trial court's entry of an agreed order based on the MSA.[29]

C. *S.P. v. N.P.*

In re S.P. v. N.P. concerned application of arbitration provisions of a MSA when post agreement issues arise. S.P. and N.P. signed a MSA in December of 2015.[30] The appellant, S.P., raised questions about the terms of the MSA at a hearing in March, and the trial judge directed the parties to pursue arbitration. In April, Appellee filed a motion to enter order and set a hearing in May. Two days before the hearing, Appellant sent correspondence to the arbitrator setting out his disputed issues and re-

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26. *Loya*, 526 S.W.3d at 450–51.

27. Loya v. Loya, 473 S.W.3d 362, 370 (Tex. App.—Houston [14th Dist.] 2015, *rev'd*, 526 S.W.3d 448 (Tex. 2017).

28. *Loya*, 526 S.W.3d at 451. Miguel proved that the 2011 bonus was discretionary and argued he did not earn the bonus until the employer awarded it in March 2011. Leticia countered with well-settled case law that the portion of a bonus that is compensation for work done during the marriage is community property. Justice Lehrmann does not address characterization of the bonus, stating "[w]hether the portion of the purely discretionary bonus based on services performed during the marriage constitutes community property is an important issue, but one we need not reach in this case." *Id.* Perhaps this opinion opens the door to raising characterization issues of discretionary bonuses in future litigation.

29. *In re* C.C.E., 530 S.W.3d 314 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

30. S.P. III v. N.P., No. 02-16-00278-CV, 2017 WL 3821887 (Tex. App.—Fort Worth Aug. 31, 2017, no pet.) (mem. op.).

quested that the trial court refer the matter to arbitration. Nothing else in the court record evidenced Appellant pursuing arbitration as directed by the judge. After the May hearing, the trial judge entered the Appellee's proposed order, and S.P. appealed. The Fort Worth Court of Appeals held it was reversible error for the trial court to enter an order based on a MSA that contained an arbitration clause when disputed issues remained.[31] This case highlights that an arbitration provision in a MSA is mandatory, so practitioners who do not want to arbitrate should strike the arbitration provision from the MSA. Further, if the opposing party raises disputed issues to the court after a MSA with an arbitration clause is signed, but fails to schedule arbitration, the best practice may be to schedule the arbitration yourself.[32]

D. *Highsmith v. Highsmith*

The Amarillo Court of Appeals ruled that a document purporting to be a MSA that is signed before a divorce petition is filed fails to meet the threshold requirements of Texas Family Code Section 6.602(a).[33] Accordingly, parties utilizing mediation in an attempt to reach a timely and amicable property settlement would be well advised to file a divorce petition prior to finalizing the MSA to ensure the MSA is binding.

IV. ACCEPTANCE-OF-BENEFITS

A. *Kramer v. Kastleman*

During the Survey period, the Texas Supreme Court revisited application of the acceptance-of-benefits doctrine to property division appeals for the first time since the 1950 *Carle* decision.[34] This equitable doctrine prohibits a party who has accepted the benefits of a judgment from subsequently challenging that judgment. The supreme court granted review because of the inconsistent application of the doctrine and the need to "clarify that the acceptance-of-benefits doctrine is a fact-dependent, estoppel-based doctrine focused on preventing unfair prejudice to the opposing party."[35] Lisa Kramer and Bryan Kastleman executed a settlement agreement concerning their child, and a second settlement agreement dividing their property. The two agreements purported to settle all issues and, after both were signed, Kastleman appeared for a prove-up hearing and testified that the property division was fair and equitable to both he

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31. *Id.* at *47.
32. An underlying issue in this case may have been avoiding unfair delay in the finalization of the case. If this issue arose in a county where *S.P. v. N.P.* is not precedent, ask the court to set a deadline for arbitration of disputed issues. If the court can set deadlines for mediation, then it may also be appropriate for the court to set deadlines for arbitration subsequent to mediation.
33. Highsmith v. Highsmith, No. 07-15-00407-CV, 2017 WL 4341466, at *4–5 (Tex. App.—Amarillo Sept. 28, 2017, no pet.). *See* Tex. Fam. Code Ann. § 6.602(a) (West 2017).
34. Carle v. Carle, 149 Tex. 469, 234 S.W.2d 1002 (Tex. 1950).
35. Kramer v. Kastleman, 508 S.W.3d 211, 213 (Tex. 2017).

and Kramer. However, no divorce decree was presented or signed at the hearing.

Before the final decree was presented to the trial court, Kramer moved to set aside the property agreement as unfair and inequitable. She argued that her consent to the agreement was fraudulently procured and provided evidence that after she entered into it she discovered Kastleman had forged her signature on financial documents and concealed significant assets from her.[36] Kastleman responded with a motion to enter judgment. After an evidentiary hearing, the trial court signed a final decree, which was later corrected to incorporate the property settlement agreement and other additional post-judgment motions. Kramer appealed, and Kastleman moved to dismiss the appeal, arguing Kramer was estopped from challenging the final decree by acceptance of the judgment's benefits, specifically, her acceptance of rents for property awarded to her. Kramer stipulated that she accepted rents, but countered that in the event of remand for reconsideration of the property division, she could restore the benefits she accepted, thereby preventing any harm to Kastleman. The Austin Court of Appeals dismissed Kramer's appeal for failure to assert an exception to the acceptance-of-benefits doctrine and never reached the merits of her fraud claim.

Kramer petitioned the supreme court for review, arguing "dismissal of an appeal is not appropriate unless a spouse's acceptance of benefits under a divorce decree prejudiced the other spouse or the spouse has otherwise clearly acquiesced in the judgment."[37] Justice Guzman's opinion sets out the history and development of the doctrine. She then examines its application and exceptions in the unique context of marriage dissolution. Acceptance-of-benefits arguments arise in divorce more than any other context because parties are dividing shared marital interests in other words, community property. The two threshold inquiries to determine if a spouse should be estopped from appealing under the acceptance-of-benefits doctrine are: (1) whether the other spouse will be prejudiced because there are no means for the appealing spouse to restore the accepted benefits under a different just and right property division; and (2) whether the spouse pursuing appeal acquiesced to the property division. Acceptance and control of property during the pendency of a divorce in and of itself does not signal acquiescence, since both parties usually hold some jointly owned property during a divorce. Acquiescence is a factual inquiry. Justice Guzman reiterates that an equity inquiry is necessary before application of estoppel under the acceptance-of-benefits doctrine.[38] Justice Guzman concluded that Kastleman would not be prejudiced, and that Kramer did not acquiesce to the property division, so the court of appeals erred in dismissing Kramer's appeal on an

36. *See* Kramer v. JP Morgan Chase Bank, 574 Fed. App'x 370, 371 (5th Cir. 2014).
37. *Kramer*, 508 S.W.3d at 216–17.
38. *Id.* at 232.

acceptance of benefits theory.[39]

B. *Matter of Marriage of Stegall*

The Amarillo Court of Appeals also considered the acceptance-of-benefits doctrine in *In re Stegall*.[40] Julie Stegall filed an abuse of discretion appeal of the trial court's property division for failing to meet the just and right standard by mischaracterizing cattle as husband Kerry's separate property. Kerry Stegall sought to have Julie's appeal dismissed using an acceptance-of-benefits argument. In applying the nonexclusive factors set out in *Kramer*, Senior Justice Hancock found that Kerry was not disadvantaged by Julie's acceptance of two awards under the property division that had a cash value of $2,703.32, particularly since there was no claim that Julie would be unable to restore those funds if she successfully appealed but received a smaller property distribution.[41] Additionally, the court found that Julie's consistent challenges to the trial court's characterization of the cattle as separate property counters Kerry's argument that Julie acquiesced in the judgment.[42] Since Kerry was not prejudiced, and Julie did not acquiesce, the case was reversed as to the characterization of property and remanded.[43]

Both *Kramer* and *Stegall* demonstrate the difficulty appellee's will have utilizing an acceptance-of-benefits theory to have property division appeals dismissed before a hearing on their merits. The appellant will have to take actions such as accepting property and then disposing of it to the extent that the marital estate cannot be made whole in the event of a successful appeal. This doctrine will only apply to very narrow factual situations going forward.

V. SPOUSAL MAINTENANCE AND ALIMONY

A. *Willis v. Willis*

There were three notable court of appeals decisions addressing spousal maintenance during the Survey period. The Fourteenth Houston Court of Appeals reversed an award of spousal maintenance for a full-time mother of special needs twins on weekly dialysis for renal disease who resided at her mother's home with her children.[44] Lola Willis testified at trial that she could meet her minimum monthly expenses of $1,455 a month if she continued to live with her children at her mother's home, continued receiving monthly social security payments for her disability, and received either $1,000 a month as spousal support or $1,000 a month as part of the

39. *Id.*
40. 519 S.W.3d 668 (Tex. App.—Amarillo 2017, no pet.).
41. *Id.* at 673.
42. *Id.*
43. *Id.* at 676.
44. Willis v. Willis, 533 S.W.3d 547 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

property division.[45] The trial court awarded her $972 a month in spousal support and $1,000 a month for sixty months under the property division. The court of appeals found that Lola failed to present sufficient evidence that she could not meet her minimum reasonable living expenses with her monthly social security disability income and the monthly payments from the property division, so the court struck the spousal maintenance award.[46] The result may have been different if Lola included housing expenses in her minimum reasonable living expenses.

B. *Alfayoumi v. Alzoubi*

Fadi Alfayoumi appealed a Cameron County district court decision awarding spousal maintenance to Tharwah Alzoubi, his wife of fourteen years.[47] In a memorandum opinion, the Corpus Christi Court of Appeals affirmed the lower court's decision. Alfayoumi argued that Alzoubi graduated from nursing school prior to the marriage and should be able to meet her minimum reasonable living expenses with a bachelor's degree. However, Alzoubi became pregnant before she was licensed and never worked as a nurse. The court of appeals reasoned that the trial court could have found Alzoubi's return to graduate nursing school was necessary for her to make meaningful use of her degree, and that by starting the graduate program during the pendency of the divorce, she made a diligent effort to meet her minimum expenses, and thereby overcame the presumption against spousal maintenance.[48]

C. *Roberts v. Roberts*

The San Antonio Court of Appeals reversed a trial court award of spousal maintenance, holding that Margaret Roberts failed to present sufficient evidence that she was unable to earn sufficient income to meet her minimum reasonable living expenses because of a disability, thereby failing to meet required factors under Texas Family Code Section 8.051.[49] Margaret testified to numerous chronic ailments,[50] but her testimony was not sufficient to rebut the presumption against awarding spousal maintenance because she failed to link her illnesses to her inability to work.[51]

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45. Lola testified that she is able "to provide for herself and her children's reasonable needs for living" while she lives rent-free at her mother's house but that "it's going to be a struggle" if that option were not available to her. *Id.* at 555–56.

46. *Id.* at 556.

47. Alfayoumi v. Alzoubi, No. 13-15-00094-CV, 2017 WL 929482, at *2 (Tex. App.—Corpus Christi Mar. 9 2017, no pet.) (mem. op.).

48. *Id.* at *1.

49. Roberts v. Roberts, 531 S.W.3d 224 (Tex. App.—San Antonio 2017, pet. denied); Tex. Fam. Code Ann. § 8.051 (West 2006).

50. No physician testified to Margaret's health problems, nor were any medical records admitted. However, the trial court could have found Margaret was disabled based solely on her testimony. *See* Pickens v. Pickens, 62 S.W.3d 212 (Tex. App.—Dallas 2001, pet. denied); Galindo v. Galindo, No. 04-13-00325-CV, 2014 WL 1390474 (Tex. App.—San Antonio Apr. 9, 2014, no pet.) (mem. op.).

51. *Pickens*, 62 S.W.3d at 234.

These cases highlight the importance of strictly following the statutory requirements for Chapter 8 spousal maintenance. To overcome the strong presumption against spousal maintenance, provide ample evidence of "minimum reasonable needs" and why a party is unable to meet those needs. *Willis* and *Roberts* presented sympathetic situations but ultimately failed by not providing sufficient evidence.

D. *Dalton v. Dalton*

The Texas Supreme Court granted review of *Dalton v. Dalton*, a post-judgment enforcement of contractual alimony case out of the Tyler Court of Appeals.[52] While residents of Oklahoma, Bart and Carol Dalton entered into a separation agreement with provisions for spousal support. The agreement was incorporated into an Order of Separate Maintenance rendered by the Rogers County Oklahoma District Court on December 18, 2006. The amount and duration exceeds what is permissible for statutory maintenance in the Texas Family Code. In 2008, the parties moved to Texas and Bart filed for divorce. After proper domestication of the Oklahoma separate maintenance order, Carol filed a counterpetition and notice of foreign judgment.[53] In 2011, after significant legal wrangling by the parties, the Nacogdoches County Court at Law entered a final decree. The decree gave full faith and credit to the Oklahoma separate maintenance order as a final order, and awarded Carol spousal support under the terms of the order of separate maintenance.[54] Almost immediately upon entry of the decree, Carol initiated enforcement proceedings, alleging support arrearages and requesting a wage withholding order for child and spousal support. Carol later filed another petition for a qualified domestic relations order. Bart filed opposing both the wage withholding order and issuance of a qualified domestic relations order. After the trial court signed a wage withholding order and a Qualified Domestic Relations Order assigning Carol a portion of Bart's retirement as payment for spousal support arrearages and attorney's fees, Bart appealed. On appeal, Chief Justice Worthen modified the arrearage amount, but otherwise affirmed the trial court ruling.[55] Bart petitioned the Texas Supreme Court for review and it was granted.

The three issues presented are: (1) does giving full faith and credit to a foreign judgment allow a Texas court to enforce a spousal support obligation originating from a final out-of-state order via wage withholding, or is enforcement via wage withholding limited to statutory spousal mainte-

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52. Dalton v. Dalton, No. 12-15-00203-CV, 2017 WL 104639 (Tex. App.—Tyler Jan. 11, 2017, pet. granted), *rev'd*, Dalton v. Dalton, No. 17-0155, 2018 WL 3207133 (Tex. June 29, 2018).

53. *See* Uniform Enforcement of Foreign Judgment Act, Tex. Civ. Prac. & Rem. Code Ann. § 35.003 (West 2015).

54. *See In re* Marriage of Dalton, 348 S.W.3d 290, 298 (Tex. App.—Tyler 2011, no pet.).

55. *Dalton*, 2017 WL 104639, at *4.

nance awards under Texas Family Code Chapter 8[56]; (2) is it unconstitutional under Texas Family Code Section 8.101 to allow garnishment of wages for payment of spousal support originating from a final out-of-state order if the award fails to meet the Texas statutory requirements for court ordered maintenance; and (3) do Texas Property Code Sections 42.001 and 42.0021 prohibit use of a qualified domestic relations order to divide an employer retirement plan covered by ERISA,[57] if the division is to satisfy an award of spousal support originating from a final out-of-state order.[58] In other words, can Texas courts use Texas enforcement vehicles to enforce out-of-state orders beyond the extent it could use those same vehicles to enforce Texas orders. The Texas Supreme Court heard oral arguments on *Dalton* in February of 2018, so these issues should be resolved during the next Survey period.

VI. STANDING

A. *In re H.S.* and *In re Lankford*

On September 1, 2017, the Texas Supreme Court granted petition for review of *In re H.S.*[59] The sole issue in *In re H.S.* is whether grandparents have standing under Texas Family Code Section 102.003(a)(9) to file an original petition for modification.[60] In *In re H.S.*, grandparents filed a petition to modify a prior SAPCR order alleging actual care, custody, and control of the child for six months prior to their filing.[61] Father filed a plea to jurisdiction. The Tarrant County district court sustained Father's plea and grandparents appealed to the Fort Worth Court of Appeals. The trial court's order was affirmed by the Fort Worth court in July 2016. Supreme court review was likely granted because of the split of opinion from the courts of appeals on the application of Section 102.003(a)(9) as seen in *In re Lankford*.[62] In that case, the Tyler Court of Appeals arrived at the opposite conclusion of *In re H.S.*, denying mandamus relief to the

56. Tex. Fam. Code Ann. §§ 8.001–8.305 (West 2017).

57. Employee Retirement Income Security Act, 29 U.S.C. §§ 1056 et seq. (2014).

58. Petition for Review, Dalton v. Dalton, (No. 17-0155) (Tex. 2017), http://www.search.txcourts.gov/Case.aspx?cn=17-0155&coa=cossup [https://perma.cc/JNZ4-HX8H]; Response to Petition for Review, Dalton v. Dalton, (No. 17-0155) (Tex. 2017), http://www.search.txcourts.gov/Case.aspx?cn=17-0155&coa=cossup [https://perma.cc/JNZ4-HX8H].

59. No. 02-15-00303-CV, 2016 WL 4040497 (Tex. App.—Fort Worth July 28, 2016, pet. granted) (mem. op.), *rev'd*, *In re* H.S., No. 16-0715, 2018 WL 2993873 (Tex. June 15, 2018).

60. Tex. Fam. Code Ann. § 102.003(a)(9) (West 2017).

61. Under § 102.003(a)(9), grandparents also had to prove they were not foster parents of the child. The parents agreed that the grandparents were not foster parents, and the court found that they were not. *In re H.S.*, 2016 WL 4040497, at *4.

62. See *In re K.K.C.*, where the Beaumont Court of Appeals found a non-parent who did not have authority to make legal decisions for the child did not have standing under Section 102.003(a)(9). *In re* K.K.C., 292 S.W.3d 788 (Tex. App.—Beaumont 2008, orig. proceedings). This is one of the cases the Fort Worth court followed to reach their decision in *In re H.S.*, 2016 WL 4040497, at *3–4. The San Antonio Court of Appeals also followed the Beaumont court. *See In re* N.I.V.S., No. 04-14-00108-CV, 2015 WL 1120913 (Tex. App.—Beaumont Mar. 11, 2015, pet. denied) (mem. op.). There is another line of cases with contrary holdings, including the Austin Court of Appeals' *Jasek* opinion. Jasek v. Tex. Dep't of Fam. & Protect. Servs., 348 S.W.3d 523 (Tex. App.—Austin 2011, no pet.). Four

father and affirming the trial court's ruling that the step-mother had standing to file an original SAPCR petition under Section 102.003(a)(9).[63] The Tyler Court of Appeals found the step-mother had actual care, custody, and control of the child for six months prior to filing.[64]

The statutory definition of actual care and control is the crux of the split of authority. In *In re H.S.*, the Fort Worth Court of Appeals said the evidence supported the trial court's finding that parents had not given up their parental rights of care and control, and therefore the grandparents could not have actual care and control.[65] Justice Walker cautioned that if a fit parent is exercising their rights, a finding of standing by a non-parent may run afoul of the U.S. Supreme Court's *Troxel* decision.[66] In *In re Lankford*, the father does not dispute step-mother had care and custody, but asserts she did not have "legal control."[67] Chief Justice Worthen does a full analysis of the split opinions interpreting Section 102.003(a)(9). He finds that the statute need not require a parent to abdicate their rights, and that a non-parent asserting standing under the statute does not have ultimate authority to make legal decisions for the child.[68] He also finds that allowing standing under Section 102.003(a)(9) in a modification matter does not offend the U.S. Supreme Court ruling in *Troxel* because Texas courts do not apply the parental presumption in modification cases.[69]

The Texas Supreme Court heard oral arguments on *In re H.S.* in January 2018, so the split will be resolved this year. If the supreme court continues its trend to strictly interpret statutes as written, the *In re Lankford* holding would appear to have the edge. However, the possible *Troxel* implications, where a fit parent allows a non-parent to have daily care of a child for six months and risks losing custody as a result, should not be overlooked. As the *Jasek* court said, "[U]nlike the statute in *Troxel*, Section 102.003(a)(9) does not violate a parent's right to make decisions regarding their children; rather, it imposes potential legal consequences for certain types of parental decisions."[70]

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other courts of appeals have applied *Jasek*, in memorandum opinions. *See In re* Lankford, 501 S.W.3d 681, 687 (Tex. App.—Tyler 2016, no pet.).

63. *In re Lankford*, 501 S.W.3d at 681.

64. It was not disputed that the step-mother was not a foster parent. *Id.* at 684–85.

65. The argument that shared custody by parents and grandparents could convey standing was also rejected. *In re H.S.*, 2016 WL 4040497, at *5.

66. *See* Troxel v. Granville, 530 U.S. 57 (2000).

67. *In re Lankford*, 501 S.W.3d at 685.

68. *Id.* at 690–91.

69. Id. at 689. Both *In re H.S.* and *In re Lankford* are modifications. Several of the cases these opinions rely on are initial SAPCR suits. Perhaps the Texas Supreme Court will clarify how *Troxel* applies in initial suits as opposed to modification matters.

70. *Jasek*, 348 S.W.3d at 536.

VII. JURISDICTIONAL ISSUES

A. *In re Reardon*

The Fort Worth Court of Appeals joined the Dallas Court of Appeals and First Houston Court of Appeals' holding that a trial court may hear a modification matter while an appeal of a prior final trial court order is pending.[71] In *In re Reardon*, the Fort Worth Court of Appeals denied Rico Reardon's petition for writ of prohibition.[72] Father's petition hinged on whether a previous El Paso Court of Appeals case, *In re E.W.N.* (Nichol Appeal II), was precedent for his case.[73] Tracing the history of *In re E.W.N.* is necessary to understand the *Reardon* decision. In 2012, *In re E.W.N.* (Nichol Appeal I), an appeal from a Denton trial court, was transferred from the Fort Worth Court of Appeals to the Amarillo Court of Appeals per a docket control order.[74] While Nichol Appeal I was pending, Father filed another petition to modify in the Denton trial court. The trial court dismissed Mr. Nichol's second petition on the basis that the Fort Worth Court of Appeals had exclusive jurisdiction over the matter. Nichol appealed (Nichol Appeal II). Per a second docket control order, Nichol Appeal II was transferred from Fort Worth to the El Paso Court of Appeals. The sole issue in Nichol Appeal II was whether a new petition to modify can be taken up by a trial court while an appeal of a previous final SAPCR order is pending. The El Paso Court of Appeals declined to follow previous decisions from its sister courts and affirmed the trial court ruling dismissing the second petition on the basis that the court of appeals had exclusive jurisdiction.[75]

Relying on Nichol Appeal II as precedent, Rico Reardon appealed a Tarrant County trial court decision rendered while an appeal of a previous final SAPCR order was pending. Reardon argued that the Fort Worth Court of Appeals, the transferor court under the docket control order in Nichol Appeal II, was bound by the El Paso Court of Appeals Nichol Appeal II decision because the El Paso Court of Appeals was the transferee court in Nichol Appeal II. The Fort Worth Court of Appeals held that neither the Rules of Appellate Procedure nor stare decisis mandate that a transferor court of appeals follow decisions from a transferee court on a matter of first impression.[76] As such, the El Paso opinion was not precedent for Fort Worth. After determining Nichol Appeal II was not precedent, the Fort Worth Court of Appeals reviewed the three non-prec-

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71. *See* Hudson v. Markum, 931 S.W.2d 336 (Tex. App.—Dallas 1996, writ denied); Blank v. Nuszen, No. 01-13-01061-CV, 2015 WL 4747022 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.).

72. *In re* Reardon, 514 S.W.3d 919, 921 (Tex. App.—Fort Worth 2017, orig. proceeding).

73. *In re* E.W.N., 482 S.W.3d 150 (Tex. App.—El Paso 2015, no pet.).

74. Nichol v. Nichol, No. 07-12-00035-CV, 2014 WL 199652 (Tex. App.—Amarillo 2014, no pet.) (mem. op.).

75. *In re E.W.N.*, 482 S.W.3d at157.

76. *In re Reardon*, 514 S.W.3d at 923; Tex. R. App. Proc. 41.3.

edential opinions from its sister courts.[77] Reardon championed the El Paso Court of Appeals holding that the interplay between Texas Family Code Sections 109.001 and 109.002 prohibited a trial court from hearing a modification request during the pendency of an appeal.[78] Section 109.001 dictates that once an appeal is perfected, temporary orders "to preserve and protect the safety and welfare of the child during the pendency of an appeal," must be rendered by the trial court within thirty days.[79] Section 109.002 governs appeals of final SAPCR orders in family law matters.[80] Reardon argued that allowing a trial court to modify a previous order while an appeal of that order is pending, but after expiration of the thirty day deadline set by Section 109.001, renders the deadline meaningless.[81] The Fort Worth Court of Appeals disagreed and declined to follow *In re E.W.N.*[82]

The court then considered the reasoning from *Blank v. Nuszen*, a 2015 First Houston Court of Appeals case.[83] Mother, Miriam Blank, appealed trial court's 2013 final SAPCR order appointing Father sole managing conservator. During the pendency of the appeal, Father filed an emergency petition to modify, and on April 23, 2015, the trial court signed a default order again naming Father sole managing conservator. Mother filed a timely motion for new trial, but did not appeal the April 23, 2015 default order. In May 2015, the First Houston Court of Appeals notified the parties that Mother's appeal of the 2013 order would be dismissed as moot unless she could show that there was a live controversy the court of appeals could consider. Mother could not make that showing. Mother's appeal of the 2013 order was moot because Father's emergency petition to modify was an original proceeding, in effect a new lawsuit, and the resulting April 2015 default order replaced the previous 2013 final order.[84] The court of appeals said the trial court retained jurisdiction to hear Father's 2015 modification matter and properly rendered a new final order.[85]

The Fort Worth Court of Appeals then reviewed the Dallas Court of

77. It is worth reading both Justice Sudderth's opinion in *Reardon* and Justice McClure's opinion in *Nichol Appeal II. In re E.W.N.*, 482 S.W.3d at 150. This issue seems ripe for the Texas Supreme Court to exercise its conflict jurisdiction under Texas Government Code Section 22.001(a)(2) and settle the split opinions from the courts of appeals. TEX. GOV'T CODE ANN. § 22.001(a)(2) (West 2017).

78. *Reardon*, 514 S.W.3d at 927.

79. TEX. FAM. CODE ANN. § 109.001 (West 2017).

80. Appeals shall be undertaken "as in civil cases generally under the Texas Rules of Appellate Procedure." TEX. FAM. CODE ANN. § 109.002 (West 2017). An appeal does not automatically suspend the final order, but the order may be suspended either by the trial court or by the appellate court if a relator makes a "proper showing" for relief. *Id.* § 109.002.

81. *Id.*

82. *See* Reardon, 514 S.W.3d at 923.

83. Blank v. Nuszen, No. 01-13-01061-CV, 2015 WL 4747022 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem.op.).

84. TEX. FAM. CODE ANN. § 156.004 (West 2017).

85. *Blank*, 2015 WL 4747022, at *2.

Appeals opinion in *Hudson v. Markum*.[86] In *Hudson*, the Dallas Court of Appeals overruled a trial court ruling dismissing a modification case during pendency of an appeal of an original SAPCR order.[87] The Dallas court found that the trial court retained continuing jurisdiction under the family code because the modification was an original proceeding.[88] In *Reardon*, the Fort Worth Court of Appeals followed the *Blank* and *Hudson* decisions, and found that a petition for modification is an original proceeding that should be heard by a trial court, even when an appeal to a previous final order is pending.[89] As long as the courts of appeals are split, practitioners in jurisdictions that have not addressed this issue should read the full *Reardon* and *In re E.W.N.* opinions to determine their best argument and anticipate opposing party's approach.

B. *Fuentes v. Zarogoza*

The First Houston Court of Appeals considered another thirty-day statutory deadline in *Fuentes v. Zaragoza*, a case from the Harris County 245th District Court.[90] On March 18, 2016, Miguel Fuentes appealed the parties' final decree of divorce and Evangelina Zaragoza made a timely request under Texas Family Code Section 6.709 for temporary orders.[91] Section 6.709(a) sets a thirty-day deadline from the date an appeal is perfected for a trial court to issue temporary orders to preserve property and protect the parties.[92] On April 1, 2016, the trial court issued orders awarding Evangelina temporary support and attorney's fees. Miguel filed a writ of mandamus. On August 9, 2016, the court of appeals conditionally granted writ and directed the trial court to vacate the April orders, hold another hearing, and enter new temporary orders. Miguel moved for rehearing, arguing the trial court lacked jurisdiction to conduct another hearing because the thirty-day deadline had passed. On October 6, 2016, the court of appeals denied rehearing, withdrew the August ruling and issued a substitute opinion directing the trial court to modify its April 1 order. In November 2016, the trial court held an evidentiary hearing and the trial judge verbally pronounced orders modifying support and, for the first time, appointed a receiver to oversee the community estate. The trial court signed the new temporary orders on November 23, 2016, and Mi-

86. 931 S.W.2d 336 (Tex. App.—Dallas 1996, writ denied).

87. *Hudson*, 931 S.W.2d at 337.

88. *Id.* The *Hudson* court relied on Texas Family Code Section 155.001(a), formerly Texas Family Code Section 11.05, to find continued, exclusive jurisdiction was retained by the trial court. *Id.* It dismissed application of Texas Family Code Section 109.001, formerly Texas Family Code Section 11.11(e), as inapplicable since the modification was not a request for temporary orders but rather an original proceeding. *Id.*

89. *Reardon*, 514 S.W.3d at 930. Father presented interesting, albeit unsuccessful, arguments about mootness, evasion of appellate review and increased litigation costs through repeated modification filings. *Id.* at 927–29.

90. Fuentes v. Zaragoza, 534 S.W.3d 658 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

91. Tex. Fam. Code Ann. § 6.709 (West 2017).

92. *See id.* § 6.709(a).

guel subsequently filed the notice of appeal of the appointment of receiver.

Ultimately, Miguel's interlocutory appeal challenges the trial court's subject matter jurisdiction to appoint a receiver to monitor the community estate during the pendency of his appeal of the decree because the temporary orders appointing the receiver were issued well after the April 17, 2016 deadline for the trial court to render temporary orders. The court of appeals agreed with Miguel's argument that the trial court's plenary power to issue new relief in temporary orders during the pendency of his decree appeal expired on April 17, 2016.[93] Justice Bland found the appointment of the receiver void because the November 2016 trial court order was the first order appointing a receiver and that order was rendered after the thirty-day deadline expired.[94] Since the receiver appointment was new relief that was not timely rendered, the trial court was directed to vacate the receivership order.[95]

C. *In re J.R.P.*

Several courts of appeals reviewed the pleadings and evidence required to change the parent with exclusive right to designate primary residence of the child in temporary orders during the pendency of a modification case. The Fourteenth Houston Court of Appeals affirmed a 300th District Court of Brazoria County case that switched the parent with the right to designate the primary residence of the child.[96] A.M. is the mother and J.P. is the father of J.R.P. In December 2013, an order on suit affecting the parent child relationship designating Mother as the parent with the exclusive right to designate J.R.P.'s residence was entered. Less than six months later, Father filed an affidavit and petition to modify.[97] Since the petition was filed less than one year after the rendition of the order, the pleadings must meet the requirements of Texas Family Code Section 156.102.[98] Section 156.102 requires that the petition to change the parent with exclusive right to designate a child's residence on temporary orders be accompanied by an affidavit containing relevant facts and alleging that the child's physical health or emotional development will be impaired if

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93. *Fuentes*, 534 S.W.3d at 663.

94. *Id.* at 665.

95. On the same day Miguel filed the notice of appeal of appointment of receiver discussed above, he also filed a petition for writ of mandamus for review of the support and attorney's fees award. *See In re* Fuentes, No. 01-16-00951-CV, 2017 WL 3184760 (Tex. App.—Houston [1st Dist.] July 27, 2017, no pet.) (mem. op.) The First Houston Court of Appeals conditionally granted the writ. *Id.* at *9. In the memorandum opinion, Justice Bland found that the trial court retained jurisdiction to render the November modification of the support and attorney's fees initial ordered in April under Texas Family Code Section 6.709(b). *Id.* at *8. Section 6.709(j) reads, "The trial court retains jurisdiction to modify and enforce a temporary order under this section unless the appellate court, on a proper showing, supersedes the trial court's order."

96. *See In re* J.R.P., 526 S.W.3d 770, 773 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

97. *Id.*; Tex. Fam. Code Ann. § 156.102 (West 2017).

98. *See* Tex. Fam. Code Ann. § 156.102 (West 2017).

the child is not removed from their current home.[99] Father filed an affidavit with his petition and alleged that Mother may be using drugs while J.R.P. is in her care and that if she is, J.R.P.'s health and emotional development are endangered. Mother filed a motion to dismiss Father's petition, alleging his affidavit was deficient.

At a June temporary orders hearing, the trial judge found that the affidavit was insufficient but did not dismiss the case and, instead, ordered Mother to submit to drug testing.[100] Mother tested positive for methamphetamine and marijuana. After Mother failed the drug test, Father amended his petition and affidavit to allege that Mother was using drugs while J.R.P. was in her care, and that her drug usage was endangering the child's physical and emotional development. The positive drug test results were incorporated into the affidavit. In August, the trial court signed temporary orders giving Father exclusive right to designate J.R.P.'s primary residence, and providing for supervised visitation for Mother. On May 27, 2015, the parties bench trial began.[101] In August, the trial court entered a final modification order preserving joint conservatorship of the parties, but giving Father the exclusive right to determine the child's residence. Mother appealed the final modification order asserting the petition to modify should have been dismissed due to an insufficient affidavit and because the trial evidence did not prove a material and substantial change.

The Fourteenth Houston Court of Appeals affirmed the trial court's decision.[102] Justice Donovan held the trial court did not abuse its discretion by denying Mother's motion to dismiss despite finding Father's initial affidavit defective, as the statute does not compel dismissal.[103] Further, Father filed an amended affidavit that supported the finding of significant impairment before the second temporary orders hearing that led to the switch to Father as conservator who determines residence. The court of appeals also found the trial evidence supported a finding of material and substantial change of the parties and modification of the conservator who designates residence as a result of the change because Mother failed drug tests and admitted to the court she was abusing drugs.[104]

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99. *Id.*

100. An interesting question is whether the court could have ordered the drug test based on an insufficient affidavit, but this question is moot in the present case because the Mother agreed to the drug test.

101. The trial was held on three non-consecutive days. Father was represented by counsel all three days. Mother was pro se for the first two days but retained counsel for the final day of trial.

102. *In re J.R.P.*, 526 S.W.3d at 781.

103. *Id.* at 778. Section 156.102(c) provides, "the court shall deny the relief sought and refuse to schedule a hearing for modification under this section unless the court determines, on the basis of the affidavit, that facts adequate to support an allegation listed in Subsection (b) are stated in the affidavit." TEX. FAM. CODE ANN. § 156.102(c) (West 2017). Why does denying the relief sought not equal dismissal? *See In re* A.S.M., 172 S.W.3d 710, 716 (Tex. App.—Fort Worth 2005, no pet.).

104. *In re J.R.P.*, 526 S.W.3d at 779. Mother argued that circumstances had not changed because she was a drug user before the prior order, but Father testified that she had passed a drug test before the prior order and that he thought she was no longer abusing drugs. *Id.*

D. *In re Eddins*

In a Dallas Court of Appeals case, Darla Eddins' request for writ of mandamus was conditionally granted and the trial court was directed to vacate temporary SAPCR orders and reinstate the final decree within ten days or writ would issue.[105] Darla and Mark Eddins divorced on November 5, 2015, and Darla was appointed conservator with the exclusive right to designate the children's residence. In March 2016, Mark filed a motion for modification but did not request modification of the right to establish the primary residence. Two temporary order hearings were held in late October. After the first temporary orders hearing, the judge issued verbal orders prompting Mark to file an amended petition and affidavit. After the second hearing, the trial judge issued written temporary orders. Under both orders, Mark was appointed sole managing conservator with exclusive right to designate the children's residence. The court of appeals found the trial judge's verbal temporary orders void.[106] The court then examined the sufficiency of Mark's amended pleadings under Texas Family Code Section 156.006(b)(1).[107] Under the statute, a trial court first reviews the affidavit in support of modification to determine if a hearing is necessary. If the affidavit sets out facts that support an allegation that changing the party with the exclusive right to designate primary residence is warranted on temporary orders because "the child's present circumstances would significantly impair the child's physical health or emotional development," then a hearing should be set.[108] However, in *Eddins*, the hearing was set before Mark filed his amended petition and initial affidavit, so it was not set on the basis of the affidavit. Despite the lack of an affidavit, the court concluded that if the evidence from the hearing sup-

105. *In re* Eddins, No. 05-16-01451-CV, 2017 WL 2443138 (Tex. App.—Dallas Jun. 5, 2017, pet. denied).

106. *Id.* at *5. At a hearing on October 24, 2016, the trial judge issued verbal temporary orders giving Mark sole managing conservatorship and exclusive right to designate the children's residence. Mark had not pled for a change of conservatorship or exclusive rights prior to the hearing, so Darla did not have notice that conservatorship was at issue at the hearing. The court of appeals found the verbal temporary orders void because of the improper notice and award of relief not requested. *Id.*; *see* Tex. Fam. Code Ann. § 105.001 (West 2017). Mark may have been able to overcome these issues if he argued in his subsequent pleadings that there was an emergency need for the court to take immediate action and change custody, since a party may be permitted to correct notice and pleading defects retroactively after emergency orders are rendered. *See* Tex. Fam. Code Ann. § 105.001(b) (West 2017).

107. Tex. Fam. Code Ann. § 156.006 (West 2017). The parties signed a MSA for their divorce in June 2015. Mark filed his petition for modification on March 11, 2016, less than one year after signing the MSA. Moreover, Section 156.102 would have applied if Mark requested switching the conservator with the exclusive right to designate the children's primary residence from Darla to him. Tex. Fam. Code Ann. § 156.102 (West 2017). However, his original petition did not request that change. His first request for change in conservatorship and exclusive right to designate was pled in his amended petition with attached affidavit that was filed on October 25, 2016. The court ruled out applicability of Section 156.102 for motions filed within year of execution of a MSA, explaining that the date of the amended pleading controls as the amended petition first requested the change of the exclusive right to designate and amended pleadings supersede prior ones. *Eddins*, 2017 WL 2443138, at *5.

108. Tex. Fam. Code Ann. § 156.006(b)(1) (West 2017).

ports the significant impairment allegation whether the hearing should have been held is immaterial.[109] Although the trial judge found significant impairment due to Darla's efforts to alienate the children from Mark, the court of appeals disagreed and ruled that the trial judge abused her discretion when she switched the parent with exclusive right to designate primary residence of the children to Mark after the second temporary orders hearing.[110]

J.R.P. and *Eddins* demonstrate the high threshold necessary to change primary conservatorship on temporary orders. Courts continue to struggle with the affidavit and pleading requirements needed to obtain a hearing under Section 156.102. Affidavit requirements designed to limit modification filings seem to be doing little to stem the continuation of litigation.

E. *In re McPeak*

The Fourteenth Houston Court of Appeals followed a 2014 Dallas Court of Appeals memorandum opinion when it conditionally granted mandamus of the Brazoria County District Court case, *In re McPeak*.[111] Mother, Amy McPeak, challenged the trial court's denial of her motion for modification of temporary orders and request for the court to confer with her 13 year-old child. The trial court relied on Texas Family Code Section 156.102 in dismissing Mother's motion because no affidavit was attached to the motion.[112] The court of appeals explained that Section 156.102 does not apply to motions to modify temporary orders, so the trial judge abused his discretion when he denied Mother's motion.[113] The court of appeals additionally found that the trial judge must confer with the 13-year-old child.[114]

109. *Eddins*, 2017 WL 2443138, at *5 (citing *In re* Barkley, 2009 WL 2431499, at *1 (Tex. App.—Amarillo Aug. 10, 2009, orig. proceeding)).

110. *Id.* at *6. The Court of Appeals acknowledged that the relationship between the parties is dysfunctional, but did not find that the environment impaired the children. *Id.* Justice Evans discusses the high bar a party must reach to meet the significant impairment standard and reviewed a line of cases where allegations of parental alienation did not rise to the level of significantly impairing the child's physical health or emotional development. *Id.* If allegations of parental alienation arise, it may be best to have a mental health professional testify about the impact on the child to prove impairment.

111. 525 S.W.3d 310 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding). *See In re* Casanova, No. 05-14-01166-CV, 2014 WL 6486127 (Tex. App.—Dallas Nov. 20, 2014, no pet.) (mem. op.).

112. Tex. Fam. Code Ann. § 156.102 (West 2017).

113. *McPeak*, 525 S.W.3d at 315–16; Section 105.001 is applicable for modification of temporary orders. Tex. Fam. Code Ann. § 105.001 (West 2017).

114. *McPeak*, 525 S.W.3d at 316. Texas Family Code § 153.009(a) dictates that upon application by a parent a trial judge shall confer with children twelve years or older regarding the child's preference on which parent should establish their residence. Tex. Fam. Code Ann. § 153.009(a) (West 2017).

F. *In re B.D.*

Lastly, a 2017 case provided a trap for the unwary that practitioners will need to know. The Dallas Court of Appeals found that a trial court's memorandum ruling issued after a jury trial was a final judgment and dismissed Mother's appeal.[115] The Collin County District Court signed a memorandum ruling on February 22, 2017.[116] Mother filed a motion to suspend judgment pending appeal five days later, and a motion for new trial on March 27, 2017. The trial court signed a final SAPCR order, presumably presented by Father, on March 30, 2017. Mother filed a notice of appeal. The court of appeals deemed the memorandum opinion a final order, holding it "substantially complie[d] with the requisites of a formal judgment" and rejecting Mother's argument that it failed as a final order under Section 105.006.[117] Section 105.006 mandates that final SAPCR orders contain specific information about the parents and mandatory statutory warnings. In the present case, neither were included in the memorandum opinion.[118] The memorandum opinion also did not have provisions for health insurance or medical support for the child, did not set a start date for child support, did not address if child support would be paid through the state disbursement unit, and the only right or duty of the conservators given was Father's exclusive right to designate residence. Nevertheless, using the February 22, 2017 memorandum ruling as the start date for the post-trial deadlines, the court of appeals deemed Mother's motion for new trial as untimely.[119] Subsequently, Mother's appeal failed for want of jurisdiction.[120]

VIII. CONCLUSION

During the Survey period, significant cases dealt with application of *Obergefell* to rights for same-sex couples beyond marriage, the importance of precision when drafting MSAs, and the difficulty of applying the acceptance-of-benefits doctrine to property division appeals. Noted Texas trends included increased review of trial courts' authority to hear matters when an appeal is pending, and clarification of pleading requirements to modify orders rendered less than a year earlier. Opinions from the Texas Supreme Court during 2018 will provide clarification on multiple fronts where a split of authority exists.

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115. *In re* B.D., No. 05-17-00674-CV, 2017 WL 3765848, at *2 (Tex. App.—Dallas Aug. 31, 2017, pet. denied) (mem. op.).

116. Tex. Fam. Code Ann. § 105.006.

117. *In re B.D.*, 2017 WL 3765848, at *2.

118. *See* Tex. Fam. Code Ann. §§ 105.006(d)–(e2).

119. *In re B.D.*, 2017 WL 3765848, at *2. An appeal must be filed within thirty days of a final order, unless the deadline is extended by post-judgment orders. Mother's motion for new trial was filed thirty-three days after the memorandum ruling. Therefore, it was filed after the trial court's plenary power expired.

120. While the authors disagree with this opinion, practitioners would be wise to file plenary extending motions within thirty days of memorandum rulings. Hopefully subsequent opinions will limit this case's reach.