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Family Law

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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, 2017, through November 30, 2018. 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. More than 279,000 new family law cases were filed in 2017.[1] The number of cases reported annually exceeds the authors' ability to report. Accordingly, the authors have limited review to a few highlight cases and an examination of trends of the past year.

II. BENEFICIARY REVOCATION-UPON-DISSOLUTION STATUTES

A. *Sveen v. Melin*

In *Sveen v. Melin*,[2] the United States Supreme Court upheld a Minnesota statute enacted in 2002 that automatically revoked beneficiary designation of a former spouse upon dissolution of marriage.[3] Retroactive application of the statute to designations made before it was enacted was also at issue. Kaye Melin and Mark Sveen were married in 1997. The following year, Sveen designated Melin as beneficiary of his Metropolitan Life Insurance Company life insurance policy. He designated his adult children as contingent beneficiaries for the policy.[4] Melin and Sveen divorced in 2007. There was no reference to the Metropolitan Life policy in their decree. Sveen passed away in 2011 without changing the beneficiary on the policy. After Sveen's death, Melin and the Sveen children filed competing claims for the insurance proceeds. The Sveens argued that the 2007 divorce triggered the automatic revocation of Melin as beneficiary of the life insurance policy. Melin argued that applying the 2002 Minnesota statute retroactively to a 1998 beneficiary designation would violate the Contracts Clause of the Constitution by allowing a state statute to impair a contract.[5]

The district court granted summary judgment to the Sveens. Relying on

1. Office of the Court Admin., Annual Statistical Report for the Texas Judiciary 10 (2017), http://www.txcourts.gov/media/1441398/ar-fy-17-final.pdf.
2. 138 S. Ct. 1815, 1818 (2018).
3. *Id.* (citing Minn. Stat. § 524.2-804, subd. 1 (2016)). Texas Family Code Chapter 9 addresses revocation of designation of an ex-spouse as beneficiary of life insurance proceeds and retirement benefits. Tex. Fam. Code Ann. § 9.301-302. Footnote 1 of the *Sveen* opinion lists statutory references for twenty-six states that have a revocation-upon-dissolution statute. *Sveen*, 138 S. Ct. at 1819 n.1.
4. *Sveen*, 138 S. Ct. at 1821.
5. U.S. Const. art. I, § 10, cl. 1.

its previous decision in *Whirlpool Corp. v. Ritter*,[6] the U.S. Court of Appeals for the Eighth Circuit reversed, finding that application of the 2002 statute to a pre-existing designation violated the Contracts Clause. The Eighth Circuit focused on the policyholder's expectations when the designation was made. Circuit Judge W. Duane Benton reasoned that retroactive application of the statute impaired the contract obligation by disrupting the policyholder's right to, "rely on the law governing insurance contracts as it existed when the contracts were made."[7] The Supreme Court granted review and, in an 8–1 decision, reversed the Eighth Circuit.[8] Justice Elena Kagan set out a two-step test for determining if a state law disrupts a contractual agreement. First, whether the state law is "a substantial impairment of a contractual relationship."[9] If substantial impairment is found, does the law advance a significant public purpose in a reasonable way?[10] The Court upheld the revocation-upon-dissolution statute finding it did not substantially impair the contract.[11] Justice Kagan explained the three aspects of the statute that save it from impairing the contract: (1) by reflecting the policyholder's intent the statute supports, rather than impairs, the contract; (2) by following what a divorce court could do to the statute provides adherence to the policyholder's expectations; and (3) by supplying a default rule, that can be easily undone by the policyholder.[12] With *Sveen* as precedent, practitioners can rely on Texas's revocation-upon-dissolution statute[13] and retroactive application of it, but best practice is to remind your clients to review and re-designate beneficiaries after their divorce is finalized.

III. *OBERGEFELL* PROTECTIONS

A. *Pidgeon v. Turner*

On December 4, 2017, the U.S. Supreme Court denied petition for certiorari of the *Pidgeon v. Turner* decision, allowing the Texas Supreme Court's decision to stand.[14] At issue in the case was whether the City of Houston is permitted to offer benefits to same-sex spouses of government

6. 929 F.2d 1318, 1324 (8th Cir. 1991).

7. Metropolitan Life Ins. Co. v. Melin, 853 F.3d 410, 413 (8th Cir. 2017) (quoting *Whirlpool Corp.*, 929 F.2d at 1323).

8. Justice Neil Gorsuch dissented. After reviewing the framer's intent behind the Contracts Clause and the results of several decades of judicial erosion of the inviolability of existing contracts, Gorsuch zeroed in on the retroactive application of the statute as unconstitutional. He found application of the later-enacted statute to an existing contract not only an impairment but an elimination of Melin's contractual remedies. *Sveen*, 138 S. Ct. at 1827–30 (Gorsuch, J., dissenting). To answer the question we posed last year in footnote 8 of our family law survey, Justice Gorsuch leans towards judicial rigidity.

9. *Id.* at 1817, 1821–22 (Kagan, J., majority).

10. *Id.* at 1822. Since the statute does not substantially impair the contract, the Court did not address whether it was reasonable for advancement of "a significant and legitimate public purpose."

11. *Id.* at 1826.

12. *Id.* at 1822.

13. Tex. Fam. Code Ann. § 9.301.

14. Pidgeon v. Turner, 138 S. Ct. 505 (2017).

employees in light of the *Obergefell* decision.[15] Last year, the Texas Supreme Court deferred determining the scope of the U.S. Supreme Court's *Obergefell* protections when it reversed the court of appeals decision, vacated the trial court decision, and remanded to allow the parties to fully develop and litigate their positions.[16]

In an effort to shift the fight to federal court, Houston asked to move the case to the U.S. Southern District Court in March 2018, but Judge Kenneth Hoyt ruled that the city did not prove federal court was the proper venue.[17] On July 2, 2018, Pidgeon filed a motion for summary judgment requesting that Mayor Turner and the City of Houston be enjoined from extending spousal benefits to same-sex spouses of city employees because Texas Family Code Section 6.204(c)(2) prohibits this extension. The motion also asserted that Houston could comply with both the *Obergefell* and *Pavan* rulings and Texas Family Code Section 6.204(c)(2) by withdrawing spousal benefits from all city employees.[18] On January 1, 2019, Judge Sonya L. Heath took the bench in the 310th District Court of Harris County, so a Democratic trial judge will preside over the remanded case.[19]

B. *Masterpiece Cakeshop*

The U.S. Supreme Court found constitutional protection for a baker who asserted his right to free exercise of religion protected him from being compelled to provide a wedding cake to a same-sex couple.[20] Colorado baker Jack Phillips refused to make a wedding cake for a same-sex couple because his religious views opposed same-sex marriage. The couple filed a complaint with the Colorado Civil Rights Commission (Commission) claiming Phillips's refusal violated the Colorado Anti-Discrimination Act (CADA) prohibition against discrimination based on sexual orientation.[21] The discriminatory conduct was Phillips's denial of "full and equal service" because they were a gay couple.[22] The Commission found Phillips violated the CADA and the Colorado state court affirmed the ruling.[23] Phillips filed a petition for certiorari and the Supreme Court accepted review. Justice Anthony Kennedy found "the Colorado

15. *See* Anna K. Teller & Donald E. Teller, Jr., *Family Law*, 4 SMU Ann. Tex. Survey 161, 165–66 (2018) (for a full discussion of the history of *Pidgeon*).

16. Pidgeon v. Turner, 538 S.W.3d 73, 76 (Tex. 2017).

17. Pidgeon v. City of Houston, No. 4:18-cv-00675 (S.D. Tex. 2018), https://txvalues.org/wp-content/uploads/2014/04/Pidgeon-v-Turner-Order-Remanding-Case-And-Awarding-Fees-4.10.2018.pdf. Houston was also ordered to pay Pidgeon and Hicks' legal fees.

18. Pavan v. Smith, 137 S. Ct. 2075 (2017).

19. *See* Harris Cty., Cumulative Report, Tex. Gen & Special Elections 25 (2018), https://www.harrisvotes.com/HISTORY/20181106/cumulative/cumulative.pdf.

20. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1725–26 (2018).

21. *Id.*; *see* Colo. Rev. Stat. § 24-34-601(2)(a) (2014). This case was initiated in 2012 before Colorado legalized same-sex marriage.

22. *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

23. *Id.* at 1726–27; *see* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (2015).

Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality" because the Commission was openly hostile to Phillips religious beliefs.[24] The very narrowly drawn decision does not hold that the Free Exercise Clause[25] outweighs Colorado's public accommodation statute and should not be seen as a blow to civil rights of same-sex couples.

IV. INDIAN CHILD WELFARE ACT

A. *Brackeen et al. v. Zinke*

A decision from the Northern District of Texas declared provisions of the Indian Child Welfare Act (ICWA)[26] unconstitutional.[27] *Brackeen et al. v. Zinke* was initiated by the State of Texas and a Texas couple who, after fostering an Indian child, sought to adopt him.[28] Other foster parents seeking to adopt Indian children joined the suit, as well as the states of Louisiana and Indiana.[29] Defendants include multiple federal agencies, directors of the agencies, and four tribes who intervened.[30] On April 26, 2018, both the individual plaintiffs and state plaintiffs moved for summary judgment seeking to have provisions of the ICWA and several ICWA regulations declared unconstitutional. The plaintiffs claimed the ICWA violates Fifth Amendment equal protection and due process requirements, the Tenth Amendment, the non-delegation doctrine of Article I of the Constitution, the Administrative Procedure Act (APA), and improperly expanded the scope of the Indian Commerce Clause.[31] After determining that strict scrutiny was the proper standard of review of the

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24. *Masterpiece Cakeshop*, 138 S. Ct. at 1723. Justice Kennedy examined the transcripts of the Commission's formal hearings and found their consideration of the case was "neither tolerant nor respectful of Phillips' religious beliefs." *Id.* at 1731. Since the Court held in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* that "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion" the Commission's decision was not neutral. *Id.* at 1731 (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534 (1993)).

25. U.S. Const. amend. I § 1.

26. 25 U.S.C. §§ 1901–1963 (1978); 25 C.F.R. pt. 23.

27. Brackeen et al. v. Zinke, 338 F. Supp. 3d 514, 536, 583 (N.D. Tex. 2018). Several 2016 ICWA regulations were also ruled invalid.

28. *Id.* at 525.

29. The foster parents are referred to collectively by the court as the Individual Plaintiffs and the three states are referred to as state plaintiffs. *Id.* at 519.

30. The defendants are referred to collectively as federal defendants include the U.S. Department of the Interior and its Secretary Ryan Zinke in his official capacity; the Bureau of Indian Affairs and both its Director Bryan Rice and Principle Assistant Secretary John Tahsuda III in their official capacities; and the Department of Health and Human Services and its Secretary Alex M. Azar II. The collective Tribal Defendants are the Cherokee Nation, Oneida Nation, Quinalt Indian Nation and Morengo Band of Mission Indians. *Id.* at 519–20.

31. *Id.* at 531. The Fifth Amendment text doesn't include an equal protection clause but courts apply the test used to evaluate Fourteenth Amendment equal protection violations when Fifth Amendment claims are made. *See* U.S. Const. amend. V; U.S. Const. amend. X; U.S. Const. art. I, § 1; 5 U.S.C. § 500 (2000); U.S. Const. art. I, § 8, cl. 3.

equal protection inquiry,[32] Judge Reed O'Connor found the ICWA classification was not "narrowly tailored to further a compelling governmental interest"[33] because the ICWA applied to potential Indian children who will never be part of a tribe. Therefore, he held that the ICWA was broader than necessary to meet the compelling government interest and granted plaintiffs' motion for summary judgment on their Fifth Amendment Equal Protection claim.[34] He further found that the ICWA delegated to Indian tribes federal legislative authority in violation of Article I of the U.S. Constitution.[35] Additionally, he found that by ordering states to follow certain federal standards in state child custody cases, the ICWA violated the Tenth Amendment by infringing on matters reserved to the states.[36] Finally, Judge O'Connor found the ICWA's accompanying binding regulations, known as the Final Rule, were invalid.[37] He granted summary judgment.[38]

On December 3, 2018, the Fifth Circuit issued a stay of the *Brackeen* decision and approved an expedited appeal.[39] Briefing will be completed before March 2019 under the expedited schedule.[40] The authors anticipate the ruling will be modified.

B. *In re J.J.T.*

A tribe's right to intervene under the ICWA was addressed in *In re J.J.T.*[41] In this case, a termination trial involving an Indian child occurred and during the trial a representative of the tribe indicated during telephone testimony that "I think we are intervening at this moment."[42] The trial court held that the attempt to intervene was ineffectual because it was untimely and not made in writing as required by the Texas Rules of Civil Procedure.[43] In an opinion by Chief Justice Anne McClure, she held that the ICWA allowed the tribe to intervene "at any point in the proceeding[s,]" including at the time of trial.[44] Chief Justice McClure further

32. *Brackeen*, 338 F. Supp. 3d at 531–34. Plaintiffs' argued for application of strict scrutiny because ICWA §§ 1915(a)–(b) rely on racial classification. Defendants countered that §§ 1915(a)–(b) distinguished children based on political categories thus requiring the less stringent rational basis standard. After a comprehensive discussion of ancestry as a racial classification, tribal membership as a political classification and application of those classifications to the ICWA, the plaintiffs' argument prevailed.

33. *Id.* at 534–35 (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

34. *Id.* at 536.

35. *Id.* at 538.

36. *Id.* at 541.

37. *Id.* at 544–46.

38. *Id.* at 546.

39. Brackeen v. Cherokee Nation, 2018 U.S. App. LEXIS 36903, *6 (5th Cir. 2018).

40. *Id.*

41. *In re* J.J.T., 544 S.W.3d 874, 877 (Tex. App.—El Paso 2017, no pet.). The Texas Department of Family and Protective Services (TDFPS) was a party to this case, so it would usually be exclude from this Survey. However, with the *Brackeen* appeal pending in the Fifth Circuit, additional discussion of the ICWA is warranted. Therefore, we reported on *In re J.J.T.*

42. *Id.* at 877.

43. *Id.*; *see* Tex. R. Civ. P. 60.

44. *In re J.J.T.*, 544 S.W.3d at 879.

found that under federal preemption the tribe's intervention did not need to be in writing because the ICWA did not require the intervention be written.[45] Because the trial court did not allow the intervention at trial, the case was remanded for a new trial.

V. INTERSECTION OF CIVIL ACTIONS AND FAMILY LAW

A. *Bos v. Smith*

Texas Family Code Section 42.002 provides, "A person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person."[46] Liability under Chapter 42 can arise from either directly interfering with a possessory right of another or aiding one who interferes with a possessory right of another.[47] Section 42.001 defines possessory right as "a court-ordered right of possession."[48] In *Bos v. Smith*, a father sued his child's maternal grandparents for assisting their daughter in interfering with his possession.[49] The child was under three when the parties divorced. The final decree gave the father standard visitation when the child turned three in June 2008.[50] On Friday, October 16, 2008, the father attempted to pick the child up from the maternal grandparent's home as ordered. Although he had given notice earlier in the week of his intention to pick up the child, the child was not at the grandparent's home. The father did not try to arrange a later pick up time. The following day, the mother brought the child to the father's home for a short visit. Immediately after the visit, she filed a police report claiming a guest at the father's home had sexually abused the three-year-old during the visit. The mother later changed her claim to assert that the father had abused the child.[51] Eventually, all abuse allegations were ruled out. In 2011, the mother agreed to terminate her parental rights to the child to avoid jail time for violating the possession order.[52] The father then sued the grandparents for violating Texas Family Code Chapter 42, defamation, and breach of fiduciary duty to the child.[53]

The 105th District Court of Nueces County, awarded the father $3.2 million for economic and mental-anguish damages arising from his Chap-

45. *Id.*

46. TEX. FAM. CODE ANN. § 42.001(a).

47. *Id.* §§ 42.001–.009.

48. *Id.* § 42.001(2).

49. Bos v. Smith, 556 S.W.3d 293, 296–97 (Tex. 2018). The father and mother had two children together, but the case arose around possession of only the older child; therefore, we will reference only this child when referring to the parties' child.

50. *Id.* at 297.

51. *Id.* at 297–98.

52. *Id.* at 298–99.

53. *Id.* at 299. The father joined the mother's boyfriend, a psychologist and TDFPS consultant, in the suit. The father did not sue the mother, but the grandparents designated her as a responsible party to the suit. *Id.* at 298–99.

ter 42 claim.[54] On appeal, the Corpus Christi Court of Appeals concluded that the trial court's finding of Chapter 42 violations by the grandparents was supported by legal and factual evidence but reversed the award of economic damages.[55] The father and the grandparents brought cross-petitions for Texas Supreme Court review, and review was granted.[56] Finding that the grandparents did not have "actual notice of the . . . contents of the order" and that the father only proved that the grandparents participated in the single violation on October 16, 2008 of his possessory rights, the supreme court rendered a take-nothing judgment.[57]

B. *Guimaraes v. Brann*

The First Houston Court of Appeals heard an appeal of Chapter 42 tort awards in *Guimaraes v. Brann*.[58] Christopher Brann brought a civil action against his wife, Marcella Guimaraes, for interference with his possessory rights under Texas Family Code Section 42.002(a) after Marcella took their child to Brazil and failed to return as agreed.[59] The trial court awarded Christopher $425,767.27 in costs, expenses, and attorney's fees;[60] $2 million dollars for mental anguish and suffering;[61] and $250,000.00 in exemplary damages.[62] The wife appealed. The court of appeals affirmed the trial court ruling.[63] This decision illustrates how effective Chapter 42 remedies are in cases where one parent tries to evade or circumvent a Texas court's jurisdiction.

C. *Collins v. Collins*

The Texas Citizens Participation Act (TCPA) is designed to protect defendants from costly litigation in lawsuits meant to censor or silence them. The TCPA safeguards Texans' First Amendment rights "to petition, to speak freely, [and to] associate freely" while simultaneously protecting

54. Bos v. Smith, 492 S.W.3d 361, 374–75 (Tex. App.—Corpus Christi 2016, pet. granted).

55. *Id.* at 394–95. The father agreed to a remittitur of the economic damage award.

56. Bos v. Smith, 556 S.W.3d 293, 299 (Tex. 2018).

57. *Id.* at 300–08.

58. Guimaraes v. Brann, 562 S.W.3d 521, 546 (Tex. App.—Houston [1st Dist.] 2018, pet. filed). The case involved a complex subject-matter jurisdiction question about whether the Harris County District Court lost subject-matter jurisdiction after a Brazilian court ruled on a Hague Convention petition that the child was not required to return to the United States. The appeals court found no error with the trial court continuing to exercise jurisdiction over the case after the Brazilian court ruling. *Id.* at 529, 543.

59. *See* Tex. Fam. Code Ann. § 42.002(a). In January 2013, Marcella signed agreed temporary orders which included a geographic restriction of the child's residence to Harris County, Texas. In May 2013, she also entered into a Rule 11 Agreement that she would return from Brazil with the child on a date certain. However, Marcella chose to stay with the child in Brazil and initiate proceedings there. *Guimaraes*, 562 S.W.3d at 529–30.

60. *See* Tex. Fam. Code Ann. § 42.006(a)(1).

61. *See id.* § 42.006(a)(2).

62. *See id.* § 42.006(b).

63. *Guimaraes*, 562 S.W.3d 546–48. On February 21, 2019, Marcella's Rule 53.7(f) motion for extension of time to file a petition for review was granted.

the rights of parties to file meritorious suits.[64] Demonstrable damages are necessary for a meritorious suit.[65] Exercising the right to petition includes "communication in or pertaining to . . . a judicial proceeding."[66] At the start of a lawsuit, defendants asking for TCPA protections may plead for dismissal and have a timely hearing.[67] Discovery is suspended while the motion for dismissal is pending and, if the suit is dismissed, the court must order the plaintiff to pay costs and actual attorney's fees.[68] TCPA dismissal is a two-step process. To prevail, the movant must show the suit was "based on, relates to, or is in response to a party's exercise" of one of the protected rights, and the non-movant must prove a prima facie case for their claims by clear and specific evidence.[69] Mere notice pleading is insufficient to support a prima facie case.[70] The authors examine two 2018 TCPA cases originating with family law suits below. The first is *Collins v. Collins*.[71]

Corinna and Bryant Collins divorced in 2007. About a year before they divorced, Bryant entered into an employment contract with Carol Crane Rigging & Lifting Technology, Inc. that included contingencies for possible future compensation.[72] During the pendency of the divorce, Bryant not only failed to disclose the Carol Crane contract in response to discovery requests from Corinna but produced two false affidavits. In the affidavits, he and the owner of Carol Crane, David Martinez, Jr., denied that Bryant was eligible for any deferred compensation from the company. In 2013, a business dispute between Bryant and Martinez regarding their ownership interests in Carol Crane led to litigation. During the business litigation, Bryant testified about a 2008 agreement that superseded his 2006 contract with Carol Crane.[73]

Bryant died in 2017. Corinna filed suit in probate court requesting partition of Bryant's interest in Carol Crane based on fraud and nondisclosure claims stemming from the divorce. Bryant's widow, Kelly Collins, was administrator of the estate. She filed a TCPA motion to dismiss Corinna's suit alleging Corinna's suit violated Bryant's right to petition. Kelly also complained that Corinna failed to make a prima facie case for her claims, while she proved Bryant's affirmative defense.[74] "The probate

64. Tex. Civ. Prac. & Rem. Code Ann. § 27.002. The TCPA is also referred to as an anti-SLAPP statute because it discourages strategic lawsuits against public participation.

65. *Id.*

66. *Id.* § 27.001(4)(A)(i).

67. *Id.* §§ 27.003–.004.

68. *Id.* §§ 27.003(c), 27.009(a).

69. *Id.* § 27.003(a); *see also In re* Lipsky, 460 S.W.3d 579, 590 (Tex. 2015). The *Lipsky* court explained that clear and specific evidence is not synonymous with the well-established clear and convincing evidence standard. *Id.* at 589.

70. Collins v. Collins, No. 01–17–00817–CV, 2018 WL 1320841, *5 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, pet. denied) (mem. op.) (citing *In re Lipsky*, 460 S.W.3d at 590–91).

71. *Id.* at *3.

72. *Id.* at *1.

73. *Id.* at *2.

74. *Id.*

court denied Kelly's motion to dismiss and she filed [an] interlocutory appeal."[75] The First Houston Court of Appeals found by a preponderance of the evidence that Corinna's suit was based on Bryant's right of petition because it was based on an affidavit from the divorce proceeding.[76] Turning to the second inquiry of the test, the court found Corrina failed to make a prima facie case because she neglected to prove each of the elements of her claim because only her pleadings were in the appellate record.[77] Justice Michael Massengale dismissed Corinna's suit and remanded the case to the probate court for determination of Kelly's damages.[78]

D. *Smith v. Malone*

In *Smith v. Malone*, a mother tried unsuccessfully to have the father's original Suit Affecting Parent-Child Relationship (SAPCR) petition dismissed under the TCPA.[79] Although the mother alleged that the father filed his petition in retaliation of her right to petition the Office of the Attorney General for child support, the Dallas Court of Appeals declined to address whether the TCPA applied to the father's suit and focused on the second step of the inquiry. The court found the father, as a parent and the admitted father of the child, met the burden of proving his prima facie case to seek a conservatorship order because the mother admitted Malone was the father and a father has a right to seek a conservatorship order.[80] The father proved by clear and specific evidence his prima facie case, and the mother failed to raise an affirmative defense; consequently, the father prevailed. On January 22, 2019, the mother filed a petition for review by the Texas Supreme Court which was denied.[81]

Collins and *Malone* demonstrate the potential minefield the TCPA may cause for family law practitioners. Corrina Collins had a persuasive situation but failed because she relied on her pleadings. Practitioners who wish to defeat the TCPA dismissal provisions need to file thorough responses that address every element of their claims. This is counter intuitive for family law practitioners since the family code requires only notice pleadings.[82] Malone prevailed largely due to Ms. Smith's admission.

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75. *Id.*

76. Corinna argued that the TCPA was inapplicable to her suit because divorce is a private matter, not one of public concern. The court was unpersuaded with this argument because the TCPA definition of the right to petition does not include the words "matter of public concern." *Id.* at *3–4.

77. *Id.* at *5.

78. *Id.*

79. Smith v. Malone, No. 05–18–00216–CV, 2018 WL 6187639 (Tex. App.—Dallas, Nov. 27, 2018, pet. denied) (mem. op.).

80. *Id.* at *3.

81. Smith v. Malone, No. 19-0074, 2019 Tex. LEXIS 318 (Tex. Mar 29, 2019).

82. Tex. Fam. Code Ann. § 6.402.

VI. STANDING

A. *In re H.S.*

To settle an appeals court split of authority, the Texas Supreme Court granted petition for review of *In re H.S.* in September 2017.[83] The split of opinion hinged on the actual care and control requirement of Texas Family Code Section 102.003(a)(9) for a non-parent to have standing.[84] The sole issue in *In re H.S.* was whether grandparents have standing to file an original petition for modification seeking conservatorship of their granddaughter.[85] In a 5–4 decision, the supreme court found standing for the grandparents and remanded the case to the trial court.[86]

The court began its analysis of Texas Family Code Section 102.003 by looking at the six-month possession requirement. Section 102.003(b) directs the court to consider the child's principal residence during the relevant six months when determining if a non-parent meets the time requirement for standing.[87] If, as in this case, the child's primary residence was with the non-parent, then the possession requirement is met. The supreme court then turned to the actual care and control requirements. Writing for the majority, Justice Debra Lehrmann explained the lower courts and dissent focus, "on the parents' conduct in evaluating nonparent standing, but the statute by its plain terms focuses on the nonparent's role in the child's life."[88] Based on the plain language of the statute, the supreme court concluded that a non-parent who provides comfort to a child meets the actual care requirement and a non-parent who has the power to direct the child, even if the power is neither exclusive nor legal, meets the actual control requirement.[89] It further found that nothing in the statute requires that the parents relinquish their rights to the non-parent or that the parent intend to leave a child with the non-parent permanently.[90] Instead, a non-parent's standing stems from their relationship with the child. Applying the statutory requirements to the facts, the supreme court found H.S.'s grandparents met the requirements for actual care, control and possession.[91]

The supreme court then distinguished *In re H.S.* from *Troxel v. Granville*[92] by explaining that the Washington statute at issue in *Troxel* was too broad, while Texas Family Code Section 102.003(a)(9) is appropriately

83. *In re* H.S., 552 S.W.3d 282 (Tex. App.—Fort Worth 2016, pet. granted); *see* Teller & Teller, *supra* note 15, at 161, 173–74 (discussing the split authority).

84. To maintain standing, the non-parents must have actual care, control, and possession of the child for a least six months ending not more than ninety days before the suit is filed. TEX. FAM. CODE ANN. § 102.003(a)(9).

85. *Id.*

86. *In re* H.S., 550 S.W.3d 151, 163 (Tex. 2018). This opinion continues the supreme court trend of strict interpretation of Family Code statutes.

87. *Id.* at 156.

88. *Id.* at 159.

89. *Id.* at 157–58.

90. *Id.* at 159.

91. *Id.* at 160.

92. 530 U.S. 57, 73 (2000).

narrow as it only confers standing on non-parents who have assumed a parental role in a child's life for at least six months.[93] As the Austin Court of Appeals reasoned in a 2011 case addressing standing of a non-parent, "[U]nlike the statute in *Troxel*, [S]ection 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."[94] In this instance, the parents' decision to leave the child with the grandparents gave the grandparents standing, and the case was remanded for a decision on the merits of conservatorship.

VII. SPOUSAL MAINTENANCE AND ALIMONY

A. *DALTON V. DALTON*

The Texas Supreme Court firmly answered no to the question of whether a Texas court could use Texas enforcement vehicles to enforce out-of-state orders beyond the extent it could use those same vehicles to enforce Texas orders.[95] In *Dalton v. Dalton*, an Oklahoma separation agreement with provisions for spousal support was properly filed in the Texas trial court and was incorporated in the decree as a final order. The amount and duration of the support exceeded what is permissible for statutory maintenance in the Texas Family Code. Almost immediately upon entry of the decree, Carol Dalton initiated enforcement proceedings alleging support arrearages and requesting a wage withholding order for child and spousal support. She later filed another petition for a qualified domestic relations order (QDRO). Bart Dalton filed motions opposing both the wage withholding order and issuance of a QDRO. After the trial court signed a wage withholding order and a QDRO assigning Carol a portion of Bart's retirement as payment for spousal support arrearages and attorney's fees, Bart appealed. On appeal, Chief Justice James Worthen modified the arrearage amount but otherwise affirmed the trial court ruling.[96] Bart petitioned the Texas Supreme Court for review and it was granted. The three issues Bart 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 maintenance awards under Texas Family Code Chapter 8?[97]; (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

93. *In re H.S.*, 550 S.W.3d at 161–62.

94. Jasek v. Tex. Dep't of Fam. & Protective Servs., 348 S.W.3d 523, 536 (Tex. App.—Austin 2011, no pet.).

95. Dalton v. Dalton, 551 S.W.3d 126, 142 (Tex. 2018).

96. Dalton v. Dalton, No. 12–15–00203–CV, 2017 WL 104639 at *7 (Tex. App.—Tyler Jan. 11, 2017, pet. granted) (mem. op.).

97. *See* U.S. CONST. art. IV, § 1; TEX. CIV. PRAC. & REM. CODE ANN. § 35.003(a); TEX. FAM. CODE ANN. §§ 8.001–8.305.

requirements for court ordered maintenance?[98]; and (3) in a post-divorce enforcement of spousal support, is issuance of a QDRO to divide an employer retirement plan covered by the Employee Retirement Income Security Act (ERISA) permissible?[99]

As to question one, the supreme court acknowledged that the Oklahoma judgment is "entitled to full faith and credit" because it was properly filed in the Texas trial court. But, the supreme court found recognition of the Oklahoma judgment did not require application of Oklahoma law for enforcement.[100] Citing U.S. Supreme Court precedent, Justice Jeffrey Boyd explained that the full-faith-and-credit clause does not require Texas to "adopt the practices of other [s]tates regarding the time, manner, and mechanisms for enforcing judgments."[101] He explained that not all Texas enforcement remedies for court-ordered spousal maintenance awards extend to court-approved voluntary contractual support and confirmed that enforcement of spousal support via wage withholding is limited to statutory spousal maintenance awards under Chapter 8.[102]

As to question two, the Texas constitution prohibits garnishment of wages except for enforcement of court-ordered child support or spousal maintenance.[103] Here the trial court approved Bart's agreement to pay support alimony,[104] as opposed to ordering him to pay spousal maintenance. Carol failed to raise the issue of her eligibility to receive Chapter 8 spousal maintenance at trial, so neither the final decree nor the trial record address it.[105] On review, Carol did not argue that she was eligible for court-ordered maintenance or that she had been denied opportunity to request such. Absent a finding of eligibility under Chapter 8, Bart's support alimony "falls outside of Chapter Eight," and the Texas constitution prohibits enforcement via wage withholding.[106]

As to question three, Carol relied on § 1056(d)(3) of ERISA as authority for seeking a post-decree QDRO to enforce Bart's support alimony obligation.[107] Bart countered that no Texas remedy provides for a post-decree QDRO that alters the property division in the prior order. The supreme court addressed Carol's ERISA argument first and concluded that "ERISA preempts any Texas law relating to employee benefit plans,

98. *See* TEX. FAM. CODE ANN. § 8.101.
99. *See* Employee Retirement Income Security Program, 29 U.S.C. § 1056 (2014).
100. *Dalton*, 551 S.W.3d at 135–36.
101. *Id.* at 136 (quoting Baker v. Gen. Motors Corp., 522 U.S. 222, 235 (1998)).
102. *Id.*; TEX. FAM. CODE ANN. § 8.001.
103. TEX. CONST. art. XVI, § 28.
104. Support alimony is more commonly known as contractual alimony by Texas practitioners.
105. *Dalton*, 551 S.W.3d at 134. In her concurring opinion, Justice Lehrmann advocated for "a former spouse . . . at the time she seeks enforcement to establish that she was eligible for Chapter 8 spousal maintenance at the time of the divorce." *Id.* at 144. (Lehrmann, J., concurring).
106. *Id.* at 134 (majority opinion) (citing *In re* Green, 221 S.W.3d 645, 647–48 (Tex. 2007)); TEX. CONST. art. XVI, § 28.
107. 29 U.S.C. § 1056(d)(3)(A) (2014).

but here, there is no Texas law that ERISA would preempt."[108] Justice Boyd then looked to Family Code Chapters 8 and 9.[109] Chapter 8 addresses court-ordered support; Bart's support is contractual, so it does not apply.[110] Chapter 9 governs post-decree proceedings and prohibits subsequent orders that alter the property division of the prior order.[111] Since "trial courts are 'without authority to enter a QDRO altering the terms of the decree,'" the QDRO was an impermissible enforcement remedy.[112]

Justice Lehrmann's concurring opinion declared the majority opinion's reading of Chapter 9, Subchapter B is "overly restrictive."[113] She argued that, "[a] court does not redivide marital property by enforcing a judgment for delinquent child support or spousal maintenance against the payee spouse's retirement benefits."[114] Nonetheless, *Dalton* seems to eliminate the ability to use a QDRO to collect past due support from a previously divided retirement account.

B. *Waldrop v. Waldrop*

Waldrop v. Waldrop presents the difficulties when attempting to blend statutory Chapter 8 spousal maintenance and contractual alimony.[115] In *Waldrop*, Husband agreed that Wife was eligible for Chapter 8 spousal maintenance and agreed to pay Wife maintenance. But Husband then agreed to pay amounts in excess and for a longer period than was allowed under Chapter 8 at the time.[116] Husband agreed to pay $3,000 per month until Wife began receiving pension income and to pay the difference between the pension amount and $3,000 indefinitely unless certain events occurred. One such event was phrased as "further orders of the Court affecting the spousal maintenance obligation, including a finding of cohabitation by [Wife]" (Spousal Maintenance Phrase).[117] After six years of payments, Husband filed to modify the payments, arguing that it was modifiable under Chapter 8 or under terms of the contract. The trial court held that the alimony was contractual alimony, not Chapter 8 maintenance, and was not modifiable, and even if Chapter 8 applied, a material and substantial change in circumstances required under Chapter 8

108. *Dalton*, 551 S.W.3d at 137.

109. Tex. Fam. Code Ann. ch. 8 & 9.

110. *Dalton*, 551 S.W.3d at 138; Tex. Fam. Code Ann. ch. 8. This opinion highlights how critical it is to pursue Chapter 8 maintenance for eligible clients, as the enforcement remedies for court ordered support have significantly more teeth.

111. Tex. Fam. Code Ann. § 9.007(a)–(b).

112. *Dalton*, 551 S.W.3d at 140 (citing Shanks v. Treadway, 110 S.W.3d 444, 449 (Tex. 2003)); *see* Tex. Fam. Code Ann. § 9.101.

113. *Dalton*, 551 S.W.3d at 147. (Lehrmann, J., concurring).

114. *Id.*; *see* Hogle v. Hogle, 732 N.E.2d 1278, 1284 (Ind. Ct. App. 2000).

115. Waldrop v. Waldrop, 552 S.W.3d 396 (Tex. App.—Fort Worth 2018, no pet.).

116. *Id.* at 400. In 2007, the maximum Chapter 8 spousal maintenance that could be awarded was three years at $2,500 per month. This has since increased to up to ten years for marriages over thirty years at up to $5,000 per month.

117. *Id.*

had not occurred.[118]

Now-former Husband appealed. The Fort Worth Court of Appeals first affirmed in 2016 but later granted a request to rehear the case en banc, and it filed a new opinion during our Survey period.[119] On rehearing, the court of appeals reversed and remanded the case back to the trial court, finding that the payments constituted contractual alimony instead of Chapter 8 alimony. However, the court of appeals found that the Spousal Maintenance Phrase was a contractual provision which allowed the court to consider modifying the obligation.[120]

In light of this opinion, the phrase "further order of the court" in Spousal Maintenance Phrases should be avoided when establishing an obligation in excess of the Chapter 8 limitations or contractual alimony obligation. If the intent is to make the obligation modifiable, the drafter should clearly define the circumstances warranting such a change.

VIII. MEDIATED SETTLEMENT AGREEMENTS

A. *Williams v. Finn*

Both Houston courts of appeals decided interesting mediated settlement agreement (MSAs) cases this year. In *Williams v. Finn*, the First Houston Court of Appeals ruled that a MSA was enforceable even if it was not rendered as a final order.[121] Brian Williams and Devinah Finn's agreed final decree was signed in 2009. Finn filed a SAPCR modification in 2011. The parties reached settlement agreements as to the modification in April 2012 and December 2014. In early 2015, the parties filed competing proposed final orders and on March 6, 2015, the trial court signed Willliams's proposed order.[122] Finn moved for a new trial on March 30, 2015, arguing the Williams's order was not agreed to because it differed from the terms of the 2012 and 2014 agreements. During the pendency of Finn's motion for new trial, the parties executed a third irrevocable MSA that included an arbitration provision.[123] The irrevocable agreement was filed with the court on May 15, 2015, and in late May, Finn filed a proposed order granting a new trial and vacating the March 6, 2015 order.[124] The court did not sign the written order granting Finn a new trial, so the motion was overruled by operation of law.[125] In September 2015, Finn filed another petition to modify that included a request for enforcement

118. *Id.* at 401.

119. Waldrop v. Waldrop, No. 02–15–00058–CV, 2016 WL 5449269 (Tex. App.—Fort Worth Sep. 29, 2016), *opinion withdrawn and superseded on reconsideration*, 552 S.W.3d 396 (Tex. App.—Fort Worth 2018, no pet.).

120. *Waldrop*, 552 S.W.3d at 412.

121. Williams v. Finn, No. 01–17–00476–CV, 2018 WL 5071196, at *5 (Tex. App.—Houston [1st Dist.] Oct. 18, 2018, pet. filed) (mem. op. on reh'rg).

122. *Id.* at *1.

123. *Id.* These parties seem to like mediation but not the binding nature of MSAs.

124. *Id.*

125. Tex R. Civ. P. 329b.

of the May 2015 MSA.[126] She also filed to compel arbitration. Williams filed a notice withdrawing his consent to the May 2015 MSA.[127] The trial court ordered the parties to arbitrate and entered a judgment based on the arbitration award. Williams appealed.[128]

Justice Laura Carter Higley explained that Texas Family Code Section 153.0071(e) provides that parties are entitled to judgment on irrevocable MSAs but the trial court is not required to render one.[129] Further, "[n]othing in the agreement prevented the parties from seeking other ways of obtaining judgment on the agreement."[130] Presumably, the court considered Finn's September 2015 filings as an acceptable alternate method of seeking judgement and the judgment based on the arbitration award proper.

Williams argued that the order based on the arbitration award was void because the May 2015 MSA expired and because he withdrew his consent to it. The MSA included a provision that the parties' attorneys would sign an agreed order granting Finn's new trial "for purposes of entry of an order pursuant to the [agreement] only."[131] Williams reasoned that since the agreement contemplated an order but no timely order was entered, the MSA expired. Williams also maintained that the MSA was unenforceable because no order based on the agreement was rendered before the trial court's plenary power expired.[132] He contended that Finn was required to appeal when the trial court declined to rendered judgment and, by failing to appeal, she lost the right to seek judgment on the May 2015 MSA.[133] The authors find Williams's arguments persuasive but the court of appeals did not. Justice Higley said the May 2015 MSA was not part of Finn's motion for new trial and did not become voidable when the trial court's plenary power expired.[134] She also found that the agreement had not expired.[135] The court held that the parties were properly ordered to arbitrate and affirmed the trial court's judgment.[136] Williams filed a petition for review in the Texas Supreme Court on January 14, 2019.

B. *In re Atherton*

The Fourteenth Houston Court of Appeals's *In re Atherton* decision highlights the importance of including a disclosure provision in MSAs.[137]

126. *Williams*, 2018 WL 5071196, at *1.
127. *Id.*
128. *Id.* at *1–2.
129. *See* Tex. Fam. Code Ann. § 153.0071(e). As a practical matter, practitioners need courts to render judgments when a party is entitled to one. Clients expect their attorney to have MSAs rendered as orders.
130. *Williams*, 2018 WL 5071196, at *5.
131. *Id.*
132. *Id.* at *2; *see* Tex R. Civ. Proc. 329b.
133. *Williams*, 2018 WL 5071196, at *2.
134. *Id.* at *2–3.
135. *Id.*
136. *Id.*
137. *In re* Atherton, No. 14–17–00601–CV, 2018 WL 6217624 (Tex. App.—Houston [14th Dist.] Nov. 29, 2018, pet. denied) (mem. op.).

Diane Atherton and her husband, Richard Atherton, signed an MSA in May 2016. A list of the parties' assets and debts, including multiple stocks, was referenced in the MSA and attached as Exhibit B. In the course of the mediation, the current values for the stocks was obliterated and no subsequent numerical value was assigned to them. Instead, the stocks were marked as being awarded to Diane or Richard.[138] About a year later, Diane asked the trial court to set aside the MSA and grant her a new trial. Her pleadings claimed Richard breached the MSA and committed fraud, claims that were supported in her accompanying affidavit. Diane filed an additional motion claiming that at the time of the mediation she did not have sufficient financial information to understand the property division. That motion was not supported by an affidavit. Richard filed a motion for entry of judgment. At the hearing on the parties' motions, Diane raised additional arguments she had not pled including that she was induced to enter into the MSA by fraud and that the MSA was ambiguous because the stock value was not disclosed. Diane served a trial brief that raised the valuation argument on Richard before the hearing, but did not file the brief with the court. No affidavit accompanied the trial brief and she did not offer evidence or offer of proof at the hearing. At the close of the hearing, the trial court heard testimony to prove-up the MSA and directed the parties to file briefs on the stock valuation.[139] Diane filed a timely brief but it was not supported by affidavits. After the trial court rendered a final decree based on the 2016 MSA and denied Diane's motion for new trial, she appealed.[140]

The court of appeals found that Diane failed to present evidence that raised a fact issue as to the value of the stocks or evidence of Richard's alleged fraud, misrepresentation, or failure to disclose.[141] Additionally, the MSA did not include a disclosure provision and spouses represented by counsel in a divorce do not have a fiduciary duty to one another, so Richard did not have a disclosure duty to Diane.[142] The court's review of the MSA revealed that each asset was unambiguously awarded to one of the parties, so Diane's ambiguity argument also failed.[143] The court affirmed the trial court decision.[144] On January 22, 2019, Diane's Rule 53.7(f) motion for extension of time to file a petition for review was granted.[145]

138. *Id.* at *1–2.
139. *Id.* at *2.
140. *Id.*
141. *Id.* at *3–4.
142. *Id.* at *4. *Cf.* Boyd v. Boyd, 67 S.W.3d 398 (Tex. App.—Fort Worth 2002, no pet.).
143. *In re Atherton*, 2018 WL 6217624, at *5–6. Diane failed to properly raise the issue of ambiguity of the MSA, but determining if a contract is ambiguous is a question of law; therefore, the issue was addressed by the court.
144. *Id.* at *6.
145. TEX. R. APP. P. 53.7(f).

C. *In re Russell* and *In re T.L.T.*

After the expiration of the trial court's plenary power, Wife moved for a *nunc pro tunc* judgment to correct variances, including terms for division of Husband's retirement, between the parties' MSA and the final decree.[146] The trial court granted the motion and Husband appealed. The Fourteenth Houston Court of Appeals reversed, holding that the requested changes were substantive instead of clerical, and that the provision in the decree providing that it controlled conflicts with the MSA prohibited substantive modifications after expiration of the trial court's plenary power.[147] Neither the decree nor the prove-up hearing record specifically incorporated the terms of the MSA into the judgment. If judgment had been rendered on the terms of the MSA, perhaps a better argument for a clerical error could have been made.

The parties to *In re T.L.T.* signed a MSA requiring post-mediation production of evidence of separate property by a date certain.[148] The MSA also provided for an equal split of community retirement. Husband failed to proffer evidence of his separate property retirement and the trial court awarded each party 50% of all retirement funds. Husband moved for a new trial arguing the decree was inconsistent with the MSA. His motion for new trial was denied and he appealed. The Dallas Court of Appeals affirmed entry of the final judgment finding that equal division of the retirement assets was not an abuse of discretion absence evidence of separate property.[149]

IX. SUPPORT OF CHILDREN AND ADULT DISABLED CHILDREN

A. *In re C.J.N.-S.*

Several important cases on child support variances occurred during the Survey period. One Texas Supreme Court case dealt with adult disabled children. *In re C.J.N.-S.* dealt with a disabled child that began to live alone, with financial help from his mother, after turning eighteen.[150] Mother sought support from the child's Father and the trial court granted support. The Corpus Christi Court of Appeals found that the Mother lacked standing because she did not have physical possession of the child.[151] The statute specified that an adult disabled child support suit may be filed by "a parent of the child or another person having physical custody or guardianship of the child under a court order."[152] The case

146. *In re* Russell, 556 S.W.3d 451, 453–54 (Tex. App.—Houston [14th Dist.] 2018, no pet.). The decree omitted Wife's award in the MSA of $201,000 from Husband's 401(k) and eleven monthly $750.00 payments from Husband to Wife.
147. *Id.* at 459–61.
148. *In re* T.L.T., 2018 WL 1407098, *1 (Tex. App.—Dallas 2018, no pet.) (mem. op.).
149. *Id.* at *3.
150. *In re* C.J.N.-S., 540 S.W.3d 589, 590 (Tex. 2018) (per curiam).
151. *Id.* at 590.
152. Tex. Fam. Code Ann. § 154.303(a).

turned on whether this phrase required the parent to have physical possession of the child. After reviewing the legislative history of the statute and noting that other sections of the family code considered child support in situations where an adult disabled child may reside outside of a parents home, the Texas Supreme Court, in a per curiam opinion, found that a parent had standing to file such a suit even if they lacked physical possession of the child, and remanded the case back to the court of appeals to address the remainder of the Father's appellate points.[153] On remand, the court of appeals found the trial court's rulings on the need and amount of support were supported by the evidence and accordingly affirmed.[154]

B. *In re K.F., R.F., and T.F.*

The requirements to show proven needs to obtain child support above the statutory guidelines was the issue in *In re K.F., R.F., and T.F.*[155] At a child support modification trial, the trial court heard that Father's income had increased dramatically and raised his child support from $1,000 per month to $4,365 per month. The court of appeals first explained that the family code had a bifurcated analysis for setting child support: one for Obligors at or below the statutory cap of net monthly resources (currently $8,550 per month), and another for Obligors with net resources in excess of the statutory cap. The Father-Obligor in this case had net resources of over $29,000 per month, allowing the court to award additional support based upon the income of the parties and the "proven needs" of the child.[156] Only in the event that the "proven needs" exceeded the presumptive award at the statutory cap could the court award additional support.[157] The court noted that there is no definition of "needs," but that it is more than the bare necessities but does not depend on the parent's ability to pay or the parent's lifestyle.

To demonstrate the "proven needs," Mother offered a spreadsheet and testimony of the children's current expenses.[158] The court of appeals found that merely offering the expenses was not the same and was not evidence of their proven needs.[159] Also, Mother failed to show how the needs of the children had changed since the prior order in this case. The court opined that if the needs of the children changed due to Mother's lifestyle changes, that would be insufficient to show that the children's needs changed.[160] Because Mother failed to demonstrate that the proven needs of the children exceeded the presumptive award, the appeals court

153. *In re C.J.N.-S.*, 540 S.W.3d at 592–93.
154. *In re* C.J.N.-S., No. 13-14-00729-CV, 2018 WL 1870430, at *5 (Tex. App.—Corpus Christi Apr. 19, 2018, no pet.) (mem. op.).
155. No. 02-18-00187-CV, 2018 WL 6816119, at *4–5 (Tex. App.—Fort Worth Jan. 31, 2018, no pet.) (mem. op.).
156. Tex. Fam. Code Ann. § 154.126(a).
157. *Id.* § 154.126(b).
158. *In re K.F.*, 2018 WL 6816119, at *5.
159. *Id.*
160. *Id.*

reversed and remanded the case back to the trial court.[161]

This case offers a textbook guide for seeking above guideline child support when an Obligor's income is above the statutory cap. The practitioner must focus on needs rather than expenses, and a modification case must show that changing needs is not tied to a parent's increasing lifestyle.

X. PREMARITAL AGREEMENTS

A. *In re Lehman*

Premarital agreements are generally enforceable and presumptively valid in Texas.[162] Successful challenges require proof that the agreement was either (1) not signed voluntarily; or (2) the agreement was unconscionable when it was signed and before executing the agreement the party against whom it is being enforced did not have fair disclosure, did not waive disclosure in writing and did not have adequate knowledge of the other parties' assets and debts.[163] Sherrie Lehman sought to invalidate her prenuptial agreement on the basis that she did not sign it voluntarily.[164] She filed a supporting affidavit that alluded to duress as proof her execution was involuntary.[165] Her husband's motion for summary judgment on the issue was granted and Sherrie appealed.[166] Sherrie's affidavit was pronounced conclusory by the court of appeals.[167] The appellate court affirmed the trial court finding that there "was no genuine issue of material fact as to voluntariness" of Sherrie's execution of the agreement.[168] This case is a good reminder of how difficult it is to challenge whether a premarital agreement was not signed voluntarily.

B. *In re the Marriage of I.C. and Q.C.*

Practitioners should approach challenges to prenuptial agreements that contain no-contest clauses cautiously. The Texas Supreme Court applied contract principals to determine if forfeiture under a premarital agreement had been triggered.[169] Jim and Becky were married in 2005.[170]

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161. *Id.* at *6.
162. *See* Tex. Const. art. XVI, § 15; Tex. Fam. Code Ann. §§ 4.001–.010.
163. Tex. Fam. Code Ann. § 4.006(a).
164. *In re* Lehman, No.14-17-00042-CV, 2018 WL 3151172, *1 (Tex App.—Houston [14th Dist.] June 28, 2018, no pet.) (mem. op.).
165. *Id.* at *2–3.
166. *Id.* at *1.
167. *Id.* at *3.
168. *Id.*
169. *In re* the Marriage of I.C. and Q.C., 551 S.W.3d 119 (Tex. 2018); *see generally* Beck v. Beck, 814 S.W.2d 745, 748–49 (Tex. 1991).
170. *In re I.C.*, 551 S.W.3d at 120. The parties to the suit are James (Jim) and Rebecca (Becky) Dondero. Portions of the trial record and appeal were filed under seal. Footnote one of the court of appeals decision explains that is why the wife was identified as Q.C. and husband as I.C. in their opinion. *In re* the Marriage of I.C. and Q.C., 552 S.W.3d 291, 292 n.1 (Tex. App.—Dallas 2016, pet. granted). Aspects of the Dondero's personal and professional lives collided during the divorce resulting in a lengthy divorce and filing of additional law suits. *See* Nathan Vardi, *Dallas Financier Used Sources Described as Illegal to*

Under the terms of their prenuptial agreement Becky would receive a lump-sum cash payment of five million dollars from Jim upon divorce.[171] The award was subject to a no-contest clause that triggered forfeiture.[172] The clause stated in relevant part, "[I]f Becky . . . seeks to recover property in a manner at variance with this Agreement, then [Becky] shall forfeit the cash payment set forth in Section 13(h)."[173] Jim filed for divorce in September 2011.[174] During the protracted divorce, Jim failed to make payments required under their prenuptial agreement and Becky filed multiple amended counter-petitions asserting breach of contract claims.[175] In 2012, Becky filed a third amended counter-petition asserting breach of contract, made her first argument in the alternative for recession of the prenuptial agreement, and moved for summary judgment.[176] On appeal, Becky claimed that requesting recession as alternative relief did not trigger forfeiture.[177]

The court found the language of the no-contest clause to be "clear contractual language" prohibiting any attempt to seek property "at variance with" the provisions of the premarital agreement.[178] On de novo review, the court found that Becky's request for recession was an attempt to change the terms of the prenuptial agreement, specifically to create community property. Further, Becky's repeated requests of recession in her pleadings and motion for summary judgment negated her argument that recession was merely sought in the alternative. The court affirmed the lower courts partial summary judgment and Becky's loss of the cash payment.[179] In a concurring opinion, Justice Lehrmann joined the majority opinion in its entirety.[180] *In re I.C.* highlights the importance of fully understanding the terms of a prenuptial agreement and discussing the risks of asserting certain claims with your client before filing divorce pleadings.

C. *In re Veldekens*

Victor and Mari Veldekens executed a premarital agreement that barred the creation of a community estate and required payment of opposing party's attorney's fees for unsuccessful challenges to the agree-

Track Wife, Former Business Partner Claims, Forbes (June 1, 2012), https://www.forbes.com/sites/nathanvardi/2012/06/01/dallas-financier-used-sources-described-as-illegal-to-track-wife-former-business-partner-claims/#47f7eb9735b8.

171. *In re I.C.*, 551 S.W.3d at 120.

172. *Id.*

173. *Id.* at 121.

174. *Id.*

175. *In re I.C.*, 552 S.W.3d at 293.

176. *In re I.C.*, 551 S.W.3d at 121.

177. *Id.* at 123.

178. *Id.* at 122.

179. *Id.* at 120.

180. *Id.* at 125 (Lehrmann, J., concurring); *see* Tex. Fam. Code Ann. § 4.006(a). Justice Lehrmann posits that Texas Family Code § 4.006(a) may provide the exclusive means to set aside a prenuptial agreement and thereby exclude recession as a remedy. *Id.*

ment.[181] Article 10.1 of the agreement provided that "separate property held by title" could be conveyed to the other spouse via deed or other written instrument.[182] The schedules attached to the agreement listed a home on Columbia Street in Houston as Mari's separate property.[183] During their divorce proceedings, Victor claimed he purchased a one-half interest in the Columbia Street property. As evidence of his ownership, he provided a handwritten note from Mari "requesting $265 for taxes and insurance as half owner."[184] The trial court confirmed the home as Mari's separate property and ordered Victor to pay $6,500 of Mari's attorney's fees for the failed attempt to challenge the agreement.[185] After asking the trial court to file findings of fact, Victor appealed. The Fourteenth Houston Court of Appeals explained that Victor should have requested amended findings of fact because, based on the filed facts, there was no error with the trial court's rejection of the handwritten note as a written instrument conveying ownership, confirmation of the Columbia Street home as wife's separate property, or the attorney's fees award.[186] The facts seem to support Victor's position and the authors are left wondering if he would have prevailed if he had challenged the findings of fact.

D. *In re Ja.D.Y.*

In re Ja.D.Y., Jeffrey Younger fraudulently induced Anne Georgulas into marriage by lying about his background, including his education, military service, employment status, and income.[187] Anne sought to annul the marriage. The parties' premarital agreement provided that any property acquired during the marriage would be the separate property of the party in whose name title was taken, regardless of how the purchase was funded.[188] During the marriage, Anne's company purchased a truck that Jeffrey had titled in his sole name.[189] Anne testified that she did not consent to putting the truck in her husband's sole name.[190] During their separation, Jeffrey sold the truck.[191] The trial court annulled the marriage and awarded wife $45,045.11 in damages for cash spent on the truck. Jeffrey appealed.[192]

Justice Douglas Lang found legal and factual evidence supported the annulment.[193] Since the parties' marriage was void and a "premarital

181. *In re* Veldekens, No. 14–16–00770–CV, 2018 WL 2727837, *1 (Tex. App.—Houston [14th Dist.] June 7, 2018, no pet.) (mem. op.).
182. *Id.* at *4–5.
183. *Id.* at *1.
184. *Id.* at *4.
185. *Id.* at *1.
186. *Id.* at *4.
187. *In re* Ja.D.Y., No. 05-16-01412-CV, 2018 WL 3424359, at *1 (Tex. App.—Dallas July 16, 2018, no pet.) (mem. op.).
188. *Id.* at *2.
189. *Id.* at *1.
190. *Id.* at *6.
191. *Id.* at *1.
192. *Id.*
193. *Id.* at *5.

agreement becomes effective on marriage," the prenuptial agreement was unenforceable and would only be applied to avoid an inequitable property division.[194] Jeffrey argued that the truck was a gift and was titled in his name with wife's knowledge, but the court of appeals affirmed Anne's damage award.[195]

XI. CONCLUSION

During the Survey period the *Pigeon v. Turner* and *Masterpiece Cakeshop* decisions addressed the evolving law regarding same-sex couples. The U.S. Supreme Court upheld revocation-upon dissolution statutes for life insurance in *Sveen v.Melin*, a decision that promotes certainty in post-divorce conflicts. The Texas Supreme Court resolved the split authority on standing issues for non-parents. The year also brought several cases to serve as guides for practitioners on best practices for drafting MSAs and premarital agreements. The first cases addressing Texas Citizen's Participation Act application in family law matters were also heard.

194. *Id.* at *6.

195. *Id.* These parties were parents of twins, and before the court of appeals issued this ruling, mother, Dr. Georgulas, filed for a modification of the parent-child relationship. At issue was whether one of the twins is gender expansive or transgendered. Gender expansive describes individuals who behave in ways that broaden the commonly held definitions of their natal gender. *See* First Amended Petition to Modify Parent-Child Relation, *In re* Ja.D.Y., No. 05-16-01412-CV 2 (July 7, 2018).