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Family Law

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FAMILY LAW

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I. INTRODUCTION

Across the country, more than three million new family law cases are filed every year, and more than ten percent of those are filed in Texas.¹ In 2020, the most recent year for which caseload statistics are available, 316,159 family law cases were filed in the state.² Just over a third of those were divorce petitions, and the remaining two-thirds involved custody, visitation, child support, paternity, adoption, and family violence restraining orders—all the topics that make up the bread and butter of family law practice.³ For many people in the United States, involvement in a family law case will be their only experience with the legal system.⁴ And it goes without saying that the consequences of family court rulings can be profound: ending a marriage; cementing, altering, or severing a parent-child tie; determining the nature and extent of access a parent has to their children; dividing property or awarding support that might dictate economic circumstances for years to come; and protecting—or failing to protect—someone from family violence.

Family law is not always glamorous, but it is brutally important work. Legal developments come at a furious pace because of the sheer number of lawsuits, even though only a small fraction result in published trial court or appellate opinions. Family law is also a mainstay of Texas legislative work, as it is technical enough to require periodic tinkering and updating, and socially important enough to provoke changes that sometimes grow out of divisive political battles. In this summary, we will consider the most important legislative and doctrinal developments from the year 2021, along with discussion of a game-changing opinion on parental rights issued by the Texas Supreme Court from 2020.

II. TEXAS SUPREME COURT CASES

The Texas Supreme Court issued opinions in three family law cases in 2021—two on parental rights and one on the standard for evaluating a motion for new trial following the entry of a default divorce decree. We also address the supreme court’s 2020 opinion in *In re C.J.C.*, a critically

1. COURT STATS. PROJECT, *CSP STAT Domestic Relations* (Jan. 6, 2022), <https://www.courtstatistics.org/csp-stat-nav-cards-second-row/csp-stat-domestic-relations> [https://perma.cc/QQ72-JQLG].

2. *Id.*

3. *Id.*

4. Natalie A. Knowlton, Logan Cornett, Corina D. Gerety & Janet L. Drobinske, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court* 1 (May 2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [https://perma.cc/CVX3-TK4L].

important decision on the protection of a fit parent's rights as against a nonparent.⁵ All four of these cases serve as a stark reminder of the high stakes in family court—litigants fighting over whether a parent will retain legal ties to a child (*In re J.F.-G.*), whether a parent will be forced to share custody and control with a nonparent (*In re C.J.C.*), whether a nonparent conservator will have absolute discretion over a parent's contact with a child (*In re J.J.R.S.*), and whether a spouse will lose title to a house through a default divorce judgment (*In re Marriage of Sandoval*).⁶

A. IN RE J.F.-G.⁷

This case raised the question whether the trial court was right to terminate the parental rights of an incarcerated father.⁸ For a 5-4 court, Justice Bland wrote an opinion holding that the evidence was sufficient to support the trial court's finding that the father engaged in conduct that endangered the physical or emotional well-being of his child and thus that the termination was warranted.⁹

When the child, referred to in the opinion as Julie, was born, her father was a fugitive who had failed to report to prison to begin serving a four-year sentence following a drug conviction.¹⁰ He ultimately did report for his sentence when Julie was an infant. He was released on parole eighteen months later and quickly committed robbery, earning him a new sentence of seven-and-a-half years. He initiated very little contact with Julie during his incarceration and was unaware of behavior by Julie's mother and her mother's boyfriend that exposed her to risk and eventually led to her removal from the home. Julie's father was released from prison the second time when Julie was a preteen and was living happily with a foster family and her half-sisters.¹¹ He took steps to reintegrate into the community and into her life, but the trial court terminated his parental rights based on its determination that he had "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child."¹² The court of appeals affirmed, concluding that there was sufficient evidence to support the trial court's decision. Julie's father petitioned for review, arguing that his incarceration is not by itself sufficient evidence of conduct endangering a child. The majority agreed with the trial court's ruling, concluding that there was sufficient evidence to support the predicate finding of conduct

5. *In re C.J.C.*, 603 S.W.3d 804, 804 (Tex. 2020).

6. *In re J.F.-G.*, 627 S.W.3d 304, 311 (Tex. 2021); *In re C.J.C.*, 603 S.W.3d at 821; *In re J.J.R.S.*, 627 S.W.3d 211, 214 (Tex. 2021); *In re Marriage of Sandoval*, 619 S.W.3d 716, 719 (Tex. 2021) (per curiam).

7. 627 S.W.3d at 304.

8. *Id.* at 308.

9. *Id.* at 307–08. The majority opinion was joined by Chief Justice Hecht and Justices Lehrmann, Boyd, and Huddle.

10. *Id.*

11. *Id.* at 309.

12. *Id.* at 312.

endangering the child.¹³

Under Section 161.001 of the Texas Family Code, parental rights can be terminated if (1) the parent's conduct or omissions "satisfy an enumerated statutory ground for termination; and (2) termination must be in the child's best interest."¹⁴ To determine whether the trial court had sufficient evidence to support both findings, the Texas Supreme Court focused both on the father's criminal history—an escalating history of conduct that meant he had spent most of his adult life in prison—and on the home Julie was left in while he was incarcerated.¹⁵ There was repeated involvement by the Texas Department of Family and Protective Services (DFPS) in the home, stemming from allegations of neglectful supervision. Julie's father was not aware of these reports and communicated with Julie's mother only three or four times a year. On a tragic night in May 2017, Julie's mother's boyfriend drove Julie and his older son to buy food; under the influence of alcohol and drugs, he crashed the car. His son died in the accident, and Julie sustained severe facial injuries. He was eventually sentenced to twenty years in prison for intoxicated manslaughter. Julie's mother, meanwhile, tested positive for cocaine use during one of the DFPS investigations. Julie and her half-sisters were removed from the home, and Julie's father was notified of the removal.¹⁶ About a year after the removal, Julie was returned to her mother with monitoring; the mother's boyfriend, who was then out on bond, was permitted only twice-monthly, supervised visits in a public place. He was not allowed to transport Julie or her half-sisters. When an investigator saw the boyfriend put the girls in a car and get in the driver's seat, the children were returned to their foster family, where they have remained.

Although still incarcerated, Julie's father filed an answer in response to DFPS's suit to terminate his parental rights.¹⁷ He was released on parole in March 2019 and found a job and a place to live. He tested negative for drugs and attended twice-monthly visitation with the children. At the final hearing in September 2019, the trial court heard testimony from Julie's mother and father, a DFPS caseworker, and a DFPS investigator. There was testimony that Julie's mother had continued to allow her boyfriend to be around the children after the accident and that she tested positive for drugs more than once. The caseworker testified that Julie was doing well with her foster family but also acknowledged that Julie's mother and father had attended some therapy sessions, which were "positive."¹⁸ Julie's father had a suitable place to live and had visited Julie on schedule at the DFPS office.

13. See *In re J.F.-G.*, 612 S.W.3d 373, 390 (Tex. App.—Waco 2020, pet. granted) (mem. op.).

14. *In re J.F.-G.*, 627 S.W.3d at 312 (citing TEX. FAM. CODE ANN. § 161.001(b)(1)(E)).

15. *Id.* at 308–11.

16. *Id.* at 308.

17. *Id.* at 309.

18. *Id.*

Julie's father admitted to his criminal history when he testified but also described the steps he had taken to improve his conduct, including cognitive intervention, anger management, job training, and parenting classes.¹⁹ As the supreme court put it, he "conceded that he had caused instability for Julie by being 'in and out of prison' nearly all of Julie's life."²⁰ Although the trial court noted his post-release improvements, it still found that the state had carried its burden of proving by clear and convincing evidence that it was appropriate to terminate his parental rights under "the E ground" and that doing so was in Julie's best interest.²¹ Under Section 161.001(b)(1)(E), the court may order termination of the parent-child relationship if there is clear and convincing evidence that the parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child."²²

Julie's father argued that his incarceration alone cannot support a finding of endangerment under subsection (E); the Department argued that his criminal behavior that resulted in lengthy periods of incarceration—and absence from his daughter's life—constitute endangering conduct within the meaning of this provision.²³ As in *In re C.J.C.*, which we discuss below, the supreme court began by acknowledging the high bar for overcoming parental rights, which are protected both by the federal Constitution and by the Texas Family Code.²⁴ This is why the standard for termination is "clear and convincing" rather than the "preponderance of the evidence" standard usually applied in civil matters.²⁵ It also explains why the standard of review on appeal is heightened to "sufficiency of the evidence" rather than "abuse of discretion."²⁶ But, the court noted, appellate courts must still offer deference to the trial court's factual determinations because only the trial court had the opportunity to hear the witnesses and evaluate their demeanor and credibility.²⁷

This case considered the relevance of incarceration to the predicate finding about a parent's conduct or omissions that endangered the child. Conduct under subsection (E), the majority wrote, need not be "directed at the child," and it is not necessary that the child suffer an actual injury.²⁸ Endangerment means exposing to the risk of loss or injury.²⁹ The majority cited an earlier case, *Texas Department of Human Services v. Boyd*, in which the Texas Supreme Court acknowledged that while incarceration standing alone does not qualify as endangerment, the court can

19. *Id.* at 310.

20. *Id.*

21. *Id.* at 310–11.

22. TEX. FAM. CODE ANN. § 161.001(b)(1)(E).

23. *In re J.F.-G.*, 627 S.W.3d at 311.

24. *Id.* at 311–12.

25. *Id.*

26. *Id.* at 312.

27. *Id.*

28. *Id.*

29. *Id.*

consider a “parent’s criminal history—taking into account the nature of the crimes, the duration of incarceration, and whether a pattern of escalating, repeated convictions exists” when determining whether the parent endangered the child.³⁰ Imprisonment is a factor that can be weighed in this broader determination.³¹

At the heart of the disagreement between the majority and the dissent is whether revisions to the Family Code since *Boyd*, which include the addition of specific enumerated grounds that involve incarceration, mean that a parent’s incarceration should no longer be considered under the more general “endangering conduct” subsection.³² Subsection (Q), for example, permits termination of parental rights when the parent knowingly engaged in criminal conduct that resulted in conviction and imprisonment for at least two years from the date of the filing of the termination petition.³³ With this ground, the conviction and sentence alone are sufficient to support termination, without any showing that the incarceration endangered the child. But does this mean trial courts cannot consider incarceration under other grounds, such as endangerment? The majority rejected this argument.³⁴ As the court wrote, the “more recently added grounds for termination thus do not exclusively define the circumstances in which a parent’s crimes or incarceration can support termination, as the dissent posits.”³⁵ The dissenters, in contrast, argued that incarceration is only relevant to the extent it satisfies one of the other enumerated grounds for termination.³⁶ The majority continued:

The grounds for termination are not mutually exclusive; rather, the same conduct may support multiple grounds and a finding that termination of a parent’s rights is in the child’s best interest. We agree that subsection (E) should not be read so capaciously as to “render the legislature’s painstaking enumeration of other predicate acts superfluous.” But under subsections (L), (Q), (T), and (U) a single criminal conviction may result in termination. These grounds allow the Department to act swiftly to protect children without specific evidence of long-term abandonment. In such cases, the State may “act in anticipation of a parent’s abandonment of the child” due to incarceration, not in response to it. . . . The same is not true for subsection (E). As we have emphasized, under that provision, the mere fact of a conviction will not support termination. Nor does a crime become conclusive evidence of “endangering” conduct because it results in incarceration. But such evidence—which in this case includes multiple criminal episodes of escalating seriousness—together with the duration and consequences of the incarceration, is relevant when the resulting abandonment presents a risk, as it did here, to a child’s

30. *Id.* at 313 (citing *Tex. Dep’t of Hum. Servs. v. Boyd*, 727 S.W.2d 531, 533–34 (Tex. 1987)).

31. *Id.*

32. *Id.* at 314.

33. TEX. FAM. CODE ANN. § 161.001(b)(1)(Q).

34. *See In re J.F.-G.*, 627 S.W.3d at 313.

35. *Id.* at 314.

36. *Id.* at 319.

physical or emotional well-being.³⁷

The majority thus concluded that the trial court was entitled to consider the father's "pattern of escalating conduct," his convictions, and the effect on Julie of his lengthy period of imprisonment.³⁸ Moreover, the majority wrote:

There is sparse evidence that Julie's father supported Julie's physical or emotional well-being. His omissions, spanning throughout her childhood, exposed Julie to physical and emotional loss, as he did not care for, nurture, or protect her. In her father's absence, Julie's mother's boyfriend injured her. Julie's father testified that he did not know the details of Julie's living situation—and that she was at risk—until the Department initiated these proceedings.³⁹

The majority did not excuse his lack of knowledge; rather, it held his lack of knowledge was the product of his own criminal behavior and his lack of attention to his daughter's needs while he was incarcerated.⁴⁰ "Mere imprisonment" does not constitute endangerment, according to the majority, but it may be at the core of a situation in which the termination of parental rights is justified.⁴¹ Parental rights "are of constitutional magnitude," the majority wrote, but "they are not absolute," and courts "must not sacrifice a child's emotional and physical well-being to preserve those rights when their corresponding obligations go unfulfilled for years."⁴² The court thus affirmed the trial court's order terminating the parental rights of Julie's father.⁴³

Justice Blacklock wrote the dissenting opinion.⁴⁴ In addition to the statutory interpretation point discussed above, the dissenters argued that involuntary termination statutes provide "one of the most intrusive actions available to the State" and should be "strictly construed in favor of the parent."⁴⁵ In this case, they argued that the father's imprisonment did not satisfy any of the enumerated grounds and should not have been used to support a finding of endangerment. As the dissent argues:

Father committed a crime and went to prison for it. He has since been released, and the evidence shows he has made substantial progress toward turning his life around. For present purposes, the important point is that neither the crime he committed nor the time he served makes him eligible for termination of his parental rights. The Court nevertheless upholds the endangerment finding under subsection (E) based on little more than Father's past commission of crimes

37. *Id.* at 314–15 (citations omitted).

38. *Id.* at 315.

39. *Id.*

40. *Id.*

41. *Id.* at 316.

42. *Id.* at 317.

43. *Id.* at 318.

44. *Id.* (Blacklock, J., dissenting). The dissent was joined by Justices Guzman, Devine, and Busby.

45. *Id.* (quoting *N.S.M. v. Dallas Cnty. Child Welfare Unit*, 747 S.W.2d 814, 815 (Tex. App.—Dallas 1987, no writ; and *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985)).

(none of which is termination-eligible on its own) and his lack of intimate involvement in his daughter's life from prison (a nearly impossible standard for imprisoned parents to meet).⁴⁶

The better interpretation of subsection (E), according to the dissenting judges, is that a parent's incarceration is not evidence of endangerment; rather, it is relevant only when it satisfies the circumstances enumerated by the legislature in other sections.⁴⁷ "To hold that an imprisonment term falling short of that described in subsection (Q) can by itself constitute 'endanger[ment]' under subsection (E)," the dissent argued, "would subvert the legislature's apparent intent in (Q) to specify the duration of incarceration that will automatically support termination."⁴⁸ While "a criminal history of escalating severity is not a mark of good character," it does not obviously endanger a child.⁴⁹ "Unless subsection (E) is to swallow everything in its path, we must require evidence that Father's *particular* crimes or Father's *particular* imprisonment posed *particular* dangers to his child."⁵⁰ The dissent argued that there simply was not sufficient evidence that this father endangered his daughter within the meaning of the termination statute.⁵¹ Indeed, the dissent concluded, on "the spectrum of incarcerated fathers," this one made an effort to "maintain his fatherly role" that is "better than might be expected."⁵²

B. IN RE C.J.C.⁵³

This case raised an important issue about nonparent custody petitions, and the Texas Supreme Court used this opportunity to reaffirm the law's robust protection for parental rights.

This case involved a complex dispute about possession and access for Abigail, a child who was born in 2014 and spent the first few years of her life with her biological parents who lived together but never married.⁵⁴ In 2016, when they stopped living together, her father filed a suit to determine conservatorship, possession, and child support. Her parents were named joint managing conservators (JMCs), and her mother was given the right to determine her primary residence.⁵⁵ Abigail's father was granted almost equal possession time based on a custom order the parties had crafted. Abigail's mother became involved with another man, Jason; she and Abigail moved into his home in September 2018 and remained there until the mother was killed in a car accident in July 2018. Six months earlier, however, Abigail's mother had filed a petition to modify

46. *Id.* at 318–19.

47. *Id.* at 319.

48. *Id.* at 320.

49. *Id.* at 321.

50. *Id.*

51. *Id.*

52. *Id.* at 322–23.

53. 603 S.W.3d 804 (Tex. 2020).

54. *Id.* at 808.

55. *Id.*

the court order to increase child support and to modify the possession order. That suit was still pending at the time of her death.⁵⁶

Abigail began to live full-time with her father after her mother died. Abigail's father moved to dismiss the still-pending motion to modify, but Abigail's maternal grandparents petitioned to intervene.⁵⁷ They sought to be named JMCs with Abigail's father. Jason also petitioned to intervene, making a similar request.⁵⁸ Both intervenors requested court-ordered visitation. Abigail's father moved to strike both petitions for lack of standing, which the trial court denied. He sought mandamus relief with respect to both intervenors.⁵⁹

The court of appeals granted partial relief, concluding that the grandparents did not have standing to seek conservatorship.⁶⁰ Section 102.004(a)(1) of the Family Code, which provides grandparents an additional pathway to seek custody or visitation, requires evidence that a parent's conservatorship would "significantly impair the child's physical health or emotional development" as a prerequisite for standing.⁶¹ Jason, on the other hand, had standing under Section 102.003(a)(9) because he had exercised "actual care, control, and possession" of Abigail when she and her mother lived in his home.⁶² The Texas Supreme Court denied all parties' requests for mandamus relief.⁶³

The case then went back to the trial court for an evidentiary hearing where the court heard from all the parties as well as therapists.⁶⁴ Abigail's father agreed that her grandparents should remain in her life, noting that he had allowed them to visit and invited them to attend her activities. He did not object to Jason's seeing her while she visited her grandparents, but he objected to any legal right of possession. As he testified, "[a]s her father and a fit parent, . . . I don't see why anyone else outside of her mother or myself would have those rights to visitation and to make decisions for her."⁶⁵ He also testified that the child had expressed no interest in seeing Jason. Nonetheless, the trial court entered temporary orders naming Jason a possessory conservator with unrestricted "duty of care, control, protection, and reasonable discipline" during possession time.⁶⁶ He received possession time for six hours every other Saturday for the first three months, increasing to include an overnight on the same schedule. The court also ordered Abigail's father and Jason to electronically "communicate regarding the child" and suggested that it might order "reunification therapy" if the parties "get into a situa-

56. *Id.*

57. *Id.*

58. *Id.* at 809.

59. *Id.*

60. *Id.*

61. TEX. FAM. CODE ANN. § 102.004(a)(1).

62. *Id.* § 102.003(a)(9).

63. *In re C.J.C.*, 603 S.W.3d at 809.

64. *Id.*

65. *Id.*

66. *Id.* at 810.

tion where [the court] feel[s] like there needs to be another therapist involved to help this child.”⁶⁷ Further, the court instructed the parties to make it work: “The [c]ourt has determined what is in [Abigail’s] best interest . . . and you are to make this as agreeable as force yourself to do.”⁶⁸ There were other court-ordered entanglements, including permission for Jason to receive notice of her school activities, consult with Abigail’s counselor regarding his visits with her, and the right to consent to medical care during possession time. Abigail’s father again filed for mandamus relief, challenging the temporary orders on grounds that they violated his parental rights.⁶⁹

Although this case was complicated by two different nonparent petitions, the conflict between Abigail’s father and Jason squarely tested the strength of parental rights, which are protected under both the Texas Family Code and U.S. Constitution. As the U.S. Supreme Court articulated in a 2000 case, *Troxel v. Granville*, the federal Constitution “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”⁷⁰ The Supreme Court first recognized that right almost a century ago and has reaffirmed it many times.⁷¹ A child is not “the mere creature of the state.”⁷² To the contrary, “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁷³ The protection for parental rights is “perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court],”⁷⁴ and reflects “a strong tradition of parental concern for the nurture and upbringing of their children.”⁷⁵

The fundamental right of parents to make decisions about the care, custody, and control of their children is protected, among other ways, by a powerful “presumption that fit parents act in the best interest of their children.”⁷⁶ This presumption applies to the decision about custody itself; if a fit parent wants custody of a child, the court must presume that to be in the child’s best interests. As the Supreme Court made clear in *Troxel*, a case in which a nonparent sought visitation over the objection of a fit parent, that presumption means that a court cannot decide custody or visitation disputes between a parent and a nonparent using the “best in-

67. *Id.*

68. *Id.*

69. Temporary orders are subject to mandamus relief if the trial court abused its discretion and no adequate remedy exists on appeal. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding).

70. 530 U.S. 57, 66 (2000).

71. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1924); *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

72. *Pierce*, 268 U.S. at 535.

73. *Stanley*, 405 U.S. at 651.

74. *Troxel*, 530 U.S. at 65.

75. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

76. *Troxel*, 530 U.S. at 68.

terests of the child” standard.⁷⁷ Rather, as a matter of federal constitutional law, the court must presume that the child’s best interests are served by the decisions of their fit parents when deciding where they should live, who should care for them, and whether they have contact of any sort with third parties, including relatives.⁷⁸ As the plurality in *Troxel* wrote, “so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”⁷⁹

Against this backdrop, the Texas Family Code has enshrined significant protection for parental rights in the Family Code. Under Texas law, there is a “parental presumption,” which requires that parents be appointed managing conservators in initial child custody suits unless it “would significantly impair the child’s physical health or emotional development.”⁸⁰ In *In re C.J.C.*, the Texas Supreme Court described this presumption as “parallel” to the Constitution’s protection for parental rights.⁸¹ The issue raised by this case, however, is whether the parental presumption applies only in original custody determinations—which is directly addressed by the statute—or whether it applies with equal force to petitions for modification, such as the one in which Jason and Abigail’s grandparents intervened. The supreme court held that it applies to modification proceedings as well because “a fit parent presumptively acts in the best interest of his or her child and has a ‘fundamental right to make decisions concerning the care, custody, and control’ of that child.”⁸² In an earlier case, *In re V.L.K.*, the Texas Supreme Court declined to apply the parental presumption in a modification proceeding because the statute did not expressly provide for it to be applied.⁸³ The supreme court did not consider, however, whether that approach was consistent with the federal constitutional standards as rearticulated in *Troxel*, a case in which a nonparent sought court-ordered visitation over the objection of a fit parent and which had been decided by the U.S. Supreme Court only a few weeks earlier.

Although both the child’s grandparents and the late mother’s boyfriend were challenging a parent’s right of exclusive control, neither contended that Abigail’s father was unfit. He thus argued that he was entitled to a presumption, under *Troxel*, that he acts in the best interest of his child—and “should be able to do so free from state interference” unless the challenging nonparent was able to rebut the presumption.⁸⁴ To grant Jason

77. *Id.* at 91 (Stevens, J., dissenting).

78. *Id.* at 58.

79. *Id.* at 68–69.

80. TEX. FAM. CODE ANN. § 153.131(a).

81. *In re C.J.C.*, 603 S.W.3d 804, 807 (Tex. 2020).

82. *Id.* at 808 (citing *Troxel*, 530 U.S. at 72).

83. *In re V.L.K.*, 24 S.W.3d 338, 344 (Tex. 2000).

84. *In re C.J.C.*, 603 S.W.3d at 810.

any rights to Abigail without sufficient evidence to rebut the presumption, he argued, was an abuse of discretion.⁸⁵ Jason argued that the statutory presumption was not affected by *Troxel* because, unlike the Washington statute at issue in that case that allowed “any person” at any time to petition for visitation with a child, Texas law only grants standing in narrow circumstances.⁸⁶

The Texas Supreme Court began its opinion with a summary of the federal constitutional protection for parental rights, quoting famous lines from the U.S. Supreme Court about their nature and scope.⁸⁷ Importantly, the court noted that “Texas jurisprudence underscores this fundamental right” with its statutory parental presumption.⁸⁸ It is “deeply embedded in Texas law” that the best interests of children are presumptively served by awarding them to the exclusive control of a parent or parents.⁸⁹ The parental presumption was added to the Code in 1998.⁹⁰ It provides:

[U]nless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child’s physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.⁹¹

However, a separate provision grants standing to intervene in custody cases and does not include any language about a parental presumption;⁹² neither does the general modification statute, which “authorizes a court to modify a custody order if it is ‘in the best interest of the child’ and ‘the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed.’”⁹³ Jason argued unsuccessfully that the common law and constitutional parental presumption is embedded *within* the best interest analysis called for by these provisions.⁹⁴ The court rejected this notion, after noting the significant similarities between the *Troxel* case and this one.⁹⁵ In both, the death of one parent led to a challenge by a nonparent over the objection of a fit, surviving parent.⁹⁶ The U.S. Supreme Court in *Troxel* made clear that the traditional “best interest of the child” standard provides insufficient protection for parental rights when resolving a dispute between a parent and

85. *Id.*

86. *Id.* at 810–11.

87. *Id.* at 811–12.

88. *Id.* at 812.

89. *Id.*

90. *Id.*

91. TEX. FAM. CODE ANN. § 153.131(a).

92. *See id.* § 102.003.

93. *Id.* § 156.101(a)(1).

94. *In re C.J.C.*, 603 S.W.3d at 813.

95. *Id.* at 813, 816.

96. *Id.* at 813.

a nonparent.⁹⁷ Rather, a plurality of the Court wrote, a court must give, at a minimum, “special weight” to the parent’s preferences because a fit parent is presumed to act in a child’s best interest when making each and every decision.⁹⁸ The fit parent’s wishes with respect to the nonparent’s visitation cannot simply be “one factor” in the analysis. Rather, the law must be structured so that the court presumes that the parent was right to deny the nonparent’s request for control, possession, or access—and overrides that decision only if there is a significant counterweight. As the plurality wrote in *Troxel*, “so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”⁹⁹

In *In re C.J.C.*, the Texas Supreme Court saw significant parallels to *Troxel*.¹⁰⁰ Jason and Abigail’s grandparents believed it was in Abigail’s best interest to maintain a relationship with them, but there was no evidence that Abigail’s father is unfit.¹⁰¹ The court reviewed the record from the two evidentiary hearings and found nothing that would justify overriding the father’s right to the exclusive care, custody, and control of his daughter. Yet the trial court “substituted its determination of Abigail’s best interest for her father’s,” ordering the father to “make this as agreeable as you can force yourself to do.”¹⁰² This, in effect, “placed on a fit parent ‘the burden of *disproving* that visitation would be in the best interest of [his child].’”¹⁰³

The supreme court agreed with Jason that Texas’s standing threshold is more exacting than the one at issue in *Troxel*.¹⁰⁴ Indeed, Abigail’s grandparents lost their case in the first mandamus proceeding because the court of appeals concluded that they did not have standing to request any possession or access.¹⁰⁵ But those who survive standing—such as Jason—are then not subjected to any special burden in seeking custody or visitation over the objection of a fit parent.¹⁰⁶ In the view of the court, the narrowing of the class of nonparents who can assert standing does not resolve “the separate constitutional infirmity that can result when a court’s best-interest determination overrides the expressed desires of a fit parent.”¹⁰⁷ The court thus read the Family Code to cure any constitutional problem: “we read any best-interest determination in which the court weighs a fit parent’s rights against a claim to conservatorship or

97. *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000).

98. *Id.*

99. *Id.*

100. *In re C.J.C.*, 603 S.W.3d at 814.

101. *Id.*

102. *Id.* at 815.

103. *Id.* at 815–16 (citing *Troxel*, 530 U.S. at 69).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 817.

access by a nonparent to include a presumption that a fit parent acts in his or her child's best interest."¹⁰⁸ Abigail's father, under this ruling, is "entitled to a presumption that he determines Abigail's best interest based on his fundamental right as a fit parent."¹⁰⁹ As the court concluded:

Our holding does not alter the burden of proof for modifications of court-ordered custody arrangements in which neither parent is named a managing conservator in the original order. But when nonparents seek court-ordered custody of a child subject to an existing order, under which one or both fit parents were appointed managing conservators, that parent or parents retain the presumption that protects their fundamental right to determine their child's best interest.¹¹⁰

For Jason, this meant the end of his quest. He had argued that he should not *need* to overcome the fit-parent presumption—and offered no evidence that would allow him to succeed in doing so.¹¹¹ The court also rejected his argument that Abigail's father had waived the parental presumption by filing the first parental rights petition.¹¹² "A fit parent," the court wrote, "does not forgo the right to parent a child by seeking to exercise that right."¹¹³ The court thus granted mandamus relief to Abigail's father, leaving him to decide what was best for his child.¹¹⁴ Justice Lehrmann wrote a concurring opinion, arguing that the majority opinion does not grapple sufficiently with the amount and type of evidence necessary to overcome the parental presumption.¹¹⁵ The concurrence suggested that

courts may afford the requisite deference to a fit parent's decisions concerning his child while still giving due consideration to the effect on the child's well-being of severing, or significantly curtailing, contact with a person who has served in a parent-like role to the child over a significant period of time.¹¹⁶

C. IN RE J.J.R.S.¹¹⁷

In this case, the Texas Supreme Court considered the scope of a parent's rights as a possessory conservator as against a nonparent managing conservator when the parent's conduct has endangered the child in the past.¹¹⁸ This case began when police responded to an aggravated robbery

108. *Id.* at 818–19.

109. *Id.* at 819.

110. *Id.*

111. *Id.* at 811.

112. *Id.* at 819.

113. *Id.* at 820.

114. *Id.*

115. *Id.* at 820–21 (Lehrmann, J., concurring).

116. *Id.* at 823.

117. 627 S.W.3d 211 (Tex. 2021).

118. *Id.* at 214.

at a hotel.¹¹⁹ According to Mother, who was a sex worker, the incident arose out of a client's insistence that she perform certain sex acts against her will. Her boyfriend entered the room with a firearm and took the client's clothes and money. Police found Mother's two children in another hotel room, along with small quantities of methamphetamine and marijuana. Mother and the children had been living in the hotel for about eight months, but that night she called her sister to come take her children. They have lived with their aunt and uncle ever since.¹²⁰

Although no criminal charges were filed after the incident at the hotel, police made a referral to DFPS.¹²¹ An investigator interviewed the children and the aunt, who described her relationship with her sister as "estranged."¹²² The investigator also interviewed Mother and her boyfriend, who is not the biological father of either child. They admitted some of the allegations related to the hotel incident but denied others.

DFPS attempted to place the children with their aunt and uncle, but Mother did not sign a voluntary, consensual placement reform and refused to comply with services.¹²³ DFPS thus filed a petition against Mother, requesting temporary sole managing conservatorship (SMC) of the children pending a final disposition, and termination of Mother's parental rights if reunification could not be achieved. The trial court issued a temporary emergency order granting SMC to DFPS and scheduled a full hearing nine days later.¹²⁴ Even though the mother was not served with a citation prior to the hearing and was not present, the court named DFPS as SMC for the pendency of the lawsuit. Mother was permitted two visits per month until trial.

DFPS created a family service plan for Mother and the children's biological father, who lived in Florida at the time.¹²⁵ Mother only sporadically exercised her visitation rights and did not complete any of the goals set by DFPS. The children did well with their aunt and uncle, attending school and therapy while also exhibiting improvements in their physical and emotional well-being. A DFPS supervisor, Kimberly Barnhill, testified at trial that the children were bonded with their caregivers and that, in her opinion, Mother could not provide for their physical or emotional needs.¹²⁶ That said, she also testified that the children missed their mother and were sad about the situation; she recommended limited visitation with Mother.

Barnhill recommended an unusual arrangement. Rather than periodic visits at a supervised facility, Barnhill suggested that the aunt should have discretion to determine whether and when Mother should be permitted

119. *Id.*

120. *Id.* at 215.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 215–16.

125. *Id.* at 216.

126. *Id.*

to have supervised visits with the children because of the “emotional and . . . drug-influenced state that Mother has been in throughout the case.”¹²⁷ Barnhill further testified that clean drug tests would not be sufficient to address her concerns because Mother had been “highly hysterical” on phone calls and had failed to show up for several scheduled visits.¹²⁸ The children, she thought, had been traumatized by the “lack of stability” and would not be well-served by sitting in a DFPS lobby waiting to see if their mother would show up. Mother offered no evidence at trial—on this or any other point.¹²⁹

DFPS recommended against terminating the parental rights of Mother or Father because they had made some effort to maintain a relationship, and the children were bonded to them.¹³⁰ The children’s guardian ad litem recommended termination but said he would be amenable to possessory conservatorship with visitation “possibly later with a lot of services.”¹³¹ A Court Appointed Special Advocates (CASA) representative recommended termination of Mother’s rights. The trial court named the aunt and uncle as joint managing conservators and named Mother and Father as possessory conservators.

The issue on appeal arose from the court’s possession order. The court stated orally at the conclusion of the trial that it would deviate from the standard possession order because of the evidence presented by DFPS.¹³² In the written order, with respect to the Mother, the court ordered that she “shall have possession of the children at times mutually agreed to in advance by the parties.”¹³³ Without mutual agreement, Mother was entitled to “supervised visitation with the children, under the terms and conditions agreed to in advance by the managing conservator,” with forty-eight hours’ advance notice.¹³⁴ But the court added a handwritten note to the order, which said “[o]nly if the managing conservator agreed to visitation. Sole discretion.”¹³⁵ The written order did not include a finding that the order was in the best interest of the children, but the court stated that orally.

Mother appealed, arguing that there was insufficient evidence to support the order, the order was void for vagueness, and Family Code section 262.201(o) is facially unconstitutional.¹³⁶ The court of appeals affirmed the order. In her petition for review, Mother argued that it is impermissible for nonparent JMCs to be given complete discretion over her access

127. *Id.*

128. *Id.*

129. *Id.* at 216–17.

130. *Id.* at 217.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

rights to her children.¹³⁷ The Texas Supreme Court affirmed the trial court's order despite "the gravity of imposing a severe restriction or limitation on access to one's children."¹³⁸

The court described the case as raising the question "whether, and under what circumstances, a trial court may order a parent's access to a child is solely at the discretion of the managing conservator."¹³⁹ It held "the trial court did not abuse its discretion in imposing a restriction on Mother's right of access because the court could have reasonably concluded that such a severe restriction was in the children's best interest."¹⁴⁰ It rejected Mother's argument that the order effectively denies her the right of access to her children.¹⁴¹

The court began by noting that conservatorship determinations are "intensely fact driven," something the court has noted in previous cases, and that the best interest of the child is the "primary consideration."¹⁴² The trial court has wide discretion to determine "what is in the child's best interest" and to establish "the terms and conditions of conservatorship."¹⁴³ This discretion is abused when a trial court acts arbitrarily or without reason.¹⁴⁴

As we are reminded by several of the court's family law cases this term, Texas law provides significant statutory protection for parental rights. A parent must be appointed as SMC unless the court finds that such an appointment would significantly impair the child's physical health or emotional development.¹⁴⁵ Moreover, a parent who is not named a managing conservator "shall" be appointed possessory conservator "unless [the court] finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child."¹⁴⁶ Within these broad parameters, the trial court must determine the appropriate level of possession and access for each conservator. In this case, the trial court did not name Mother (or Father) as a managing conservator.¹⁴⁷ This was presumably based on a finding of significant impairment, and Mother does not challenge this aspect of the order. The question, then, is whether the trial court abused its discretion by naming Mother as a possessory conservator but giving the child's aunt (and SMC) sole discretion to determine when and whether visits would take place. The Family Code provides that there is a rebutta-

137. Mother also argued that the trial court had violated her due process rights by naming DFPS as SMC before she received notice of the suit, but the Texas Supreme Court did not reach the merits of this argument, concluding that the claim is moot. *Id.* at 217–18.

138. *Id.*

139. *Id.* at 214.

140. *Id.*

141. *Id.* at 218.

142. *Id.*

143. *Id.*

144. *Id.*

145. TEX. FAM. CODE ANN. § 153.131(a).

146. *Id.* § 153.191.

147. *In re J.J.R.S.*, 627 S.W.3d at 217.

ble presumption that the standard possession order provides the minimum level of possession and access for a parent who is named as a possessory conservator and is in the best interest of the child.¹⁴⁸ Here, the trial court deviated significantly from the standard order by awarding no guaranteed visits and requiring the aunt's consent for any visits requested by Mother.¹⁴⁹ The Family Code permits deviations from the standard order based on "(1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named as a possessory conservator; and (3) any other relevant factor."¹⁵⁰ The deviation that denies, limits, or restricts a parent's right to possession of or access to a child "may not exceed those that are required to protect the best interest of the child."¹⁵¹ Moreover, the court must "specify and expressly state in the order the times and conditions for possession of or access to the child, *unless* a party shows good cause why specific orders would not be in the best interest of the child."¹⁵²

Although the supreme court conceded that the nonspecific order in this case "falls on the opposite end of the spectrum from the standard possession order," it concluded that the "good cause" exception in 153.006 "relaxes the specificity requirement for possession and access orders to the point of permitting an 'as agreed' order as the one issued here."¹⁵³ Mother argued, unsuccessfully, that although this provision relaxes the specificity requirement for certain cases, it does not permit an order as nebulous as this one, with "no specificity."¹⁵⁴ DFPS, on the other hand, argued that once good cause for a nonspecific order has been established, the trial court is free to limit or restrict possession or access in any way it sees fit as long as the order is based on the best interest of the child.¹⁵⁵

The supreme court reasoned that the permissibility of an "as agreed" visitation order was a matter of statutory construction.¹⁵⁶ In its view, an order making visits dependent on the aunt's consent qualifies as a "restriction" or "limitation" contemplated by section 153.193 that can be ordered if necessitated by the child's best interests.¹⁵⁷ The court rejected the mother's argument that the order is tantamount to a denial of possessory conservatorship, which can only be ordered based on evidence that parental possession would endanger the child and not based solely on the child's best interest.¹⁵⁸ According to the court, the "restriction is undoubtedly a severe one, permissible only if necessary to protect the chil-

148. TEX. FAM. CODE ANN. § 153.252.

149. *In re J.J.R.S.*, 627 S.W.3d at 217.

150. TEX. FAM. CODE ANN. § 153.256.

151. *Id.* § 153.193.

152. *Id.* § 153.006(c) (emphasis added).

153. *In re J.J.R.S.*, 627 S.W.3d at 219.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 220.

158. *Id.*

dren's best interest, but it is not an outright denial that forecloses all access."¹⁵⁹ The court noted the similarity with *In re A.N.*, in which a mother was given only "as agreed" visitation.¹⁶⁰ The court of appeals upheld the severe restriction in that case, though it noted that such an order should only be used in "rare circumstances."¹⁶¹ In this case, the court concluded:

As in *A.N.*, the record here contains legally sufficient evidence to support a finding that it was in the best interest of J.J.R.S. and L.J.R.S. to impose a severe restriction on Mother's access. For one, the incident leading to the children's removal involved Mother soliciting with an armed boyfriend while her children waited in another motel room. Evidence collected from the scene included drug paraphernalia that could have been accessible by the children. Once the lawsuit was filed, Mother failed to participate in or acknowledge the lawsuit for eight months, attending only four scheduled visits with her children. Mother's failure to attend most visits was very hard on the children, causing J.J.R.S. to worry about Mother's safety and wonder if she was hurt. Prior to their removal, both children had been out of school for nearly two years and showed signs of social and emotional developmental issues. Mother refused all drug tests, failed to complete any part of her service plan, and failed to obtain stable housing or a job throughout the entirety of the lawsuit. Notably, that same lack of stability prior to the removal had been "extremely emotionally traumatizing for [the children.]" This case presents extreme circumstances warranting a severe restriction.

We hold that Texas Family Code sections 153.006(c) and 153.193, read in conjunction, permit the kind of "as agreed" order at issue in this case in the narrow circumstance where such a severe restriction is necessary to protect the child's best interest. We further hold that legally sufficient evidence supported the terms of the trial court's order here.¹⁶²

The court also rejected Mother's argument that if a total denial of access serves the child's best interests, the trial court must instead terminate the parent-child relationship.¹⁶³ Even if this order qualified as a total denial, the court wrote, it was still within the trial court's discretion.¹⁶⁴ Mother's argument

would place trial courts in an unimaginable bind. Such a harsh rule would force a trial court to either allow access to a child by a possessory conservator who may immediately endanger that child's physical or emotional wellbeing, or conversely, force the trial court to prematurely sever the parent-child relationship out of fear that immediate access may cause irreparable harm to the child. Such a pro-

159. *Id.*

160. *Id.* at 220–21 (citing *In re A.N.*, No. 10-16-00394-CV, 2017 WL 4080100, at *7 (Tex. App.—Waco Sept. 13, 2017, no pet.) (mem. op.)).

161. *Id.* at 221.

162. *Id.*

163. *Id.* at 221–22.

164. *Id.* at 222.

position is antithetical to the purpose of visitation orders, which strive to balance the rights of parents with the importance of protecting children.¹⁶⁵

As the court concluded,

[g]iven the evidence, the trial court arguably could have terminated Mother's rights, but it chose to preserve the bond between Mother and her children while still protecting their physical and emotional needs. We do not sit here to question why the trial court made the choice it did except to determine whether it was an abuse of discretion.¹⁶⁶

Although this opinion reads quite differently from *In re C.J.C.* with respect to the robustness of parental rights, the two rulings are arguably consistent. The court limited its discussion in *In re C.J.C.* to the treatment of fit parents, while *J.J.R.S.* dealt with a parent who the trial court deemed presently unable to care for her children. The ruling in *J.J.R.S.* goes to great lengths to emphasize that an "as agreed" visitation order should be reserved for rare cases and used only the best interest of the child necessitates such a restrictive approach. Still, this ruling gives some ammunition to nonparents who are seeking conservatorship over the objection of a parent.

D. IN RE MARRIAGE OF SANDOVAL¹⁶⁷

In this per curiam opinion, the Texas Supreme Court considered the proper standard for evaluating a motion for a new trial in a no-answer default judgment divorce decree.¹⁶⁸ Motions for new trial are common in family law cases and occupy a surprising portion of the appellate docket.

In *Craddock v. Sunshine Bus Lines, Inc.*, the Texas Supreme Court articulated the standard for evaluating a motion for a new trial following a default judgment.¹⁶⁹ Under *Craddock*, the trial court must

set aside a default judgment if (1) "the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident;" (2) "the motion for a new trial sets up a meritorious defense;" and (3) granting the motion "will occasion no delay or otherwise work an injury to the plaintiff."¹⁷⁰

The trial court must hear evidence if the motion for new trial alleges facts that would entitle the movant to a new trial.¹⁷¹ And if the facts alleged in the movant's affidavit are not controverted, the motion and affi-

165. *Id.*

166. *Id.* at 223–24.

167. 619 S.W.3d 716 (Tex. 2021) (per curiam).

168. *Id.* at 719.

169. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 124 (Tex. 1939).

170. *Sutherland v. Spencer*, 376 S.W.3d 752, 754 (Tex. 2012) (quoting *Craddock*, 133 S.W.2d at 126).

171. *In re Marriage of Sandoval*, 619 S.W.3d at 721.

davit together can support the grant of a new trial as long as they would, if true, negate intentional or consciously indifferent conduct.¹⁷² If that standard is met, it is an abuse of discretion under *Craddock* to deny a motion for a new trial.¹⁷³

In this case, the husband, Angel Sandoval, defaulted in the divorce case brought by his wife, Angelina Sandoval.¹⁷⁴ Angelina filed for divorce on March 24, 2016. She filed a motion for alternative service because she could not find him, and the trial court authorized substituted service at the home of his mother in Fort Worth. Service was effectuated on Angel's mother on October 6, 2016, and the court granted a no-answer default judgment against Angel on January 6, 2017. The default judgment gave the home where Angel's mother lived to Angelina as part of the division of marital property.

Angel filed a motion for a new trial on January 30, 2017, arguing equitable grounds under *Craddock* and that service was deficient.¹⁷⁵ He attached a notarized affidavit to the motion, along with unsworn declarations from his sister and mother. In the affidavit, he swore that he had resided at the same address in Chihuahua, Mexico, since being deported from the United States in 2012. He also stated that Angelina had visited that home many times and that their child was conceived there. He stated that he did not object to the divorce or to court orders regarding visitation and child support, but that he did not know Angelina was seeking the Fort Worth home—he asserts it was not part of the community estate.¹⁷⁶ His affidavit and his sister's declaration stated that the two of them bought the property together, two years before his marriage to Angelina, for his mother, who had a poor credit history. They attached copies of his loan application, note, and deed of trust, as well as evidence that his mother provided the down payment and has made all the loan payments.¹⁷⁷

Angelina objected to Angel's affidavit and the unsworn declarations as hearsay. The trial court sustained the objection and denied the motion for a new trial.¹⁷⁸ The court of appeals affirmed by a vote of 2-1 but on different grounds.¹⁷⁹ Angel's submission was not hearsay, the court of appeals held, but it also did not qualify as an "affidavit" under Texas Rules of Evidence because it did not include a translation of the certification that it was sworn before an authorized officer.¹⁸⁰ And the unsworn declarations were conclusory and without underlying factual support. The court of appeals also determined that Angel had presented "no excuse for fail-

172. *Id.*

173. *Id.* at 720.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *In re Marriage of Sandoval*, 589 S.W.3d 267, 271(Tex. App.—Waco 2019, pet. granted)

180. *Id.* at 273.

ing to provide an answer” and demonstrated “the epitome of conscious indifference.”¹⁸¹

Angel sought review in the Texas Supreme Court, which was granted. As to the question of whether Angel offered a good enough excuse for failing to file an answer, the court began by noting that a mistake of law can qualify as a reasonable excuse, in part because of the law’s preference that cases be adjudicated on the merits rather than by default.¹⁸² Angel’s claim that he did not know Angelina was claiming the Fort Worth home was part of the community estate is such a mistake. The trial court ignored this claim, even though it was uncontroverted. But when facts within the affiant’s personal knowledge are represented as true and correct, they must be taken as true if uncontroverted.¹⁸³ “Angel’s affidavit,” the court wrote, “is clearly based on his personal knowledge—it describes who purchased the Fort Worth home, who paid for it, when it was purchased, when he married Angelina, and where he had been living since being deported in 2012.”¹⁸⁴ None of this is hearsay and “should have been accepted as true” for purposes of ruling on the motion for new trial.¹⁸⁵ The court also disagreed with the analysis of the court of appeals, which had affirmed the denial of the motion for new trial on the grounds that the affidavit did not include a translation of the jurat as required by Texas Rules of Evidence 1009(a).¹⁸⁶ Objections to the lack of a proper jurat must be raised by the opposing party in a manner that gives the litigant the chance to correct the error.¹⁸⁷ In this case, Angelina did not raise the issue in the trial court nor argued it in the court of appeals.

The court also concluded that Angel’s affidavit provided a reasonable explanation for failing to file an answer to the petition for divorce.¹⁸⁸ He was not personally served with the petition.¹⁸⁹ And even if he had been, the petition asked for division of the community estate—it did not disclose in any specific way that Angelina was alleging the Fort Worth home to be part of that pie.¹⁹⁰ As the court stated, “[t]hus, because Angel was reasonably unaware that his separate property would be affected in the divorce, his failure to respond was not intentional or the result of conscious indifference but the result of an accident or mistake.”¹⁹¹ A failure to respond can be deliberate and yet also reasonable, contrary to the analysis of the court of appeals in this case. “Proof of justification—accident, mistake (including some mistakes of law), or other reasonable explanation—negates intent or conscious indifference,” according to the

181. *Id.* at 277.

182. *In re Marriage of Sandoval*, 619 S.W.3d at 721.

183. *Id.* at 722.

184. *Id.*

185. *Id.*

186. *Id.* (citing *In re Marriage of Sandoval*, 589 S.W.3d at 273).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 723.

191. *Id.*

court.¹⁹² “Angel could not anticipate that Angelina would seek ownership of his separate property in the divorce proceeding,” and this excuse “is adequate to preclude a finding of conscious indifference.”¹⁹³ The supreme court also concluded that Angel’s motion and affidavit set up a meritorious defense—the allegation that the Fort Worth home was separate property was uncontroverted and supported by the affidavit and attached evidence.¹⁹⁴ Moreover, there was no evidence that a new trial would cause delay or injure Angelina. The trial court should have taken it all as true and granted the new trial; it was an abuse of discretion to deny it.¹⁹⁵ The supreme court reversed the court of appeals’ ruling and remanded the case to the trial court.¹⁹⁶

III. OPINIONS FROM THE COURTS OF APPEALS

For every one opinion from the Texas Supreme Court, there are of course dozens or more from the intermediate appellate courts. For purposes of this summary, we provide analysis of just some of the notable rulings—it is impossible to do justice to all the work done by the courts of appeals in family law. We focus on opinions in five areas: child support, premarital agreements, informal marriage, mediated settlement agreements, and the characterization of marital property.

A. CHILD SUPPORT

1. *In re Howley*¹⁹⁷

This case raises questions about the scope of a trial court’s discretion to award child support above the presumptive statutory guidelines and to make the award retroactive. Brie Howley and Sandra McGinnis have three children together, who range in age from nine to seventeen years old.¹⁹⁸

In 2019, the trial court signed an agreed divorce decree, which provided that Howley would pay McGinnis \$2,565 in monthly child support and \$3,200 in monthly spousal maintenance, along with division of the couple’s savings and retirement accounts.¹⁹⁹ The parties retained joint ownership of the family home, and McGinnis was allowed to continue living there until all the children reached the age of majority.

A little over a year later, McGinnis filed a petition to modify, seeking an increase in both child support and spousal maintenance, retroactive to the date Howley was served with the motion or appeared.²⁰⁰ The Texas

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 724.

197. No. 03-21-00318-CV, 2021 WL 5750190 (Tex. App.—Austin Dec. 3, 2021, no pet.) (mem. op.).

198. *Id.* at *1.

199. *Id.*

200. *Id.*

Family Code provides that child support may be modified only as to obligations accruing after the date of service of citation or appearance in a suit to modify, whichever is earlier.²⁰¹

McGinnis provided documents listing her income and expenses and alleging a shortfall.²⁰² She is a full-time student and has an unpaid internship; she is struggling to become self-sufficient after seventeen years of staying home to raise the couple's children. She sought an increase in both forms of support because she and the children had undergone a significant "lifestyle change" since the divorce.²⁰³ She testified that the children "are used to doing activities and they are not able to do those things anymore."²⁰⁴ She claimed to be "as resourceful as I can to make up for these deficits" and was "getting by" but that the children "were used to many activities and a different—a different way of living. They have adapted, but they deserve—they deserve more."²⁰⁵ Howley filed a counter-petition and argued that McGinnis could use the assets she was awarded in the divorce to fund her lifestyle until she is able to earn more money. When asked why Howley's solution was not the appropriate one, McGinnis explained:

I haven't worked . . . for 17 years, . . . I'll be turning 49 in May and I'm starting over at kind of a disadvantage. I don't have savings or retirement. These funds will serve that, they'll serve as, you know, savings in the future for—that may go towards my future education, my children's future education, um, these are preserved for my future. . . . I disagree that I should be spending a retirement while I'm starting at age 49 all over again to enter the workforce.²⁰⁶

The trial court signed temporary orders requiring Howley to pay additional child support of \$1000 per month, retroactive to March 2020 and continuing through August 2021 and a one-time payment of \$15,000 in additional child support for the same period.²⁰⁷ The court justified the modification based on the fact that the agreed divorce decree set child support below the presumptive guidelines.²⁰⁸ Moreover, McGinnis is currently a student with no other income, and the children are getting older and engaging in more expensive activities. She has applied for government benefits like food stamps but has been denied. Howley, the court found, has the ability to contribute more to their support. The COVID-19 pandemic played a role here as well, as the court found that McGinnis had much more possession time with the children due to remote schooling, which impairs her ability to seek part-time employment.²⁰⁹ She is

201. TEX. FAM. CODE ANN. § 156.401(b).

202. *In re Howley*, 2021 WL 5750190, at *1.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at *2.

207. *Id.*

208. *Id.*

209. *Id.*

also entitled to be compensated for providing more care to the couple's children.

There are two issues on appeal.²¹⁰ Howley first challenged the modification on the merits, arguing that there was no basis for an upward deviation.²¹¹ The Family Code provides that the court "shall presumptively apply the percentage guidelines to the portion of the obligor's net resources that does not exceed" \$9,200 per month.²¹² When the obligor has net resources that exceed that amount, however, the court may award additional child support "as appropriate, depending on the income of the parties and the proven needs of the child."²¹³ The difference between the proven needs of the child and the presumptive guideline amount should be allocated between the parents based on their circumstances.²¹⁴ As other courts have explained, "proven needs" do not include "the most extravagant demands," but the court has "broad discretion to determine what a child's reasonable needs are."²¹⁵

Howley argued that McGinnis did not present sufficient evidence of the children's needs to justify going beyond the presumptive guideline amount (perhaps conceding that the original agreed amount was too low).²¹⁶ Howley argued that McGinnis did not present evidence of the children's needs such that the trial court could order child support beyond 30% of \$9,200 and that the court abused its discretion in ordering retroactive child support dating to March 2020, which was before Howley was served or appeared in the suit to modify.²¹⁷ But the Court of Appeals for the Third District of Texas at Austin concluded that the trial court could have determined that the children's needs were sufficient to justify an upward deviation.²¹⁸ It certainly did not abuse its discretion in modifying the order to provide additional support for a specified period of time.²¹⁹

The appellate court agreed with Howley, however, on the second issue—the retroactivity of the modified order.²²⁰ The Family Code is clear that support can only be modified as to support obligations accruing after the earlier of service of citation or a party's appearance in the suit to modify.²²¹ Here, although the trial court presumably could have ordered a lump-sum payment that would have complied with this rule, it specifically held that it would charge Howley with monthly payments retroac-

210. *Id.* at *4.

211. *Id.*

212. TEX. FAM. CODE ANN. § 154.126(a).

213. *Id.*

214. *Id.* § 154.126(b).

215. See *Coburn v. Moreland*, 433 S.W.3d 809, 836 (Tex. App.—Austin 2014, no pet.); *Nordstrom v. Nordstrom*, 965 S.W.2d 575, 582 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

216. *In re Howley*, 2021 WL 5750190, at *3.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at *4.

221. *Id.* (citing TEX. FAM. CODE ANN. § 156.401(b)).

tive to March 2020, even though the petition to modify was not filed until January 2021. This was an abuse of discretion.²²² The court thus vacated the temporary orders and remanded the case for the entry of corrected orders with a shorter period of retroactivity.²²³

2. *In re Interest of B.Y.*²²⁴

This case also involved a father's challenge to a child support order.²²⁵ Father claimed that he should no longer be paying child support for a child who had reached the age of eighteen and who was not enrolled in high school or a program that would entitle him to post-majority support. The Court of Appeals for the Ninth District of Texas at Beaumont agreed with Father.²²⁶

Mother and Father married in June 1994 and divorced in March 2017.²²⁷ They were the parents of B.Y., who was born in April 2000 and who was almost seventeen years old by the time of the divorce. The decree obligated Father to pay child support in the amount of \$1500 per month until "the child reaches the age of eighteen years or graduates from high school, whichever occurs later."²²⁸ The decree further specified that the obligation could continue for as long as the child is enrolled:

1. under chapter 25 of the Texas Education Code in an accredited secondary school in a program leading toward a high school diploma or under section 130.008 of the Education Code in courses for joint high school and junior college credit and is complying with the minimum attendance requirements of subchapter C of chapter 25 of the Education Code or
2. on a full-time basis in a private secondary school in a program leading toward a high school diploma and is complying with the minimum attendance requirements imposed by that school.²²⁹

B.Y. turned eighteen in April 2018, and Father filed a Petition to Terminate Withholding for Child Support the following September. In support, Father alleged that the child was no longer fully enrolled in a qualifying educational program.²³⁰ Mother, on the other hand, alleged that he was "currently enrolled in James Madison High School, an accredited secondary school, leading towards a high school diploma."²³¹ Mother, in fact, sought an increase in the amount of monthly child support. Meanwhile, Father sought reimbursement for payments made after

222. *Id.*

223. *Id.*

224. No. 09-19-00255-CV, 2020 WL 5240456 (Tex. App.—Beaumont Sept. 3, 2020, no pet.) (mem. op.).

225. *Id.* at *1.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at *2.

the child reached the age of eighteen or, at the very least, those made after he filed his motion.

A bench trial was held on May 20, 2019. Father testified that although B.Y. was attending high school around the time of his eighteenth birthday, he then began skipping classes and not doing his work. He would take B.Y. to school, but B.Y. would “walk out the back door and hop in a friend’s car and they’d leave.”²³² Father argued that B.Y. was not in compliance with the high school’s attendance requirements and, indeed, did not graduate on schedule that spring. The school notified Father that B.Y. was not enrolled for the following year, and B.Y. allegedly confirmed that he did not plan to return to high school.²³³ He stated that he planned to attend online high school instead. But the online school he was allegedly attending had no records of his participation in the program. Mother testified that B.Y. would skip class but would remain in the school building. She was not sure how many credits he had earned in high school and knew he did not pass classes due to poor grades and attendance. She testified that he was never “unenrolled” in high school and that he had an Individualized Education Program (IEP) to allow him extra time to complete assignments because he suffered from anxiety and panic attacks.²³⁴ Mother also testified that he had been pursuing online school, even though he had not yet earned any credits toward graduation.

In addition to the parties’ testimony, the trial court had the benefit of significant documentary evidence about B.Y.’s educational record and mental health challenges. At the conclusion of the trial, the court stated that “I understand that what I have to decide is whether or not at any time after [B.Y.] turned age 18, he was complying with the attendance requirements of The Woodlands High School.”²³⁵ In post-trial briefing requested by the court, Father argued that B.Y. had to be meeting the minimum attendance requirements after turning eighteen in order to be eligible for post-majority support. Texas education law requires attendance for 90% of class days.²³⁶ Father requested reimbursement for \$16,500 paid after B.Y. stopped meeting that minimum standard. Mother argued that his specialized education plan meant that he was not held to the typical attendance requirements and that the law should be interpreted in a way that is consistent with the “Texas public policy to provide support for children to obtain an education even if that means education continues beyond the date on which a child becomes a legal adult.”²³⁷

The trial court agreed with Father and entered an Order Terminating Income Withholding as of June 1, 2018, the first payment after B.Y. fell short of the attendance requirement. Mother appealed.²³⁸ Mother argued

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at *4.

236. TEX. EDUC. CODE ANN. § 25.092(a).

237. *In re Interest of B.Y.*, 2020 WL 5240456, at *4.

238. *Id.*

on appeal that the trial court should not have terminated Father's child support obligation.²³⁹ She drew on the public policy to support children's education, even if that means child support after a child's eighteenth birthday.²⁴⁰ This is in many ways a sad case—Father is frustrated to be paying support for an adult child who is not in school; Mother is frustrated that she cannot seem to get the same child to follow the rules. And she did not want to pull him out of mainstream education, even though he might have been better served by a special education environment. Like most parents, she wanted her child to get a high school diploma.

The trial court's order terminating support is reviewed only for abuse of discretion.²⁴¹ Given the detailed evidence about B.Y.'s grades, attendance, and failure to earn credits during the 2017–2018 year, the court of appeals held that it was not an abuse of discretion to find that even if B.Y. was technically "enrolled" in high school, he was not complying with the minimum attendance requirements of the Texas Education Code.²⁴² The Mother cited some older cases about the standard for being "fully enrolled" in high school, but the statute in question no longer uses that language.²⁴³ Moreover, although the court did not rule out the possibility that an online school could qualify,²⁴⁴ the evidence here did not support the claim that B.Y. was pursuing a high school education online:

In this case, however, the record reflects that B.Y. had only enrolled in one credit-bearing course with the online program and that he had not passed any learning objectives, nor had he submitted any assignments. On this record, we cannot say the trial court abused its discretion because the court could have concluded that B.Y. was not making progress toward his diploma or completing testing through the online school.²⁴⁵

Mother pleaded with the court of appeals to give effect to its public policy of maintaining support for children so they can obtain a high school education.²⁴⁶ But the public policy does not provide any special pathway for an order of support. The applicable statutory standard, for better or worse, is quite specific, and the court of appeals thought the trial court was well within its discretion to determine that it was not met by B.Y.'s spotty participation in high school.²⁴⁷ The court also rejected the mother's claim that B.Y. was disabled in such a way that the court could award support for an indefinite period, as provided under Section 154.302

239. *Id.*

240. *Id.*

241. *Id.* at *5.

242. *Id.* at *8.

243. *Id.* at *6.

244. In *In re J.H.*, the Court of Appeals for the Fifth District of Texas at Dallas considered whether there was evidence to support a child support order for a child older than eighteen who was enrolled in an internet-based homeschooling program. See *In re J.H.*, 264 S.W.3d 919, 926–27 (Tex. App.—Dallas 2008, no pet.).

245. *In re Interest of B.Y.*, 2020 WL 5240456, at *6.

246. *Id.* at *7.

247. *Id.*

of the Family Code.²⁴⁸ In order to qualify, Mother would have to prove that B.Y. “requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support.”²⁴⁹ The evidence in the record did not support a finding that this standard is met.²⁵⁰ B.Y. was left alone for long periods of time, held a job, and did attend school prior to his eighteenth birthday.²⁵¹ The fact that B.Y. had an IEP under Section 504 of the Rehabilitation Act is not sufficient to prove a disability under this section.²⁵² The court of appeals thus affirmed the trial court’s order, which meant the end of the father’s child support obligation.²⁵³

B. PREMARITAL AGREEMENTS

There were several appellate cases during the Survey period on premarital agreements, which play an increasingly important role in family law.

1. *In re Marriage of Sauls and Worley*²⁵⁴

This case involved the validity of premarital and post-marital agreements signed by an older couple who married in 2015.²⁵⁵ Josephine Marie Worley appealed the final decree of divorce from her former spouse, Eugene Howell Sauls. The trial court found the agreements to be valid and, per the terms of those agreements, held that there was no community property.²⁵⁶ Each spouse was awarded the property in his or her name.

On appeal, Worley challenged the validity of the premarital agreement.²⁵⁷ A few days before their wedding, Worley and Sauls signed a premarital agreement. Each page was initialed by both parties, and each signed in front of a notary public. The crux of the agreement was that the parties agreed that separate property would remain separate—and, according to one key provision, “[T]he Parties intend that there shall never be any community property.”²⁵⁸ Property would belong to whoever acquired it—regardless of timing or source—unless one party expressly gifted or otherwise transferred property to the other party.

As the Sixth District Court of Appeals of Texas at Texarkana pointed out, Texas law favors the enforceability of prenuptial agreements—in-deed, they are presumptively valid.²⁵⁹ Beginning in the 1960s and 1970s,

248. *Id.* at *8.

249. *Id.* at *7.

250. *Id.* at *8.

251. *Id.* at *7.

252. *Id.* at *8.

253. *Id.*

254. No. 06-20-00103-CV, 2021 WL 5364775 (Tex. App.—Texarkana Nov. 18, 2021, no pet.).

255. *Id.* at *1.

256. *Id.*

257. *Id.* at *3.

258. *Id.* at *1.

259. *Id.* at *4.

couples began using premarital agreements in greater numbers and attempted to regulate not only the inheritance consequences of the first spouse's death, but also the financial consequences of divorce.²⁶⁰ The 1970s saw a significant change in the law of premarital agreements, in step with social and legal developments that all reinforced the state's loosening grip on marriage.²⁶¹ A key catalyst in this shift was the promulgation of the Uniform Premarital Agreement Act (UPAA) in 1983.²⁶² More than half the states adopted the UPAA, including Texas, which codified the UPAA in 1987.²⁶³ The UPAA established a default rule of enforceability, thus the presumption cited by the appellate court in *In re Marriage of Sauls and Worley*.²⁶⁴ A party seeking to avoid enforcement has the burden to prove that (1) the agreement was executed involuntarily; or (2) the agreement was unconscionable when executed *and* signed without fair and reasonable disclosure of the other party's financial circumstances.²⁶⁵ In other words, unfairness, even gross unfairness, is insufficient to void an agreement unless it was coupled with the failure to disclose the other party's financial situation.²⁶⁶ Neither the UPAA, nor the Uniform Premarital and Marital Agreement Act (UPMAA) that superseded it in 2012, imposes any special requirements of formality on premarital agreements. But some states, including Texas, have rules particular to these agreements, designed to ensure that they are voluntarily entered into by both parties.²⁶⁷ The Texas Family Code provides that a premarital agreement must be in writing and signed by both parties; it need not be notarized.²⁶⁸ State courts tend to be strict about the formalities required by statute, but, if satisfied, courts tend to hold couples to their bargains. This is the lesson learned by Josephine Worley in this case.

She argued that although the premarital agreement was in writing and signed by both parties (and even notarized), it contained a certification of review by independent counsel that was invalid.²⁶⁹ The agreement contained a certification by an attorney, M. Lane Lowery, which represented that Worley had consulted him and that he had explained the terms of the agreement to her.²⁷⁰ At trial, Lowery testified that while Worley had given him the agreement to review, and he had a conversation with her

260. Joanna L. Grossman, "Dot the i's and Cross the t's": Louisiana Supreme Court Voids Prenuptial Agreement for Signature Defect, JUSTIA'S VERDICT (May 23, 2017), <https://verdict.justia.com/2017/05/23/dot-cross-ts> [<https://perma.cc/8NDW-TFLP>].

261. *Id.*

262. Unif. Premarital Agreement Act (1983).

263. See *Premarital and Marital Agreements Act: Enactment History*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2e456584-938e-4008-ba0c-bb6a1a544400> [<https://perma.cc/XW95-H2NY>].

264. See *Grossman v. Grossman*, 799 S.W.2d 511, 513 (Tex. App.—Corpus Christi—Edinburg 1990, no writ).

265. *Id.*

266. Grossman, *supra* note 260.

267. See TEX. FAM. CODE ANN. § 4.002.

268. *Id.*

269. *In re Marriage of Sauls and Worley*, No. 06-20-00103-CV, 2021 WL 5364775, at *3 (Tex. App.—Texarkana Nov. 18, 2021, no pet.).

270. *Id.* at *2.

about it, he did not agree to represent her as a client.²⁷¹ He did not believe there was anything wrong with the certification. Worley alleged that she was only given the agreement to review two days before the wedding, at which point it was too late to delay or cancel the wedding. Worley also complained that the agreement was one-sided and unconscionable. Sauls testified that Worley received the agreement four to six weeks before the wedding and that she knew months earlier that he would not marry without a prenuptial agreement.

The trial court held the premarital agreement to be valid, and the appellate court agreed, citing the state's public policy in favor of enforcing such agreements.²⁷² As the appellate court wrote:

Here, it is undisputed that the written premarital agreement was signed by Worley and Sauls. Also, it is undisputed that the post-marital agreement was also signed by the parties and incorporated the complained-of terms from the premarital agreement. Because all the formalities of a premarital agreement were met, the trial court properly found the premarital and post-marital agreements valid.²⁷³

The court did not address whether it believed Lowery's certification was appropriate. Unlike a small handful of states, Texas does not require that both parties to a premarital agreement have the opportunity to consult with independent counsel.²⁷⁴ If the disadvantaged party did have the opportunity to consult with counsel, or was encouraged but refused to, this can make the case for enforceability even stronger.²⁷⁵ Since there is no independent counsel requirement, the court may not have found it significant whether certification was overstated. Moreover, the court did not engage in any analysis of Worley's claim that the premarital agreement was "one-sided and unconscionable."²⁷⁶ This case is consistent with the approach counseled by the UPAA—and its successor the UPMAA—which narrowly circumscribes the opportunities to avoid enforcement of a premarital agreement. It is also consistent with prior Texas cases, in which courts have held that agreements can be one-sided, unfair, and presented to one party just days before a wedding, and yet still be enforceable.²⁷⁷

2. *Fraccionadora y Urbanizadora de Juarez, S.A. v. Delgado*²⁷⁸

The core of the premarital agreement between Worley and Sauls contemplated a complete separation of each party's property.²⁷⁹ Texas law

271. *Id.*

272. *Id.* at *4.

273. *Id.*

274. *See, e.g.*, CAL. FAM. CODE ANN. § 1615(c)(1) (2022).

275. *Marsh v. Marsh*, 949 S.W.2d 734, 741 (Tex. App.—Houston [14th Dist.] 1997, no writ).

276. *In re Marriage of Sauls and Worley*, 2021 WL 5364775, at *2.

277. *See, e.g.*, *Larson v. Prigoff*, No. 05-99-01755-CV, 2001 WL 13352, at *1 (Tex. App.—Dallas Jan. 8, 2001, no pet.); *Grossman v. Grossman*, 799 S.W.2d 511, 513 (Tex. App.—Corpus Christi—Edinburg 1990, no writ).

278. 632 S.W.3d 80 (Tex. App.—El Paso 2020, no pet.).

279. *In re Marriage of Sauls and Worley*, 2021 WL 5364775, at *3.

makes clear that couples can use a premarital agreement in exactly this way.²⁸⁰ The Family Code provides that a couple can use a premarital agreement in order to contract about “the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.”²⁸¹ An otherwise valid prenuptial agreement can prevent the creation of community property—as it did in *In re Marriage of Sauls and Worley*—and can partition community property or designate the character of the earnings on community property or draw virtually any other line the couple unambiguously intends.

In this case, the parties were both Mexican citizens who came from wealthy and influential families.²⁸² They married in Ciudad Juarez in 1996 and resided in Mexico until 2008, when they moved to El Paso for safety reasons. Wife filed for divorce in 2013, and Husband raised the existence of a Mexican premarital agreement in his answer. He sought confirmation of his separate property, and several Mexican corporate entities tried to intervene in the case in order to seek the same outcome. The appeal revolved around whether a valid Mexican premarital agreement exists and dictates the property aspects of the divorce.²⁸³

Although Wife testified that Husband did not disclose all his financial information before they signed the alleged premarital agreement, she also testified that she knew he owned commercial properties and that he received rent and other payments from those properties.²⁸⁴ She also testified that their marriage certificate showed that they had chosen to keep their property separate—an option that is available through the marriage licensing process in Mexico (though not in the U.S.). She argued, however, that the selection of a “separate property” marriage ceased to have any meaning once the couple moved to El Paso.²⁸⁵ It does not, she argued, rise to the level of an enforceable premarital agreement under Texas law.

Husband asked the court to take judicial notice of Mexican law, including the provision from the State of Chihuahua’s civil code that requires couples to select either a separate or community property regime before they marry.²⁸⁶ He submitted translated versions of the relevant code provisions, and Wife never objected or responded to his motion for judicial notice. Under the relevant provision, a couple must enter into an agreement “with regard to their existing assets and to the ones acquired during their marriage” and that states “clearly if the marriage is formalized under the joint property or the Separate Assets regime.”²⁸⁷

280. See TEX. FAM. CODE ANN. § 4.003(a)(1).

281. *Id.*

282. *Delgado*, 632 S.W.3d at 81–82.

283. *Id.* at 82.

284. *Id.*

285. *Id.* at 83.

286. *Id.*

287. *Id.* at 85.

The trial court granted partial summary judgment to the wife, concluding that there was no Mexican premarital agreement, and granted the divorce. The Eighth District Court of Appeals of Texas at El Paso reversed on the grounds that there were disputed issues of fact about the existence of a premarital agreement.²⁸⁸ There is no question that this couple had the legal authority to enter into a premarital agreement that would alter the character of property during marriage and the division of property upon divorce. This right is stated expressly in the Texas Family Code, as discussed above, as well as in the Texas Constitution.²⁸⁹ So the question in this case is whether the couple *did* have such an agreement. And because the appeal was of a grant of summary judgment, the appellate court had to resolve all doubts in favor of the non-movant (Husband).²⁹⁰ Thus, the court had to assume that the Husband's affidavits about Mexican marital property law were accurate, and Wife had to establish as a matter of law that no premarital agreement exists.

The court summarized its understanding of the law in Chihuahua—that marrying couples elect a marital property regime that will govern their marriage.²⁹¹ The default is joint ownership, but the law seems to give couples the right to elect to retain separate ownership of everything they bring to the marriage or acquire during it.²⁹² In this sense, the law of Chihuahua is similar to Texas law.²⁹³ Community property is acquired by spouses after marriage unless they validly opt out of the system.²⁹⁴ As the court wrote,

Both Texas and Chihuahua allow persons about to marry a great deal of flexibility in determining the character of the various types of property they will acquire during their marriage. In our view, it would not be against the public policy of Texas to enforce a premarital agreement properly executed in Chihuahua, Mexico. We conclude that Wife did not establish as a matter of law that no premarital agreement exists.²⁹⁵

This case turned not only on the rules governing premarital agreements but also on conflict of laws principles. Although Wife and the trial court insisted that Texas law governs the couple's property arrangement and marriage, "Texas courts have held that premarital agreements entered into in another state must be evaluated under the law of the sister state."²⁹⁶ In this case, the couple

chose to be married in Chihuahua, Mexico, whose laws required that their marriage be contracted under either the community property or

288. *Id.* at 92.

289. *Id.* at 88.

290. *Id.*

291. *Id.* at 89.

292. *Id.*

293. *Id.* at 90.

294. *Id.*

295. *Id.*

296. *Id.* (citing Rathjen v. Rathjen, No. 05-93-00846-CV, 1995 WL 379322, at *1 (Tex. App.—Dallas May 30, 1995, writ denied)).

separate property regime. They chose to be married under the separate property regime as evidenced by the marriage certificate which Wife attached to her motion for summary judgment as evidence.²⁹⁷

And if the Mexican premarital agreement is valid, it governs all of the property acquired during this couple's marriage, regardless of where they lived at the time. The appellate court also cited with approval *Carrillo v. Garzon*, in which another appellate court considered the validity of a Mexican premarital agreement under Texas law.²⁹⁸ That court opined that "marriage agreements which designate the character of property to be acquired during the marriage are valid in Texas."²⁹⁹ In fact, the court wrote, "it is inconceivable to think that a Texas court would invalidate a premarital agreement that was valid in Mexico when it was executed and now would be valid in Texas."³⁰⁰ The court in *Delgado* remanded the case for trial on whether the Mexican marriage certificate in fact operates as an enforceable premarital agreement in the couple's Texas divorce.³⁰¹

Like *In re Marriage of Sauls and Worley*, this case is a good reminder that the pro-enforcement approach for premarital agreements is holding strong. Clients would be well-advised to seek review by independent counsel before signing such agreements as the likelihood of avoiding enforcement is slim.

C. INFORMAL MARRIAGE

Texas is one of the few states that both permits couples to establish nonceremonial marriage and regulates the status by statute. The courts of appeals dealt with several issues about the evidence necessary to prove the existence of an informal marriage.

1. *In re Marriage of Caldwell-Bays*³⁰²

In *In re Marriage of Caldwell-Bays*, Thirteenth Court of Appeals of Texas at Corpus-Christi-Edinburg examined what constitutes "more than a scintilla" of evidence for purposes of defeating a traditional motion for summary judgment on the issue of informal marriage.³⁰³ In *Caldwell-Bays*, the parties were married, then divorced, and then, according to Crystal Caldwell-Bays, they informally remarried. Marvin Bays filed both a no-evidence motion for summary judgment and a traditional motion for summary judgment attempting to defeat the claim of informal marriage. The trial court granted the traditional motion for summary judgment and

297. *Id.*

298. *Id.* at 91; *Carrillo v. Garzon*, No. 14-94-00630-CV, 1995 WL 628156, at *1 (Tex. App.—Houston [14th Dist.] Oct. 26, 1995, no writ).

299. *Carrillo*, 1995 WL 628156, at *3.

300. *Id.* at *4.

301. *Delgado*, 632 S.W.3d at 92.

302. No. 13-20-00202-CV, 2021 WL 3777143 (Tex. App.—Corpus Christi—Edinburg Aug. 26, 2021, pet. denied) (mem. op.).

303. *Id.* at *1.

dismissed the lawsuit.³⁰⁴

A finding of informal marriage in Texas requires three elements be met.³⁰⁵ The parties: (1) must agree to be married; (2) must live together in Texas as spouses; and (3) must hold themselves out to others in Texas as spouses.³⁰⁶ There was no dispute that the parties lived together in Texas and that they represented to others that they were married while living in Texas.³⁰⁷ The central issue in *Caldwell-Bays* was whether there was more than a scintilla of evidence that the parties *agreed* to be remarried.³⁰⁸

Bays repaired Caldwell-Bays' previously broken wedding ring and returned it to her. Coupled with evidence that Bays sent an email to one of his child's teachers that his "wife" gave birth that morning and a text message mentioning his "beautiful wife," the court of appeals concluded there was more than a scintilla of evidence that the parties agreed to be married.³⁰⁹ Therefore, the trial court erred in granting the appellee's traditional motion for summary judgment. The court of appeals, reaffirming *Eris v. Phares*,³¹⁰ confirmed that credible testimony of one party that the parties agreed to be married is sufficient to survive a motion for summary judgment on the first element of informal marriage.³¹¹ Notably, the court of appeals stated that a specific date or exact words are not needed to prove an agreement to be married.³¹² The court of appeals remanded the case back to the trial court for the factfinder to decide whether an informal marriage existed.³¹³

2. *Umana v. Rodriguez-Ramos*³¹⁴

The Court of Appeals for the Fifth District of Texas at Dallas decided a procedural issue that will pave the way for more challenges to claims of informal marriage through a plea to the jurisdiction.³¹⁵ In *Umana v. Rodriguez-Ramos*, Umana alleged she was informally married to Rodriguez-Ramos and sought a divorce and division of their community estate.³¹⁶ If the trial court had found the parties were married, the characterization of a particular parcel of land would have been a key issue in the divorce. However, the trial court dismissed her claim. On appeal, Umana argued that a plea to the jurisdiction and a motion to dismiss were not proper procedural mechanisms to dispose of a petition for divorce based on in-

304. *Id.* at *2.

305. *Id.* at *3.

306. See TEX. FAM. CODE ANN. §2.401(a)(2).

307. *In re Marriage of Caldwell-Bays*, 2021 WL 3777143, at *1.

308. *Id.* at *2.

309. *Id.* at *4.

310. 39 S.W.3d 708, 714 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

311. *In re Marriage of Caldwell-Bays*, 2021 WL 3777143, at *4.

312. *Id.*

313. *Id.* at *5.

314. No. 05-20-00238-CV, 2021 WL 2525458, at *1 (Tex. App.—Dallas June 21, 2021, no pet.) (mem. op.).

315. *Id.*

316. *Id.*

formal marriage.³¹⁷

The court of appeals held that when a plea challenges the existence of jurisdictional facts, a trial court may consider relevant evidence in order to resolve the jurisdictional dispute.³¹⁸ According to the court of appeals, the evidentiary standard that governs a plea to the jurisdiction mirrors the summary judgment standard under Texas Rule of Civil Procedure 166a(c).³¹⁹ If evidence regarding the jurisdictional issue is undisputed or fails to raise a question of fact, the trial court can rule on the plea as a matter of law.³²⁰ However, if the evidence presented creates a fact issue, the trial court cannot grant the plea to the jurisdiction, and the case must proceed to the factfinder.³²¹

Rodriguez-Ramos presented undisputed evidence that he was still married to another woman at the time Umana claimed they had established their informal marriage, a fact Umana admitted to during her testimony.³²² In spotty testimony, perhaps affected by a language barrier, Umana also testified they had discussed a plan to marry in the future, and on cross-examination, she admitted she was not currently married.³²³

Based in part on her admissions, the court of appeals held the trial court did not err in dismissing Umana's claim for divorce because the evidence presented by the parties did not raise an issue of fact about whether the parties agreed to be married.³²⁴ The court of appeals held a plea to the jurisdiction was an appropriate litigation technique because it was an undisputed fact that Rodriguez-Ramos was still married to another woman, making it legally impossible for him to be married to Umana at the same time.³²⁵ Because the evidence was undisputed and failed to raise a fact issue on a jurisdictional issue—whether there was a marriage that could be dissolved through divorce—the trial court was permitted to rule on the plea as matter of law.³²⁶ The plea was used in lieu of a motion for summary judgment and likely saved the litigants additional attorneys' fees and protracted litigation at the trial court level.

As a result of this ruling, attorneys may be motivated to use a plea to the jurisdiction as opposed to a motion for summary judgment in situations, like *Umana v. Rodriguez-Ramos*, where there was conclusive evidence eliminating an element of informal marriage. When appropriately

317. *Id.* at *8.

318. *Id.* at *9.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. However, the court of appeals held it was error for the court to dismiss her civil claims, which were argued in the alternative. *Id.* at *10.

325. *Id.* at *9. The flaw in Umana's argument was Rodriguez-Ramos was still married to another woman at the time Umana claimed she was also married to him. A marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse. TEX. FAM. CODE ANN. § 6.202. This legal impediment cannot be waived or cured.

326. *Umana*, 2021 WL 2525458, at *10.

pleaded and argued, this method can put an early end to litigation that should never have been filed in family law court. In most cases, however, a motion for summary judgment is still the more appropriate vehicle to challenge an informal marriage if there are disputed facts and facts that are not jurisdictional in nature.

3. *Fuller v. DeFranco*³²⁷

The Court of Appeals for the Fifth District of Texas at Dallas affirmed the denial of the existence of an informal marriage in *Fuller v. DeFranco*.³²⁸ In this case, the parties had an on-again, off-again relationship. The parties cohabitated for at least part of the time of the purported marriage. Eventually, they were engaged and planned a symbolic, nonlegal wedding in Mexico. There were multiple representations by both parties in writing that the parties were married, mostly for the purpose of obtaining benefits for Rhonda Fuller, including affidavits and forms for John DeFranco's employer, American Airlines, to provide Fuller flying privileges and to obtain health insurance. DeFranco also signed off on documents to obtain military identification cards and a military license plate for Fuller, stating that she was his wife.³²⁹ There were pages of text messages from the parties about DeFranco's unwillingness to get married at one point, about the parties' excitement for their *future* wedding, and texts referring to each other as boyfriend and girlfriend. DeFranco sought a declaratory judgment to confirm that he and Fuller were not married. In response, Fuller filed a counter-petition for divorce, claiming they had been informally married since 2014. The trial court entered a declaratory judgment that the parties were not informally married.³³⁰

The court of appeals examined whether the evidence was factually insufficient to support the trial court's final order and underwent an exhaustive review of the text messages between the parties and multiple notarized documents.³³¹ Affirming the trial court's ruling, the court of appeals confirmed that the holding out element under Texas law requires more than occasional references to each other as spouses.³³²

In *Fuller*, a greater emphasis was placed on personal communications between the parties over documents notarized and sworn to under oath for the purpose of obtaining benefits. A party swearing under oath they are married in an affidavit or signing a significant document labeling a partner a spouse is not enough to guarantee a finding of informal marriage. Personal communications in the form of text messages between the parties illuminated the parties' true intentions—and here, those intentions were not sufficient to establish a marriage.

327. No. 05-19-01203-CV, 2020 WL 6778408 (Tex. App.—Dallas Nov. 18, 2020, no pet.) (mem. op.).

328. *Id.* at *1.

329. *Id.* at *5.

330. *Id.* at *7.

331. *Id.* at *8.

332. *Id.*

D. MEDIATED SETTLEMENT AGREEMENTS

A familiar idiom is that death and taxes are the only two certainties in life. The Texas Courts of Appeals are adding a third category to that list—a mediated settlement agreement (MSA) that complies with the statutory requirements will be enforced in the state of Texas.³³³ Pursuant to Texas Family Code Section 6.602 and recent Texas caselaw, it is now well established that a trial court may not deny a motion to enter judgment on a properly-executed MSA.³³⁴ A trial court may not substitute its judgment for that of the parties and refuse to enforce a statutorily-compliant MSA.³³⁵ One theme in the MSA cases from 2020–2021 is that the common law exception to enforcement of MSAs for fraud, coercion, duress, or other dishonest behavior appears to still be a viable defense under Texas law, although it is rarely successful. As a few of the courts of appeals acknowledged in their rulings, the Texas Supreme Court has yet to rule on the issue and has not said explicitly that the common law defense is still available.³³⁶ Regardless, it appears clear from these cases that otherwise valid MSAs will generally be enforced, even when challenged with a motion for new trial or divorce decree with a merger clause that conflicts with the MSA.

1. *In re Bouajram*³³⁷

The Court of Appeals for the Second District of Texas at Fort Worth still recognizes a common law “dishonest behavior” exception for setting aside an MSA under Texas law, which may apply when the MSA has been procured by fraud, coercion, duress, or “other dishonest means.”³³⁸ In *In re Bouajram*, the court of appeals stated: “For now, this common law exception remains good law because in *Lee* and in other cases, the [Texas] supreme court has expressly declined to address it.”³³⁹

During his divorce proceeding, Rami Bouajram failed to disclose two business entities until after he and his wife Nancy Bouajram entered into an MSA.³⁴⁰ Nancy claimed she was fraudulently induced into signing the MSA as a result of his non-disclosure. Whether the failure to disclose the two entities was intentional or a mistake was a fact in dispute. In addition, Rami failed to disclose two more entities until two days before the parties signed the MSA. The four entities in question were not disposed of in the MSA or the divorce decree. The trial court granted a new trial on the basis of newly discovered evidence and because it was in the interest of justice and fairness. Rami filed a petition for writ of mandamus because

333. *In re Lee*, 411 S.W.3d 445, 447 (Tex. 2013).

334. *Id.*

335. *Id.* at 457–58.

336. *Id.* at 455 n.10.

337. No. 02-21-00072-CV, 2021 WL 3673856 (Tex. App.—Fort Worth Aug. 17, 2021, orig. proceeding [mand. pending]) (mem. op.).

338. *Id.* at *3.

339. *Id.*

340. *Id.* at *2.

the new trial effectively set aside the MSA the parties had executed.³⁴¹

The court of appeals held that the trial court erred in setting aside the MSA in the absence of proper legal grounds for doing so.³⁴² In the proposed order, the trial court judge crossed out language that made a specific finding that Rami had fraudulently induced his wife into signing the MSA. The court of appeals stated, in doing so, the trial court made an implied affirmative finding that the dishonest means exception did *not* apply.³⁴³ Thus, the trial court did not set aside the MSA on any legal basis and, as a result, Rami Bouajram was entitled to mandamus relief.³⁴⁴ *In re Bouajram* illustrates that a trial court cannot grant a new trial as a means to avoid enforcement of a valid MSA.

2. *Choksi v. Choksi*³⁴⁵

The Court of Appeals for the Ninth District of Texas at Beaumont also examined a possible common law defense to an MSA of whether one was procured under duress, specifically the threat of criminal prosecution.³⁴⁶ Asit Choksi allegedly threatened his wife, Ulupi Choksi, with a firearm while he was intoxicated. Ulupi called the police, and Asit was arrested and charged with making a terroristic threat. Shortly thereafter, Ulupi filed for divorce.³⁴⁷ The parties, both physicians with substantial property, entered into an MSA at the conclusion of mediation. Asit later claimed he was forced to sign the MSA under duress due to the threat presented by his criminal indictment,³⁴⁸ which he alleged interfered with his ability to consider the legal advice given to him by his two attorneys. Asit argued he felt he had no choice but to sign the MSA—he was lacking free will.

Of note, Ulupi signed a letter during mediation regarding the incident.³⁴⁹ While there are not many details about the letter in the opinion, the court of appeals explained that the letter did not require Ulupi to destroy any evidence, did not request Ulupi change her testimony, or require Ulupi to refuse to cooperate with the prosecution in Asit's criminal proceeding related to the incident.³⁵⁰ Thus, Asit did not gain any protection from prosecution by signing the MSA.

Asit did not allege the MSA failed to meet the requirements of Texas Family Code Section 6.602(b). Further, Asit did not even raise the defense of duress until seven months after he signed the MSA. The court of appeals expressly declined to decide whether duress is still a defense to

341. *Id.* at *3.

342. *Id.* at *4.

343. *Id.*

344. *Id.*

345. No. 09-19-00183-CV, 2020 WL 6787410, at *1 (Tex. App.—Beaumont Nov. 19, 2020, pet. denied) (mem. op.).

346. *Id.*

347. *Id.*

348. Asit further claimed that Ulupi caused him to lose his privileges at several hospitals—an allegation Ulupi denied. *Id.* at *2.

349. *Id.* at *6.

350. *Id.*

an MSA as many of its sister courts of appeals have held.³⁵¹ Rather, it assumed *arguendo* that duress is an available defense and agreed with the trial court that Asit did not meet his burden of proving duress in order to avoid enforcement of the MSA.³⁵² Claims of duress in the execution of a contract must focus on the actions of the accused and not the emotions of the alleged victim.³⁵³ Ulupi did not make any imminent threats of criminal prosecution at or before mediation to procure Asit's signature on the MSA.³⁵⁴ The information regarding the incident had been communicated to the district attorney two years before the mediation, so there was no obvious tie between the MSA and the possibility of criminal action against Asit.³⁵⁵

3. *Grantom v. Swisher*³⁵⁶

In *Grantom v. Swisher*, the Court of Appeals for the Fourteenth District of Texas at Houston held that a trial court may adjust the division of property in an MSA provided the adjustment is not contrary to the terms in the agreement.³⁵⁷ Over the course of three different MSAs, the parties in *Grantom v. Swisher* were able to settle all issues in their divorce proceeding except three issues.³⁵⁸ The parties included language in the last MSA agreeing that the allocation of assets in the MSA may need to be adjusted by the trial court based on the trial court's ultimate determination on three issues that would be tried. After a jury trial, the trial court signed a final decree of divorce and issued findings of fact and conclusions of law.³⁵⁹ In accordance with the flexibility included in the MSA language, the trial court then redistributed assets to effectuate the jury's decision. The husband appealed.

The court of appeals closely examined the language of the MSA and held the trial court did not improperly contradict the MSA because the plain language of the MSA anticipated and allowed for redistribution of assets.³⁶⁰ Applying contract principles, the court of appeals found that the MSA's provisions were plain, definite, and unambiguous.³⁶¹

351. The court of appeals acknowledged several of the Texas courts of appeals have interpreted Texas Family Code Section 6.602(b)–(c) to mean that an MSA that is illegal or procured by fraud, duress, coercion, or other dishonest means is unenforceable. *Id.* at *3. The Texas Supreme Court has not addressed whether procuring an MSA by fraud, duress, coercion, or other dishonest means or one that is illegal makes an MSA unenforceable. *See In re Lee*, 411 S.W.3d 445, 455 n.10 (Tex. 2013).

352. *Choksi*, 2020 WL 6787410, at *4.

353. *Id.* at *5.

354. *Id.*

355. *Id.*

356. No. 14-19-00705-CV, 2021 WL 1134784 (Tex. App.—Houston [14th Dist.] Mar. 25, 2021, pet. denied) (mem. op.).

357. *Id.* at *5.

358. *Id.* at *3.

359. *Id.* at *2.

360. *Id.* at *5.

361. *Id.*

Parties can build flexibility into an MSA to allow the trier of fact to decide issues that are not agreed upon at mediation. Under traditional contract principles, certain issues may be reserved for the trier of fact, and assets may be reallocated or adjusted, without violating the general rule that terms in an MSA must be enforced. The application of rules governing enforcement of a valid MSA are rigid, but that does not foreclose flexibility that the parties explicitly decided to grant to the trier of fact or issues they intentionally deferred for trial.

4. *Upton v. Upton*³⁶²

The Court of Appeals for the Eleventh District of Texas at Eastland held that the trial court properly revised an agreed final decree of divorce, which divided sixty-five items missing from the parties' MSA.³⁶³ As part of their divorce settlement, Tamara Upton and Anderson Upton entered into an MSA that had three sections: a preamble, Exhibit A, and Exhibit B. The Preamble provided that "[t]he parties agree to the items set forth in Exhibit 'A' and 'B' attached hereto and incorporated by reference."³⁶⁴ The last four and a half pages of Exhibit B were a list of sixty-five items listed under the heading "SEPARATE PROPERTY."³⁶⁵ All sixty-five items came with a description of the item with a reference to why Tamara believed those items were her separate property or her personal items, e.g., crystal glasses and china from Tamara's aunt. Because these sixty-five items were left out of the Final Decree of Divorce, Tamara filed a Motion for Clarification of Mediation Agreement. Anderson contended he did not agree that the sixty-five items in question were to be awarded to Tamara because the items were not circled and because the word "yes" did not appear next to them as it did for items in the first section of Exhibit B.³⁶⁶ The trial court granted the Motion, reformed the Agreed Final Decree of Divorce to comply with the MSA, and then Anderson appealed.

The court of appeals affirmed the trial court's ruling, holding that the trial court properly modified the divorce decree so that it would reflect the property division set out in the MSA.³⁶⁷ The court of appeals relied on the fact that a trial court is without authority to enter a divorce decree that contains a property division that conflicts with the terms of a valid MSA.³⁶⁸

Even when a merger clause exists in a final decree of divorce that provides, to the extent there are differences between an MSA and a decree,

362. No. 11-19-00025-CV, 2021 WL 219662, at *1 (Tex. App.—Eastland Jan. 22, 2021, no pet.) (mem. op.).

363. *Id.*

364. *Id.* at *2.

365. *Id.* at *3.

366. *Id.* at *2.

367. *Id.* at *3.

368. *Id.*

the decree shall control, the MSA still controls.³⁶⁹ An MSA that complies with Texas Family Code Section 6.602 is binding on the parties and the court—even a contractual merger clause cannot trump the MSA.

E. CHARACTERIZATION OF PROPERTY

1. *Chacko v. Thottiyil*³⁷⁰

The Court of Appeals for the First District of Texas at Houston held a trial court did not err in characterizing two parcels of real property in India as separate property, holding that the use of community property funds expended to improve separate real property does not change the character of the real property from separate to community; there is no conversion of real property.³⁷¹ During mediation, Chacko and Thottiyil agreed to the characterization and division of all of their property except for two parcels of land located in India called the “Fifteen-Cent” parcel and the “One-and-a-half-Acres” parcel.³⁷² The MSA deferred the characterization of those two properties to the trial court. Thottiyil provided a testamentary document that supported his claim that the One-and-a-half-Acres parcel was a bequest to Thottiyil from his parents, and Thottiyil’s testimony during trial further supported the inheritance. There was no controverting evidence in the record. During the marriage, a house was added to part of one of those properties, and Thottiyil contributed the parties’ community funds toward completion of that house.³⁷³

Chacko argued: (1) because community funds were used to build the house that sits partly on the One-and-a-half-Acres parcel and partly on another parcel of land that *is* community property, One-and-a-half-Acres was now commingled; and (2) Thottiyil failed to trace the separate property assets from the community property assets.³⁷⁴ Therefore, Chacko, argued, One-and-a-half-Acres could no longer be characterized as separate property. The court of appeals held that the later use of property for community purposes or adding improvements to separate property with community funds does not change the separate property’s character.³⁷⁵ When community funds are spent to improve a spouse’s separate property, such as adding a house to separate real property, Texas law provides

369. *Id.*

370. No. 01-19-00798-CV, 2021 WL 1414274 (Tex. App.—Houston [1st Dist.] April 15, 2021, no pet.) (mem. op.).

371. *Id.* at *4.

372. *Id.* at *1.

373. *Id.* at *2.

374. *Id.* at *3. Regarding the Fifteen-Cent parcel, Chacko argued that mere testimony, without any tracing, is not adequate to rebut the community property presumption. However, in addition to Thottiyil’s testimony, a deed was admitted into evidence, which showed the property was originally Thottiyil’s grandfather’s and passed by testamentary transfer to several members of his family, finally landing with Thottiyil and the parties’ son. The court of appeals concluded the deed and the testimony combined was enough to meet Thottiyil’s burden to prove his separate property by clear and convincing evidence and nothing controverted that evidence. *Id.* at *4.

375. *Id.* at *3.

for a claim for reimbursement, which Chacko failed to assert.³⁷⁶

2. *In re Marriage of Torres Alvarado*³⁷⁷

The Court of Appeals for the Fourteenth District of Texas at Houston, in a majority opinion with the Chief Justice dissenting, held that a trial court shall not award community property absent a full evidentiary hearing or agreement on the property issues.³⁷⁸ In *In re Marriage of Torres Alvarado*, the parties agreed that a jury would determine conservatorship, but that the trial court would consider the possibility of fraud committed on the community estate and the proper allocation of community. The trial court said it would attempt to hear the property issues on breaks during the jury trial or during their deliberations.³⁷⁹

A handful of exhibits referencing property were preadmitted and some were admitted during the jury trial for the purpose of the jury's determining whether fraud was committed on the community estate; the property-related exhibits were not admitted for the purpose of the court's division of the estate. There was never an opportunity for wife's counsel to cross-examine the husband about the values of property.³⁸⁰ After the jury trial, the parties rested subject to the property issues. The trial court later set a hearing on the property issues but reset the hearing almost immediately after it began, and no evidence was admitted. Several months later, the trial court issued a ruling dividing the parties' community property.³⁸¹

Wife filed a motion for new trial on the division of property arguing the court abused its discretion in awarding an unjust and disproportionate division of the parties' community estate. The majority held that because the parties did not agree to a property division, a contested evidentiary hearing was required.³⁸² A trial court cannot render judgment against a party if the parties did not have the opportunity to present evidence and rest at the close of evidence.³⁸³ The Chief Justice dissented from the majority's opinion, arguing that the trial before the jury addressed all issues—those for the jury and for the trial court to decide.³⁸⁴ The Chief Justice dissented, in part, because the wife failed to state what evidence she was prevented from introducing, failed to make an offer of proof, and failed to show harm.³⁸⁵ Regardless, this case illustrates that parties should be diligent in making sure a full evidentiary hearing is scheduled and

376. *Id.*

377. No. 14-19-00250-CV, 2021 WL 1920879 (Tex. App.—Houston [14th Dist.] May 13, 2021, no pet.) (mem. op.).

378. *Id.* at *2, *9.

379. *Id.* at *1.

380. The wife's sworn inventory and appraisal was preadmitted prior to the jury trial; the husband's sworn inventory and appraisal was submitted to the trial court after the jury trial. *Id.*

381. *Id.* at *2.

382. *Id.* at *6.

383. *Id.* at *7.

384. *Id.* at *9 (Christopher, C.J., dissenting).

385. *Id.* at *11, *12.

completed on any and all remaining issues—particularly when some issues are tried in a jury trial that was not bifurcated.

3. *Seitz v. Seitz*³⁸⁶

In *Seitz v. Seitz*, the Court of Appeals for the First District of Texas at Houston held parol evidence should not be considered regarding a gift from one spouse to the other absent evidence of fraud, accident, or mistake.³⁸⁷ It was undisputed that Lauren Seitz owned a home in Frisco as her separate property prior to her marriage to Brian Seitz. Less than a month after they were married, Lauren executed a special warranty deed conveying half of her property to herself and half to Brian, i.e., half was Lauren's separate property and half was Brian's separate property.³⁸⁸

The following year, the parties separated, and on November 11, 2015, Brian sent an email to Lauren with the subject line of "Seitz Warranty Deed—Ownership Transfer."³⁸⁹ In the email, Brian wrote: "For your records. . . ." ³⁹⁰ Attached to the email was an executed special warranty deed, signed and notarized on November 11, 2015, deeding his 50% ownership interest back to Lauren. Eight days later, Brian sent another email to Lauren stating: "Please note that this warranty deed was not filed. The original signed and notarized document has been destroyed. You may delete this draft copy."³⁹¹

One of Lauren's three motions for summary judgment requested a determination that the property in question was her separate property.³⁹² In response, Brian filed a response with an affidavit that claimed he only sent Lauren the deed to use if Lauren would return home and work on their marriage. Brian further claimed he had no intent to convey title by sending her the notarized, executed special warranty deed.³⁹³

The court of appeals affirmed the trial court's summary judgment holding that the property was entirely Lauren's separate property as a result of this conveyance.³⁹⁴ Brian's conveyance met the elements of a gift: (1) Brian intended to make a gift; (2) Brian delivered the property to Lauren; and (3) Lauren accepted the property.³⁹⁵ Under Texas law, a deed from one spouse as grantor to the other spouse as grantee creates a presumption that the grantee spouse received property as separate property by gift.³⁹⁶ This presumption can only be rebutted by evidence the

386. 608 S.W.3d 272 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

387. *Id.* at 278.

388. Lauren's half was separate property because it was owned before marriage. Brian's half was separate property because Lauren gifted it to him. *Id.*

389. *Id.* at 275.

390. *Id.*

391. *Id.*

392. *Id.* at 278.

393. *Id.*

394. *Id.* at 279.

395. *Id.* at 277.

396. *Id.* at 277–78 (citing *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston 2005, no pet.)).

deed was procured by fraud, accident, or mistake.³⁹⁷

Relevant to the facts of this case, a spouse who is a party to such a transaction may not introduce parol evidence to contradict the express recitals in the deed without first producing evidence of fraud, accident, or mistake.³⁹⁸ Because Brian could not produce any evidence of fraud, accident, or mistake, the claims in his affidavit that he did not intend to make a gift to Lauren cannot be considered.³⁹⁹ Moreover, if delivery of a gift is completed with the requisite intent, a subsequent change of the donor's intent does not alter the transaction.⁴⁰⁰ The deed in this case did not contain any reservations or exceptions. Brian's initial email forwarding the deed to Lauren did not state the deed was a conditional gift conditioned on reconciliation. In other words, a party cannot change their mind after the fact unless the gift is conditional. The court of appeals concluded that the delivery of the deed by Brian to Lauren via email without expressing any conditions or reservations constituted an immediate transfer of Brian's 50% interest in the property back to Lauren.⁴⁰¹ In other words, there are no takebacks.

IV. LEGISLATIVE AMENDMENTS AND ADDITIONS TO THE TEXAS FAMILY CODE

During the 2021 Legislative Session, the Texas Legislature made several amendments and additions to the Texas Family Code. Three of the significant changes are discussed below. The most remarkable change is a new provision that makes the expanded standard possession order for parties who live less than fifty miles from each other the new *default* standard possession order, moving the needle closer to a default fifty-fifty possession schedule.

A. AMENDMENT AND ADDITION TO TEXAS FAMILY CODE SECTION 153.3171.

Summary: The expanded standard possession schedule is now the default possession order under Texas Law for most conservators. The beginning and ending possession times for parents who reside fifty miles or less are automatically extended.

Before September 1, 2021, the Texas Family Code provided for two default possession schedules, i.e., (1) one for conservators residing 100 miles or fewer from each other; and (2) one for conservators residing over 100 miles from each other.⁴⁰² While the Texas Family Code previously authorized an extended period of possession for parties living 100

397. *Id.* at 278.

398. *Id.* at 279.

399. *Id.* at 278.

400. *Id.* at 279 (citing *Adams v. First Nat'l Bank of Bells/Savoy*, 154 S.W.3d 859, 869–70 (Tex. App.—Dallas 2005, no pet.)).

401. *Id.*

402. *See* TEX. FAM. CODE ANN. § § 153.312–.313.

miles or fewer from each other, this possession schedule was an election the possessory conservator could make, and the trial court would have to honor the election, unless the trial court specifically found it was not in the best interest of the child.⁴⁰³ Under the extended standard possession schedule, the possessory conservator can pick up the child when school lets out on Thursday and return the child when school resumes on Monday morning.⁴⁰⁴

The new law, codified as Texas Family Code Section 153.3171, provides that the trial court shall extend the standard possession order so the conservator has the right to possession of the child as if the conservator had made the elections for alternative beginning and ending possession times under Texas Family Code Sections 153.317(a),⁴⁰⁵ provided the conservator resides not more than fifty miles from the primary residence of the child.⁴⁰⁶ If the residency requirements are met, the automatic extended standard possession is now the default possession schedule for all suits affecting the parent-child relationship pending in court or filed on or after September 1, 2021.⁴⁰⁷ An election is no longer required. This change puts Texas one step closer to a fifty-fifty default possession schedule in the Texas Family Code.

The Texas Legislature also changed the end time for a weekend possession that is extended by a student holiday or school in-service day that falls on a Monday.⁴⁰⁸ Under the previous section, a parent had to return the child at 6:00 p.m. on a school holiday falling on a Monday.⁴⁰⁹ The legislature changed the statute so a conservator has possession of the child until 8:00 a.m. the following Tuesday, presumably so that the conservator may drop the child off at school at the end of their possession time.⁴¹⁰

B. AMENDMENT AND ADDITION TO TEXAS FAMILY CODE SECTION 154.125.

Summary: The Texas Legislature adjusted child support guidelines for calculation of child support for low-income wage earners.

The Texas Legislature also enacted new child support guidelines for low-income wage earners. Pursuant to the Texas Family Code Section 154.125(c), if the obligor's monthly net resources are less than \$1,000, the court shall presumptively apply guidelines starting at 15% of an obligor's net resources as opposed to 20% for higher wage earners.⁴¹¹ For suits affecting the parent-child relationship filed on or after September 1, 2021,

403. *Id.* § 153.313.

404. *See id.*

405. *Id.* § 153.317(a)(1)(C), (2)(C), (3), (4), (5), (6), (7)(C), (8), (9).

406. *Id.* § 153.3171(a).

407. *Id.*

408. *Id.* § 153.317(a)(9).

409. *Id.* § 153.315(a).

410. *Id.* § 153.317(a)(9).

411. *Id.* § 154.125(c).

the following schedule shall be used in rendering the child support order for low-income obligors:

- 1 child: 15% of Obligor's Net Resources
- 2 children: 20% of Obligor's Net Resources
- 3 children: 25% of Obligor's Net Resources
- 4 children: 30% of Obligor's Net Resources
- 5+ children: 35% of Obligor's Net Resources⁴¹²

While this will be a welcome change for low-income wage earners, the net result is less child support will go to help pay the costs of child-rearing for the obligee. This is reflective of a national trend, however, to avoid child support orders that are likely to severely diminish the ability of the parent to support themselves.⁴¹³

C. ADDITION OF TEXAS FAMILY CODE SECTION 8.351

Summary: A trial court now retains jurisdiction to enforce child support and spousal maintenance orders by collecting from an obligor's retirement.

Further strengthening an obligee's ability to collect on spousal maintenance or child support, the Texas Legislature enacted a provision that allows an obligee to enforce spousal and child support maintenance orders by collecting from the obligor's retirement accounts.⁴¹⁴ Specifically, a trial court retains jurisdiction to render "enforceable qualified domestic relations orders or similar orders permitting payment [from a] pension, retirement plan, or other employee benefits to an alternate payee or other lawful payee to satisfy amounts due under the maintenance order" until all maintenance due under the order, including arrearages and interest, have been paid.⁴¹⁵ Fortunately, with this change in Texas law, an obligor can no longer easily pad their retirement accounts, while contemporaneously evading their child support or spousal maintenance obligations.

V. CONCLUSION

During the Survey period, the Texas Supreme Court reiterated the strong protection for parental rights under state law and the federal Constitution. It also weighed in on an important procedural matter regarding review of default judgments. The courts of appeals continued their work of regulating family formation and dissolution, with no discernible trends in terms of outcomes.

412. *Id.*

413. These issues are explored in many law journal articles, including Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families*, 20 *GEO. J. ON POVERTY L. & POL'Y* 1 (2012).

414. *TEX. FAM. CODE ANN.* § 8.351.

415. *Id.* § 8.351(a), (c).

