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Family Law

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I. INTRODUCTION

More than 300,000 new family law cases were filed in Texas in 2022; more than a third of those were divorces (and there were more divorces in Texas than in any other state).¹ Tens of thousands of children live in households that are involved in family court proceedings in any given year.² Family law remains one of the areas with the greatest unmet legal need—more than half of litigants are pro se in cases with enormous stakes.³ The work of lawyers, judges, and other professionals in this area should not be underestimated. In this Article, we will try to lighten the load somewhat by highlighting the most important family law cases during the year 2022. As the reader will see, they touch on a wide range of issues, both substantive and procedural. There is no single takeaway from this year's case law, but the opinions illustrate the challenge of staying on top of a complex and busy area of law.

II. TEXAS SUPREME COURT CASES

The Texas Supreme Court decided four family law cases during 2022, which considered very distinct issues: the state's power to insist that parents of transgender children be investigated for child abuse,⁴ the enforceability of a religious premarital agreement,⁵ a party's ability to challenge a default judgment of divorce on grounds of insufficient evidence,⁶ and whether an attorney is immune from wiretap claims brought by a non-client.⁷

A. IN RE ABBOTT⁸

Although this case decided very little, it was a flashpoint in the ongoing culture war over the treatment of transgender children. This case was born of a letter Governor Greg Abbott wrote to the Commissioner of the Texas Department of Family and Protective Services (DFPS), the agency charged with implementing the state's child welfare laws and protecting children from abuse and neglect.⁹ In the letter, Abbott stated that gender-affirming care for transgender children constitutes child abuse under Texas law.¹⁰ He

1. See *CSP STAT Domestic Relations*, COURT STATISTICS PROJECT, <https://www.court-statistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-second-row/csp-stat-domestic-relations> [<https://perma.cc/CV85-9XP5>].

2. See *id.*

3. Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L. J. 1389, 1391 (2016).

4. See *In re Abbott*, 645 S.W.3d 276 (Tex. 2022).

5. See *In re Ayad*, 655 S.W.3d 285 (Tex. 2022) (per curiam).

6. See *In re Marriage of Williams*, 646 S.W.3d 542 (Tex. 2022) (per curiam).

7. See *Taylor v. Tolbert*, 644 S.W.3d 637 (Tex. 2022).

8. 645 S.W.3d 276 (Tex. 2022).

9. See Letter from Governor Greg Abbott to Comm'r of Dep't of Fam. and Prot. Serv. Jaime Masters, (Feb. 22, 2022) (<https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf>) [<https://perma.cc/96A5-VHNK>].

10. See *id.*

stated that this proposition is “now confirmed,” citing only a legal opinion contemporaneously issued by Texas Attorney General Ken Paxton.¹¹ The letter continued: “I hereby direct your agency to conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the State of Texas.”¹² The letter also recited the mandatory reporting requirements in the state’s child abuse law, which provide for criminal penalties for licensed professionals who deal with children who fail to report suspected child abuse.¹³

Paxton’s opinion letter purported to rely on existing provisions of the Texas Family Code to conclude that allowing one’s children to receive gender-affirming care is child abuse.¹⁴ Several investigations were launched based on the letter, including one against an employee of DFPS with a transgender child.¹⁵ This employee and her husband filed a lawsuit to stop investigations based solely on the parents’ decision to seek gender-affirming care for their children.¹⁶ The crux of the argument is that it would be an unconstitutional interference with parental rights to investigate or take any other actions based solely on the fact that a parent consented to the provision of gender-affirming care to a minor.¹⁷ The merits of the parents’ challenge have not yet been reached by any court—and probably will not be in this particular case because the Texas Legislature passed a new law during the 2023 session that bans all gender-affirming care for minors.¹⁸ That law will certainly be challenged and likely enjoined on constitutional grounds if the challenges to similar bans in other states are any guide.¹⁹ In the meantime, some of the actions called for by Governor Abbott have been blocked by an injunction in this case.²⁰

The lawsuit names three defendants: Greg Abbott, the DFPS Commissioner, and DFPS (the agency itself) and asks that they be enjoined from taking any actions to implement the directives of Abbott’s letter.²¹ The trial court issued a temporary injunction that restrains all three defendants from: (1) taking any action based on the Governor’s directive, the DFPS rule that followed, or Paxton’s opinion letter; (2) investigating reports anywhere in Texas:

11. *Id.*; see also Tex. Att’y Gen. Op. No. KP-0401 (2022).

12. Letter from Governor Greg Abbot, *supra* note 9.

13. *See id.*

14. *See* Tex. Att’y Gen. Op. No. KP-0401 (2022).

15. *See Doe v. Abbott*, ACLU <https://www.aclu.org/cases/doe-v-abbott> [<https://perma.cc/S67B-FNS4>].

16. *See id.*; see also *In re Abbott*, 645 S.W.3d 276, 279–80 (Tex. 2022).

17. *See In re Abbott*, 645 S.W.3d at 280–81.

18. *See* Tex. S.B. 14, 88th Leg., R.S. (2023).

19. *See Healthcare Laws and Policies: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (July 13, 2023), <https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf> [<https://perma.cc/K5ZB-S2X7>].

20. *Doe v. Abbott*, No. D-1-GN-22-000977, 2022 WL 831383, at *1 (353d Dist. Ct., Travis County, Tex. Mar. 11, 2022).

21. *See id.*

based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment; (3) prosecuting or referring for prosecution such reports;

and (4) requiring mandatory reporters to make reports based solely on the fact that a child is transgender or is seeking gender-affirming care.²² The defendants filed an interlocutory appeal, which automatically superseded the injunction, but it was reinstated by a Rule 29.3 temporary order issued by the court of appeals.²³ The defendants continued their quest, petitioning the Texas Supreme Court for a writ of mandamus to direct the court of appeals to vacate the Rule 29.3 order.²⁴

The Texas Supreme Court upheld the narrowest version of the preliminary injunction—which will prevent the plaintiffs from being investigated or hassled on the basis of their child’s transgender status or seeking of gender-affirming care until the case is resolved.²⁵ However, the supreme court granted mandamus relief on two points: (1) the injunction against the Governor must be lifted because “there is no allegation that he is taking, or has authority to take, the enforcement actions the order enjoins;” and (2) the injunction against nonparties throughout the state must be lifted because the court of appeals lacked authority under Rule 29.3 to reinstate such relief.²⁶ The majority began its short opinion with a series of “preliminary observations” about the allocation of power over the welfare of children.²⁷ First, in the supreme court’s view, the Governor does not have the authority “to bind state agencies with the instruction contained in the letter’s final sentence.”²⁸ Second, the Attorney General has no “formal legal authority to direct the investigatory decisions of DFPS” and cannot “alter the pre-existing legal obligations of state agencies or private citizens” through an opinion letter purporting to interpret the law.²⁹ Third, the child welfare system is organized such that while DFPS has preliminary authority to investigate allegations of child abuse or neglect.³⁰ Only courts can exercise “the ultimate authority to *interfere* with parents’ decisions about their children, decisions which enjoy some measure of constitutional protection whether the government agrees with them or not.”³¹

22. *See id.*; see also *In re Abbott*, 645 S.W.3d 276, 279–80 (Tex. 2022).

23. *See In re Abbott*, 645 S.W.3d at 280.

24. *See id.*

25. *See id.* at 283–84.

26. *Id.*

27. *Id.* at 282.

28. *Id.* at 281.

29. *Id.*

30. *See id.* at 281–82.

31. *Id.* (emphasis in original).

The supreme court then turned to the issue of the injunction more specifically.³² It held that Rule 29.3 authorizes courts of appeals to “make any temporary orders necessary to preserve the parties’ rights until disposition” of an interlocutory appeal.³³ The court of appeals is limited in what it can do through this mechanism. The supreme court held that the use of a Rule 29.3 order to issue a statewide injunction exceeded the scope of the rule.³⁴ However, the court of appeals was clearly within its power to enjoin DFPS from investigating or taking other action against the plaintiffs themselves.³⁵ The supreme court thus denied mandamus relief “insofar as it governs conduct among the parties while the appeal proceeds.”³⁶ The only exception to this order is that the injunction should not have applied to Governor Abbott since he does not have the power to take any of the challenged actions.³⁷ Additionally, although his letter put this whole situation in motion, the supreme court did not view it as a threat that he would personally seek to take any of the actions in his directive.³⁸ Although none of the justices considered the merits directly, Justice Lehrmann noted in a concurring opinion that, “in [his] view, a parent’s reliance on a professional medical doctor for medically accepted treatment simply would not amount to child abuse.”³⁹ This issue will undoubtedly end up before the supreme court once the challenges to the new law make their way there.

B. IN RE AYAD⁴⁰

In this case, the Texas Supreme Court examined whether a trial court was required to rule on the enforceability of a religious-based premarital agreement before compelling the parties to arbitration per its terms.⁴¹ Prior to their marriage in 2008, the parties signed two documents entitled the “Marriage Contract” and “Islamic Pre-Nuptial Agreement” (the Premarital Agreement), which together provide that arbitration under Islamic religious law will resolve all conflicts within the marriage.⁴² The Premarital Agreement specifically provided that “[a]ny conflict which may arise between the husband and the wife will be resolved according to the Qur’an, Sunnah, and Islamic Law in a Muslim court, or in [its] absence by a Fiqh Panel.”⁴³ Pursuant to the Premarital Agreement, members of a three-person Fiqh Panel are supposed to serve as “impartial arbitrators

32. *See id.* at 282–84.

33. *Id.* At 282.

34. *See id.* at 283.

35. *See id.*

36. *Id.*

37. *See id.*

38. *See id.*

39. *Id.* at 289 n.3 (Lehrmann, J., concurring).

40. 655 S.W.3d 285 (Tex. 2022) (per curiam).

41. *See id.* at 287.

42. *Id.* at 287.

43. *Id.*

and judges guided by Islamic law and [its] principles.”⁴⁴ The wife, Salma Ayad (Ayad), claimed she never read the Premarital Agreement. Instead, she believed she was just signing another copy of the Marriage Contract.⁴⁵ In 2020, when the parties began having marriage difficulties, Ayad claimed she saw the Premarital Agreement for the first time.⁴⁶

Ayad filed for divorce and after her husband, Ayad Latif (Latif), sought to enforce the Premarital Agreement, Ayad challenged it on multiple grounds, including that: (1) the term “Islamic Law” was too indefinite; (2) the Premarital Agreement was void against public policy; (3) Latif’s previous breaches of the Premarital Agreement excused Ayad from performance; and (4) the Premarital Agreement was unconscionable.⁴⁷

Without addressing the validity of the arbitration clause, the trial court stayed the proceeding, declined to hold a hearing on temporary orders, and referred the case to arbitration per the terms of the Premarital Agreement and the Texas General Arbitration Act.⁴⁸ The trial court stated that if an arbitration award was based on foreign law, it would review the award under Texas Rule of Civil Procedure 308b to determine whether the arbitration award violated public policy or either of the parties’ constitutional rights.⁴⁹ The trial court also believed that it had the ability to hold a hearing to determine whether the arbitration award was not in the best interest of the parties’ child.⁵⁰

This case raised the question of whether the trial court should have determined the validity of the Premarital Agreement before compelling the parties to arbitration.⁵¹ The supreme court concluded that the trial court was statutorily required to resolve Ayad’s challenges to the Premarital Agreement before referring the parties to arbitration to resolve the divorce and custody issues.⁵² It granted the petition for writ of mandamus without reviewing the merits of the challenges to the Premarital Agreement.⁵³

Notably, the Texas Family Code provides that a “trial court ‘may’ refer suits for dissolution of marriage and suits affecting the parent-child relationship to either binding or nonbinding arbitration based on the parties’ written agreement.”⁵⁴ However, as the supreme court explained in this case, the Texas Family Code modifies the ordinary rule that the arbitrator rules on challenges to the validity and enforceability of an agreement with an arbitration clause.⁵⁵ Texas Family Code §§ 6.6015(a) and 153.00715(a),

44. *Id.*

45. *See id.*

46. *See id.*

47. *Id.*

48. *See id.* at 288.

49. *See id.*

50. *Id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *Id.* (quoting TEX. FAM. CODE ANN. §§ 6.601(a), 153.0071(a)).

55. *See id.* at 289.

which govern dissolution of marriage and suits affecting parent-child relationships, provide that the trial court shall first try the validity and enforceability issues and then refer for arbitration if determines that the underlying agreement is valid and enforceable.⁵⁶

Of concern to the supreme court was that it was unclear whether Texas Rule 308b provided a post-arbitration method to review Ayad's challenges to the Premarital Agreement, particularly the argument that the arbitration clause itself is void against public policy.⁵⁷ The opinion explained: "In the divorce context, a post-arbitration proceeding is not an adequate substitute for this statutory pre-arbitration remedy, as illustrated by the trial court's refusal to hold a temporary orders hearing pending the completion of arbitration."⁵⁸

The supreme court held that trial courts should decide issues of validity and enforceability of premarital agreements containing arbitration clauses prior to ordering arbitration in divorce and suits affecting the parent-child relationship cases.⁵⁹ The alternative would be to delay resolution of child custody and support issues that should have been tried in a temporary orders hearing at the beginning of the proceeding.⁶⁰ The supreme court directed the trial court to withdraw its order referring the parties to arbitration and consider the validity of the agreement first.⁶¹

C. IN RE MARRIAGE OF WILLIAMS⁶²

The Texas Supreme Court decided one case relating to procedure in divorce cases.⁶³ In *In re Marriage of Williams*, Anthony Williams filed a petition for divorce; his wife, Theresa Williams, failed to file an answer.⁶⁴ Anthony was granted a default judgment of divorce that included a division of the marital estate.⁶⁵ Theresa filed a motion for new trial in which she contended that Anthony's lawyer lied to her and said the final hearing had not yet been scheduled even though it had.⁶⁶ In that motion, she did not complain that there was insufficient evidence to support the court's division of the marital estate.⁶⁷ At a hearing on the motion for a new trial, Theresa said she had been served but had not filed an answer because she expected the parties would reach a settlement.⁶⁸ Anthony's attorney testified that

56. *See id.*

57. *See id.* at 290.

58. *Id.*

59. *See id.*

60. *See id.* at 291.

61. *See id.*

62. 646 S.W.3d 542 (Tex. 2022) (per curiam).

63. *See id.* at 543.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See generally, id.* at 543–46.

68. *See In re Marriage of Williams*, No. 06-20-00095-CV, 2021 WL 1521978, at *1 (Tex. App.—Texarkana May 12, 2021, pet. denied)(explaining that "Theresa admitted that she had

he made no promises to her about notifying her of a final hearing date, and the court denied her motion for a new trial.⁶⁹ She then appealed, now arguing for the first time that there was insufficient evidence to support the court's division of the couple's assets.⁷⁰ She complained both that some property had been characterized as Anthony's separate property without evidence and that there was no evidence to support the conclusion that the division was "just and right."⁷¹ She did not complain specifically that the denial of her motion for a new trial was in error.⁷² The court of appeals held that "this omission results in a failure to preserve error of other claims raised on appeal, including whether the trial court erred in its property division" and affirmed the trial court's judgment.⁷³

Theresa then filed a petition for review in the Texas Supreme Court, arguing that she could challenge the legally sufficiency of the evidence to support a default judgment without satisfying the standard under *Craddock v. Sunshine Bus Lines, Inc.*⁷⁴ *Craddock* provides a means for a defendant to challenge a default judgment by showing that the failure to appear was the result of "accident or mistake," that the "motion for a new trial sets up a meritorious defense," and that granting the motion "will occasion no delay or otherwise injure the plaintiff."⁷⁵ The question is whether Theresa had to first file a motion for a new trial in which she established the *Craddock* factors and raised her sufficiency of the evidence challenge, or whether she could simply mount that challenge on appeal.⁷⁶ In a per curiam opinion, the supreme court sided with Theresa: "Because a *Craddock* motion for new trial and a sufficiency challenge are distinct, we conclude that the defendant was entitled to raise her sufficiency challenge without also satisfying *Craddock*."⁷⁷ According to the supreme court, a *Craddock* motion "does not attempt to show an error in judgment" but rather "seeks to excuse the defaulting party's failure to answer."⁷⁸ A challenge to the sufficiency of the evidence, in contrast, is a claim that the trial court made a legal error. The unique features of divorce cases were relevant here. Because the petitioner's allegations are not deemed admitted just because the defendant fails to appear, the court of appeals should have analyzed whether the petitioner presented sufficient evidence to support the allegations in the petition, regardless of whether the respondent responded

been served with citation . . . but failed to file an answer because she believed that she and Anthony could agree on the disposition of community assets").

69. *See id.*; *see also In re Marriage of Williams*, 646 S.W.3d 542, 543–44 (Tex. 2022) (per curiam).

70. *See In re Marriage of Williams*, 646 S.W.3d at 543–544.

71. *Id.* at 544.

72. *See id.*

73. *Id.*

74. *See id.*; *see also Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. [Comm'n Op.] 1939).

75. *In re Marriage of Williams*, 646 S.W.3d at 544.

76. *See id.*

77. *Id.* at 543.

78. *Id.* at 545.

or had a good excuse for failing to respond to the petition.⁷⁹ The supreme court specifically disapproved two courts of appeals' cases that suggested a contrary approach.⁸⁰ The case was remanded for consideration of the sufficiency of the evidence.⁸¹

D. TAYLOR V. TOLBERT⁸²

In this case, the Texas Supreme Court considered whether an attorney is immune from wiretap claims by a non-client under state and federal law.⁸³ This case also examined whether an exception existed for nonclients who argue that the attorney engaged in actions that are criminalized by the state and federal wiretap statute.⁸⁴ Pursuant to the Texas common law immunity defense, attorneys are generally immune from civil liability to nonclients for actions they took during their course of representation of a client.⁸⁵ However, an attorney is only immune if their conduct is the type attorneys engage in while performing their professional duties to a client.⁸⁶ Importantly, the analysis focuses on the “function and role the lawyer was performing, not the alleged wrongfulness, or even asserted criminality, of the lawyer’s conduct.”⁸⁷

The child in this case, N.B., logged into her aunt’s iPad with her mother Vivian’s email address and password to download an app. Afterwards, the aunt’s iPad began receiving text messages between Vivian and over thirty other people.⁸⁸ None of the people consented or had knowledge that their texts were being received in real time by a third party.⁸⁹ The aunt or her husband (the brother of the father of N.B.) mailed the iPad to Mark (the father of N.B.).⁹⁰ Mark provided the text messages and emails from the iPad to his attorney, Terisa, to use in the parties’ contentious modification suit.⁹¹

Vivian and several other people whose text messages were shared sued Terisa and others for violating the Texas and federal wiretap statutes, particularly for “using” and “disclosing” the communications, as opposed to “intercepting” them.⁹² Both statutes permit private persons to pursue civil redress for violations of these criminal statute.⁹³ Terisa filed for summary

79. *See id.*

80. *See id.* at 545–46 (citing *In re Jackson*, No. 10-17-00403-CV, 2018 WL 4925780, at *1 (Tex. App.—Waco Oct. 10, 2018, no pet.); *In re Ellis*, No. 13-07-0034-CV, 2008 WL 328025, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 7, 2008, pet. denied)).

81. *See id.* at 546.

82. 644 S.W.3d 637 (Tex. 2022).

83. *See id.* at 642.

84. *See id.* at 642.

85. *See id.*

86. *See id.*

87. *Id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *Id.* at 643–44.

93. *See id.* at 643.

judgment based on immunity as a matter of law because the plaintiffs' claims originated from her role as an attorney in the family law case.⁹⁴ The trial court granted summary judgment in favor of Terisa.⁹⁵ The court of appeals, in a split opinion, reversed and remanded.⁹⁶

The supreme court explained that whether counsel may invoke the attorney-immunity defense depends on the task performed, rather than whether the attorney's actions were "meritorious."⁹⁷ If an attorney is engaged in conduct that falls outside the scope of representation of a client, an action that is not a "lawyerly" duty, or conduct that is "entirely foreign to the duties of a lawyer," then the attorney-immunity defense does not apply under state law.⁹⁸ The opinion explained: "To prevent chilling an attorney's faithful discharge of this duty, lawyers must be able to pursue legal rights they deem necessary and proper for their clients without the menace of civil liability looming over them and influencing their actions."⁹⁹ The wrongfulness of an attorney's conduct, even if egregious and allegedly fraudulent, is not an exception to the attorney-immunity defense.¹⁰⁰

The supreme court held that Terisa's conduct was (1) within the scope of her representation of Mark; and (2) not foreign to her duties as an attorney.¹⁰¹ Terisa acted in a lawyerly capacity when she acquired materials from her client to provide legal services to him in the modification proceeding and when she made demands based on those materials.¹⁰² As such, the alleged wrongfulness of her actions does not prevent application of the attorney-immunity defense.¹⁰³ The supreme court held that, "when conduct is prohibited by statute, the attorney-immunity defense is neither categorically inapplicable nor automatically available, even if the defense might otherwise cover the conduct at issue. In such cases, whether an attorney may claim the privilege depends on the particular statute in question."¹⁰⁴

The supreme court further held that Terisa was only entitled to partial immunity on the civil claims against her that alleged she violated state and federal wiretap statutes by using and disclosing electronic communications that her client and others illegally intercepted.¹⁰⁵ The attorney was entitled to immunity on "the state claims because the Texas wiretap statute does not expressly, or by necessary implication, abrogate the immunity defense, and the attorney met her burden to establish its applicability to the conduct at issue."¹⁰⁶ However, the attorney was not entitled to immunity as to the

94. *See id.* at 644.

95. *See id.*

96. *See id.*

97. *Id.* at 647.

98. *Id.* at 646.

99. *Id.* at 647.

100. *See id.*

101. *See id.* at 648.

102. *See id.* at 649.

103. *See id.*

104. *Id.* at 642.

105. *See id.*

106. *Id.*

federal claims alleged against her based on federal authority and because the federal wiretap statute is not worded the same as the state statute.¹⁰⁷

The Texas wiretap statute does not abrogate or repudiate the attorney-immunity defense.¹⁰⁸ Of significance, the supreme court noted that, if Vivian had pleaded facts implicating Terisa in the interception of the text messages and emails (whether through advice or action), that conduct could fall outside the scope of the attorney-immunity defense.¹⁰⁹ Regarding the federal wiretap statute, the supreme court concluded that the Texas attorney-immunity defense is inapplicable because “a state’s common-law defenses [do] not apply to federal statutes.”¹¹⁰ State law may not modify federal law.¹¹¹ Moreover, Terisa was unable to identify a federal common-law defense that would apply.¹¹² The supreme court explained: “[F]ederal courts are nearly uniform in declining to adopt extra-statutory exceptions and refusing to apply state common-law defenses, such as the judicial-proceedings privilege and interspousal immunity.”¹¹³ The supreme court affirmed the judgment that the attorney-immunity defense did not apply to the federal wiretap claims but reversed and rendered judgment on the Texas wiretap claims.¹¹⁴

III. NOTABLE OPINIONS FROM THE COURTS OF APPEALS

The sheer volume of family law appeals makes it impossible to capture all of the developments in a coherent manner. In this section, we describe and analyze the rulings that we found most notable. We focus on opinions in the following areas: divorce procedure, marital property agreements, family violence, parentage, nonparent standing, and child support.

A. DIVORCE AND ANNULMENT

There are three legal ways to end a marriage: divorce, annulment, and death of one spouse.¹¹⁵ Texas courts heard cases this year about divorce and annulment, as well as several cases where a pending dissolution proceeding was interrupted by the death of one party.

1. *The Outsiders*

Unlike with divorce, there are circumstances in which a third party can petition to annul a marriage. For example, if a minor enters into a marriage

107. *See id.*

108. *See id.* at 649.

109. *See id.* at 653.

110. *Id.*

111. *See id.* at 656.

112. *See id.* at 653.

113. *Id.* at 655.

114. *See id.* at 642–43, 656–57.

115. *See In re Wilburn*, 18 S.W.3d 837, 840 (Tex. App.—Tyler 2000, pet. denied) (“In Texas, marriage may only be terminated by death or court decree.”).

even though the law does not permit people under eighteen to marry, the marriage can be annulled in a proceeding by the minor or by the minor's parent. In *Hawk v. Wallace*, the Fort Worth Court of Appeals had to decide whether a third party had standing to file a bill of review challenging the grant of annulment.¹¹⁶ Pamela Wallace and John King married in 1985.¹¹⁷ At some undetermined point, Wallace began to live with another man named Charles Quebe.¹¹⁸ When Quebe died, Quebe's daughter, Kari Hawk, filed an application for letters of administration of his estate.¹¹⁹ Wallace did the same, filing her own application and claiming that she was Quebe's common-law wife at the time of his death.¹²⁰ While these competing probate applications were pending, Wallace filed a petition to annul her marriage to King on grounds of fraud.¹²¹ King waived service and did not appear; Wallace was granted the annulment she sought.¹²² She introduced the annulment decree in the probate proceeding and that court made a finding that Wallace and Quebe were common-law spouses.¹²³

Quebe's daughter filed a petition for bill of review, asking the court to vacate the agreed decree of annulment.¹²⁴ She complained that she had not been notified of the annulment proceeding before it concluded and that the annulment had been procured by fraud.¹²⁵ She alleged standing based on the impact of the alleged marriage on her inheritance from her father's estate.¹²⁶

The trial court dismissed Hawk's petition because she did not have standing, but she appealed.¹²⁷ The court of appeals sided with Wallace (as it should have).¹²⁸ In order to maintain a bill of review, a proceeding to set aside a judgment that is no longer appealable, a party must "plead and prove (1) a meritorious defense to the underlying action; (2) that the plaintiff was prevented from making by the fraud, accident, or wrongful act of the opposing party; and (3) unmixed with any fault or negligence of [its] own."¹²⁹ However, the person bringing the bill of review must also have standing, often characterized as a "personal stake in the controversy."¹³⁰ For a bill of review, standing requires that the person "must have been a party to the prior judgment or have had a then-existing right or interest

116. See *Hawk v. Wallace*, No. 02-21-00044-CV, 2022 WL 60736, at *1 (Tex. App.—Fort. Worth Jan. 6, 2022, no pet.) (mem. op.).

117. *Id.* at *1.

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.* at *2.

128. *See id.* at *3.

129. *Id.*

130. *Id.* at *2.

that was prejudiced by the prior judgment.”¹³¹ Hawk makes the convoluted argument that she had a “then-existing right or interest” prejudiced by the annulment because she and her brother would have been Quebe’s sole heirs at the time of his death but for his common-law marriage to Wallace.¹³² However, as the court of appeals concluded, her entitlement to a particular share of her father’s estate is not something that “will be actually determined” by the bill of review proceeding.¹³³ The probate court relied on the annulment decree in assessing the claim that Wallace and Quebe were in a common-law marriage, but the existence of that marriage required an additional set of findings.¹³⁴ Moreover, the court where she filed the bill of review had nothing to do with those proceedings.¹³⁵ Hawk “has no rights or interest concerning the Wallace-King marriage” and “has no personal stake in the annulment proceeding,” so she lacks standing to pursue her bill of review.¹³⁶

2. *Give Me Liberty or Give Me Death*

There were several cases this year in which one party to a dissolution proceeding died before it was finalized. In *Bizzle v. Baker*,¹³⁷ Eve Baker filed a petition to divorce her spouse of twenty years, Terry Bizzle, on grounds of insupportability, cruel treatment, and abandonment.¹³⁸ He counterpetitioned for divorce, alleging insupportability, cruel treatment, and adultery.¹³⁹ A little less than a year after the initial petition was filed, there was a bench trial on the divorce.¹⁴⁰ At the conclusion of the day’s proceedings on September 17, 2019, there was a colloquy between the court and the attorneys focused primarily on property valuation and division issues.¹⁴¹ The court told the parties that it would not be able to resolve all the issues in court that day but said that it would e-mail the parties a decision in a week or two.¹⁴² However, before the parties left for the day, the court made the following statement on the record: “All right. The parties are divorced. I pronounce and render all of that as of today and that entry of the final decree of divorce will be ministerial in nature.”¹⁴³ A few weeks later, on October 4, 2019, the court e-mailed the parties a more detailed ruling with ten specific sub-parts such as the “wife’s \$12,500.00

131. *Id.* at *3.

132. *Id.*

133. *Id.*

134. *See id.* at *1.

135. *See id.*

136. *Id.* at *3.

137. No. 02-20-00075-CV, 2022 WL 123216 (Tex. App.—Fort Worth Jan. 13, 2022, pet. denied) (mem. op.).

138. *See id.* at *1.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *Id.*

school loan is community debt; awarded to W.”¹⁴⁴ The e-mail also directed “Mr. Nelson to prepare the decree” and invited the parties to let him know if he had “missed” anything in his list.¹⁴⁵ The court did not file the e-mail with the clerk.¹⁴⁶ Five weeks after this e-mail, the court sent the parties another e-mail indicating its intent to set the case for a dismissal hearing because a decree had not been submitted.¹⁴⁷ A hearing was scheduled for December 13, 2019.¹⁴⁸ However, on December 3, the court sent another e-mail cancelling that setting and rescheduling for January 24, 2020; this information came with a stern warning from the court that the parties should “use the six weeks to work out whatever is holding up entry of the Order” and promised a “high probability that the case will be dismissed” if a proposed decree was not on file at that point.¹⁴⁹

On December 19, 2019, Baker passed away.¹⁵⁰ Baker’s lawyer filed a motion to sign, while Bizzle filed a notice of death, motion to abate, and motion to dismiss.¹⁵¹ The January 24, 2020 hearing took place as scheduled but revolved around whether the court still had jurisdiction over the case after Baker’s death.¹⁵² The court sided with Baker’s lawyer and signed a final decree of divorce from which Bizzle appealed.¹⁵³

Texas law is clear that an action for divorce “abates on either party’s death prior to the rendition of judgment on the merits.”¹⁵⁴ The question here is whether the court had made a full and final adjudication of the issues in the case before Baker passed away.¹⁵⁵ A written judgment is not essential for finality. Were the oral statements in court either alone or in conjunction with the e-mails to the parties “legally sufficient to constitute a full and final rendition of judgment in the case”?¹⁵⁶ The court made clear that the parties were “divorced” by the oral ruling but also made clear that he would have to take the property valuation and division issues under advisement.¹⁵⁷ Thus, the Court of Appeals for the Second District of Texas at Fort Worth concluded that “many issues essential to the divorce judgment were unresolved on September 17, 2019,” which means the court had not rendered a “full and complete judgment at that time.”¹⁵⁸ However, did the October 4, 2019 e-mail transform the interlocutory oral ruling into a final judgment? Judgment “is rendered when the trial court officially

144. *Id.* at *1–2.

145. *Id.* at *2.

146. *See id.*

147. *See id.*

148. *See id.*

149. *Id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *Id.* at *3.

155. *See id.*

156. *Id.*

157. *See id.* at *3–4.

158. *Id.* at *4.

announces its decision in open court or by written memorandum filed with the clerk.”¹⁵⁹ Here, however, the oral ruling did not include the grounds for divorce or the division of property, and the e-mail “ruling” was never filed with the clerk.¹⁶⁰ Thus, even taken together, the oral statements and e-mail do not meet the standard for a final judgment.¹⁶¹

The court ultimately agreed with Bizzle’s claim that the October 4, 2019 e-mail “is not a full and complete judgment that reflects a present intent to render judgment.”¹⁶² For the court of appeals, the key facts were (1) that the e-mail was brief (less than a page) and invited the parties to provide feedback about issues that “remained unaddressed”; and (2) that the e-mail was never filed with the clerk, thus not signifying that the ruling was final.¹⁶³ Moreover, the court of appeals expressed concern about the final decree signed by the trial court after Baker’s death.¹⁶⁴ It stated with respect to several individual property rulings that “the parties agree,” even though there was no evidence in the record to demonstrate their agreement and Baker’s lawyer told the court that his client died before she had a chance to review his marked-up version of Bizzle’s proposed decree.¹⁶⁵ The decree even included a statement that the parties had both had the opportunity to read and review the final decree and had “voluntarily affixed their signatures” to it as an indication of their assent.¹⁶⁶ Baker, of course, was dead at this point, and Bizzle had also not signed the decree.¹⁶⁷ The court of appeals thus concluded that the divorce was not finalized before Baker died and therefore was terminated by her death.¹⁶⁸ Bizzle was a widower—not a divorcée—and not responsible for sharing the marital assets with anyone.¹⁶⁹

The Court of Appeals for the Second District of Texas at Fort Worth considered a similar issue in *Hearn v. Hearn*,¹⁷⁰ where the husband died before a divorce decree was entered.¹⁷¹ Although the parties’ relationship was not straightforward—they were married from 1993 to 2000 and then married again in 2018—the legal issue was straightforward.¹⁷² Patricia filed for their second divorce on May 29, 2020, and requested that the court divide the community estate.¹⁷³ David filed an answer, but nothing else

159. S&A Rest. Corp. v. Leal, 892 S.W.2d 855, 857 (Tex. 1995) (per curiam).

160. See *Bizzle*, 2022 WL 123216, at *7.

161. See *id.*

162. *Id.* at *6.

163. *Id.* at *6–7.

164. See *id.*

165. *Id.* at *7.

166. *Id.*

167. See *id.*

168. See *id.*

169. See *id.* at *7–8.

170. See No. 02-21-00367-CV, 2022 WL 714699, at *1 (Tex. App.—Fort Worth Mar. 10, 2022, pet. denied) (mem. op.).

171. See *id.*

172. See *id.*

173. See *id.*

happened in the case until David's counsel filed a suggestion of death on March 3, 2021.¹⁷⁴ David, apparently, had passed away in January 2021.¹⁷⁵ Patricia sought the issuance of a scire facias to require his heirs—his son and daughter from a previous marriage—to defend the divorce on his behalf.¹⁷⁶ A trial was set, but the court immediately raised the issue whether it had the “capacity to proceed” given that the divorce action was personal to David and abated on his death.¹⁷⁷ Patricia argued that because there is no statute specifically barring community property division after the death of one spouse, the court was guided only by “tradition.”¹⁷⁸ The court of appeals was not convinced: “If by tradition Patricia means binding case law, she is correct.”¹⁷⁹ The court cited *Bizzle*, which it had decided only a few months earlier, but which relied on several prior cases for the proposition that a divorce action is abated by the death of either party before the rendition of judgment on the merits.¹⁸⁰ Here, the court of appeals ruled that this “abatement extends to any property rights of the parties.”¹⁸¹ The trial court thus “did not err by finding that it had no subject-matter jurisdiction over Patricia’s petition for divorce.”¹⁸²

Divorce is a unique proceeding in many ways. Unlike in other civil cases, a defendant’s failure is not taken as an admission of the allegations in the petition.¹⁸³ This is a leftover relic of fault-based divorce and the notion that divorce was a remedy granted by the state to an innocent spouse victimized by one of the enumerated types of marital fault rather than simply a dispute between two private parties.¹⁸⁴ Only a petitioner who proved she deserved a divorce could obtain one.¹⁸⁵ However, that rule persists in Texas, even though a divorce can be granted based on “insupportability,” which is just an odd way of saying the marriage has failed.¹⁸⁶ When the respondent in a divorce case does not answer or make an appearance, the petitioner must offer proof to support the entitlement to the requested relief.¹⁸⁷ In

174. *See id.*

175. *See id.*

176. *See id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (citing *Bizzle v. Baker*, No. 02-20-00075-CV, 2022 WL 123216 (Tex. App.—Fort Worth Jan. 13, 2022, pet. denied) (mem. op.)).

181. *Id.*

182. *Id.*

183. *See* TEX. FAM. CODE ANN. § 6.701.

184. *See* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 5 (Princeton University Press 2014).

185. *See id.* at 5–6.

186. *See* *Sheffield v. Sheffield*, 3 Tex. 79 (1848)(explaining “divorce . . . may be obtained where either the husband or wife is guilty of excesses, cruel treatment or outrages towards the other, if such ill treatment is of such a nature as to render their being together insupportable”); *see also* Tex. Fam. Code Ann. § 6.001.

187. 122C

Short v. Short, Jacqueline Short filed for divorce after twenty-five years.¹⁸⁸ Claude, her spouse, was served but did not answer.¹⁸⁹ The trial court held a hearing on the divorce but did not make a record.¹⁹⁰ In the final divorce decree, there was an interlineation to strike that the “record of testimony was duly reported” and replaced with the “record of testimony was waived by the parties with the consent of the District Court.”¹⁹¹ In addition to granting the divorce, the decree awarded Jacqueline more than half of the community property.¹⁹² Claude filed a restricted appeal, alleging that the court erred in the distribution of property in a way that was “apparent on the face of the record,” which is the standard required for this type of appeal.¹⁹³ He argued that there was nothing in the record to support the distribution of property.¹⁹⁴ In her petition, Jacqueline requested that the court divide property in a manner that was “just and right, as provided by law;” the decree recited that the court found the division it ordered to be “just and right.”¹⁹⁵ What was the support for that conclusion? The family code requires that the trial court order a division of property that it deems “just and right, having due regard for the rights of each party and any children of the marriage.”¹⁹⁶ Each spouse, according to the Court of Appeals for the Fifth District of Texas at Dallas in *Short*, “has the burden to present sufficient evidence of the value of the community estate to enable the trial court to make a just and right division,” and while the “division of a community estate need not be equal,” there must be “a reasonable basis for the division.”¹⁹⁷ The problem here is that while a hearing was held, no record of testimony was made.¹⁹⁸ The decree stated that the making of a record was waived “by the parties,” but Claude was not present at the hearing (nor did he waive it at some other point).¹⁹⁹ Even though Claude defaulted, Jacqueline still had to offer evidence and prove her case.²⁰⁰ As noted by the court of appeals: “If the plaintiff offers evidence in the absence of the defendant or her attorney, the failure to have the court reporter present to make a record constitutes reversible error.”²⁰¹ Additionally, the “error is not harmless because, without a reporter’s record, the reviewing court is unable to determine if sufficient evidence was submitted to support

188. See *Short v. Short*, No. 05-21-00095-CV, 2022 WL 405821, at *1 (Tex. App.—Dallas Feb. 10, 2022, no pet.) (mem. op.).

189. See *id.*

190. See *id.*

191. *Id.*

192. See *id.*

193. *Id.*

194. See *id.*

195. *Id.*

196. TEX. FAM. CODE ANN. § 7.00.

197. *Short*, 2022 WL 405821, at *2 (citing *Fuentes v. Zaragoza*, 555 S.W.3d 141, 162 (Tex. App.—Houston [1st Dist.] 2018, no pet.)).

198. See *id.*

199. *Id.*

200. See *id.*

201. *Id.*

the judgment.”²⁰² Jacqueline did file a prove-up affidavit, and the parties disagreed about whether this was properly made part of the record on appeal.²⁰³ However, the court said it wouldn’t change the result; it deemed the affidavit insufficient evidence as it, like the petition and the decree itself, simply recited that the division of property was fair without giving any reasons to support the unequal distribution of the marital estate.²⁰⁴ This case is a cautionary tale given the number of divorces that are finalized as default judgments. The petitioner and the court need to take care to ensure the presence and proper memorialization of sufficient evidence to support the decree.

One of the factors that can support an unequal division of the marital estate is the conduct of one spouse in a fault-based divorce. In *In re Mena*, the trial court granted a divorce to the Dalia Fernandez on grounds of cruel treatment, which she had alleged in a counterpetition after her husband, Jose Mena, filed for a divorce on grounds of insupportability.²⁰⁵ The court also awarded Fernandez a disproportionate share of the community assets because of Mena’s fault and gave her the exclusive right to determine their child’s primary residence.²⁰⁶ Mena appealed the court’s ruling, challenging the finding of cruel treatment, the property division, and the custody determination.²⁰⁷ The Court of Appeals for the Sixth District of Texas at Texarkana, however, sided with Fernandez on all three issues and upheld the trial court’s ruling in full.²⁰⁸

Under § 7.001 of the Texas Family Code, the court must divide the marital estate in a manner that is “just and right.”²⁰⁹ Property determinations are reversible on appeal only if the court abused its discretion “by a division or an order that is manifestly unjust and unfair.”²¹⁰ The code does not provide a list of factors relevant to the division of property, but the Supreme Court of Texas provided an expansive list in *Murff v. Murff*, including “fault in the breakup of the marriage.”²¹¹ Thus, as long as the trial court was within its discretion in finding Mena guilty of cruel treatment, it was within its power to give Fernandez a greater share of the marital estate.²¹²

The trial court’s finding of cruelty was based on evidence of a longstanding pattern of domestic abuse, which included physical assault (including while she was pregnant), threats, and restrictions on her freedom

202. *Id.*

203. *See id.*

204. *See id.* at *2 n.1.

205. No. 06-21-00088-CV, 2022 WL 3907926, at *1 (Tex. App. — Texarkana Aug. 31, 2022, no pet.) (mem. op.).

206. *See id.*

207. *See id.*

208. *See id.*

209. TEX. FAM. CODE ANN. § 7.00.

210. *In re Mena*, 2022 WL 3907926, at *1 (citing *Willis v. Willis*, 533 S.W.3d 547, 551 (Tex. App. — Houston [14th Dist.] 2017, no pet.)).

211. 615 S.W.2d 696, 698–99 (Tex. 1981).

212. *See generally In re Mena*, 2022 WL 3907926, at *4–5.

of movement.²¹³ After a careful review of the evidence, the court of appeals concluded that a reasonable trier of fact could have concluded that Mena's conduct rose to the level of cruel treatment that "rendered the parties' living together insupportable," as required under the relevant statute.²¹⁴ The trial court awarded her more than half of the community assets based on the finding of cruelty, but also because of the difference in the parties' earning capacity.²¹⁵ Mena was a police officer while Fernandez came to the United States from Mexico on a student visa and had struggled to learn English well enough to pursue a career of her choosing.²¹⁶ The trial court did not abuse its discretion with its division of property.²¹⁷ Nor did it do so by awarding Fernandez the exclusive right to determine the primary residence of the couple's eight-year-old daughter.²¹⁸ Although the child had lived with Mena since the separation, and he was meaningfully involved in her care, the court was obligated to consider the history of domestic violence and within its discretion to give Fernandez control over the child's residence.²¹⁹

B. INFORMAL MARRIAGE

Texas is one of only ten states that continues to allow common-law marriage (called "informal marriage" in Texas).²²⁰ This type of marriage differs from a ceremonial marriage only in the way it is formed.²²¹ Rather than a license and solemnization, an informal marriage is created when the parties agree to be married, cohabit together in Texas, and represent to other that they are married.²²² In *Lane v. McCormick*,²²³ Edward Lane filed a petition for divorce, but the respondent, James McCormick, responded by asking for a declaration that they were not married.²²⁴ A jury found that there was no marriage.²²⁵ The two men had lived together in Houston for nineteen years but never participated in a formal marriage nor filed a declaration of informal marriage.²²⁶ In most states, there is no statutory provision on common-law marriage; it was a doctrine developed

213. *See id.* at *4.

214. *See id.* at *4; *see also* TEX. FAM. CODE ANN. § 6.002.

215. *In re Mena*, 2022 WL 3907926, at *4.

216. *See id.* at *2.

217. *See id.* at *5.

218. *See id.*

219. *See id.* at *6; *see* TEX. FAM. CODE § 153.004(a).

220. *See* Molshree A. Sharma, *New Beginnings the Legal Implications of Remarriage Versus Cohabitation*, FAM. ADVOC. 25, 26 (2023).

221. *See id.*

222. *See* TEX. FAM. CODE § 2.401(a)(2).

223. No. 14-19-00624-CV, 2022 WL 777281 (Tex. App.—Houston [14th Dist.] Mar. 15, 2022, no pet.) (mem. op.).

224. *See id.* at *1.

225. *See id.*

226. *See id.*

and shaped by the courts alone.²²⁷ In Texas, however, informal marriage is codified.²²⁸ The code permits parties to an informal marriage to sign and file a declaration of informal marriage, which operates as prima facie evidence that the marriage exists.²²⁹ A party can still prove the existence of an informal marriage without a declaration, but it is more difficult.²³⁰

In this case, the jury concluded that the parties had never agreed to be married.²³¹ Lane had presented a variety of evidence to support his claim of informal marriage: the couple had signed domestic partnership affidavits stating that they lived together in a “spouse-like” relationship; handwritten letters from McCormick, which referred to the two as “Husbears”; lengthy cohabitation; McCormick gave Lane a ring similar to McCormick’s wedding band from a previous marriage; designation of one another as fiduciaries in estate and healthcare planning documents; and McCormick’s creation of a trust for the benefit of Lane.²³² On the other side of the scale, McCormick testified that he never considered Lane his husband and that they had “never married;” they listed themselves as single on tax returns, including those after the U.S. Supreme Court legalized same-sex marriage nationwide with its decision in *Obergefell v. Hodges*;²³³ and that Lane had repeatedly suggested the couple marry after *Obergefell*, but McCormick declined each time.²³⁴ The question for the jury was not whether the couple were in a committed relationship or whether they loved each other, but whether their relationship was *marital*.²³⁵ The evidence on this point was conflicting, but the Court of Appeals for the Fourteenth District of Texas at Houston concluded that the jury’s finding of no marriage was not “so against the great weight and preponderance of the evidence . . . for this court to disturb the jury’s determination.”²³⁶ The court of appeals did not consider the jury’s finding on the remaining two elements since the lack of an agreement to marry was fatal to the claim of informal marriage.²³⁷

A second informal marriage case, also involving two men, began the same way as *Lane*. In *Villa v. Gebetsberger*,²³⁸ Anthony Villa filed for divorce, and Greg Gebetsberger denied the existence of an informal marriage.²³⁹

227. See Kelsey Henderson, Rachel Keirstead, Amanda Maze-Schultz, Suzie McKelvey, Lettie Rose & Melissa Zubizarreta, *Marriage & Divorce*, 23 GEO. J. GENDER & L. 361, 374 n.114 (2022).

228. See TEX. FAM. CODE § 2.404(d).

229. See *id.*

230. Compare *id.* § 2.401(a)(1) with *id.* § 2.401(a)(2).

231. *Lane*, 2022 WL 777281, at *1.

232. See *id.* at *2.

233. 576 U.S. 644, 681 (2015).

234. *Lane*, 2022 WL 777281, *2.

235. See *id.*

236. *Id.*

237. See *id.* at *3.

238. No. 01-21-00529-CV, 2022 WL 3649368 (Tex. App.—Houston [1st Dist.] Aug. 25, 2022, no pet.) (mem. op.).

239. See *id.* at *1.

The couple lived together for just under a decade.²⁴⁰ Gebetsberger offered fourteen affidavits from himself and friends in support of his claim that no informal marriage existed.²⁴¹ Among other pieces of evidence, the affidavits showed that he had consistently filed federal income tax returns as a single person, that he wrote a will stating that he was single, and that he shared on Facebook that the two men had “no marriage plans.”²⁴² Villa had responded to discovery requests with statements like “[w]e talked about being married and then agreed to be married,” but did not include any specific evidence that the elements of informal marriage were satisfied.²⁴³ Gebetsberger filed for both traditional and no-evidence summary judgment, and Villa did not file a response.²⁴⁴ The trial court granted summary judgment for Gebetsberger and dismissed Villa’s divorce petition with prejudice.²⁴⁵

The trial court did not state whether it was granting the traditional portion of the summary judgment motion, the no-evidence portion, or both.²⁴⁶ Villa argued on appeal that the court had only granted the traditional motion because the court considered Gebetsberger’s evidence and affidavits.²⁴⁷ However, since Gebetsberger filed a facially valid no-evidence summary judgment motion, the burden shifted to Villa to point out a factual issue regarding one of the required elements of the claim.²⁴⁸ Since Villa did not file any response at all, the court was required to grant the motion, and the Court of Appeals for the First District of Texas at Houston affirmed the ruling.²⁴⁹ Moreover, the court of appeals found that it was also proper to grant the traditional summary judgment motion because the evidence established that, although the two men “were in a long-term, committed relationship,” they never “referred to themselves as married.”²⁵⁰ Representing themselves to others as a married couple is an essential element of informal marriage under Texas law.²⁵¹ If Villa had evidence to the contrary, he failed to get it before the court.

C. MARITAL PROPERTY

The courts of appeals considered a few interesting cases involving the characterization of marital property and a trial court’s power to enforce property division post-dissolution. One particularly fascinating case

240. *See id.*

241. *See id.*

242. *Id.* at *1.

243. *Id.*

244. *See id.* at *2.

245. *See id.*

246. *See id.*

247. *See id.* at *5.

248. *See id.* at *3 (explaining that “a proper no-evidence summary judgment motion shifts the burden to the nonmovant to present evidence raising a genuine issue of material fact on each element challenged in the motion”).

249. *See id.* at *5; TEX. R. CIV. P. 166a(i).

250. *Villa*, 2022 WL 3649368, at *6.

251. *See* TEX. FAM. CODE ANN. 2.401(a)(2).

involved the characterization of a retired astronaut's Apollo-era artifacts from his space travel.²⁵² Another case involved a martial mansion that was destroyed by a tornado shortly after the parties' divorce was finalized.²⁵³ A third case involved a trial court's power to enforce an offer by a party in open court to sell his separate property land along with his wife's separate property mobile home.²⁵⁴

1. *Moon Rocks*

In a probate proceeding *Bean v. Bean*, the court considered the marital property characterization of an astronaut's space artifacts where Congress did not recognize his right to own artifacts from his space missions until after he married his second wife.²⁵⁵ The decedent husband, Alan, possessed artifacts he obtained from space during his participation in Apollo-era space programs prior to his marriage to Leslie, his second wife. Alan was a NASA astronaut from the 1960s to the 1970s and was a member of the Apollo 12 crew.²⁵⁶ Notably, Alan was the fourth man to walk on the Moon and served as the Commander of NASA's Skylab III mission.²⁵⁷ Alan acquired many artifacts from his time as a NASA astronaut and several items he obtained during his two missions to space.²⁵⁸

Of relevance, when Alan divorced his first wife, the parties entered into a settlement agreement, which divided the community property and designated the parties' separate property.²⁵⁹ Alan was awarded the following as his separate property: "[a]ll space pictures, mementos, awards," "[his] desk and contents, chair and lamp. All books, awards, artifacts, etc. [in his study]," "[one-half] of all space flown Apollo and Skylab flags and medallions," and "N.A.S.A. documents" in his son's bedroom.²⁶⁰

In 1982, after he retired from NASA, Alan married his second wife, Leslie.²⁶¹ Prior to their marriage, on July 15, 1982, the parties entered into a premarital agreement.²⁶² The premarital agreement permitted the parties to "continue to own and to manage his or her separate property," which included property owned prior to marriage consistent with long-standing Texas law.²⁶³ The premarital agreement provided a three-page list of Alan's separate property, which included "[a]ll space related photographs, models, mementos, awards, coins, stamps, souvenirs [sic], jewelry except for one

252. See *Bean v. Bean*, 658 S.W.3d 401, 405 (Tex. App.—Dallas 2022, pet. denied).

253. See *Byrnes v. Byrnes*, No. 05-21-00338-CV, 2022 WL 2437531, at *1–2 (Tex. App.—Dallas July 5, 2022, no pet.) (mem. op.)

254. See *Dyer v. Dyer*, No. 11-20-00212-CV, 2022 WL 2720494, at *1 (Tex. App.—Eastland July 14, 2022, no pet.) (mem. op.).

255. *Bean*, 658 S.W.3d at 405.

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.* at 406.

260. *Id.*

261. See *id.*

262. See *id.*

263. *Id.*

Apollo 12 silver medallion,” “[a]ll flags, jewelry, medallions, and other items that were taken by [him] on space flights,” and “[a]ll contents” of Alan’s carved desk.”²⁶⁴

In 2007, Alan signed his last will and testament (the Will), which incorporated both the settlement agreement from his first marriage and the premarital agreement from his second marriage.²⁶⁵ It contained extremely detailed instructions, including how to only loan items to the Air and Space Museum (i.e., not to “give” the museum items) and how to trace and prove whether Alan had given away any of his personal property between the time he executed his Will and his death.²⁶⁶ The Will also updated the status of the items he listed in the premarital agreement and confirmed they were still in his possession.²⁶⁷ In 2012, the U.S. Congress confirmed “full ownership” and “title” in space artifacts for certain U.S. astronauts when it enacted H.R. 4158.²⁶⁸

On May 26, 2018, Alan passed away.²⁶⁹ Amy and Leslie were appointed co-executors pursuant to the terms of the Will.²⁷⁰ As permitted by the Will, a third co-executor was appointed as a tiebreaker.²⁷¹ The tiebreaker determined that “title to space artifacts in Alan’s possession had not been vested in Alan prior to the date of House Bill 4158 and therefore constituted community property at his death.”²⁷²

Amy filed a petition for a declaratory judgment because she believed the tiebreaker’s decision was beyond the scope of his administrative role and was counter to Alan’s intent as stated in his Will, the law, the premarital agreement, and a form previously filed by Leslie.²⁷³ In contrast, Leslie argued that the tiebreaker’s decision was final and the thirty-nine space artifacts in question were presumed community property because the items were not “owned” by Alan prior to his marriage to Leslie or, likewise, were not “acquired” by him by “gift, devise or descent.”²⁷⁴

The probate court granted Amy’s motion for summary judgment, determining that the thirty-nine space artifacts were Alan’s separate property.²⁷⁵ On appeal, Leslie argued that NASA owned the thirty-nine items in 1982, and that Alan did not acquire title to the artifacts until 2012 when H.R. 4158 was enacted.²⁷⁶ The Court of Appeals for the Fifth District

264. *Id.* at 407.

265. *See id.*

266. *See id.* at 408.

267. *See id.* at 407.

268. *Id.* at 405; *see also* Owners and Ownership—Artifacts of Astronauts, H.R. 4158, 112th Cong. (2012) (“An Act To confirm full ownership rights for certain United States astronauts to artifacts from the astronauts’ space missions.”).

269. *See Bean*, 658 S.W.3d at 409.

270. *See id.*

271. *See id.* at 408–09.

272. *Id.* at 409.

273. *See id.*

274. *Id.* at 410.

275. *See id.*

276. *See id.* at 411.

of Texas at Dallas affirmed the decision of the trial court, determining the thirty-nine items were indeed Alan's separate property.²⁷⁷ Notably, the court of appeals reviewed the definition of separate property, focusing on part of the definition that is often overlooked.²⁷⁸ Pursuant to the Texas Family Code, a spouse's separate property includes "the property owned *or claimed* by the spouse before marriage"²⁷⁹ Likewise, the Texas Constitution provides that "[a]ll property, both real and personal, of a spouse owned *or claimed* before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse"²⁸⁰ The court of appeals determined that the record conclusively showed that Alan "claimed" the artifacts as his separate property prior to his marriage to Leslie, meeting the Texas definition of separate property.²⁸¹

Examining the plain language, legislative history, and extensive commentary, the court of appeals determined that H.R. 4158 (the Act) did not provide astronauts with new ownership rights.²⁸² Instead, the Act "confirmed" that the astronauts owned and had clear title to artifacts in their possession.²⁸³ Examination of some of the commentary regarding the Act "can also be reasonably construed as *giving* the space artifacts to the astronauts as either gifts or compensation" for their heroism.²⁸⁴ Gifts received by a spouse during their marriage are that spouse's separate property pursuant to the Texas Family Code and the Texas Constitution.²⁸⁵ Likewise, any payment received during marriage for services performed prior to marriage is separate property.²⁸⁶ Also persuasive to the court of appeals was the fact that Leslie agreed the artifacts were Alan's separate property when she signed the premarital agreement.²⁸⁷

The fact that a party does not have the right to enforce a right to property is not relevant in determining characterization of property.²⁸⁸ To establish separate property, a party need only show that, prior to marriage, they had a right to claim the property, later pursued that right, and the right ripened at some point.²⁸⁹ A party's right to claim property as their separate property is not required to vest prior to marriage.²⁹⁰

277. *See id.* at 420.

278. *See id.* at 415.

279. *Id.* at 412 (emphasis added); *see also* TEX. FAM. CODE ANN. § 3.001(a) (explaining that separate property includes "property acquired by the spouse during marriage by gift, devise, or descent."); Tex. Const. art. XVI, § 15 (explaining that separate property includes property acquired after marriage by gift).

280. Tex. Const. art. XVI, § 15 (emphasis added).

281. *Bean*, 658 S.W.3d at 412.

282. *See id.* at 414–15.

283. *Id.* at 413.

284. *Id.* at 415 (emphasis added).

285. *See id.*; *see also* TEX. FAM. CODE ANN. § 3.001(2).

286. *See Bean*, 658 S.W.3d at 415.

287. *See id.* at 412.

288. *See id.* at 416.

289. *See id.* (citing *Smith v. Smith*, 22 S.W.3d 140, 144–45 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

290. *See id.*

Finally, regarding the question of whether a tiebreaker's decision is binding, the court of appeals concluded that a provision in a will making a decision by an executor on disputed issues binding is typically final and binding on all interested parties.²⁹¹ However, "a gross departure from the testator's intent cannot be considered an honest endeavor by the executor to determine that intent."²⁹² The court of appeals determined the tiebreaker's decision was indeed a gross departure from Alan's expressed intent that the artifacts be characterized as separate property to be considered an honest endeavor.²⁹³ The court of appeals also determined that the tiebreaker had a slight bias toward protecting Leslie based off of comments he testified to in an affidavit.²⁹⁴ The probate court properly disregarded the tiebreaker's decision.²⁹⁵ The tiebreaker was not an attorney and was only charged with breaking ties regarding issues related to the administration of the estate, not determining legal issues.²⁹⁶

2. Acts of God

In *Byrnes v. Byrnes*, the court considered whether a suit to divide undivided property following a divorce, i.e., insurance proceeds related to a marital home that was destroyed by a tornado, may be heard in family court if the property is not community property.²⁹⁷ In March 2019, the parties divorced.²⁹⁸ The decree provided that the wife, Glenda, was awarded as her separate property 75% of the net proceeds from the sale of the marital home exceeding four million dollars and the husband, Howard, was awarded 25% of the proceeds as separate property up to four million dollars and both parties were to receive 50% of the amount exceeding four million dollars (subject to the provisions regarding the sale of the marital home).²⁹⁹ In October 2019, the marital home was destroyed by a tornado several months after the decree was entered.³⁰⁰ The insurance company "declared the property a total loss" and issued payment to Glenda and Howard.³⁰¹

In January 2020, Glenda filed a petition for clarification of the final decree and/or request to divide omitted property requesting the family court determine who was entitled to the proceeds.³⁰² In the alternative, she requested the court make an award of property pursuant to Texas Family Code § 9.201.³⁰³ Thereafter, Howard filed a separate action in another

291. *See id.* at 419.

292. *Id.*; *see also* Pray v. Belt, 26 U.S. 670, 680 (1828).

293. *See Bean*, 658 S.W.3d at 419.

294. *See id.*

295. *See id.*

296. *See id.*

297. *See Byrnes v. Byrnes*, No. 05-21-00338-CV, 2022 WL 2437531, at *1–2 (Tex. App.—Dallas July 5, 2022, no pet.) (mem. op.).

298. *See id.* at *1.

299. *See id.*

300. *See id.*

301. *Id.*

302. *See id.* at *2.

303. *See id.*

district court seeking a declaratory judgment that the insurance proceeds were owned by Glenda and Howard in equal shares and that the insurance policy is not community property.³⁰⁴ Glenda moved to dismiss the case for lack of jurisdiction or, in the alternative, to transfer the case to the family court where she filed her petition.³⁰⁵

Howard argued that the family court was without jurisdiction over his petition for declaratory judgment, the insurance contract, and the insurance proceeds.³⁰⁶ He argued the family court's plenary power expired because the marital home ceased being community property after the decree was entered.³⁰⁷ Howard further relied on the fact that the parties' agreed settlement did not award title to the marital home or ownership of insurance proceeds.³⁰⁸ While Howard was correct that the family court's plenary power to "modify, correct, or reform" a judgment had expired, Glenda sought to *clarify* the parties' divorce decree and also sought division of the undivided property as an alternative to clarification.³⁰⁹

The Court of Appeals for the Fifth District of Texas at Dallas stated in its opinion: "[A] court has continuing jurisdiction to render further orders to enforce the division of the property made in the decree of divorce to assist in the implementation of or to clarify the prior order."³¹⁰ Likewise, a family court may enter a clarifying order setting forth specific terms to enforce compliance with an original property division after finding the original property division is not specific enough to be enforced by contempt.³¹¹

A family court has jurisdiction to clarify a divorce decree to the extent the clarification does not alter the decree's original terms.³¹² The court of appeals concluded the parties' divorce decree did not award or dispose of the marital home or the insurance proceeds related to its destruction during the Dallas tornado, which occurred several months after the parties' divorce was finalized.³¹³ Instead, the property was not divided or awarded to either spouse in the decree. As such, it must be divided by the court in a just and right manner pursuant to Texas law.³¹⁴ The marital home, indeed, ceased to be community property when the divorce decree was entered.³¹⁵ Community property that is not divided or awarded to either spouse in a divorce decree "is subject to later partition between two ex-spouses who are considered joint tenants or tenants in common."³¹⁶ The court of appeals explained that the character of the property does not deprive the family

304. *See id.*

305. *See id.*

306. *See id.*

307. *See id.*

308. *See id.* at *2-3.

309. *Id.* at *2.

310. *Id.*

311. *See id.*

312. *See id.* at *3.

313. *See id.*

314. *See id.*

315. *See id.*

316. *Id.* (citing *Wilde v. Murchie*, 949 S.W.2d 331, 332 (Tex. 1997)).

court of jurisdiction to make a partition of property after the family court loses plenary power.³¹⁷ Citing the *S.C.* case, the court of appeals explained that Subchapter C of Chapter 9 of the Family Code “allows property that is no longer community property to be treated as if it still were, so that it can be divided by the just-and-right standard.”³¹⁸ Because an action to divide previously undivided property is a new lawsuit, jurisdiction to divide such property is not exclusive to the trial court that entered the decree.³¹⁹ Any court may apply the “just and right” standard.³²⁰

The term “any court” does not exclude a family court from hearing a post-divorce partition case, as any district court in the appropriate venue has jurisdiction to hear the suit.³²¹ Because the family court first acquired jurisdiction over the matter when Glenda filed, that court acquired jurisdiction to the exclusion of the other district court.³²² The court of appeals held that the district court did not err by dismissing Howard’s suit and transferring the deposited proceeds from the marital residence to the family court.³²³

3. *The Fault of the Matter*

In *In re Johnson*, the Court of Appeals for the Fifth District of Texas at Dallas considered whether a divorce was granted on fault grounds where the divorce decree was silent as to fault and subsequent findings of fact and conclusions of law found the fault grounds of cruelty and adultery.³²⁴ In 2019, the parties separated and the husband, Malcolm, filed for divorce.³²⁵ The wife, Veronica, filed a counterpetition for divorce requesting a disproportionate share of the estate based on two fault grounds for divorce: adultery and cruelty.³²⁶ Malcolm subsequently amended his petition for divorce, also seeking a disproportionate share of the estate, claiming Veronica had committed fraud and waste of community assets.³²⁷ The trial court found Malcolm was at fault in the breakup of the marriage and awarded Veronica the marital home along with \$6,500.00 for attorney’s fees.³²⁸ Malcolm appealed contending there was insufficient evidence to support a finding of fault in the breakup of the marriage to justify the award of a disproportionate share of the community property to Veronica.³²⁹

Although the divorce decree said the marriage was dissolved on the ground of insupportably, the decree failed to address the cruelty and

317. *See id.*

318. *Id.* (citing *S.C. v. M.B.*, 650 S.W.3d 428, 440 (Tex. 2022)).

319. *See id.*

320. *Id.*

321. *Id.*

322. *See id.* (citing *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 294 (Tex. 2016)).

323. *See id.*

324. *See In re Johnson*, No. 05-20-00517-CV, 2022 WL 123106, at *2 (Tex. App.—Dallas Jan. 13, 2022, no pet.) (mem. op.).

325. *See id.* at *1.

326. *See id.*

327. *See id.*

328. *See id.*

329. *See id.*

adultery fault grounds.³³⁰ However, the trial court later signed findings of fact and conclusions of law that found that Malcolm was at fault for the breakup of the marriage.³³¹ In supplemental findings of fact and conclusions of law, the trial court found insupportability, that Malcolm committed adultery, and that he was guilty of cruel treatment toward Veronica.³³² Malcolm argued that because the decree failed to contain the fault grounds of adultery and cruelty, the divorce was not granted on any fault grounds.³³³

The court of appeals explained that any conflict between earlier findings regarding grounds for divorce and later findings of fact are resolved in favor of the later findings.³³⁴ As such, because the trial court found that Malcolm had committed adultery and cruelty toward Veronica, the court of appeals concluded that the divorce was granted on fault grounds.³³⁵ Applying the abuse of discretion standard, the court of appeals affirmed the trial court's finding of fault grounds and award of property and confirmed the disproportionate division.³³⁶ While Malcolm claimed he should be entitled to a new trial due to ineffective assistance of counsel, the court of appeals explained the doctrine of ineffective assistance of counsel generally does not apply to civil cases.³³⁷

4. *Property for Sale*

In *Dyer v. Dyer*, the Court of Appeals for the Eleventh District of Texas at Eastland considered whether a court can order a party to sell their separate property, despite the long-standing Texas rule that a court is without authority to divest a party of its separate property, if the party had agreed in open court to sell it.³³⁸

The mobile home the parties owned was the wife Jodi's separate property and the land it was on was the husband Brent's separate property.³³⁹ During the final trial, Brent testified on direct examination by his counsel that he wanted to "either buy the mobile home from [his wife, Jodi] or sell the five acres and mobile home as a single asset and split the proceeds equally."³⁴⁰ Brent again unequivocally affirmed the agreement to sell both assets through his own testimony and his counsel's urging at

330. *See id.* at *2.

331. *See id.*

332. *See id.*

333. *See id.*

334. *See id.* at *1.

335. *See id.* at *2. The court of appeals also performed an exhaustive review of the facts to conclude there was legally and factually sufficient evidence to support the trial court's findings that Malcolm was at fault for cruelty and adultery. *See id.*

336. *See id.* at *4, 6.

337. *See id.* at *6.

338. *See Dyer v. Dyer*, No. 11-20-00212-CV, 2022 WL 2720494, at *1 (Tex. App.—Eastland July 14, 2022, no pet.) (mem. op.).

339. *See id.*

340. *Id.*

the end of the trial before the trial court.³⁴¹ As such, the trial court found that the land was Brent's separate property and that the mobile home was Jodi's separate property ordered the sale of the two properties that the net proceeds would be divided evenly as agreed to by the parties during their testimony.³⁴²

Brent appealed the trial court's judgment contending the trial court erred when it divested him of his separate property.³⁴³ However, the court of appeals decided that Brent was estopped from making this argument based on "the invited error doctrine."³⁴⁴ The Texas Supreme Court has long recognized the invited error doctrine.³⁴⁵ A party cannot claim error by asking the court to do something and then complaining on appeal that the court committed error when the court followed their request.³⁴⁶

Relying on the invited error doctrine, the court of appeals concluded it was not error for the trial court to order the sale of Brent's separate property.³⁴⁷ Examining a separate issue, the court of appeals also determined that the trial court abused its discretion when it awarded Jodi an "unconditional" award of attorney's fees.³⁴⁸ Trial courts must condition the award of attorney's fees on a successful appeal; they cannot penalize a party for successfully winning an appeal.³⁴⁹

D. FAMILY VIOLENCE

The courts of appeal routinely hear family violence case appeals. In 2022, they considered several appeals challenging the length of protective orders, particularly lifetime protective orders for stalking and harassment behavior. Among other issues, the courts of appeal also examined territorial jurisdiction, the requirement to make a record of an interview with an alleged child victim, and whether physically restraining a family member amounted to family violence.

1. *Opportunity to Admit Evidence*

In the *In re Gillespie* case, the relator and real party in interest entered into an agreed, five-year protective order.³⁵⁰ Notably, relator wrote on the

341. *See id.*

342. *See id.* at *2.

343. *See id.*

344. *Id.* at *1.

345. *See id.* (citing *In re G.X.H.*, 627 S.W.3d 288, 301 (Tex. 2021); *In re Dep't of Fam. & Protective Servs.*, 273 S.W.3d 637, 646 (Tex. 2009) (stating that the invited error doctrine applies when "a party requests the court to make a specific ruling, then complains of that ruling on appeal"); *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005) (stating that estoppel requires a party to have "unequivocally taken a position in the trial court that is clearly adverse to its position on appeal"))).

346. *See id.* at *2.

347. *See id.* at *4.

348. *Id.*

349. *See id.*

350. No. 14-22-00174-CV, 2022 WL 2350041 (Tex. App.—Houston [14th Dist.] June 30, 2022, no pet.) (mem. op.) (per curiam).

order that he denied the allegations, but agreed to comply with the order.³⁵¹ Before it expired, relator filed a motion to vacate.³⁵² During the Zoom hearing on the motion to vacate, the trial court refused to allow relator to put evidence on and orally denied the motion due to his refusal to “own up to what he’s done.”³⁵³ The Court of Appeals for the Fourteenth District of Texas at Houston held that the trial court abused its discretion by refusing to allow relator to put forth evidence to support his motion.³⁵⁴ The court of appeals concluded that the relator has “a liberty interest in the care, custody, and control of his children,” and he is therefore entitled to due process, including an opportunity to be heard.³⁵⁵

2. Territorial Jurisdiction

In *Sabatino v. Goldstein*, the Court of Appeals for the First District of Texas at Houston considered whether a protective order may be entered in Texas against a nonresident who did not commit any acts in Texas.³⁵⁶ The trial court granted a protective order against James, a Massachusetts resident, after the Harris County District Attorney filed an application for protective order.³⁵⁷ Rachel dated James until 2017.³⁵⁸ According to Rachel, James contacted her in 2020 claiming to have explicit photos on a phone she had loaned to him.³⁵⁹ She retained a lawyer to send a demand letter requesting James cease and desist contacting her and further demanding he return her phone.³⁶⁰ However, James continued to text Rachel.³⁶¹ Of importance, all of the texts (sent and received) were in Massachusetts.³⁶² As a result of his continued behavior, Rachel obtained an emergency protective order from the police in Massachusetts.³⁶³

James then proceeded to file several small-claims lawsuits against Rachel relating to her phone he refused to return, for alleged lost wages from his inability to work due to the protective order showing up in background checks, reimbursement for monies he paid a private investigator to find Rachel, and a claim for taking care of her pet three years prior.³⁶⁴ Rachel moved from Massachusetts to Texas in July 2020.³⁶⁵ Based off of James’s continued stalking and harassing behavior, she filed another application

351. *See id.*

352. *See id.*

353. *Id.* at *1, 2.

354. *See id.*

355. *Id.* at *2.

356. 649 S.W.3d 841, 843 (Tex. App.—Houston [1st Dist.] 2022, pet. granted).

357. *See id.*

358. *See id.*

359. *See id.*

360. *See id.*

361. *See id.*

362. *See id.* at 849.

363. *See id.* at 843.

364. *See id.*

365. *See id.* at 844.

for a protective order in Texas.³⁶⁶ Of importance, testimony established that all of James's actions occurred in Massachusetts.³⁶⁷ The trial court granted the protective order and found good cause existed for James to have no contact with Rachel.³⁶⁸ In its findings of facts and conclusions of law, the trial court found that James's actions toward Rachel qualified as stalking and harassment pursuant to Texas Penal Code §§ 42.07 and 42.072.³⁶⁹

The court of appeals determined Rachel properly filed her application for protective order in Harris County, where she resides, as permitted by the statute.³⁷⁰ Texas had subject matter jurisdiction because the state courts can hear applications for protective orders where their residents reside.³⁷¹ However, the state court must also have territorial jurisdiction, which is distinct from personal and subject matter jurisdiction.³⁷² James committed all the stalking and harassment acts in Massachusetts.³⁷³ While Article 7a matters are civil, it incorporates the criminal offenses of stalking and harassment as defined in the Texas Penal Code.³⁷⁴

In criminal law, in addition to personal and subject matter jurisdiction, the state must also have territorial jurisdiction.³⁷⁵ The court of appeals explained: "Given that a state only has the authority to enact and enforce criminal laws within its borders, a state's courts do not have jurisdiction to adjudicate offenses committed outside the state."³⁷⁶ The court of appeals vacated and dismissed the protective order for lack of territorial jurisdiction because all the actions complained about occurred outside of the state.³⁷⁷ When a victim is stalked and harassed in another state and later relocates to Texas, that move does not grant Texas territorial jurisdiction.³⁷⁸ Notably, the court of appeals included a footnote that stated:

If Goldstein had been in Texas when she received Sabatino's text messages, it might alter our analysis [A] Texas district court may well have territorial jurisdiction over harassment allegations that are premised on the receipt of repeated texts accompanied by such audible sounds or vibration by someone in this state even though the sender is not.³⁷⁹

366. *See id.*

367. *See id.*

368. *See id.* at 845.

369. *See id.*

370. *See id.* at 847.

371. *See id.*

372. *See id.*

373. *See id.*

374. *See id.* at 847–48.

375. *See id.* at 848.

376. *Id.*

377. *See id.* at 850.

378. *See id.*

379. *Id.* at 849 n.3.

3. *Record of Child Interview*

The *Gabel v. Gabel-Koehne* case considered whether it is reversible error for a trial court to fail to make a record of its interview with a child.³⁸⁰ A mother filed an application for protective order as next of friend for her minor daughter against another minor, accusing him of sexual assault.³⁸¹ The appointed amicus attorney filed a motion to confer with a child with the trial court present and asked that a court reporter be present.³⁸² The trial court interviewed the child in chambers with the amicus attorney present and refused to make a record of the interview.³⁸³

The Court of Appeals for the First District of Texas at Houston held that the trial court abused its discretion when it interviewed the child without providing the accused party with the opportunity to review or respond to any statement made during the interview.³⁸⁴ There was no opportunity for the accused to rebut the evidence or address the testimony in any way because a record was never provided to him.³⁸⁵

4. *Physical Restraint*

In *Jenkins v. Wills*, the Court of Appeals for the Fourteenth District of Texas at Houston was asked to determine whether physical restraint used by a stepfather against his stepdaughter, who was allegedly attacking her mother, warranted a protective order.³⁸⁶ BJ, who was fourteen at the time, and her brother, JJ, lived with their mother and stepfather.³⁸⁷ A neighbor called the police when BJ went to the neighbor claiming she had been strangled.³⁸⁸ The deputy who responded said he saw no injuries on BJ that would indicate choking.³⁸⁹ However, he saw injuries to BJ's mother's neck and chest and also injuries to the stepfather's earlobe.³⁹⁰ The deputy testified he believed family violence had actually occurred against the adults.³⁹¹ BJ's father filed the application for protective order after she claimed her stepfather tried to strangle her.³⁹²

The stepfather testified that he never intended to inflict harm when he "got in between BJ and her mother, pushed BJ down, held her on the ground, and got on top of her."³⁹³ He further testified that he felt his response was

380. 649 S.W.3d 590, 595 (Tex. App.—Houston [1st Dist.] 2022, no pet.).

381. *See id.* at 593.

382. *See id.*

383. *See id.* at 595.

384. *See id.* at 598.

385. *See id.*

386. No. 14-21-00130-CV, 2022 WL 11551147 (Tex. App.—Houston [14th Dist.] Oct. 20, 2022, no pet.) (mem. op.).

387. *See id.* at *2.

388. *See id.*

389. *See id.*

390. *See id.*

391. *See id.*

392. *See id.* at *1.

393. *Id.* at *2.

appropriate to “subdue” his stepdaughter.³⁹⁴ The court of appeals found that the video exhibit, the stepfather’s testimony, and the deputy’s testimony all support the trial court’s finding that BJ was assaulting her mother.³⁹⁵

The trial court granted a directed verdict denying the protective order and found that the stepfather had not committed family violence.³⁹⁶ The court of appeals affirmed the trial court’s directed verdict, confirming the trial court reasonably concluded the stepfather did not intend to hurt the child, did not threaten her when he said he would put his hands on her if she continued her behavior, and that the stepbrother, who was also present, was in fear of his sister rather than his stepfather.³⁹⁷

5. *Two-Year Limitation Cannot be Extended*

In *In re J.K.R.*, the Court of Appeals for the Thirteenth District of Texas at Corpus Christi–Edinburg considered an issue of first impression in this case, i.e., whether a trial court may modify a protective order to extend past its two-year deadline.³⁹⁸ The trial court entered a protective order against a husband and father, Zane, in February 2019, which prohibited him from communicating with his wife, Carla, and further prohibited him from going within 200 feet of her and their children.³⁹⁹ It was set to expire in February 2021.⁴⁰⁰ In October 2019, Zane filed a suit to modify the protective order and Carla filed a counterpetition to modify the parent-child relationship.⁴⁰¹

During the bench trial, Carla testified that she only agreed to enter into the divorce decree because Zane threatened to kill her.⁴⁰² During the trial, she admitted multiple audio recordings and text messages into evidence, including ones where Zane threatened to kill her and where he threatened to drink and drive with their children in his vehicle.⁴⁰³ After Zane allegedly hacked into Carla’s personal and work voicemails and obtained access to several of her electronic devices, Zane was indicted for felony stalking and wiretapping.⁴⁰⁴ As a result of this indictment, Carla obtained a protective order that prohibited Zane from communicating with her.⁴⁰⁵ At the trial on the SAPCR modification and motion to modify the protective order, Zane testified his behavior was inappropriate, that he sought professional help, and implemented what he learned while seeking help.⁴⁰⁶ The trial court modified its 2019 protective order to include a finding that Zane

394. *Id.*

395. *See id.* at *4.

396. *See id.* at *3.

397. *See id.*

398. 658 S.W.3d 354, 362 (Tex. App.—Corpus Christi–Edinburg 2022, no pet.).

399. *See id.* at 357.

400. *See id.*

401. *See id.*

402. *See id.*

403. *See id.* at 357–58.

404. *See id.* at 359.

405. *See id.* at 360.

406. *See id.*

committed an act constituting a felony offense involving family violence against Carla and extended the protective order until two years after the current pending felony indictments were resolved.⁴⁰⁷

While a trial court retains jurisdiction to modify a protective order until the order expires, the court does not have the legal authority to extend the duration of a protective order.⁴⁰⁸ Even though Texas Family Code § 87.001 provides broad discretion to add or remove anything that may have been included in the original protective order, § 87.002 has an express limitation on the trial court's authority to extend the duration of a protective order more than two years.⁴⁰⁹ If a protective order was to expire in less than two years, a trial court could only modify the order to two years after the order was entered.⁴¹⁰ In other words, a trial court cannot circumvent the two-year limitation just by modifying a previous order.⁴¹¹ The court of appeals held the trial court erred in modifying the previous protective order to extend the two-year expiration in contradiction to the Texas Family Code.⁴¹² However, modifying the order to include the felony indictment was permitted under Texas Family Code § 87.001, immaterial, and harmless.⁴¹³

6. *Protective Order for Duration of Childhood*

The *Jones v. Frazier* case considered whether a protective order, which did not expire until the child turned eighteen, effectively terminated the respondent's rights without a proper termination trial.⁴¹⁴ The same protective order was a "lifetime protective order" as to the child's mother.⁴¹⁵ Krista and Stephen were the parents of a five-year-old son Sam.⁴¹⁶ In 2021, Krista filed an application for protective order pursuant to Title IV of the Texas Family Code and Texas Code of Criminal Procedure 7B.⁴¹⁷ Krista alleged that Stephen was physically violent and used drugs.⁴¹⁸ Krista testified about several incidents, including that Stephen grabbed her by the neck in a "horse collar" and dragged her down the stairs while she was pregnant.⁴¹⁹ Krista also testified about another incident when Stephen allegedly shook Sam while he was an infant against a lamp claiming he should be in bright light to keep him awake.⁴²⁰ A few of the other incidents involved Stephen throwing a loveseat at Krista, breaking her phone and her mother's phone

407. *See id.* at 360–61.

408. *See id.* at 361–62.

409. *See id.*; *see also* TEX. FAM. CODE ANN. §§ 87.001, 87.002.

410. *See id.* at 362–63.

411. *See id.*

412. *See id.* at 366.

413. *See id.* at 364.

414. No. 01-21-00297-CV, 2022 WL 3588752 (Tex. App.—Houston [1st Dist.] Aug. 23, 2022, pet. denied) (mem. op.).

415. *Id.* at *4.

416. *See id.* at *1.

417. *See id.*

418. *See id.*

419. *Id.*

420. *See id.* at *2.

to prevent them from calling the police, punching Krista in the face, and kicking her elderly dog in the face.⁴²¹ Krista admitted many photographs of the incidents into evidence at trial.⁴²² Other behavior included reporting Krista to Child Protective Services (CPS) for false allegations, reporting the allegation to a private school where she sought to enroll Sam, and stalking behavior by one of Stephen's friends against Krista.⁴²³ At trial, Stephen categorically denied all allegations by Krista.⁴²⁴

The trial court granted the protective order, found Stephen had committed family violence, found that it was likely to occur in the future, and further found that Krista was the victim of stalking under the Texas Penal Code.⁴²⁵ The protective order was granted in favor of Krista for her lifetime and Sam until he was eighteen.⁴²⁶ In the protective order, the trial court allowed Stephen to apply to modify or vacate the order after one year, ordered him to sell his handgun, complete classes, and pay Krista's attorney's fees.⁴²⁷ The trial court also found there were grounds to believe that Stephen had engaged in stalking behavior in violation of Texas Penal Code § 42.072 and found that the conduct was likely to occur again in the future.⁴²⁸ The Texas Code of Criminal Procedure provides that protective orders for stalking "may be effective for the duration of the lives of the offender and victim or for any shorter period stated in the order."⁴²⁹

Stephen appealed claiming the evidence was legally and factually insufficient.⁴³⁰ He further argued that the terms were contradictory because it allowed him to modify or vacate in a year and that the protective order effectively terminated his parental rights.⁴³¹ In light of the overwhelming evidence, the Court of Appeals for the First District of Texas at Houston affirmed the issuance under both the Texas Family Code and the Texas Code of Criminal Procedure.⁴³² The court of appeals concluded that the trial court did not abuse its discretion in making the protective order last for the duration of Krista's life and until Sam turned eighteen.⁴³³ The court of appeals also did not agree that the order effectively terminated Stephen's parental rights because Sam could modify or vacate the order after a year provided a court found that "Sam's safety and well-being would not be endangered."⁴³⁴ The court of appeals further held the terms were not

421. *See id.*

422. *See id.*

423. *See id.* at *3.

424. *See id.*

425. *See id.* at *4.

426. *See id.*

427. *See id.*

428. *See id.* at *8–9.

429. *Id.* at *9 (citing TEX. CRIM. PROC. ANN. ART. 7B.007(a)).

430. *See id.* at *4.

431. *See id.* at *9.

432. *See id.* at *7, 9.

433. *See id.* at *9.

434. *Id.* at *10.

contradictory and found that the trial court did not abuse its discretion in awarding attorney's fees to Krista.⁴³⁵

E. CONSERVATORSHIP

The appellate courts were of course flooded with cases involving parentage, conservatorship and possession. It is impossible to do justice to the range of issues in this Article, but a few cases raised especially important issues.

1. *Same-Sex Couples and Parentage*

In re N.H. considered the parentage status of a lesbian partner whose nonmarital partner gave birth to a child they intended to raise together.⁴³⁶ The partner was involved in every aspect of pregnancy, childbirth, and childcare; she was not, however, listed on the birth certificate as a second parent, and the two women did not sign an acknowledgment of parentage.⁴³⁷ The adult relationship ended when the child was sixteen months old, and the partner filed a SAPCR petition a month later, requesting that she be appointed a joint managing conservator.⁴³⁸ She alleged that the mother was unfit, at least at some points between the adult breakup and the trial more than two years later.⁴³⁹ The trial court appointed the biological mother as sole managing conservator and the co-parent as a possessory conservator.⁴⁴⁰ However, the court separately made a finding that the biological mother was an unfit parent.⁴⁴¹ She appealed the order in full.⁴⁴²

The outcome of the appeal is presaged by the court's decision to label the parties "Mother" and "Ex-Girlfriend" from the outset.⁴⁴³ The Court of Appeals for the Fourteenth District of Texas at Houston did find that the partner had standing to bring the case because she had "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition."⁴⁴⁴ However, it ultimately concluded that the partner was not entitled to any rights with respect to the child and overruled the trial court's order.⁴⁴⁵ Under both the Texas Family Code and the federal Constitution, fit parents are entitled to

435. *See id.* at *9, 10.

436. *See In re N.H.*, 652 S.W.3d 488, 491–92 (Tex. App.—Houston [14th Dist.] 2022, pet. filed).

437. *See id.*

438. *See id.* at 492.

439. *See generally id.* at 492–93.

440. *See id.* at 492.

441. *See id.*

442. *See id.*

443. *See generally id.* at 491–99.

444. *Id.* at 493; *see* TEX. FAM. CODE ANN. § 102.003(a)(9).

445. *See id.* 499.

a presumption that every decision they make is in the best interests of their children.⁴⁴⁶ The presumption is strong, but rebuttable.⁴⁴⁷

The trial court found that the mother was unfit, but the court of appeals concluded it was an abuse of discretion to make such a finding.⁴⁴⁸ Although the partner had introduced some evidence of verbally abusive behavior and perhaps excessive use of alcohol and prescription drugs, the court of appeals concluded that neither the abuse nor the substance use involved or negatively affected the child.⁴⁴⁹ Moreover, the finding was inconsistent with the trial court's decision to name the mother as sole managing conservator.⁴⁵⁰ The biological mother was thus entitled to the fit parent presumption, according to the court of appeals.⁴⁵¹ The next question was whether the partner had satisfied the burden of proof necessary to overcome the presumption.⁴⁵² The Texas Supreme Court made clear in *In re C.J.C.* that the presumption must be overcome even when a nonparent has been named only a possessory conservator—the nonparent in that case was the boyfriend of the child's deceased mother, and the trial court had named him a possessory conservator over the objection of the child's (fit) father.⁴⁵³ In this case, however, the court of appeals focused on the burden of proof necessary for a nonparent and non-grandparent to overcome the fit parent presumption.⁴⁵⁴ Although it found a lack of clarity in the Family Code because there is no provision that specifically addresses what is necessary to overcome the presumption in a challenge brought by someone who is not a grandparent, aunt, or uncle, the court of appeals concluded that the relevant statutes “all evince a policy judgment that the fundamental rights of parents cannot be infringed by a court absent some compelling reason, and that reason must typically involve the health and welfare of the child.”⁴⁵⁵ Thus, “a nonparent with standing who has no biological or legal relationship to the child cannot obtain court-ordered possession of a child over the wishes of a fit parent unless the nonparent proves, at a minimum, that the denial of possession would significantly impair the child's physical health or emotional well-being.”⁴⁵⁶ The court of appeals concluded that the

446. The strength of this presumption was reaffirmed by the Texas Supreme Court in *In re C.J.C.*, 603 S.W.3d 804, 819 (Tex. 2020) (orig. proceeding). We discuss this case at length in our previous family law summary article. See Joanna L. Grossman & Christine P. Leatherberry, *Family Law*, 8 SMU ANN. TEX. SURV. 89, 96–102 (2022).

447. See Joanna L. Grossman & Christine P. Leatherberry, *supra* note 446, at 96–102.

448. See *In re N.H.*, 652 S.W.3d at 494, 499.

449. See *id.* at 494–95.

450. See *id.* at 495.

451. See *id.* at 496.

452. See *id.* at 496–97.

453. See *In re C.J.C.*, 603 S.W.3d at 820 (“When a nonparent requests conservatorship or possession of a child, the child's best interest is embedded with the presumption that it is the fit parent—not a court—who makes the determination whether to allow that request.” (emphasis added)).

454. *In re N.H.*, 652 S.W.3d at 496–97.

455. *Id.* at 497.

456. *Id.* at 498.

partner had not met this standard.⁴⁵⁷ The court wanted specific evidence to show how the child would be harmed by losing contact with the partner and was not satisfied with the partner's testimony that the child "would feel like I was abandoning her."⁴⁵⁸ The court of appeals noted the lack of expert testimony and the lack of specific evidence about how the harm to the child might manifest itself (e.g., nightmares, bedwetting, behavioral issues, etc.).⁴⁵⁹

It is not clear in this case why the parent did not seek to be treated as a co-parent rather than a nonparent. The court of appeals is right about the strength of the parental presumption and the difficulty any nonparent has in obtaining conservatorship, possession, or access over the objection of a fit parent. However, the facts suggest that these two women intended to co-parent and shared decision making and responsibilities from the time of conception until they ended their relationship. Wasn't there an argument that they were both parents? The court of appeals says very little on this subject, noting only that the trial specifically found the partner to be a nonparent and that she "has not presented any legal basis for setting aside that finding . . ."⁴⁶⁰ Specifically, the court of appeals notes that the partner did not enter into a coparenting agreement with the biological mother nor "advocate for any sort of extension of the law regarding presumptive fathers."⁴⁶¹ A petition for review is pending in this case, and the issue of parentage might be raised there if the Texas Supreme Court agrees to hear the case.⁴⁶²

Joshua Reyes, also a nonmarital partner, filed a SAPCR with respect to his ex-girlfriend's daughter in *Reyes v. Lott*.⁴⁶³ Reyes lived with Holly Lott and her daughter for eighteen months, during which time they had a child together.⁴⁶⁴ Reyes filed a SAPCR regarding his biological daughter but filed a separate one regarding Lott's daughter.⁴⁶⁵ In that petition, he alleged standing as a person who had had "actual care, control, and possession" during the requisite time prior to filing the case.⁴⁶⁶ The trial court found that Reyes did not have standing and dismissed his petition; the Court of Appeals for the Fourteenth District of Texas at Houston agreed.⁴⁶⁷ In order to have standing under this provision, according to this court of appeals, the nonparent must share a principal residence with the child, provide for the child's daily physical and psychological needs, and

457. *See id.* at 499.

458. *Id.* at 498.

459. *See id.*

460. *Id.* at 496.

461. *Id.*

462. *See generally id.* at 491–99.

463. *See* No. 14-20-00105-CV, 2022 WL 248122, at *1 (Tex. App.—Houston [14th Dist.] Jan. 27, 2022, no pet.) (mem. op.).

464. *See id.*

465. *See id.*

466. *Id.*

467. *See id.* at *5.

exercise “guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children.”⁴⁶⁸ This does not mean that the parent must have “wholly ceded or relinquished their own parental rights and responsibilities,” but the nonparent’s role must be “parent-like”—the evidence must show that the “nonparent consistently made the kinds of day-to-day efforts and decisions associated with raising a child.”⁴⁶⁹ The record showed that Reyes shared a residence with the child for the requisite period of time and provided “actual care” throughout their time in the shared residence.⁴⁷⁰ However, the trial court found, and the court of appeals agreed, that he did not demonstrate he also had “actual control” over the child.⁴⁷¹ The court of appeals looked for evidence that the nonparent consistently made “the kinds of day-to-day decisions associated with raising a child, such as when the child gets up and goes to bed, how much television she watches, whether she gets dessert, when she needs to go to the doctor,” and so on.⁴⁷² Here, in the court of appeals’ view, Reyes “made suggestions and expressed concern when he did not agree with Lott’s decisions,” but did not make the decisions himself.⁴⁷³ He thus did not have standing to bring a SAPCR petition.⁴⁷⁴ Several other cases from 2022 show that the issue of nonparent standing is litigated frequently.⁴⁷⁵

Another important case, *In re D.A.A.-B.*, also involved a parentage dispute between two women.⁴⁷⁶ Andrea and Cristina were legally married in New Mexico in 2013, before same-sex marriage was legal in Texas.⁴⁷⁷ During the marriage, Andrea became pregnant using sperm donated by a male friend, Luis.⁴⁷⁸ The child was born in 2014, and the couple divorced in 2016. Strangely, the divorce decree states that there were no children of the marriage, and thus the decree did not address conservatorship, possession,

468. *Id.* at *2.

469. *Id.*

470. *Id.* at *5.

471. *Id.*

472. *Id.*

473. *Id.*

474. *See id.*

475. *See, e.g., In re S.W.*, No. 02-21-00409-CV, 2022 WL 325385, at *19 (Tex. App.—Fort Worth Feb. 3, 2022, no pet.) (mem. op.) (granting mandamus to correct trial court’s grant of standing to grandmother); *In re J.C.*, No. 13-21-00380-CV, 2022 WL 580950, at *14 (Tex. App.—Corpus Christi–Edinburg Feb. 25, 2022, no pet.) (mem. op.) (holding that the trial court erred in striking grandmother’s petition for intervention because she had standing); *In re M.L.R.S.*, No. 14-20-00584-CV, 2022 WL 2165539, at *1–2 (Tex. App.—Houston [14th Dist.] June 16, 2022, no pet.) (mem. op.) (holding that a great-grandmother had standing because she proved significant impairment); *In re D.D.L.*, No. 13-22-00062-CV, 2022 WL 3652496, at *1–2 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, no pet.) (mem. op.) (holding that the trial court erred in finding grandmother had standing since child hadn’t lived with her within ninety days of filing petition and grandmother did not establish that mother was unfit).

476. *See In re D.A.A.-B.*, 657 S.W.3d 549, 553 (Tex. App.—El Paso 2022, no pet.).

477. *See id.*

478. *See id.* at 553–54.

or child support.⁴⁷⁹ However, after the divorce, Andrea and Cristina orally agreed to continue the same possession schedule they had implemented at the time of separation, and Cristina continued voluntarily to make support payments to Andrea.⁴⁸⁰ This worked for a period of time, but eventually Andrea began curtailing Cristina's access to and time with the child.⁴⁸¹ Cristina thus filed a SAPCR in order to establish her rights. In her petition, she alleged standing on the basis of being "the mother of the child."⁴⁸² The trial court required Cristina to amend her petition to identify the sperm donor and to serve him with a copy.⁴⁸³ Luis filed a general denial, and Andrea filed a responsive pleading in which she expressly denied that Cristina was the child's mother.⁴⁸⁴ During a hearing, the trial court stated that it planned to grant a directed verdict to Andrea on the grounds that Cristina lacked standing, but it did not enter a final order denying the SAPCR petition.⁴⁸⁵ Cristina amended her petition again, alleging standing on the basis of "actual, care, control, and possession of the child."⁴⁸⁶ Andrea filed a motion to dismiss the petition because although Cristina's initial petition had been filed within ninety days of when she lived with the child, the amended petition was many months later.⁴⁸⁷ The trial court held a hearing and then took the matter under advisement.⁴⁸⁸ More than a year later, the trial court signed an order granting Andrea's motion to dismiss without providing any findings of fact or conclusions of law.⁴⁸⁹ This happened to be the judge's last day in office, and the successor judge declined to issue any findings or conclusions or to grant Cristina's motion for a new trial.⁴⁹⁰

On appeal, however, Cristina found success on a key issue.⁴⁹¹ She argued that the "trial court failed to construe the Code in a constitutionally-sound 'gender-neutral' manner that affords spouses in same-sex marriages the same rights that spouses in opposite-sex marriages have in determining parentage."⁴⁹² Under the Texas Family Code, an original SAPCR proceeding "may be filed at any time by . . . a parent of the child."⁴⁹³ Is Cristina a parent within the meaning of this statute? A "parent" is "the mother, a man presumed to be the father, a man legally determined to be the father,

479. *See id.* at 570–71. The court of appeals held that a divorce decree that mistakenly omits children of the marriage "cannot be considered final" and therefore does not preclude litigation of issues relating to the child in a separate proceeding. *Id.* at 570–71.

480. *See id.* at 555.

481. *See id.*

482. *Id.*

483. *See id.*

484. *See id.*

485. *See id.* at 555–56.

486. *Id.* at 556.

487. *See id.*

488. *See id.* at 556–57.

489. *See id.*

490. *See id.* at 557.

491. *See id.* at 572.

492. *Id.* at 557.

493. TEX. FAM. CODE ANN. § 102.003(a)(1).

a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father.”⁴⁹⁴ The Code provides different ways for men and women to establish legal parentage.⁴⁹⁵ A woman is a legal mother if she gives birth to a child, is adjudicated a mother, or adopts a child.⁴⁹⁶ A man can be recognized as a father because his biological paternity has been acknowledged or adjudicated, but he is also presumed to be a father if he is married to a woman when she gives birth.⁴⁹⁷ Texas applies the marital presumption, which means that a “man is presumed to be the father of the child if he is married to the mother of the child and the child is born during the marriage.”⁴⁹⁸ The presumption applies with equal force if the child is conceived using donor sperm and the husband (or other spouse as in this case) consented to “assisted reproduction.”⁴⁹⁹ Cristina did not give birth to or adopt Andrea’s child.⁵⁰⁰ However, she was married to Andrea at the time of conception and birth, and she consented to the conception using assisted reproduction.⁵⁰¹

Under the U.S. Supreme Court’s opinions on same-sex marriage, she is entitled to be recognized as a presumed parent just as a husband would be.⁵⁰² In *Obergefell v. Hodges*, the Supreme Court held that it was unconstitutional for any state to deny the celebration or recognition of marriages by same-sex couples.⁵⁰³ In *Pavan v. Smith*, the Supreme Court held that same-sex spouses are entitled to equal parental rights arising from marriage.⁵⁰⁴ In that case, the Supreme Court held that Arkansas could not refuse to put the mother’s female spouse on a child’s birth certificate.⁵⁰⁵

The Court of Appeals for the Eighth District of Texas at El Paso in *D.A.A.-B.* read the Texas Code in light of these constitutional requirements:

When read alongside the U.S. Supreme Court’s holding that states must extend equal benefits to spouses in same-sex marriages, we reach the inexorable conclusion that the Family Code gives spouses in same-sex marriages the same opportunity to assert their parentage to a child born during the marriage, as it gives to spouses in opposite-sex marriages.⁵⁰⁶

494. *Id.* § 101.024(a).

495. *See generally id.*

496. *See id.* § 160.201(a)(1)–(3).

497. *See id.*

498. *Id.* § 160.204(a)(1).

499. *Id.* § 160.201(b)(5).

500. *See In re D.A.A.-B.*, 657 S.W.3d 549, 553–54 (Tex. App.—El Paso 2022, no pet.).

501. *See id.*

502. *See generally* *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015); *Pavan v. Smith*, 582 U.S. 563, 567 (2017) (per curiam).

503. *See Obergefell*, 576 U.S. at 681 (2015).

504. *See Pavan*, 582 U.S. at 567 (2017) (per curiam).

505. *See id.*

506. *In re D.A.A.-B.*, 657 S.W.3d 549, 561 (Tex. App.—El Paso 2022, no pet.).

This interpretation not only complies with binding federal precedent but also, in the court of appeals' view, "promotes the longstanding principle that the 'best interest of the child is always the primary consideration of the court in determining issues of conservatorship and possession of or access to a child.'"⁵⁰⁷ This means that Cristina is entitled to be treated as a "presumed parent" and that her lack of a biological tie to the child is not sufficient to rebut the presumption given that the Family Code permits a husband to be recognized as a legal father even when the child is conceived with donor sperm.⁵⁰⁸ Andrea correctly argued that Luis would not be considered a "donor" under the Family Code because the insemination took place outside of a medical setting, but the court of appeals held that this did not deprive Cristina of her presumed parent status or her standing to bring an original SAPCR.⁵⁰⁹ This ruling does not mean that Cristina will ultimately obtain conservatorship or possession of the child, but it does give her the right to pursue those outcomes before the trial court on remand.⁵¹⁰

2. *Father Knows Best*

There were several appellate cases in 2022 where fathers had been awarded superior custody rights by the trial court, and they successfully defended those rulings on appeal. In *In re M.L.P.*, for example, Jessica Ochesky and Jon Pick were parties to an agreed divorce that named them joint managing conservators and provided for alternating weeks of possession.⁵¹¹ Two years later, Ochesky filed a petition to modify the custodial arrangement, in which she sought to limit his possession time to one weekend a month plus assorted holidays and vacations.⁵¹² While that was pending, Pick filed an application for a protective order, alleging that Ochesky had abused one of the couple's three kids.⁵¹³ He asked for a child custody evaluation, and the court ordered one.⁵¹⁴ The custody evaluator cited concerns with each of the parents.⁵¹⁵ At Ochesky's home, the sleeping arrangements were "not optimal" because there wasn't enough room for the kids in the adjoining mobile homes that she shared with several members of her extended family.⁵¹⁶ There was also evidence of physical altercations between Ochesky and one of the children.⁵¹⁷ On the other hand, Pick failed to provide health insurance for the children as he was ordered to do, and he had previously been in the habit of leaving the children with relatives

507. *Id.* at 562.

508. *Id.* at 565.

509. *See id.* at 564.

510. *See id.* at 572.

511. *See In re M.L.P.*, No. 13-20-00547-CV, 2022 WL 120012, at *1 (Tex. App.—Corpus Christi—Edinburg Jan. 13, 2022, no pet.) (mem. op.).

512. *See id.*

513. *See id.*

514. *See id.*

515. *See id.* at *2–3.

516. *Id.* at *3.

517. *See id.*

on a regular basis.⁵¹⁸ The evaluator recommended that the oldest child live with Pick at all times because of the evidence of physical abuse and that the other two children live with him primarily but see their mother on holidays and vacations.⁵¹⁹ The trial court decided that the parties should remain joint managing conservators but that Pick should be the primary conservator for all three children, with Ochesky paying child support.⁵²⁰ Ochesky was given standard possession for parties that live more than 100 miles apart.⁵²¹

Among other issues, Ochesky argued on appeal that the trial court abused its discretion by granting Pick the exclusive right to designate the children's primary residence.⁵²² The Court of Appeals for the Thirteenth District of Texas at Corpus Christi–Edinburg considered the enumerated factors from *Holley v. Adams*, in which the Texas Supreme Court elaborated on the best-interest-of-the-child standard.⁵²³ Among the relevant factors, the court of appeals found the following most relevant: (1) that the children had expressed a desire to live with Pick; (2) that although both parties had been arrested for assaulting family members, Ochesky was arrested for assaulting one of the children; and (3) that the housing provided by Ochesky was not “livable” (though the children were supervised and safe).⁵²⁴ The evidence “was not overwhelming,” but the trial court was within its discretion to award custody to Pick.⁵²⁵

In *In re K.L.S.*, the trial court named the child's father as sole managing conservator and gave him the exclusive right to designate the child's primary residence.⁵²⁶ The mother was appointed as a possessory conservator with limited, supervised visitation.⁵²⁷ On appeal, the mother argued that there was insufficient evidence to rebut the presumption that parents should be appointed joint managing conservators.⁵²⁸ This presumption does not apply in cases where the court makes a finding of a history of family violence involving the parents of the child.⁵²⁹ Although the trial court did not issue specific findings of fact, the Court of Appeals for the Eleventh District of Texas at Eastland concluded that there was sufficient evidence to support an implied finding that the mother perpetrated family violence

518. *See id.*

519. *See id.* at *4.

520. *See id.* at *5.

521. *See id.*

522. *See id.* at *1.

523. *See id.* at *9; *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *see also* TEX. FAM. CODE ANN. § 153.002 (“The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”).

524. *In re M.L.P.*, 2022 WL 120012, at *10.

525. *Id.* at *11.

526. *See In re K.L.S.*, No. 11-21-00094-CV, 2022 WL 401474, at *1 (Tex. App.—Eastland Feb. 10, 2022, no pet.) (mem. op.).

527. *See id.*

528. *See id.*

529. *See* TEX. FAM. CODE § 151.131(b).

against the father.⁵³⁰ Although the parties gave quite different versions of various events, the trial court was in the best position to assess their credibility—and to reject the mother’s version of most of them.⁵³¹ It did not abuse its discretion when it determined that the father was capable of meeting the child’s physical and emotional needs, nor when it determined that the mother “presented emotional or physical dangers” to her.⁵³² Courts in several other cases also upheld orders giving fathers superior custody rights.⁵³³

3. *Who is a Parent?*

a. *In re L.M.R.*⁵³⁴

This case examined whether the four-year statute of limitations for paternity cases with presumed fathers is constitutional.⁵³⁵ A child, Lucy, was born during the marriage of her mother, Dina, to Jordan.⁵³⁶ Jordan was Lucy’s presumed father.⁵³⁷ An alleged biological father, Frank, brought suit to establish his parentage one year after Lucy’s fourth birthday.⁵³⁸

Pursuant to Texas Family Code §§160.602 and 160.606, if a child does *not* have a presumed, acknowledged, or adjudicated father, a person with standing may bring a suit to adjudicate parentage at any time, i.e., there is no statute of limitations.⁵³⁹ If a child has a presumed father, Texas Family Code § 160.607 applies:

(a) Except as otherwise provided by Subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father *shall be commenced not later than the fourth anniversary of the date of the birth of the child.*

530. See *In re K.L.S.*, 2022 WL 401474, at *5.

531. See *id.* at *2.

532. *Id.* at *8.

533. See, e.g., *In re E.N.D.*, No. 11-21-00040-CV, 2022 WL 401249, at *1 (Tex. App.—Eastland Feb. 10, 2022, no pet.) (mem. op.) (holding that the trial court did not err in giving father exclusive right to designate child’s primary residence); *In re H.M.W.*, No. 09-21-00047-CV, 2022 WL 710059, at *1 (Tex. App.—Beaumont Mar. 10, 2022, no pet.) (mem. op.) (holding that the trial court did not err in giving father exclusive right to designate child’s primary residence); *In re Marriage of Karasagi*, No. 13-20-00077-CV, 2022 WL 868129, at *3–4 (Tex. App.—Corpus Christi–Edinburg Mar. 24, 2022, pet. denied) (mem. op.) (holding that the trial court properly appointed father sole managing conservator because mother posed risk of international abduction); *In re Marriage of L.B.*, No. 12-22-00135-CV, 2022 WL 16842688, at *1–3 (Tex. App.—Tyler Nov. 9, 2022, no pet.) (mem. op.) (ruling that the court did not err by giving mother less than standard possession when she abused prescription medication and abandoned the child).

534. 644 S.W.3d 783 (Tex. App.—Corpus Christi–Edinburg 2022, no pet.).

535. See *id.* at 786.

536. See *id.* at 785.

537. See *id.* at 787.

538. See *id.* at 785.

539. See *id.* at 788 (citing TEX. FAM. CODE ANN. §§ 160.602(a)(1)–(8), 160.606).

(b) A proceeding seeking to adjudicate the parentage of a child having a presumed father may be maintained at any time if the court determines that:

- (1) the presumed father and the mother of the child did not live together or engage in sexual intercourse with each other during the probable time of conception; or
- (2) the presumed father was *precluded from commencing a proceeding to adjudicate the parentage* of the child before the expiration of the time prescribed by Subsection (a) because of the mistaken belief that he was the child's biological father based on misrepresentations that led him to that conclusion.⁵⁴⁰

The party seeking to toll the four-year statute of limitations bears the burden of proof, and the ordinary discovery rule does not toll the limitations period.⁵⁴¹

The Court of Appeals for the Thirteenth District of Texas at Corpus Christi–Edinburg noted that, for Frank to prevail, he must prove that one of the exceptions above applied or that application of the four-year statute of limitations violated his Fourteenth Amendment rights under the U.S. Constitution.⁵⁴² There was no evidence in the record that the presumed father and Dina failed to engage in sexual relations.⁵⁴³ Further, Dina and Jordan stipulated that they lived together.⁵⁴⁴

Noting without deciding the issue, the court of appeals stated that generally only presumed fathers may raise the §160.607(b)(2) exception, not alleged fathers.⁵⁴⁵ Even if Frank, as an alleged father, were to have standing to assert the exception, Frank presented no evidence that Jordan was misled by Dina that he was Lucy's biological father, or that Dina knew or assumed that Jordan was Lucy's biological father.⁵⁴⁶ The court of appeals sustained Jordan's argument that no Texas Family Code § 160.607(b) exception applied.⁵⁴⁷ Regarding Jordan's argument that § 160.607 violates a fundamental right under the Fourteenth Amendment of the U.S. Constitution, the court of appeals reviewed that legal question *de novo*.⁵⁴⁸ The alleged fundamental right at issue in this case is a biological father's right to establish a legal parent-child relationship with his biological child, who is over four years old, and has a presumed father under state law.⁵⁴⁹

Relying heavily on *Michael H. v. Gerald D.*, the leading case before the U.S. Supreme Court on preserving the relationship between a presumed

540. TEX. FAM. CODE § 160.607 (emphasis added).

541. *See In re L.M.R.*, 644 S.W.3d at 788.

542. *See id.*

543. *See id.* at 788–89.

544. *See id.* at 788.

545. *See id.* at 789.

See id.

546. *See id.* at 788.

547. *See id.*

548. *See id.* at 789–90.

549. *See id.* at 790.

father and a child, the court of appeals found that Texas Family Code § 160.607 is constitutional.⁵⁵⁰ In *Michael H. v. Gerald D.*, the relevant law provided that the presumption of paternity could only be rebutted by the husband or wife within two years of the child's birth, a more stringent standard than the Texas law that was at issue in this case.⁵⁵¹ In line with similar decisions in the Courts of Appeals for the Fifth District of Texas at Dallas and the Second District of Texas at Fort Worth, the court of appeals here determined that Frank's Fourteenth Amendment rights were not violated by application of the four-year statute of limitations.⁵⁵²

4. *Bearing the Cost of Children*

Child support issues can be loosely grouped into three categories: (1) establishing the obligation to pay support; (2) determining the amount of support to be paid; and (3) enforcing child support orders.

In *In re A.Z.F.*, the Court of Appeals for the Fourth District of Texas at San Antonio considered the rules for imputing income to an unemployed parent.⁵⁵³ The mother and father divorced in 2010.⁵⁵⁴ The mother was ordered to pay \$150.00 per month in child support for their one child.⁵⁵⁵ She went on to have a second son with a different man, who was later arrested for assaulting her.⁵⁵⁶ She then began dating a third man and moved to Washington with him and her second son in 2017.⁵⁵⁷ In 2018, the mother sought to modify the possession order, and the father counterclaimed for an increase in child support.⁵⁵⁸ The parties were able to agree on every issue except for whether the mother should continue to pay child support and in which amount.⁵⁵⁹ During a bench trial, the father argued that the mother was intentionally unemployed and that her child support should be increased to reflect her potential earnings; the mother argued that she suffered from post-traumatic stress disorder due to the abuse she suffered, which precluded her employment.⁵⁶⁰ The trial court concluded that the mother was intentionally unemployed and that she could earn at least \$40,000.00 per year.⁵⁶¹ The mother requested findings of fact and conclusions of law, which the trial court did not file.⁵⁶² The mother argued on appeal that the trial court abused its discretion both in finding her to be

550. *See id.* at 790–92; *see also* *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (plurality opinion).

551. *See In re L.M.R.*, 644 S.W.3d at 791; *see also* *Michael H.*, 491 U.S. at 116.

552. *See In re L.M.R.*, 644 S.W.3d at 791.

553. *See In re A.Z.F.*, No. 04-20-00553-CV, 2022 WL 1019566, at *1 (Tex. App.—San Antonio Apr. 6, 2022, no pet.) (mem. op.).

554. *See id.*

555. *See id.*

556. *See id.*

557. *See id.*

558. *See id.*

559. *See id.*

560. *See id.*

561. *See id.*

562. *See id.* at *2.

intentionally unemployed and by impliedly relying on the earning potential of her current romantic partner in assessing her earning potential.⁵⁶³

The Texas Family Code permits a trial court to impute income to a parent for purposes of imposing a child support obligation as long as the record supports the conclusion that the parent is intentionally unemployed.⁵⁶⁴ In this case, the mother had worked as a certified esthetician.⁵⁶⁵ She testified that, although she could find work in this field in Washington, doing so would be bad for her mental health.⁵⁶⁶ The father did not dispute that she suffered mental health issues but argued that they did not make her unable to work.⁵⁶⁷ The mother and her partner testified that they had considered whether the mother should get a job but determined that the cost of daycare would exceed whatever she could earn.⁵⁶⁸ This suggested to the trial court that the mother *could* work but was choosing not to.⁵⁶⁹ The court of appeals concluded that it was not an abuse of discretion to find her intentionally unemployed.⁵⁷⁰

The court of appeals also ruled against the mother on her second claim of error.⁵⁷¹ Although she is right that the court cannot add “any portion of the net resources of an obligor’s spouse to an obligor’s net resources in order to calculate the amount of child support to be ordered,” the court of appeals found no evidence the trial court had done so in this case.⁵⁷² The mother earned just over \$40,000.00 in 2015, the last year she worked full time. It was not an abuse of discretion to find, in 2019, that she could earn a similar amount.⁵⁷³ The mother also complained that the trial court erred by failing to file findings of fact and conclusions of law, which made it difficult to pursue her appeal.⁵⁷⁴ Although the failure to do so is presumed harmful, the court of appeals concluded that the presumption was rebutted.⁵⁷⁵ There was only one issue in dispute, and the trial court explained on the record the basis for its child support calculation.⁵⁷⁶ The record “demonstrates that appellant was not required to guess the reason for the trial court’s ruling,” and, indeed, “her appellate presentation affirms she understood the basis for the trial court’s rulings.”⁵⁷⁷

In *In re Marriage of Contreras*, the Court of Appeals for the Thirteenth District of Texas at Corpus Christi–Edinburg also found that the

563. *See id.*

564. *See* TEX. FAM. CODE ANN. § 154.066(a).

565. *See In re A.Z.F.*, 2022 WL 1019566, at *2.

566. *See id.*

567. *See id.*

568. *See id.*

569. *See id.*

570. *See id.* at *4.

571. *See id.* at *3.

572. *Id.* at *2–3 (citing TEX. FAM. CODE § 154.069(a)).

573. *See id.* at *3.

574. *See id.*

575. *See id.*

576. *See id.*

577. *Id.*

non-custodial parent was intentionally underemployed and upheld the trial court's assessment of imputed income for purposes of calculating child support.⁵⁷⁸ The court of appeals clarified that it is not necessary to find that the parent was intentionally minimizing income in order to avoid child support; it is enough to prove that the parent is earning "significantly less" than he could potentially earn.⁵⁷⁹ Similarly, the court of appeals clarified that when the trial court calculates child support based on higher potential earnings, this does not constitute an upward deviation from the guidelines; it is simply the application of the guidelines to a higher level of income.⁵⁸⁰ This case, however, also raised another issue related to an award of indefinite child support for an adult child with a disability.⁵⁸¹ The husband and wife had three children, two of whom were still minors at the time of their divorce trial in 2020.⁵⁸² The parties stipulated that they would serve as joint managing conservators, that the wife would have the right to designate the primary residence for the minor children, that the husband would have standard possession, and that the husband would pay child support in an amount to be determined by the court.⁵⁸³

The trial court assessed child support for the disabled adult child, which the husband contested on appeal.⁵⁸⁴ Under § 154.302 of the Texas Family Code, a court may order indefinite child support for a disabled child if the evidence shows that the disability existed before the child's eighteenth birthday (or the cause that would ultimately result in disability existed) and the child "requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support."⁵⁸⁵ The support amount should reflect the child's existing and future needs that relate directly to the disability, whether care will be paid for by the parent or provided directly by the parent, the parents' available resources, and other resources available to the disabled child.⁵⁸⁶

In this case, the husband argued that there was insufficient evidence to show that the child's disability existed before her eighteenth birthday, but given ample testimony that she was born with the condition and used a wheelchair throughout her childhood, this was not a successful line of argument.⁵⁸⁷ He also argued that there was insufficient evidence of the child's incapacity for self-support.⁵⁸⁸ However, although the child testified that she hoped one day to obtain education or training sufficient to obtain

578. See *In re Marriage of Contreras*, No. 13-21-00063-CV, 2022 WL 17983483, at *12 (Tex. App.—Corpus Christi—Edinburgh Dec. 29, 2022, no pet.) (mem. op.).

579. *Id.* at *5.

580. *See id.*

581. *See id.* at *1.

582. *See id.* at *1.

583. *See id.* at *1.

584. *See id.* at *4.

585. TEX. FAM. CODE ANN. § 154.302(a)(1).

586. *See* TEX. FAM. CODE § 154.306.

587. *See In re Marriage of Contreras*, 2022 WL 17983483, at *7.

588. *See id.* at *7–8.

a job, she had not successfully been able to find a job yet because of her inability to walk, drive, or use her hands.⁵⁸⁹ Even if she does not require constant care or supervision, her inability to earn income is sufficient to support an indefinite child support award.⁵⁹⁰

The case of *In re S.M.A* reinforced the importance of following the child support guidelines in typical cases.⁵⁹¹ The mother and father are the parents of two children.⁵⁹² In 2017, the trial court entered an agreed order establishing the parent-child relationship, naming the parents joint managing conservators, and ordering the father to pay \$620.00 per month in child support.⁵⁹³ In January 2020, the father filed a petition to modify the conservatorship and to terminate the child support order.⁵⁹⁴ The mother counterpetitioned asking for a different modification of the conservatorship and asking that the child support obligation be recalculated and increased.⁵⁹⁵ The trial court held a trial at which the father failed to appear.⁵⁹⁶ The court denied both parents' requested modifications to conservatorship and possession.⁵⁹⁷ The court confirmed child support arrearages in the amount of \$24,082.48 and increased the monthly amount to be paid to \$1,700.00.⁵⁹⁸ The court found that the mother presented admissible, uncontroverted testimony about the father's income and resources, and that 25% of the proven income (the guideline amount for two children) equals \$2,300.00 per month.⁵⁹⁹ Child support calculated using the statutory guidelines is presumed to be in the best interests of the child, and a trial court can deviate downward only if there is evidence to rebut that presumption.⁶⁰⁰ Here, the trial court specifically noted that there was no evidence to rebut the presumption.⁶⁰¹ The father was properly cited and yet failed to appear.⁶⁰² Indeed, he disappeared from the children's lives as well as the litigation in July 2020.⁶⁰³ At the time of the trial in 2021, he

589. *See id.*

590. *See id.* at *8 (citing *In re W.M.R.*, No. 02-11-00283-CV, 2012 WL 5356275, at *5 (Tex. App.—Fort Worth, Nov. 1, 2012, no pet.) (mem. op.) (holding that child support was appropriate even though adult disabled child did not need constant supervision); *In re D.C.*, No. 13-15-00486-CV, 2016 WL 3962713, at *8 (Tex. App.—Corpus Christi—Edinburg, July 21, 2016, pet. denied) (mem. op.) (holding that child support was appropriate because adult disabled child was not currently capable of self-support even though he was pursuing education that might someday help him seek employment)).

591. *See In re S.M.A.*, No. 05-21-00744-CV, 2022 WL 16918365, at *2 (Tex. App.—Dallas Nov. 14, 2022, no pet.) (mem. op.).

592. *See id.* at *1.

593. *See id.*

594. *See id.*

595. *See id.*

596. *See id.*

597. *See id.*

598. *See id.*

599. *See id.*

600. *See* TEX. FAM. CODE § 154.122.

601. *See In re S.M.A.*, 2022 WL 16918365, at *2.

602. *See id.* at *1–2.

603. *See id.*

had not seen or communicated with the children in nine months.⁶⁰⁴ More importantly, he offered no evidence to contradict the mother's evidence and did not object to the trial court's findings.⁶⁰⁵

On appeal, the mother argued that the trial court's award of \$1,700.00 per month in child support is not supported by the evidence at trial.⁶⁰⁶ Strangely, the trial court made a finding of fact that the guideline amount was \$2,300.00 per month and that the presumption that the guideline amount is in the best interests of the children was not rebutted and, yet, entered an order for only \$1,700.00 per month.⁶⁰⁷ No party in this case challenged the findings of fact on appeal, and they were thus binding on the Court of Appeals for the Fifth District of Texas at Dallas.⁶⁰⁸ The "judgment rendered by the trial court must conform to the nature of the case proved."⁶⁰⁹ The court of appeals stated that the judgment in such a case "should either be reformed to conform to the findings, or if appropriate, it should be reversed."⁶¹⁰ In this case, the court of appeals modified the trial court's order to award the mother \$2,300.00 per month in child support after determining that there was "no way to reconcile the multiple findings made by the trial court on the child support issue and the amount of monthly support it ordered."⁶¹¹

On the issue of conservatorship and possession, the court of appeals also ruled for the mother but in a more limited way.⁶¹² Although it agreed that the trial court's findings did not support its decision to deny the mother's requested modifications, it did not think the unrebutted evidence provided "unequivocal[] support" for them either.⁶¹³ The court of appeals simply could not "discern the basis of the trial court's ruling from the findings it made."⁶¹⁴ It thus remanded the case for a new trial because the "trial court's findings are dissonant with its order."⁶¹⁵

Of course, not all cases are "typical." In *In re J.A.V.*, the Court of Appeals for the Fourth District of Texas at San Antonio considered the validity of an upward deviation from the guidelines where the father was a professional football player.⁶¹⁶ Marcus D. and Cynthia T. met in college; Cynthia got pregnant and dropped out of school.⁶¹⁷ Marcus, meanwhile, got drafted

604. *See id.* at *2.

605. *See id.*

606. *See id.*

607. *See id.*

608. *See id.* (citing *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630, 632 (Tex. App.—Dallas 1993, writ denied)).

609. *Id.*

610. *Id.* (citing *Pac. Emp'rs Ins. Co. v. Brown*, 86 S.W.3d 353, 353 (Tex. App.—Texarkana 2002, no pet.)).

611. *Id.*

612. *See id.* at *3.

613. *Id.*

614. *Id.*

615. *Id.*

616. *See In re J.A.V.*, No. 04-21-00084-CV, 2022 WL 379316, at *1 (Tex. App.—San Antonio Feb. 9, 2022, no pet.) (mem. op.).

617. *See id.*

by the New Orleans Saints, with whom he signed a lucrative contract.⁶¹⁸ Marcus filed a SAPCR in 2018, and, after a long discovery period, the trial court held a bench trial in 2020.⁶¹⁹ Marcus was ordered to pay \$4,000.00 per month in child support.⁶²⁰ Under the Texas Family Code, child support is set by the guidelines for an obligor's net monthly resources of \$9,200.00 or below.⁶²¹ When the obligor's resources exceed this amount, the court can award additional child support based on the child's "proven needs."⁶²² As in many other family law contexts, "needs" are not limited to "bare necessities of life."⁶²³ Marcus was determined to have net monthly resources of \$49,445.00—more than five times the amount at which the guidelines cease to operate.⁶²⁴ Marcus did not succeed in challenging the excess child support award; the trial court did not abuse its discretion in finding that the child had special needs that justified private school and certain other expenses.⁶²⁵ Given that Marcus received an \$8 million signing bonus when he signed with the New Orleans Saints, the court of appeals may not have been sympathetic to his objections to excess child support.⁶²⁶

The Court of Appeals for the Fourth District of Texas at San Antonio, in *In re A.R.G.*, vacated the imposition of penalties for retroactive child support.⁶²⁷ The Office of the Attorney General (OAG) filed a SAPCR in 2012, asserting that Karisha Gomez and Pete Salazar were the parents of a child who was then fifteen years old.⁶²⁸ The trial court ordered Pete to pay child support monthly and also set an amount due as retroactive child support, to be paid off monthly with interest.⁶²⁹ Pete's obligations ended in June 2015, when the child graduated from high school.⁶³⁰ In 2020, the mother filed a suit asking for confirmation of child support arrearages and petitioning for the suspension of Pete's driver's license and motor vehicle registrations for failure to pay child support.⁶³¹ The trial court confirmed arrears of just over \$16,000.00 and entered a money judgment for the mother.⁶³² The court also deemed the outstanding amount "overdue" child support and agreed to suspend Pete's license and registrations.⁶³³ It

618. *See id.*

619. *See id.*

620. *See id.*

621. *See* TEX. FAM. CODE ANN. §§ 154.125, 154.126.

622. *Id.* § 154.126.

623. *Rodriguez v. Rodriguez*, 860 S.W.2d 414, 417 n.3 (Tex. 1993).

624. *See In re J.A.V.*, 2022 WL 379316, at *3.

625. *See id.* at *6.

626. *See generally id.* at *1.

627. *See In re A.R.G.*, 645 S.W.3d 789, 795–99 (Tex. App. — San Antonio 2022, no pet.).

628. *See id.* at 792.

629. *See id.*

630. *See id.*

631. *See id.* at 792–93.

632. *See id.* at 793.

633. *Id.*

stayed the suspensions as long as Pete paid \$300.00 per month against the judgment.⁶³⁴

On appeal, Pete first argued that the trial court did not have jurisdiction to suspend his license because the court only has jurisdiction to enter a contempt order for two years after the child support obligation terminates.⁶³⁵ The OAG, which was a party to the case, argued that the petition to suspend a license is “an enforcement remedy” but not a “contempt order” and therefore is not constrained by the statute of limitations.⁶³⁶ The court of appeals agreed with the OAG, concluding that contempt orders are “limited to those orders that assess monetary fines or incarcerate an individual for failure to follow a court order.”⁶³⁷ Because the trial court’s order took neither of these actions against Pete, it did not qualify as a contempt order.⁶³⁸ This conclusion was supported by code provisions showing it is possible to pursue contempt and other enforcement remedies simultaneously, as well as caselaw drawing a distinction.⁶³⁹

Pete also argued that the requirements for license suspension were not met because child support owed under his retroactive support judgment was not “overdue.”⁶⁴⁰ Under § 232.003 of the Texas Family Code, an obligor’s license cannot be suspended unless the obligor is at least three months behind, has been provided an opportunity to make payments under a court-ordered or agreed repayment schedule, and has failed to comply with the repayment plan.⁶⁴¹ The OAG argued that the schedule set for paying off the retroactive child support was a payment plan on which Pete had defaulted.⁶⁴² Pete argued that retroactive child support is not “overdue” unless and until it has been confirmed as an arrearage.⁶⁴³

A parent who has not previously been ordered to pay child support can be ordered to pay retroactive child support, as Pete was.⁶⁴⁴ Was that child support “overdue” such that the court-ordered schedule of monthly payments constituted his opportunity to repay what he owed? The court of appeals noted that the code does not define the term “overdue,” but that Black’s Law Dictionary defines it as “not paid by the appointed time [or] unpaid beyond the proper time of payment.”⁶⁴⁵ The trial court’s 2012 order established child support obligations for the first time and also set the

634. *See id.*

635. *See* TEX. FAM. CODE § 157.005(a)(2).

636. *In re A.R.G.*, 645 S.W.3d at 793.

637. *Id.* at 794.

638. *See id.*

639. *See id.* at 794–95 (citing *In re Cannon*, 993 S.W.2d 354, 356 n.2 (Tex. App.—San Antonio 1999, no pet.)).

640. *Id.* at 795.

641. *See* TEX. FAM. CODE ANN. § 232.003(a).

642. *See In re A.R.G.*, 645 S.W.3d at 792.

643. *Id.*

644. *See* TEX. FAM. CODE § 154.009(a).

645. *In re A.R.G.*, 645 S.W.3d at 796 (quoting *Overdue*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

amount for retroactive child support.⁶⁴⁶ It established a payment schedule for the latter portion, but the retroactive child support was not “overdue” at the time it was set.⁶⁴⁷ Rather, it “became overdue when it remained unpaid beyond the time payment was ordered under the retroactive child-support payment plan in the SAPCR Order.”⁶⁴⁸ The trial court erred by treating child support that was “due and owing” as “overdue.”⁶⁴⁹ Without the missed payments for the retroactive child support, Pete did not have sufficient arrearages to qualify for license suspension.⁶⁵⁰ The court of appeals thus reversed that portion of the judgment.⁶⁵¹

646. *See id.* at 792.

647. *Id.* at 796.

648. *Id.*

649. *Id.* at 797.

650. *See id.*

651. *See id.*

