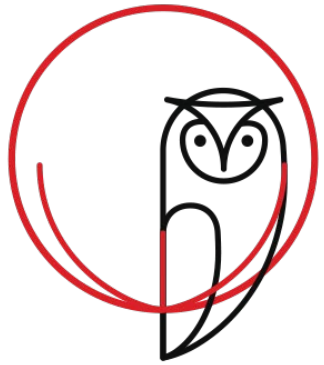
WHAT'S NEW IN TEXAS FAMILY LAW THIS FALL?



O'NEIL WYSOCKI
FAMILY LAW
The Wise Choice

Michelle May O'Neil

www.owlawyers.com

IN RE J.J.R.S., ___ S.W.3D ___, NO. 20-0175, 2021 WL 2273722 (TEX. 2021) (06-04-21).

- **TEXAS FAMILY CODE PERMITS TRIAL COURTS TO GIVE ONE CONSERVATOR SOLE DISCRETION OVER ANOTHER CONSERVATOR'S POSSESSION AND ACCESS.**

- **Facts:** TDFPS filed suit to terminate Mother's parental rights after police responded to an incident involving Mother prostituting herself in a motel just one room away from Children, with drugs located it both rooms. TDFPS removed Children from Mother's care and placed them with Aunt and Uncle. At final trial, evidence was admitted that Mother was uncooperative with TDFPS and failed to complete any service plan goals, that Mother continued using drugs during the suit, and that Children were experiencing emotional trauma when they would wait for Mother in the CPS lobby for her visitation and she frequently would not show up. Throughout the pendency of the suit, Mother had only exercised a handful of her allotted visitations with Children. At the conclusion of final trial, the trial court appointed Aunt and Uncle as MCs and appointed Mother as PC. The trial court further awarded Mother possession of Children at Aunt and Uncle's sole discretion. Mother appealed, arguing, *inter alia*, that the trial court's possession order was void for vagueness and based on insufficient evidence. The appellate court affirmed. Mother filed a petition for review.

- **Holding: Affirmed**

- **Opinion:** Mother argues that the trial court's possession schedule effectively denies her the right of access to Children. TFC § 155.006(c) requires a trial court to "specify and expressly state in the order the times and conditions for possession of or access to the child, *unless* a party shows good cause why specific orders would not be in the best interest of the child." The trial court's possession order does not completely deny Mother of possession, but merely serves as a severe restriction on her possession, which, if good cause exists, is permissible under § 155.006(c). Here, the evidence admitted at final trial, including that Mother was uncooperative with TDFPS and failed to complete any service plan goals, that Mother continued using drugs during the suit, and that Children were experiencing emotional trauma when they would wait for Mother in the CPS lobby for her visitation to which she frequently would not show up, was sufficient to support the trial court's severe restriction on Mother's possession. Accordingly, the trial court's possession order is legally permissible under § 155.006(c) and is factually permissible under the record in this case.

Mother next argues that, if a total denial of access serves Children's best interest, then the trial court must terminate the parent-child relationship instead of imposing a possession order that effectively denies access altogether. Again, however, the trial court's possession order does not constitute an outright denial of access. Even if it were, a trial court is not required to irrevocably terminate a parent's rights rather than restrict those rights and give the parent the opportunity to seek to increase their rights in the future.

Mother lastly argues that an "as agreed" possession order, like the one here, is an impermissible delegation of judicial authority, particularly because they are unenforceable by contempt. It is true that the power to enforce an order by contempt is an essential element of judicial independence and authority. However, courts routinely find that orders are too vague to be enforceable by contempt. Even still, those courts do not render the orders vague for voidness as a result. Furthermore, the TFC does not require trial courts to render possession orders that are always enforceable by contempt. Additionally, the possession order at issue does not leave Mother without remedy. If she, Aunt, and Uncle are unable to reach agreements for possession, then Mother can always move to modify the order.

MY THOUGHTS…

- J.J.R.S.: This case bothers me. It bothers me even more that it comes out of Austin. It is a child protection suit which explains how the logic got to this, but bad cases make bad law. There should never be a time where a parent's access should be dependent upon the agreement of the other parent or TDFPS or anyone besides a court order. I thought judges were supposed to make the decisions? I mean if one parent can just be in charge, then why do we need judges and courtrooms?

HULTQUIST V. COOK, NO. 14-19-00896-CV, 2021 WL 2252129 (TEX. APP.—HOUSTON [14TH DIST.] 2021, NO PET. H.) (MEM. OP.) (06-03-21).

- **EVIDENCE SUFFICIENT TO SUPPORT TRIAL COURT'S FINDING OF CRUELTY AND DISPRO-PORTIONATE DIVISION OF COMMUNITY ESTATE**
- **Facts**: At final trial in the parties' divorce, Husband testified that he had resigned from his job as a teacher after testing positive for drugs. Husband testified that his mother provides him with financial support for his living expenses and attorney's fees. Husband denied having an affair but conceded that he had made a profile on a dating website. Husband further conceded that he failed to produce a substantial amount of information regarding assets relevant to the divorce proceeding. Wife testified that Husband had called her derogatory names during the marriage and would tell her that he was having affairs with other people. Wife testified that she would get rashes and her hair began falling out as a result of the stress she experienced from Husband's treatment of her. Wife also testified that, if she didn't have sex with Husband, he would get very mad and angry. Wife further testified that Husband had spent about $10K on drugs during their marriage without her knowledge. At the conclusion of final trial, the trial court signed a divorced the parties on the grounds of insupportability and cruel treatment. The trial court further awarded Husband $177K in property and awarded Wife $226K in property. Husband appealed.
- **Holding**: Affirmed

- **Opinion**: Husband challenges the trial court's finding of cruelty and its disproportionate division of the community estate. At final trial, Wife testified that Husband had called her derogatory names during the marriage and would tell her that he was having affairs. Because of this treatment, she would get rashes and her hair began falling out as a result of the stress she experienced. Wife also testified that, if she didn't have sex with Husband, he would get very mad and angry. Additionally, Wife testified that Hus-band had spent $10K on drugs during the marriage. This evidence is sufficient to support the trial court's finding of cruel treatment. This cruelty finding is, in turn, sufficient to support the trial court's disproportionate division of the estate. With Wife being awarded the equivalent of $226K and Husband being awarded the equivalent of $177K, the disproportionate division is not punitive, particularly given that Husband failed to produce substantial information regarding the assets in the estate and Husband's receipt of financial support from his mother.

ORZECHOWSKI V. ORZECHOWSKA, NO. 14-20-00055-CV, 2021 WL 3202679 (TEX. APP.—HOUSTON [14TH DIST.] 2021, NO PET. H.) (MEM. OP.) (07-29-21).

- **TRIAL COURT DID NOT ERR IN FINDING THAT HUSBAND WAS GUILTY OF CRUEL TREATMENT AND IN DECLINING TO FIND THAT WIFE HAD COMMITTED FRAUD ON THE COMMUNITY ESTATE**
- **Facts**: At final trial in the parties' divorce, the primary issues were Wife's allegations of cruel treatment and both parties' claims for fraud on the community estate. Regarding cruel treatment, Wife testified that Husband continuously demeaned her during the marriage, primarily focusing on her appearance and her individual worth as someone who earned less than he did. Wife further testified that Husband controlled the parties' finances and had done so punitively on several occasions, including not letting her use money to visit sick family members and not paying for her hand surgery. Wife also testified to two incidents of physical violence and to an incident where Husband refused to give Wife digital copies of their family photographs after they separated. The couple's Daughter and several friends also testified, corroborating Wife's allegations of cruel treatment. As to the allegations of fraud, Wife presented testimony and other evidence in support of hundreds of thousands of dollars missing from the community estate for which Husband had no explanation. Husband brought his own fraud claim, testifying that Wife invested $560K without his consent and that this money was lost when the invested company went bankrupt. Wife testified that the investment was made for the benefit of the parties' children, because Husband had been draining their bank accounts and had threatened to leave them all penniless. At the end of final trial, the trial court found that the marriage should be dissolved on the ground of Husband's cruel treatment. The trial court further granted Wife's fraud claim; reconstituted the community estate based on Wife's fraud claim; and awarded Husband a portion of the community estate that, ignoring the reconstitution, would only provide him with 10% of the estate. Husband appealed.
- **Holding**: Affirmed

- **Opinion**: Husband argues that the trial court erred in finding cruel treatment, because he alleges that verbal abuse alone does not constitute cruel treatment. However, verbal abuse alone can constitute cruel treatment. Furthermore, even if it could not, Wife also testified to two incidents of physical violence, to incidents where Husband had used his sole control of the couple's finances punitively against Wife, and to an incident where Husband refused to give Wife digital copies of their family photographs after they separated. On this record, the trial court did not err in finding cruel treatment. Husband next argues that the trial court acted punitively in considering his fraudulent activities when reconstituting the community estate but declining to find that Wife had committed fraud on the community estate. At final trial, Husband testified that Wife invested $560K without his consent and that this money was lost when the invested company went bankrupt. However, Wife testified that the investment was made for the benefit of the parties' children, because Husband had been draining their bank ac-counts and had threatened to leave them all penniless. Based on Wife's testimony, the trial court could have reasonably found that Wife's disposition of the funds was fair, because she invested them for the benefit of the parties' children and with concern for Husband's desire to leave them penniless. Because the evidence presented at trial did not establish as a matter of law that Wife had committed fraud on the community estate, the trial court had no obligation to factor Wife's failed investment into its calculation of the reconstituted community estate like it did with Husband's fraudulent activities. Therefore, the trial court did not act punitively.

MY THOUGHTS…

- **Hultquist**: The Houston 14th Court has opened the flood gates for litigation on the issue of cruel treatment grounds. Seems like calling the spouse derogatory names and admitting to affairs might be run-of-the-mill for a couple having marital difficulties. Now, because wife reacts to the "stress" of the breakup with a rash and hair falling out, we will call it cruel treatment. Seems like that's not far off, in the Houston 14th court's definition, from an IIED claim. Family lawyers rejoice in the new litigation strategy!
- **Orzechowski**: As in the Hultquist case above, the Houston 14th Court has given family lawyers a new litigation strategy of cruel treatment grounds (and maybe an IIED claim?) for evidence such as name-calling, comment on appearance ("ugly", "fat cow"), comment on earning ability ("low-level job"), comment on individual worth ("stupid", "a nobody"), financial control, threats of divorce, disagreement on how to spend money, disagreement on elective surgery, disagreement about visiting family members out of the country, refusing to share copies of digital family pics, and refusing to buy the spouse a new car. In fact, reconciliation after these events didn't cure the fault finding. The Court states, "To constitute cruel treatment, the conduct of the accused party must rise to such a level as to render the couple's living together insupportable." Sooooo…… family lawyers, there seems to be no difference between conduct in the no-fault divorce arena that leads to divorce versus conduct the Houston 14th Court thinks is cruel. Let the litigation games begin!

M.B. V. R.B., NO. 02-19-00342-CV, 2021 WL 2252792 (TEX. APP.—FORT WORTH 2021, NO PET. H.) (MEM. OP.) (06-03-21).

- **TRIAL COURT ERRED IN SIGNING DIVORCE DECREE, BASED ON MEDIATED SETTLEMENT AGREEMENT, WHERE WIFE RECEIVED LESS THAN 45 DAYS' NOTICE OF THE HEARING ON HUSBAND'S MOTION TO ENTER PROPOSED DIVORCE DECREE**
- **Facts**: Wife filed for divorce and Husband filed an answer and general denial. Thereafter, the parties entered into an MSA, resolving the issues between them. The trial court subsequently sent out a notice of dismissal for want of prosecution, setting a dismissal date several months later. Just 3 days prior to dismissal, Husband filed a motion to enter a proposed divorce decree. This proposed divorce decree did not bear the signatures of either Husband or Wife, or either of their attorneys. The trial court signed a notice of hearing for Husband's motion to enter 2 days prior to dismissal, setting the motion for hearing at the same time as the dismissal docket. The record does not reflect that this notice of hearing was ever served on Wife or her attorney. Thereafter, at the time set for hearing, the trial court signed Hus-band's proposed divorce decree. Several months later, Wife filed a restricted appeal.
- **Holding**: Reversed and Remanded

- **Opinion**: Wife argues that the trial court erred in signing Husband's proposed divorce decree, because she did not receive the requisite notice of the final hearing. Even though the parties entered into an MSA, this suit is still considered contested, because an answer and general denial were filed. Further-more, the existence of an MSA does not mean there is nothing left for the trial court to resolve, because a party could still assert defenses against the validity of an MSA. Therefore, a hearing to prove-up an MSA, such as the hearing here, is still considered a final hearing and requires 45 days' notice. There is nothing to indicate that Wife received any notice of the hearing here, but certainly less than 45 days' notice. Accordingly, the case must be reversed and remanded for insufficient notice to Wife.

MY THOUGHTS…

- M.B.: So let me get this straight…. An MSA is entered into that purports to settle all issues, but in case someone wants to file to set it aside we still have to give 45 days notice of a final trial (instead of an immediate proveup). Umm…. Yeah… that makes so much sense. Not.

ALIKHAN V. ALIKHAN, NO. 03-19-00515-CV, 2021 WL 3085844 (TEX. APP.—AUSTIN 2021, NO PET. H.) (MEM. OP.) (07-22-21).

- **HUSBAND'S APPLICATION TO VACATE ARBITRATOR'S AWARD UNTIMELY WHEN FILED MORE THAN 90 DAYS AFTER HE SIGNED ARBITRATION AGREEMENT AND RULES, WHICH FORMED THE BASIS OF HIS COMPLAINT**
- **Facts**: Husband and Wife entered into a premarital agreement with a binding arbitration provision prior to marriage. During their divorce, the parties and the trial court signed agreed TOs, which provided, in relevant part, that the case would be submitted to binding arbitration and that they would comply with the requests of the arbitrator. Thereafter, on July 18 of that year, the parties and the arbitrator signed an ar-bitration agreement and rules, which provided, in relevant part, that there would be no court reporter at arbitration and that the arbitrator would first try to mediate the disputes and, thereafter, would arbitrate any remaining disputes. The parties also entered into a partial MSA on that same day, which resolved some of the issues between them. They then participated in arbitration, after which the arbitrator rendered an award as to all remaining issues. At a subsequent hearing, the trial court orally granted a divorce in accordance with the terms of the partial MSA and the arbitrator's award. Husband then retained new counsel and filed an application to vacate the arbitrator's award on October 30 of that same year, arguing that the arbitration agreement and rules were essentially an "adhesion contract" that he had "no choice but to accept" and were unconscionable in that they allegedly deprived Husband of his right to have the arbitration proceeding recorded. Months later, the trial court signed a divorce decree in accordance with the partial MSA and the arbitrator's award; however, Husband's application to vacate the arbitrator's award was never heard by the trial court. Husband appealed.
- **Holding**: Affirmed

- **Opinion**: Husband argues that the arbitration agreement and rules were unconscionable, because he was allegedly forced to waive his rights to the making of a record. Husband argues that this waiver pre-vented him from presenting his case on appeal. At the trial-court level, the only place Husband made this complaint was in his application to vacate the arbitrator's award. Under the TCPRC, an application to vacate an arbitrator's award must be made within 90 days after "the date the grounds for the application are known or should have been known." Here, those grounds – the arbitration agreement and rules – were known to Husband when he signed them on July 18. His application to vacate arbitrator's award, which was not filed until October 30, were more than 90 days later and thus untimely made under the TCPRC. In addition, even if the application had been timely, Husband failed to preserve error, because he never ensured that his application was heard by the trial court. On top of this, Husband fails to pro-vide any authority for the crux of his argument: that he had a right to have the arbitration proceeding recorded. Accordingly, the trial court's divorce decree is affirmed.

MY THOUGHTS…

- Alikhan: I hate arbitration agreements in family law cases. I do. I hate them. Don’t do them. Just don’t.

TOUPONSE V. TOUPONSE, NO. 02-20-00285-CV, 2021 WL 2753504 (TEX. APP.—FORT WORTH 2021, NO PET. H.) (MEM. OP.) (07-01-21).

- **TRIAL COURT ERRED IN AWARDING TO HUSBAND TWO REAL PROPERTIES OWNED BY LIMITED LIABILITY COMPANIES**
- **Facts**: At final trial in the parties' divorce, the undisputed evidence showed that the parties held owner-ship interests in, inter alia, two LLCs. In turn, it was undisputed that one of these LLCs owned a parcel of real property referred to as the South Main Street property and the other LLC owned a parcel of real property referred to as the Bunker Hill property. After final trial, the trial court entered a divorce decree, which, inter alia, found the South Main Street property and the Bunker Hill property to be community property, valued them cumulatively at $332K, valued the entire community estate at $2.6MM, and awarded both properties to Husband. Husband appealed.
- **Holding**: Reversed and Remanded

- **Opinion**: Husband argues that the trial court erred in its division of property in numerous ways, including by awarding to Husband the two parcels of real property owned by LLCs. An LLC is a separate legal entity, and property owned by an LLC is neither the community property nor the separate property of its members. The only business property that is subject to division upon divorce is the parties' interest in the LLC itself, not the LLC's specific assets. Accordingly, the trial court erred by finding that the two parcels of real property were community property when the undisputed evidence showed that they were both owned by LLCs. In addition, these erroneous awards to Husband added $332K to his side of the proper-ty division, which, given that the total value of the community estate was $2.6MM, is not an insignificant amount and materially affected the property division. Accordingly, the entire property division must be remanded.

MY THOUGHTS…

- Touponse: Entity theory – assets of a company belong to the company, not the parties. You can't dive inside the entity. Only the ownership of the interest is up for grabs.

IN RE GOPALAN, NO. 03-21-00209-CV, 2021 WL 2964263 (TEX. APP.—AUSTIN 2021, NO ORIG. PROCEEDING) (MEM. OP.) (07-15-21).

- **TRIAL COURT PROPERLY EXCLUDED EXPERT TESTIMONY, CRITIQUING CHILD-CUSTODY EVALUATION, ON GROUND THAT EXPERT WITNESS HAD NOT PERFORMED CHILD-CUSTODY EVALUATION**
- **Facts:** During Husband and Wife's divorce, the trial court appointed Evaluator to perform a child-custody evaluation. Husband subsequently hired Expert Witness, who reviewed Evaluator's child-custody evaluation and issued reports criticizing the methodologies, findings, and recommendations in the evaluation. Wife filed a motion to exclude Expert Witness from testifying, arguing that he could not give an opinion on Evaluator's child-custody evaluation, because he had not been appointed as a child-custody evaluator and he had not completed all elements of a child-custody evaluation under Chapter 107. Wife further contended that any probative value of Expert Witness's testimony would be outweighed by the danger of unfair prejudice, confusion, or delay. After a hearing on Wife's motion to exclude, the trial court excluded Expert Witness from testifying, finding that he did not perform a child-custody evaluation and therefore could not qualify as a child-custody evaluator in the suit. The trial court further concluded that any probative value of Expert Witness's testimony would be outweighed by the potential for confusion. Husband filed a petition for writ of mandamus.
- **Holding: Petition for Writ of Mandamus Denied**

- **Opinion:** Under TFC § 104.008(a), only a person who has conducted a child-custody evaluation may offer an expert opinion or recommendation relating to conservatorship, possession, or access. Husband argues that the trial court erred in excluding Expert Witness from testifying, because Expert Witness was not giving an expert opinion or recommendation regarding conservatorship, possession, or access. Instead, Husband argues that Expert Witness was simply identifying the flawed methodology in Evaluator's child-custody evaluation. However, § 104.008(a) does not require that the excluded testimony be the equivalent of an opinion on custody; it authorizes exclusion of expert testimony merely "relating to" conservatorship, possession, or access. The trial court did not err in concluding that Expert Witness's testimony, which criticized Evaluator's child-custody evaluation, was sufficiently "related to" conservatorship, possession, and access to warrant exclusion under § 104.008(a). Furthermore, Husband did not show that he will suffer irreparable harm from the exclusion of this testimony. For example, Husband did not show that he is unable to challenge Evaluator's opinion through a *Daubert* hearing, nor has he shown that Expert Witness's criticisms cannot be used for effective examination during deposition or cross-examination at trial.

MY THOUGHTS…

- Gopalan: I'm afraid many will try to make more out of this case than they should. It is a memo opinion without a full analysis which means the summary nature of the opinion does not provide the full statement of the law that I'd prefer. My read of the case: When you hire an expert to critique a custody evaluation, that person cannot substitute his/her judgment for the original evaluator. They can criticize the methodology, reasoning, and even the conclusions. But they cannot go the next step and say a different conclusion should have been reached. This is basic Daubert challenge 101.

NEW LEGISLATION

TITLE 1 MARRIAGE RELATIONSHIP

- **MARRIAGE LICENSE APPLICATIONS** meet high technology. If certified through the Texas Judicial Council under Section 71.039, Tx Gov't Code, county clerks may issue a marriage license through remote technology). This is effective 9/1/2021. TFC 2.0091. HB 907.
- **DATE OF MARRIAGE** must be in Divorce Decrees, effective September 1, 2021 TFC Section 6.712, HB 3774.

MAINTENANCE

- **MAINTENANCE.** Due to COVID layoffs, many sought modifications of statutory maintenance related to job losses and decreased earnings. Language has been added to assure that the Court may not increase statutory maintenance to an amount that exceeds the amount or duration of the original maintenance Order. Moreover, even if the Court finds a material and substantial change in circumstances regarding maintenance, such a finding cannot be the sole basis for arguing a material and substantial change regarding custody, access, or child support. This applies to motions filed on or after 9/1/2021. TFC Section 8.057(a), (b), (c) and (c)(1). HB 867 and HB 851.
- **ENFORCEMENT OF MAINTENANCE.** A judgment of enforcement on default of maintenance payments may be enforced by any means available for any other judgment, but may now also be enforced by entry of an order or writ of withholding and a maintenance Qualified Domestic Relations Order (QDRO). TFC Section 8.059(b). This applies to orders entered before or after 9/1/2021. HB 867.
- **STATUTORY MAINTENANCE PAYMENTS**. If statutory maintenance and child support payments per Chapter 154 are ordered, then maintenance payments shall be paid through the central registry in San Antonio. TFC 8.062 applies to maintenance orders entered on or after 9/1/2021. SB 286.

- **CJ/MAINTENANCE.** The Court that rendered a maintenance order has continuing jurisdiction (CJ) to enter a QDRO in the event of a default and enforcement action, to require payment via retirement funds. Query: Is the person who owes money really agreeable with the taxes that will be occasioned if the payor is under 59½? Moreover, if a plan administrator deems an order as unworthy of QDRO status, the Court still retains CJ in order to enter a QDRO that will be worthy. TFC 8.354. In addition to having a CJ to correct a defective order, the court that renders a QDRO regarding statutory maintenance has the right to clarify or to add language to assure the collection of maintenance. TFC 8.355. Courts are obliged to give the statute liberal construction. TFC Section 8.356. Attorney's fees may be granted in maintenance enforcement, which can be recovered under any means allowed for a debt. TFC 8.357. Maintenance may be awarded by direct payments. TFC 8.358. Regarding built-in pre-emption, in the event of a conflict of law with the Government Code, the Government Code wins. In the event of a conflict with federal law, federal law trumps TFC Chapter 8. This applies to matters that were entered before or after 9/1/2021, the effective date of the act. HB 867.
- **ASK NICELY AND YOU SHALL BE REWARDED.** A party to a maintenance order may request a QDRO in an original suit and/or in an enforcement suit. TFC 8.352(a)(b) can ask for a QDRO in an original suit or enforcement suit regarding maintenance. This applies to matters that were entered before or after 9/1/2021, the effective date of the act. HB 867.
- **TEMPORARY ORDERS RE MAINTENANCE**. During the pendency of a QDRO proceeding or similar order, or on appeal of an enforcement action, on the motion of a party or on the Court's own motion, the Court may render appropriate orders to preserve pensions, retirement accounts, or other employee benefits. Such an order is not subject to interlocutory appeal. TFC Section 8.353(a)(b). This applies to matters that were entered before or after 9/1/2021, the effective date of the act. HB 867.

TFC 45

- **CHANGE OF NAME**. TFC 45. A petitioner is no longer required to provide an address if the petitioner can show that they are participating in an address confidentiality program (e.g., if domestic violence is an issue). TFC 45.102(c) Proof of participation in an address confidentiality program is to be provided per Article 58.059, Code of Criminal Procedure. This applies only to applications on or after 9/1/2021. HB 2301.

TITLE IV PROTECTIVE ORDERS

- Gov. Greg Abbott vetoed SB 1458, a bill that sought to standardize protective order applications. Senate Bill 1458 was passed by the 87th Legislature, Regular Session. In vetoing SB 1458, a gubernatorial proclamation was issued in which the governor noted, in pertinent part:
- "Senate Bill 1458's goal of having model forms for protective orders, orders for emergency protection, and temporary ex parte orders is a sound one, but this is already allowed. The Office of Court Administration can, and is encouraged to, create model forms to help achieve the commendable goals behind Senate Bill 1458. But the bill would go farther and impose categorical mandates that courts use standardized forms, without addressing what happens if a court deviates from the prescribed form and without allowing flexibility for unique cases. I vetoed similar legislation last session because, without appropriate safeguards, mandating the use of standardized forms in criminal cases sets a trap for courts whose orders may be challenged as void for deviating from the form and creates loopholes for opportunistic litigants to pursue needless challenges."

- **PROOF OF SERVICE/DEFAULTS.** There is no more last-minute waiving of certified mail receipts. To take a default judgment, proof of service must be filed with the Court prior to the hearing. With the status of the e-file system, this may be easier to say than to do. TFC 85.006(a).
- **SEPARATION OF WIRELESS SERVICE.** While well intentioned, this may prove difficult to implement. If a petitioner on a protective order application is a primary user of a wireless telephone number associated with the respondent's telephone service account, the applicant/petitioner may ask the Court for a separation order allowing them to remove the phones used by the applicant or the applicant's children to a new account so that the respondent can no longer use the original phone account to track the applicant. Many protective order applicants have limited financial resources. Is it unclear how, or if, cellular phone companies will be forced to cooperate.

TITLE IV PARENT CHILD RELATIONSHIP

- **RIGHT TO JURY**. Sole managing conservators are added to those who can request a jury trial on residency restrictions, and simply ties to "any right of a conservator other than a determination under Subdivision (1) (D) (E) or (F). This applies to suits filed on or after 9/1/2021. SB 285.
- **TRANSLATOR REGARDING CHILD CUSTODY EVALUATION WHERE PARENT DOES NOT SPEAK ENGLISH AS PRIMARY LANGUAGE**. Child custody evaluators must speak the language of the people they are evaluating, or a translator/interpreter who can be an intermediary must be retained. This applies only to custody evaluations on or after the effective date of 9/1/2021. TFC 107.103 (c) (f) and (g). HB 3009.

- **AAL/GAL training.** While there is some time built in to get in CLEs, court appointed counsel who wish to be on the judge's appointment list must supply each court with proof of training regarding trauma informed care and the effect of trauma on children in the custody of TDFPS. If the judge simply chooses someone due to their familiarity with the attorney, the attorney's acumen, etc., the training requirement is waived. TFC 107.004(b-1). Attorneys may want to see some excellent work on the State Bar of Texas website by Barbara Elias Perciful for such CLEs. This applies to suits filed before, during, or after 9/1/2021, but proof of such training is not due until 9/1/2022. HB 1315. If there has been termination of parental rights, the child remains in the department's custody, and all orders shall be entered for the AAL/GAL to continue to serve ("watchdog provision"). TFC 107.016. SB 904.

- **ADDRESS WITHIN 50 MILES, BETWEEN 50 AND 100 MILES and OVER 100 MILES. Alternate beginning and ending possession times**. In the past, the point of demarcation was reduced from 200 miles to 100 miles. It's been a long time, but this is another big change. It is presumed that if the parties live within 50 miles of one another, that the "visiting" parent will elect the expanded possession terms (pick up from school and return to school); this does not apply if the possessory conservator declines. So, likely there is a need for verbiage in the Decree to address visitation: 1. If the parties reside within 50 miles 2. If the parties reside between 51 and 100 miles apart, and 3. If the parties reside over 100 miles apart. How distance is measured is not specified. TFC 153.3171. Courts are given discretion to deny expanded terms if they find that it would not be in the child's best interests. This presumption does not apply if there is evidence of family violence, or if the conservator files a written document with the Court declining the expanded terms. Unclear is how that document might impact a future modification. The statute itself does not constitute a material and substantial change in circumstances. This is effective 9/1/2021. SB 1936.

CHAPTER 154 CHILD SUPPORT

- **Chapter 154 Child Support.** If TDPFS is the recipient of child support as a result of a prior order, the court must provide notice to the OAG within 10 days after the modification order is entered. This applies to proceedings filed on or after 9/1/2021. HB 1227. 10
- **Manner of payment**. As previously mentioned, this applies to the pension and retirement of obligors to assure payment. TFC 154.003. The effective date is 9/1/2021, but it applies regardless of whether the order was rendered before, during or after the effective date. HB 867.
- **DEFINITION OF EARNINGS BROADENED.** In addition to the old standbys of wages, salary, etc., wages now include compensation from a transportation network company or someone who uses a technology platform to make customer deliveries — for example, Uber and Amazon drivers. This is effective 9/1/2021. HB 458.
- **MORE RECORDS.** Finally, Clerks will keep records not only of base monthly child support, but of medical support and dental support too. This aligns with the fact that cumulative judgments are now authorized for arrearages, i.e., base, health, dental). How will the data entry clerks handle this if parents are not specific, given the fact that if there is an arrearage, payments are to be applied to the arrearage due first? TFC 105.008 SB 285.

- **Resources.** Courts are to consider all relevant background circumstances for the payor, including assets, residence, employment, earnings history, job skills, educational attainment, literacy, age, health, criminal history, barriers to employment and record of seeking work, jobs available in the community, prevailing wage in obligor's community, and whether there are employers willing to hire the payor. However, incarceration is not to be considered intentional unemployment or underemployment. TFC 156.066. Effective 9/1/2021, this applies to cases pending or filed on or after the effective date. SB 286.
- **Child Support Guidelines**. Similar to adding the provision to address access under 50 miles, the child support guidelines get a new look, and are to include guidelines if the payor earns less than $1,000 per month. Low income (under $1,000/month) essentially drops each guideline sector by 5%, so one child is based on 15% of net, two on 20% of net, three on 25% of net, four on 35% of net, and five or more on 40% of net. TFC 154.125. Effective 9/1/2021, this applies to cases filed after this date. Cases filed before are governed by the old guidelines.
- **Multiple Family Guidelines.** This section has new provisions for those earning less than $1,000/month/low-income families. TFC 154.129 SB 286.

CHAPTER 156 MODIFICATIONS

- **Excluded Admissions.** Certain filings are not considered judicial admissions. The mere filing of a motion to modify does not constitute a material and substantial change in circumstances. TFC 156.007. This applies only to modifications filed on or after the effective date of 9/1/2021. Existing modifications previously filed are governed by the old law. HB 851.
- **Modification based on Death of Conservator.** Imagine there is a 'bad' parent with restricted access, e.g., findings of domestic violence, and a 'good' parent. If the 'good' parent dies the Court has the right to consider any term and condition that warranted restricted access. TFC 156.106. This may have been prompted by In Re CJC. This applies to pending cases and cases filed on or after 9/1/2021.HB 851.
- **Grounds for Modification of Support.** The payor must have been incarcerated for 180 days before that can be considered a material and substantial change in circumstances. There is no mention of good time served, nor is there mention of how to count if the person is appealing the criminal conviction. This applies to cases filed after 9/1/21. SB 286.

CHAPTER 157 ENFORCEMENT

- **Dental and Medical expenses.** As mentioned above, dental and medical expenses can now be part of a cumulative judgment. TFC 157.005(b). This applies to suits filed on or after the effective date of 9/1/2021. Older cases are governed by the old law. This is effective 9/1/2021. SB 286.
- **Confirmation of arrearages**. A cumulative money judgment can include unpaid medical expenses previously confirmed, medical support payments, interest on the same, and all of the above as to dental. TFC 157.263. This effective 9/1/2021. SB 286.
- **Child Support QDRO.** A Court that rendered an order for support has continuing jurisdiction to enforce a child support order. TFC 157.501. This can include going after income from a pension or retirement to assure payment of child support. Effective 9/1/2021, this applies regardless of whether the order was rendered before or after the effective date. HB 867.
- **QDRO.** As noted above, regarding asking for a QDRO initially, in a modification, at a temporary hearing, final hearing, or if the original QDRO was defective, liberal construction is encouraged. If there is a conflict of laws, federal law prevails. TFC 157.502-.503. Effective 9/1/2021, this applies regardless of whether order rendered before or after the effective date. HB 867.
- **Registration of foreign order.** A non-recording party is now entitled to 30 days notice rather than 20. A failure to contest timely still means that the order will be confirmed and arrearages/enforcement can be sought here. TFC 159.605(b). Effective date 9/1/2021, this applies only to support orders or income withholding orders issued by a court of another state that is registered in Texas on or after the effective date of the act. SB 286.

CHAPTER 161 TERMINATIONS

- **Chapter 161 Termination of Parent Child Relationship.** Instead of referencing termination based on a finding of continuous sexual abuse of children, there is now reference to "a young child or disabled individual." This dovetails nicely with the Penal Code regarding the abuse of elderly or disabled individuals. TFC 161.001(b). Effective 9/1/2021, this applies only to offenses committed after the effective date of the act. HB 375.
- **Clarification regarding things as not necessarily being grounds for termination.** These may include a parent homeschooling their child, a parent who is economically disadvantaged, or a parent charged with a nonviolent misdemeanor. TFC 161.001(c). This applies only to cases filed by the TDFPS on or after the effective date of 9/1/2021. HB 567.

- **Seeking Second Medical Opinion.** Seeking a second medical opinion, or transferring to a new medical provider is not grounds to terminate. TFC 161.001 (c). This is effective immediately. HB 2536.
- **Termination of Parent Right.** Where there has been a prior termination of parental rights, that prior termination cannot be the basis of another termination unless the department asks for a TPR within one year of the date that TDPFS was granted managing conservatorship. TFC 161.001 (d) (1). This applies to cases after the effective date, 9/1/21. HB 2924.
- **Who's your daddy?** TDPFS must now give notice to the 4th degree of consanguinity. i.e., to the children of cousins of terminated parent(s) and to great grandparents, in addition to grandparents, aunts, uncles immediately after a termination order is entered. Again, what if there is an appeal? The persons notified have 90 days after the termination order is entered to try to set aside the involuntary termination. This does not apply if there is 'buyer's remorse' on a voluntary termination. This is effective 9/1/2021. HB 2926.

- **Reinstatement of Parental Rights after Involuntary Termination.** It is possible for TDPFS, AAL, and a former parent whose rights were involuntarily terminated to seek reinstatement. This does not mean reinstatement will necessarily be granted. There are special rules as to a former parent, in that they must give notice to the department at least 45 days prior to filing their petition (leaving a short window for the Court to act). This does not apply to voluntary termination cases. TFC 161.302. A hearing must be held within 60 days of filing, and there is a need to note whether or not a child aged 12 or older consents to having the errant parent back in their life. It is now possible for the Court to solicit the opinion of a child under 11, based on the child's maturity and ability to express preference. Following a hearing, the court may grant, deny, defer the decision for six months while the child remains the managing conservator and the former parent is a possessory conservator. A very nuanced case might exist whereby the parent was 'bad' enough to have their rights terminated but not so 'bad' they could still have contact with the child. TFC 161.302. If a petition is denied, the court must provide detailed reasons ("findings of fact") and a statement prohibiting filing of a subsequent petition before the first anniversary of the date of the order denying the petition. This is effective 9/1/2021. HB 2926.

CHAPTER 203 DRO

- **Chapter 203 Domestic Relations Offices.** A suit to modify or clarify can be filed. TFC 203.004. This is effective date 9/1/2021. SB 567.

TITLE IV-D

- **Chapter 231. Title IV-D Services.** A form is to be created to allow an obligee or obligor to seek child support services through a IV-D agency. TFC 231.0011(c) and (d) applies to suits pending on or after 9/1/2021. SB 285.
- **Paper trail**. If there has been an assignment of rights to child support, proof must be attached to a pleading TFC 231.104 (c). This is effective 9/1/2021. SB 285.
- **Even IV-D Cases need to note the new possession orders 50/50-100/over 100**. TFC 231.1211. Effective 9/1/2021, this applies to pending cases. HB 3203.
- **New contents of IV-D case.** A waiver must be signed before a notary, or executed with an unsworn declaration. TFC 233.018 (C) cross references Section 132.001, Civil Practice and Remedies Code. This is effective 9/1/2021. SB 285.
- **State Case Registry.** Obligors should be paying everything through the state disbursement unit. TFC 234.007(a). This is effective 9/1/2021 SB 286.
- **Chapter 254, Procedure in Suits by Governmental entities**. See the notes above regarding the need for the Department to try to glean names and contact information for relatives to the 4th degree of consanguinity. TFC 262.1095 (a). This is effective 9/1/2021. HB 2926.

OTHER LEGISLATION

- **Separation of wireless telephone service accounts**. Chapter 608 Bus. Comm. Code speaks to separation of cell phones after protective order issued. TBCC 608.001.
- **Judicial Branch/Government Code.** A person can only bring a qualified facility/assistance dog to court, and they must have proof of insurance. This is effective 9/1/2021. HB 1071.
- **Cross check on remote marriage license applications**. Tx Gov't Code Section 71.039. This is effective 9/1/2021, but the Texas Judicial Council has until 9/1/2022 to implement. SB 907.
- **Office of Court Administration, Gov't Code Chapter 72.** The Office of Court Administration must develop and have on its website Protective Order forms. This is effective 9/1/2021, but the Texas Judicial Council has until 9/1/2022 to fully comply. SB 1458.

- **Second Amendment Rights.** Persons between 18 and 21 can get a handgun if they are protected under a protective order. Department of Public Safety Chapter 411.1732. There will be special designation on their CHL noting that they have the right to carry per a protective order, provided the applicant passes muster on other fronts. This applies only to applications for handguns processed after 9/1/2021. Prior applications are governed by the old law. HB 918.

PROPERTY CODE

- **Actions and remedies, access to residence or former residence to retrieve personal property.** If denied entry by a current occupant, the person who was denied entry can seek a writ, authorizing them to go to the residence with a peace officer to get their possessions. There is a need to know if the property was listed in a Decree, and if so, relief can be sought in court granting such a Decree. Texas Property Code Chapter 24. This applies only to applications filed on or after 9/1/2021. HB 1012.

CREDIT TO ELISA REITER

- **Elisa Reiter** *is an attorney, Board Certified in Family Law and in Child Welfare Law by the Texas Board of Legal Specialization, at Underwood Perkins, P.C. Contact: ereiter@uplawtx.com.*

CREDIT TO THE FAMILY LAW SECTION NEWSLETTER

- The case law blurbs come from the State Bar of Texas Family Law Section quarterly newsletter. Georganna Simpson does an amazing job preparing these case law updates.

STATE BAR OF TEXAS

Minimum Continuing Legal Education

P.O. Box 13007 / Austin, Texas 78711-3007 / 1414 Colorado, Suite 503 / Austin, Texas 78701
800-204-2222, ext. 1806 / 512-427-1806 / Fax: 512-427-4423
e-mail: mcle@texasbar.com

COURSE NO	174137552
COURSE TITLE	What's new in Texas Family Law this fall?

Scanning this code takes you directly to the State Bar of Texas MCLE reporting tool with information for this course automatically filled in.

For an attorney to report your attendance, simply scan the code, log in, certify that the requested credit is correct, and click submit.

Click on this link to create or download a QR barcode of different sizes, go to: https://www.texasbar.com/qr?crs=174137552

FOR MORE INFORMATION AND OTHER TOPICS:

O'NEIL WYSOCKI
FAMILY LAW
The Wise Choice

- Follow our blog www.dallastxdivorce.com
- Follow us on Facebook: @OneilWysocki for notices of live CLE presentations free on Facebook.