

**TWISTS, TRENDS AND TOLKEIN:
SIGNIFICANT DECISIONS**

Justice Ann Crawford McClure
Heather J. Reynolds
Eighth Court of Appeals
500 E. San Antonio, Suite 1203
El Paso, Texas 79901
(915) 546-2240
j.mcclure@8thcoa.courts.state.tx.us

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TWISTS, TRENDS AND TOLKIEN: SIGNIFICANT DECISIONS

I. INTRODUCTION

In reviewing what I consider to be the significant decisions of the past year, I have seen a few trends developing—trends which may indicate dissension in the courts as well as hot topics the courts would like to see addressed given a pristine record. I begin with termination, not because most family law practitioners handle a large number of termination cases, but because that's where the action is as far as the Texas Supreme Court is concerned. While they have been outspoken on several issues which are detailed below, the percolating issue is the continued viability of *E.B.* See *Texas Dept. of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990) (approving the use of broad form submission in termination cases). In the past few years, the court has retreated from broad form submission. See *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). Since *Casteel*, the court has heard at least four termination cases in which charge error was raised on appeal and each time, the court found it could not decide the question because error had not been preserved in the trial court.

Elsewhere, the intermediate courts are continuing to grapple with *Troxel* as well as its application to custody rather than visitation cases. They continue to disagree about the appealability of a protective order and its collateral estoppel effect. There is also a trend for courts to discount testimony by an interested party which is not substantiated by documentary evidence, particularly where characterization is in issue and a heightened burden of proof applies. One constant remains—attorney's fees are always in jeopardy.

II. TERMINATION OF THE PARENT-CHILD RELATIONSHIP

A. Ineffective Assistance of Counsel

1. *In re M.S.*, 115 S.W.3d 534 (Tex. 2003)

In this termination suit, the court announced that the statutory right to counsel in termination cases embodies the right to the effective assistance of counsel. It adopted the *Strickland* test from criminal law: a parent must show first that counsel's performance was deficient and second that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984). I note parenthetically that this is somewhat ironic since the mother's name here is Shana Strickland. Shana complained of counsel's failure to obtain a record at portions of her trial including voir dire, the charge conference, and closing argument. The parties had not agreed that a record was unnecessary, but neither party objected. Further, Shana did not identify what errors a record would have revealed. Since Shana failed to demonstrate harm, the court found no ineffective assistance. Secondly, Shana complained that counsel failed to preserve her factual sufficiency point of error. The court decided that if counsel's failure were unjustified, then counsel's incompetency increased the risk of a due process violation. Procedural rules may give way to constitutional due process considerations if the level of ineffective assistance under the *Strickland* standard is demonstrated. If the court of appeals found that the evidence was factually insufficient to support termination and that counsel's failure to preserve the error was unjustified and not reasonably objective, then the court must find that counsel's failure constituted ineffective assistance. The court remanded the case to the court of appeals to determine whether the failure was objectively reasonable and whether it deprived Shana of a fair trial.

2. *Brice v. Denton*, No. 10-01-392-CV, 2004 WL 444642, at *1 (Tex.App.—Waco 2004, pet. filed)

The termination of Gene Brice's parental rights was reversed for ineffective assistance of counsel. Brice was an inmate in the Texas Department of Criminal Justice and filed a *pro se* answer. On the day of the hearing, an attorney ad litem was appointed for Brice. Counsel did not move for a continuance, did not consult with Brice and did not request an opportunity to do so. She reviewed his criminal history and her presentation of evidence consisted of cross examination only. During cross, she adduced evidence that Brice had been arrested for numerous offenses including harassment, stalking, indecency with a child, indecent exposure,

and driving while intoxicated. After receiving no evidence from Brice, the trial court found by clear and convincing evidence that Brice engaged in criminal conduct that resulted in his being convicted or placed on community supervision for violating Penal Code §22.021 and that termination of Brice's parental rights was in the best interest of the children.

The court of appeals concluded that counsel's assistance fell below an objective standard of reasonableness. She took no opportunity to interview Brice, did not request a writ of habeas corpus *ad testificandum*, did not find or interview witnesses, did not investigate the conviction that was the basis for the termination, did not request a jury trial, and did not challenge the pleadings or the statute. Because Brice was prejudiced by his counsel's deficient performance, he was denied effective assistance of counsel. The court reversed and remanded.

B. Frivolous Appeals

Porter v. Texas Dept. of Protective and Regulatory Services, 105 S.W.3d 52 (Tex.App.—Corpus Christi 2003, no pet.); *In re K.M.*, 98 S.W.3d 774 (Tex.App.—Fort Worth 2003, no pet)

The applicability of criminal procedures in termination cases has not been limited to claims of ineffective assistance of counsel; the *Anders* doctrine has emerged as well. In *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the United States Supreme Court authorized a court-appointed attorney representing a criminal defendant on appeal to review the record and, having determined that any appeal was wholly frivolous and without merit, withdraw from representation. The defendant must receive a copy of the "brief" as well as notification that s/he has a right to file a *pro se* brief. Regardless of whether a *pro se* brief is filed, the court of appeals is required to review the record to determine whether error exists.

C. Preservation of Error Still Required

1. *In re B.L.D.*, 113 S.W.3d 340 (Tex. 2003), cert. denied, *Dossey v. Texas Dept. of Protective and Regulatory Services*, 124 S.Ct. 1674, 158 L.Ed.2d 371, 72 USLW 3598 (2004).

Jimmy and Spring Dossey were the parents of two children. In January 1995, the Texas Department of Protective and Regulatory Services investigated an incident where B.L.D. fractured his skull and determined it was an accident. Then in February 1998, B.R.D. was seriously scalded in the kitchen when Spring was home. Spring told hospital personnel that the child had crawled into the kitchen sink while she was asleep and turned on the hot water. The hospital notified the Department because the burns were inconsistent with Spring's explanation. The Department removed the two children from the Dosseys' custody and filed a suit affecting the parent-child relationship. After a hearing, the court granted temporary custody to the Department until the Dosseys complied with a family reunification plan. Ultimately, the trial court returned the children pending completion of the plan. In February 1999, the children were removed again due to a finding of immediate danger to their health and safety. The Department alleged that Jimmy had stolen a gun, worked as a drug informant for the police, lied to the Department about being a drug informant, and downloaded child pornography on a home computer. The Department also contended that the Dosseys could not meet the children's physical needs.

During a pre-trial hearing, court-appointed counsel moved to sever the cases due to a potential conflict of interest based on evidence that he anticipated would be offered against them. The trial court denied the motion. At the end of trial, counsel again moved to sever on the ground that an actual conflict had arisen. The trial court again denied the motion. The charge submitted the two statutory grounds for termination disjunctively and included four broad form questions requiring the jury to determine whether the parent-child relationship should be terminated between each parent and each child. No objections were made to the charge. The jury terminated the rights of the Dosseys to both children.

The Dosseys then appealed, arguing that the trial court erred in refusing to sever their trials or grant separate counsel and that the disjunctive jury instruction and the broad form questions deprived them of the right to have the jury agree on a specific finding for termination. The court of appeals held that the Dosseys had a right to effective representation and that a conflict of interest arose between Jimmy and Spring since counsel could not strongly advocate for one parent due to his ethical obligations to the other. Next, the court of appeals reviewed the charge error and found that the disjunctive instruction combined with the broad form questions violated the Dosseys' right to due process. The Department appealed.

The Supreme Court first recognized that the court of appeals had framed the issue *sua sponte* as a challenge to the effective assistance of counsel when the Dosseys actually argued that the trial court erred in failing to grant separate trials or counsel because their interest conflicted. The court noted its prior opinion in *In re M.S.*, 115 S.W.3d 534 (Tex. 2003), which held that the statutory right to counsel in termination cases implicitly includes a right to effective assistance of counsel. This requires non-conflicted counsel. It next examined the question of what constituted a conflict of interest between parents under §107.013(b) and noted that normally an attorney cannot jointly represent clients with adverse interests. The court held that a trial court must determine whether there is a substantial risk that a lawyer's obligations to one parent would materially and adversely affect his obligations to the other parent when deciding whether there is a conflict of interest between parents opposing termination in a single suit. In evaluating substantial risk, a trial court should consider the record to determine the likelihood that the parents' position will be adverse to each other by considering the Department's allegations against each parent, evidence adduced during pre-trial, and statements and positions taken by parents during pre-trial.

In examining the record, the court found that the Department's allegations permitted termination based not only upon one parent's conduct but upon knowing exposure to the other's endangering conduct so that evidence tending to prove Jimmy's

conduct could also be the basis of termination of Spring's rights. Further, the Dosseys were married, living together, and originally hired one attorney to represent them both. The record did not reflect that one parent blamed the other for conduct related to termination or would be willing to separate from the other to retain custody. Because the Dosseys failed to demonstrate an *actual* conflict of interest, the trial court did not abuse its discretion in denying the motion to sever.

The court then turned to the charge issue. The Dosseys never objected to the form of the charge and waived that complaint on appeal. The court of appeals reviewed the complaint anyway. In analyzing review of unpreserved error, the Supreme Court declared that it is improper unless a recognized exception exists. The court then examined the fundamental error doctrine and noted that it had not been previously extended to termination of parental rights and the court was not persuaded to extend it. Next, the court examined due process and found that while parental interests in obtaining review of unpreserved error may be high, the State also has a compelling interest in protecting the best interests of the children through judicial economy, certainty, and finality. Due to the heightened nature of procedural protections in termination cases, a consistent application of the rules of waiver and preservation of error would not result in the erroneous deprivation of due process. Although due process does not as a general rule mandate review of unpreserved complaints of charge error, there may be circumstances requiring a court of appeals to review an unpreserved error to ensure that procedures comport with due process. Such was not the case here since the Dosseys did not claim that counsel's failure to preserve error constituted ineffective assistance and because the record demonstrated that counsel zealously acted to protect their interests.

2. *In the Interest of L.M.I. and J.A.I.*, 119 S.W.3d 707 (Tex. 2003)

Following closely on the heels of *B.L.D.*, this lengthy and vituperative opinion demonstrates the split among the justices concerning due process application in termination cases. The majority, written by Justice O'Neill, begins:

As today's fractured opinions illustrate, appellate review has been greatly hampered by the shifting, indistinct focus of their complaints – although the case has been pending for more than a year, we still disagree about what the complaints are and whether they were preserved.

Id. at 708. In essence, the father complained that his signature on the affidavit of relinquishment was procured in violation of his due process rights because it was not translated into Spanish. The mother complained that she was fraudulently induced to sign the affidavit of relinquishment because it was procured in exchange for unenforceable promises of future contact with the children. Finding that neither parent had preserved the issues for review, the majority affirmed the termination order. Justice Wainwright concurred, but cautioned that “where a ‘voluntarily’ executed relinquishment affidavit is the sole ground for termination . . . , placing the burden on the parents to set aside the affidavit may run afoul of constitutional and statutory mandates for the burden of proof and quantum of evidence necessary to terminate parental rights.” *Id.* at 716. Justice Owen dissented, finding no clear and convincing evidence that the father’s affidavit was voluntarily executed, to which the majority responded that the father had not raised a legal insufficiency argument. Justice Owen also agreed with and expanded upon Justice Wainwright’s concern about shifting the burden of proof to the parents. In his dissent, Justice Hecht was far more descriptive and sarcastic, yet his objections were well articulated. His primary focus was that the father’s rights were terminated because he does not speak English. He quoted at length from the record as to the evidence of the father’s language skills. But to give you a flavor of the dissension among the judges, I will quote the introduction as well as the conclusion:

"[T]his case," laments the Court, "has taken its excruciatingly slow course through our judicial system." Lamentably, a little more than a third of the excruciation has been in this Court. And just whose fault is that? Whose fault is it that

this Court has taken 524 days to decide this case? Why, the parties', of course, says the Court. Who else could be to blame? Not us. We've tried our very best, but "appellate review has been greatly hampered by the shifting, indistinct focus of their complaints". Well, well. The facts here are a bit of a problem. We decided six parental rights termination cases last Term, and took, respectively, 199 days, 361 days, 387 days, 540 days, 584 days, and 646 days to issue an opinion in each. In none of the three cases that the Court took a week, eight weeks, and seventeen weeks longer to decide than it took to decide this case was "appellate review ... greatly hampered" by poor briefing.

“[W]e still disagree about what the complaints are and whether they were preserved”, the Court moans. And here again, the fault for our disagreement must in all fairness be laid squarely at the parties' feet. If only the briefing had been better, the Court's decision would have been prompt and unanimous. But before taking the Court's word for this, the reader may wish to know that the parties have filed about 88 pages of briefs and motions in this Court, the reporter's record of the one-day hearing in the trial court is 328 pages, and the clerk's record is 117 pages. All told, the record and briefs would not take any one of our law clerks more than half a day to master. Truth is, the Court knew what the issues were in this case from the time it was filed. What the Court has disagreed about for more than a year is not what the issues are, but whether these parents' rights in their children can be terminated some technical way without having to address their arguments.

* * * * *

[T]he evidence is overwhelming that [the father] has lost rights among the most precious guaranteed by law simply because he does not understand English. If [he] could read the Court's opinion, he would no doubt be surprised (and dismayed) to learn that he is not entitled to a decision on the only claim he has ever made because his lawyer in the trial court

phrased it differently than his lawyer on appeal.

The one benefit of [his] inability to understand English is that he will not be able to read of the injustice that has been done to him. He should at least have a paraphrase of the Court's opinion, however, just as his affidavit was paraphrased for him. I offer the following:

_Peligro!
Si usted no puede hablar Inglés,
usted puede perder a sus niños.

Id. at 730-31, 754 (footnotes deleted).

D. Clarification of Subsection (Q)

In the Interest of A.V. and J.V., 113 S.W.3d 355 (Tex. 2003)

Pablo Puig's parental rights were terminated pursuant to §161.001(1)(Q), which requires that the parent knowingly engage in criminal conduct that results in the parent's imprisonment and inability to care for the child for not less than two years from the date of filing the petition. The court of appeals interpreted the statute to mean that the applicable time period is two years before the petition was filed. The Department argued that the language mandates a prospective rather than retrospective application. Noting that the intermediate courts of appeals were in conflict and had struggled with the ambiguity, the Supreme Court held that the statute is to be read prospectively. "Thus, if the parent is convicted and sentenced to serve at least two years and will be unable to provide for his or her child during that time, the State may use subsection Q to ensure that the child will not be neglected." *Id.* at 360. In so doing, it specifically disapproved of the appellate opinions to the contrary, including one of mine. See *In re A.L.S.*, 74 S.W.3d 173 (Tex.App.—El Paso 2002, no pet.). Jack Sampson and David Gray have kindly overlooked this *faux pas* in their commentaries.

E. Affirmative Defenses

1. Equitable Estoppel

In the Interest of S.A.P., No. 10-02-345-CV, 2004 WL 575215, at *1 (Tex.App.—Waco March 17, 2004, extension filed)

Equitable estoppel is an affirmative defense to a termination suit. Shortly after Rebecca Peterson gave birth to S.A.P., DPRS representatives came to her hospital room and told her she would not be allowed to take the baby home. They did not explain why, except to allude to the Department's involvement with her two older children as to whom her parental rights had been previously terminated. Scott Peterson was not in the room at the time but found out later that he would be unable to leave with his child. The emergency removal notice listed "risk of abandonment" as the reason for removal. DPRS took custody of the baby at the hospital three days after birth. Two weeks later, Rebecca and Scott received letters from DPRS advising them that it had ruled out any allegations of abuse or neglect. The letters informed the parents that they were entitled to request that the information be removed from the Department's records and destroyed. Both Rebecca and Scott returned the request forms. DPRS offered them family reunification services, which later became court ordered. Rebecca and Scott participated in the services, voluntarily took parenting classes, and participated in private parenting counseling and religious, pre-marital counseling. Still S.A.P. was not returned to his parents.

The letters the couple received from DPRS were discussed in a pre-trial hearing on November 18, 2002. The court initially granted a motion *in limine* that would have prevented the Department from introducing evidence related to the factual basis initially used to remove S.A.P. from his parents without first approaching the bench. Two days prior to opening statements, the court withdrew its order *in limine*. After a jury trial, the court entered a final order of termination as to both Rebecca and Scott.

The court of appeals reversed, holding that equitable estoppel prevented the Department from seeking termination. After removing S.A.P., the Department represented to Scott and Rebecca that it

had determined neither parent had abused or neglected the child. Nevertheless, the baby was not returned. Moreover, the Department never notified the court of its determination. No other conduct occurred that was detrimental to S.A.P. The Department argued that the letters simply meant that the couple could have their "role designation" removed. The court of appeals found that the letters constituted a false representation or concealment of facts made with actual or constructive intent that the letter meant something other than what it indicated. The Department intended for the letters to be acted upon since they were accompanied by forms to be signed and returned by Scott and Rebecca. The parents were parties without knowledge or means of obtaining knowledge of the fact that the letter meant something other than what it said. Both parties denied the neglect and abuse and sent in the forms only to find out that it did not result in the return of their child. The court found detrimental reliance since both parents cooperated with the Department instead of opposing it based on its letters. Equitable estoppel prevented the Department from bringing the termination proceeding.

2. Failure to Comply with the ADA

In re S.G.S., 130 S.W.3d 223 (Tex.App.—Beaumont 2004, no pet.)

The facts present a dreadful living environment for three children and certainly the evidence supported the statutory requirements for termination by DPRS. Of interest is the fact that the mother was mildly retarded with an IQ of 62. During trial, a caseworker who provided parenting classes was questioned about the Department's compliance with the Americans with Disabilities Act. She testified that special accommodations for a mildly retarded person might include one-on-one instruction and reinforcement through repetition. Specific accommodations implemented for the mother included providing a meeting room without distractions and allowing her husband or a staff member to sit in during written or reading exercises. She further testified that providing transportation was an unreasonable accommodation but was sometimes arranged through the Department of Mental Health and Mental Retardation. She also

testified that the parents never requested transportation services or verbalized that the classes were a hardship, and they stopped attending halfway through the course. Thereafter, the mother unsuccessfully attempted to amend her pleadings to include an affirmative defense under the ADA. The rights of both parents were terminated following a jury trial.

On appeal, the parents argued that they were each entitled to amend their pleadings and that the ruling prevented them from presenting the merits of their case. But the court found that they had been able to develop evidence regarding ADA compliance and argue it to the jury. The trial court's ruling only prevented them from asserting the issue as a bar to termination. Recognizing that neither parent presented any authority that failure to comply with the ADA is an affirmative defense to an action to terminate parental rights, and reciting numerous decisions from other jurisdictions rejecting the proposition that an ADA violation is a defense in termination proceedings, the court declined to create an affirmative defense out of noncompliance with the ADA. Nevertheless, the case may be useful in justifying a parent's failure – or inability – to fully comply with a service plan.

III. PATERNITY

A. Change of Name

In re M.C.F., 121 S.W.3d 891 (Tex.App.—Fort Worth 2003, no pet.)

Stephanie Ford met Kerry Estes in June 2001 and they lived together briefly. In October, Ford discovered she was pregnant. They broke up in January 2002 and although they discussed counseling, Ford did not follow through. The child was born on June 12, and within a month, Estes filed a paternity action and requested that the child's name be changed from Ford to Estes. He did not offer any reasons why the name change would be in the child's best interest. Ford requested that the child's name not be changed. The trial court entered an order establishing paternity and changing the child's surname to Estes. In its findings, the court found that it was in the child's best interest to have his name changed to that of his biological father. It

later amended its findings to reflect that the name change was granted since Estes requested it and had demonstrated good cause. Ford filed a motion for new trial on the issue of the name change and the court conducted a hearing. She testified that the child had lived with her and her parents since his birth and that all of his medical records and birth certificate listed his surname as Ford. She also testified that she would not change her maiden name in the event she married in the future. The court denied the motion and Ford appealed.

The appellate court found that §160.636(e) applied and required Estes to show good cause for the name change. However, the court recognized that the best interest of the child is always a consideration in a SAPCR and thus Estes should have also shown that the name change was in the baby's best interest. In examining "good cause," the court looked to Black's Law Dictionary, which defined the phrase as a "legally sufficient reason." Estes did not present any reason why the child's name should be changed, much less a legally sufficient reason. In fact, he made only a bare request to change the child's name. The court found a complete absence of evidence of a vital fact to support the trial court's conclusion that there was good cause to change the child's name.

The court also looked at the best interest of the child and enumerated various factors that courts could consider: (1) whether the original name or the changed name would best avoid embarrassment, inconvenience, or confusion for the custodial parent; (2) whether the changed name or original name would help best identify the child with the family unit; and (3) the degree of respect in the community associated with the original or changed names. Ford showed that she would be inconvenienced by having the child's name changed since Ford was the name listed on all his records. The court recognized that since the child was born in 2002, he could not yet identify with the Ford surname but that his family, friends, doctors, insurers, and the government had records using the Ford surname. Further, Estes had not contributed any financial support. The court stated that the child would be better served by a name that was positively associated with the community and the bond between family. Because Estes did not

present evidence of good cause or why the name change was in the child's best interest, there was legally insufficient evidence to support the name change. In the absence of legally sufficient evidence, the trial court abused its discretion.

B. Equitable Estoppel

In re Shockley, 123 S.W.3d 642 (Tex.App.-El Paso 2003, no pet.)

Kevin Shockley and Monica Smith engaged in a sexual relationship between 1992 and mid-1996. In late May and early June 1996, Monica also had sexual relations with Damin Guthrie. Damin knew about Kevin, but Kevin knew nothing of Damin. Monica learned she was pregnant in October 1996 and when Kevin questioned whether the baby was his, Monica denied having relations with any other men. In fact, Monica never told anyone about Damin until March 2001. Regan was born on February 24, 1997. Kevin was named the child's father and she was given the surname Shockley. Damin recognized that he could be Regan's father and confronted Monica on several occasions. He requested genetic testing which Monica refused, insisting that Kevin was Regan's father. After Regan was born, Kevin began paying child support and visiting with the child. After the baby was weaned, Kevin would keep her one or two nights a week. In July 1998, Kevin married Misti Evans and moved to Midland. Regan then alternated between San Angelo and Midland. Since Misti was a teacher and did not work in the summer, Regan began to stay in Midland on a continuous basis, with Monica seeing her on occasional weekends.

On February 8, 2000, Monica filed a paternity suit alleging Kevin to be Regan's father. The same day Kevin filed a paternity suit in Midland and sought to be named sole managing conservator. Monica's answer admitted Kevin's paternity. On May 30, 2000, a San Angelo court entered temporary orders that Kevin and Monica would alternate weekends. In June, Monica's suit was transferred to Midland and consolidated with Kevin's. On March 20, 2001 without Kevin's knowledge and without a court order, Damin, Regan, and Monica obtained parentage testing,

which showed that Damin could not be excluded as the father.

On April 9, Damin filed a petition in intervention seeking to establish parentage, to be named a joint managing conservator, to change Regan's surname, and to recover attorney's fees. On April 27, Monica amended her pleadings to allege that Damin was Regan's father. On May 21, she requested that Kevin's relationship be terminated or restricted. Monica then told four-year-old Regan that Kevin was not her father. In response to Kevin's motion for summary judgment based upon the statute of limitations, Damin non-suited his intervention. The motion, filed on June 21, 2000, was granted by the court on June 22. He filed no subsequent pleadings although he remained a respondent to Monica's lawsuit.

The trial court adjudicated Kevin as Regan's father and appointed him sole managing conservator. In response to Monica's request for findings of fact and conclusions of law, the trial court found (1) that Kevin was the only father Regan had ever known; (2) that Damin had non-suited his intervention; (3) that Monica should be estopped from denying Kevin's paternity and from seeking an adjudication that Damin was the child's biological father; (4) that it was impossible for Monica and Kevin to share parental rights and duties; and (5) that it was not in Regan's best interest for Monica and Kevin to be appointed joint managing conservators. No additional or amended findings were requested or filed. Both Monica and Damin appealed.

The appellate court determined that Damin's original answer merely echoed Monica's claims and reasserted the fundamental claim contained within his intervention – designation as Regan's biological father. The nonsuit operated to abandon Damin's claims for relief, all of which related to the establishment of parentage. In its findings, the trial court reiterated that Damin had non-suited his claims, and Damin did not file a request for amended or additional findings that his request for relief in the original answer somehow survived his nonsuit. Damin also did not assign as error the trial court's determination that he had abandoned his claim for affirmative relief. Thus, while Monica could complain of the trial court's failure to

establish Damin's parentage, Damin lacked standing to do so.

On appeal, Monica questioned whether a trial court can disregard un rebutted, clear and convincing evidence of paternity in an original establishment action where there is no presumed father. Although Kevin was Regan's presumed father at the time of her birth, subsequent statutory amendments had removed that presumption by the time of trial. Consequently, Regan was a child with no presumed father. In essence, Monica contended that the equitable theory of estoppel is unavailable as a defense in a parentage suit where biological paternity is established by genetic testing. She drew distinctions between the instant case in which she as the mother sought the establishment of paternity and those cases in which estoppel barred the husband from seeking to disestablish his paternity. Finally, she complained that the effect of the trial court's ruling was to grant adoption by estoppel and effectively terminate Damin's parent-child relationship without the due process protections which the state and federal constitutions afford.

The court first addressed the applicability of equitable estoppel. Estoppel in paternity actions is merely the legal determination that because of a person's conduct, that person, regardless of biological status, will not be permitted to litigate parentage. It operates both offensively and defensively. In most instances it applies to prevent a party from disestablishing a parent-child relationship, such as an adjudicated father who learns through genetic testing that he is not the biological father and wishes to denounce paternity so he can discontinue paying child support. The application of estoppel in paternity actions is aimed at achieving fairness between the parents by holding them to their prior conduct regarding the child. Estoppel is based on the public policy that children should be secure in knowing who their parents are. If a person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father she has known all her life is not in fact her father. In determining whether the doctrine should be applied to a particular case, the child's best interests are of paramount concern. Courts are more inclined to impose equitable

estoppel to protect the status of a child in an already recognized and operative parent-child relationship.

The court concluded that because no parent-child relationship was ever established between Damian and Regan, there was no factual basis for Monica's complaint that his parental rights were terminated in violation of state and federal constitutional protections. Consequently, the only issue for consideration was whether the trial court rightly determined that Monica was estopped from asserting Damian's parentage, which it had.

Monica then complained that the evidence presented did not establish all of the elements of estoppel. Equitable estoppel is based on fair dealing, good faith and justice. It may arise if five factors are satisfied: (1) there was a false representation or a concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) to a party without knowledge, or the means of knowledge, of those facts; (4) with the intention that it be acted upon; and (5) the party to whom it was made must have relied on the misrepresentation to his prejudice. The theory is that a person who by speech or conduct induces another to act in a particular manner should not be permitted to adopt an inconsistent position, attitude or course of conduct. Each case must be determined upon its own facts.

Monica did not challenge the trial court's findings that she made a false representation or concealed material facts known to her, nor did she deny that the misrepresentation was made with the intent that Kevin rely upon it and that he did so to his detriment. Instead, she focused solely on the third element, arguing that even if she owed a duty to disclose her sexual relationship with Damin, Kevin had the means to learn the truth about Regan's paternity by requesting a paternity test. In reviewing the evidence, the court found Monica actively misrepresented that Kevin was the father and did so repeatedly without disclosing her sexual relationship with Damin. On more than one occasion, Damin confronted Monica with the possibility that he might be the biological father, but Monica persisted in her claim that Kevin was the father and refused Damin's request for genetic testing. Moreover, Monica repeatedly told Kevin that he was Regan's father. Having spoken, she had

a duty to tell the whole truth. She filed suit against Kevin, alleging that he was the father. She answered his suit, admitting he was the father. By her conduct, she dissuaded both Damin and Kevin from pursuing genetic testing which might foil her plans. She continued her deception for more than four years after Regan was born until custody litigation loomed on the horizon. Consequently, Kevin had no reason to question that he might not be the biological father and Monica intended as much. She wanted Kevin to assume the rights and duties of fatherhood because he was a far more attractive candidate than Damin. Consequently, the evidence was sufficient.

Finally, since Kevin was a parent, he could be appointed Regan's sole managing conservator provided the evidence rebutted the presumption that it was in the best interest of the child for the parents to be appointed joint managing conservators. The court found that since Monica did not challenge the finding that the appointment of Monica and Kevin as joint managing conservators was not in Regan's best interest, there was no error. The judgment of the trial court was affirmed.

IV. CONSERVATORSHIP

A. Relocation

Navarro v. Lamusga, 88 P.3d 81 (Cal. 2004)

Although this case issued from the California Supreme Court, it is nevertheless a significant decision on relocation. California has historically favored a presumptive right of the custodial parent to change the residence of a child so long as removal would not be detrimental to the child. This placed the burden of persuasion on the non-custodial parent in a modification proceeding. *In re Marriage of Burgess*, 13 Cal.4th 25, 35, 37, 913 P.2d 473, 480, 482, 51 Cal.Rptr.2d 444, 451, 453 (1996).

Here, the parents were unable to reach an agreed visitation schedule pending their divorce. Dr. Philip Stahl was appointed to conduct a child custody evaluation. The mother had expressed a desire to move to Ohio. The father was concerned that the mother was trying to alienate the children. On October 10, 1996, Dr. Stahl reported that there had been verbal hostility between the parents for a long period of time. Each parent had positive qualities

and the children would be best served by maintaining relationships with both parents. However, the relationship between the two had a negative impact on the children, creating anxiety. He concluded that a move would be difficult considering the children's developmental needs and Susan's unwillingness to follow through on a regular and consistent visitation schedule.

A divorce was granted on December 31, 1997. The parents were awarded joint legal custody with Susan having primary physical custody. Both parties remarried. In 2001, Susan sought to modify the order so that she could move to Ohio. Dr. Stahl again evaluated the situation. He reported that Gary wanted equal time with the children, that Susan wanted to discontinue his visitation, and that the children showed signs of alienation. He recommended longer periods of visitation with Gary and raised the possibility of transferring custody to Gary if the situation did not improve. The trial court found that Susan was not purposely trying to alienate the children from Gary but that her inability to let go of her feelings reinforced the children when they expressed negative feelings. It also found that moving the children to Ohio would be detrimental to the relationship between the children and Gary. It ruled that if Susan moved to Ohio, Gary would have physical custody during the school year.

Susan appealed. The court of appeals applied the deferential standard of review as articulated in *Burgess* and found that the superior court placed too much emphasis on the detriment to the children's relationship with their father and thus abused its discretion.

The Supreme Court disagreed, stating that in applying the deferential standard of review, the precise measure is whether the trial court could have reasonably concluded that the order advanced the "best interest" of the child. It found no evidence that the trial court failed to consider the children's interest in stable custodial and emotional ties with their mother. In fact, the trial court carefully considered the evidence in Dr. Stahl's reports. The issue was not whether either of the parents were competent and qualified to be custodial parents but whether the best interests of the children were served by a change in physical custody if the mother

relocated to Ohio. The trial court did not act out of a desire to punish or reward either parent but that due to the mother's animosity, the move would have been detrimental. The court faulted the intermediate court for increasing the father's burden and requiring that he demonstrate that modification was essential for the child's welfare. The court reversed the judgment of the appellate court and remanded with instructions to affirm the trial court's order.

The dissent argued that the trial court had not applied the proper legal principles and policies. It did not mention the detriment that the children would suffer in the event of a custody change and that the court was required to weigh this detriment against the detriment to the children's relationship with their father, which it did not do.

B. Grandparent Rights

1. Access and Troxel

- a. *In re Pensom*, 126 S.W.3d 251 (Tex.App.-San Antonio 2003, no pet.)

Keith and Melanie Pensom were named joint managing conservators of their two sons following their divorce. Because Melanie was ill, she and the boys went to live with her mother and stepfather for six years. After Melanie died, the grandparents sought sole managing conservatorship. In the alternative, they sought joint managing conservatorship or grandparent access to the children. The trial court entered a temporary order that the grandmother be given access. Keith filed a mandamus proceeding in which he claimed (1) that the grandparent access statute is unconstitutional on its face; and (2) even if the statute is constitutional, there must be a finding that Keith is unfit before grandparent access is granted.

The appellate court examined what parameters would be consistent with the constitutional interest at stake and the Legislature's intent to limit a court's jurisdiction over non-parental intrusion into the parent-child relationship. The court found a narrow standing requirement since only grandparents are given standing. However, the court recognized that more was necessary to satisfy the due process concerns addressed in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The

court opined that the statute was constitutional if its application protected a parent's fundamental due process rights. It held that in order to satisfy the "best interest of the child" prong, a grandparent must overcome the presumption that a fit parent acts in the best interest of his or her child. To overcome this presumption, the court found that a grandparent had the burden to prove, by a preponderance of the evidence, either that the parent was not fit, or that denial of access by the grandparent would significantly impair the child's physical health or emotional well-being. When interpreted in light of the framework established in *Troxel*, the statute was narrowly drawn to serve a compelling state interest and therefore was facially constitutional. However, since the trial court failed to make the required findings, its order was set aside.

b. *In re N.A.S.*, 100 S.W.3d 670 (Tex.App.—Dallas 2003, no pet.)

The parents had two children before their 1999 divorce. After the father died in 2001, his parents tried to visit with the children. When their attempts were rebuffed, they filed suit for access. The trial court granted them one weekend in March, October and December, and one week of summer vacation in July. In findings of fact, the trial court noted that access to the grandparents was in the children's best interest; their mother was not acting in their best interest; she had denied access and would continue to do so. The court concluded that the grandparent access statute was constitutional. While a parent is presumed to act in a child's best interest, the presumption is rebuttable and the grandparents duly rebutted it.

The appellate court affirmed, finding first that the statute was facially constitutional and second, that the mother had waived her argument that the statute was unconstitutional as applied. Instead, she alleged the evidence was legally and factually insufficient to support the judgment. The court reviewed her testimony, in which she admitted it was in the children's best interest to have a relationship with their grandparents and that she would not want to totally deny visitation. Yet she had changed her address and phone number without notice and ignored a letter from the grandparents.

The court could not conclude that visitation was not in the children's best interest.

2. Grandparent as Managing Conservator

a. *In the Interest of M.N.G.*, 113 S.W.3d 27 (Tex.App.—Fort Worth 2003, no pet.)

The parents were divorced in 1989 and the father was named sole managing conservator. He left his son with the paternal grandmother, where he lived until this modification action began. By that time, the boy was fourteen years old. The litigation began when the Attorney General filed suit to recover monies the grandmother had received, including Medicaid and food stamps. The grandmother filed a petition in intervention seeking to modify the divorce decree to appoint her as the sole managing conservator. The child signed an affidavit choosing to live with his grandmother. The father objected. Following a bench trial, the court denied the modification and ordered the child surrendered to his father immediately. He specifically found that there was

. . . insufficient evidence to establish that [father] (a) has, by act or omission, harmed the child in the past, (b) is in any way unfit as a custodial parent, or (c) poses an actual or potential threat of physical or emotional harm to the child as the custodial parent.

Id. at 31. In his conclusions of law, the court noted his opinion that *Troxel* imposes the additional requirement of proof of actual or potential harm to the child or parental unfitness. "To consider the modification requested by the non-parent intervenor by any lesser standard would be an unconstitutional infringement on [father's] right to make decisions concerning the care, custody, and control of his son." *Id.*

Grandmother successfully appealed, complaining that the trial court erred by requiring her to prove unfitness rather than following the Texas modification statute. The father responded that the modification statute was unconstitutional as applied to him. The court of appeals agreed with the grandmother. It first emphasized that *Troxel* involved a visitation statute, not a modification

provision. The purpose of the modification statute differs from the visitation statute and does not presume parental fitness. Declining to read *Troxel* as requiring, for due process purposes, a showing of harm or potential harm to the child, the court determined that *Troxel* does not support placing the burden on the grandmother to prove the father was unfit or that he posed a threat to the child. "...[T]he Texas modification statute necessarily includes consideration of the fitness of the parent and whether a change in custody would harm the child, regardless of whether those findings are constitutionally required." *Id.* at 35. Finally, the court rejected the father's argument that *Troxel*'s due process paradigm trumped the Texas Supreme Court's decision in *In re V.L.K.*, 24 S.W.3d 338 (Tex. 2000), in which the court held that the parental presumption does not apply in a modification proceeding. *Id.* at 35-36.

b. *In re O'Donnell-Lamont and Lamont*, No. S5055, 2004 WL 1277486 (Or. June 10, 2004)

This recent opinion comes from the Oregon Supreme Court and interprets a post-*Troxel* statutory amendment pertaining to grandparent custody. The prior statute allowed a court to award custody to a nonparent if "appropriate in the case" and "in the best interest of the child." In 2001, the statute was amended to establish a presumption that a legal parent acts in the best interest of the child. It also identified non-exclusive factors which a court may consider in determining whether the nonparent has rebutted that presumption: (1) whether the legal parent is unwilling or unable to adequately care for the child; (2) whether the petitioner or intervenor is or recently has been the child's primary caretaker; (3) whether circumstances detrimental to the child exist if relief is denied; (4) whether the legal parent has fostered, encouraged or consented to the relationship between the child and the non-parent; and (5) whether the legal parent has unreasonably denied or limited contact between the child and the nonparent. "Circumstances detrimental to the child" as used in number (4) is specifically defined to mean circumstances that may cause psychological, emotional, or physical harm to a child. The Supreme Court determined that this definition requires a showing of a serious *present*

risk. In reviewing the evidence, the court concluded that the grandparents had rebutted the parental presumption and that their appointment as custodians was in the children's best interests.

V. PROTECTIVE ORDERS AND FAMILY VIOLENCE

A. Appealability

There continues to be disagreement among the intermediate courts of appeals as to whether protective orders are appealable. Several courts have taken the position that a protective order granted in conjunction with a pending divorce is interlocutory and, consequently, is not a final appealable order. *In re K.S.L.-C.*, 109 S.W.3d 577 (Tex. App.—Tyler 2003, no pet.); *Bilyeu v. Bilyeu* 86 S.W.3d 278 (Tex.App.—Austin 2002, no pet.). If the order is issued outside of an ongoing proceeding, then it is injunctive in nature, has disposed of all parties and issues, and is final and appealable. *Vongontard v. Tippit*, No. 01-03-00814-CV, 2004 WL 440438, at *1 (Tex.App.—Houston [1st Dist.] March 11, 2004, no pet.); *Ulmer v. Ulmer*, 130 S.W.3d 294 (Tex.App.—Houston [14th Dist.] 2004, no pet.); *Kelt v. Kelt*, 67 S.W.3d 364 (Tex.App.—Waco 2001, no pet.); *Cooke v. Cooke*, 65 S.W.3d 785 (Tex.App.—Dallas 2001, no pet.); *Pena v. Garza*, 61 S.W.3d 529 (Tex.App.—San Antonio 2001, no pet.).

B. Collateral Estoppel

1. *Gonzalez v. Gonzalez*, No. 08-01-00453-CV, 2004 WL 1178898, at *1 (Tex.App.—El Paso 2004, no pet. h.).

Both parties filed for divorce and sought sole managing conservatorship of their three children. The trial court appointed them joint managing conservators of all three children. Tereso was awarded primary custody of two of the children, while Cleotilde was awarded custody of the third. In her *pro se* appeal, she claimed she should have been awarded primary custody of all the children because Tereso had a history of domestic violence.

Cleotilde testified that Tereso physically abused her throughout their marriage, but she did not pursue

criminal proceedings against him until after an incident in 1998. He pleaded guilty to a criminal offense arising from that incident. He testified, however, that he was not really guilty and that he pleaded guilty on the advice of counsel. At the time of the divorce hearings, two other criminal complaints were pending against him but Tereso maintained his innocence.

In a divided opinion, the appellate court determined that Tereso's guilty plea and conviction were not conclusive proof that he committed family violence and that the trial court seemed to find Cleotilde's testimony lacked credibility. Discounting the testimony of Cleotilde and her mother, there was ample evidence to support the trial court giving Tereso primary custody of the children. Consequently, the trial court's order was affirmed.

I wrote separately because of my disagreement with the majority's treatment of Tereso's guilty plea and conviction of Class A misdemeanor assault. The majority noted the statutory directive that a trial court shall consider evidence of physical abuse against a spouse in determining whether to appoint a parent as a sole or joint managing conservator and it was quite clear from the record that the trial court had indeed considered the issue. More troublesome was the short shrift given the statutory prohibition against the appointment of joint managing conservators if credible evidence is presented of a history or pattern of abuse.

The concept of physical abuse remains subject to wide variations and varying interpretations and where the parties tell different versions of a confrontation, the trial court must determine the weight and credibility of the evidence. Where there is nothing in the record to demonstrate that the trial court did *not* consider the testimony of family violence, the trial court rarely abuses its discretion in granting joint managing conservatorship.

Here, the record did not contain the judgment of conviction. Cleotilde offered a computer printout of a disposition record, but it was excluded upon Tereso's objection that an improper predicate had been laid. Cleotilde did not complain on appeal that the exhibit was erroneously excluded. She asked the trial court to take judicial notice of the conviction. Although the judge declined to do so,

she indicated she would allow counsel the opportunity to retrieve the judgment upon recess. She ruled similarly with regard to the two felony assault charges which were pending at the time of the trial. Cleotilde did not complain that insufficient time was allotted. It simply was not done. We were left then with Tereso's testimony, which was elicited by Cleotilde's own attorney. He acknowledged that he had pled guilty to family violence but he wasn't guilty and pled only because his lawyer told him to. He also stipulated to the pendency of the two felony indictments.

The majority dismissed this testimony by summarily deciding that Tereso's guilty plea and conviction were not conclusive evidence that he committed family violence. In support of this conclusion, it referenced a Supreme Court opinion which held that a guilty plea and conviction for theft were not conclusive evidence of theft in a civil suit to obtain insurance benefits arising from the theft. In that case, however, the thief was not a party to the litigation; the litigation ensued between the policy holder/victim and the insurance company. Consequently, collateral estoppel was not an issue. Here we were presented not with merely conflicting testimony. We were presented with a judicial admission of guilt. Is that enough? The majority answered, "no."

I noted opinions holding that under the doctrines of collateral estoppel and judicial admission, an agreed judgment establishes the issue in question as a matter of law. The same is true of a guilty plea giving rise to a judgment of conviction. A prior conviction may work as collateral estoppel in a subsequent proceeding if the identical issues for which estoppel is sought were litigated and directly determined in the prior criminal proceeding. In that event, the convicted party is estopped from attacking the judgment or any issue necessarily decided by the guilty plea. This means that the convicted party may not introduce testimony to controvert a judicial admission. However, the party opposite must nevertheless preserve error by objecting to the introduction of controverting evidence.

Since Cleotilde failed to object when Tereso testified that he pled guilty to assault only because his lawyer told him to and that "in his heart" he knew he was not guilty, the trial judge was presented

with conflicting evidence and, as the fact finder, she was required to determine the weight and credibility of the evidence. Although I disagreed with the majority's broad statement that Tereso's plea of guilt and subsequent conviction were not conclusive evidence of physical abuse, I concurred because the error was not preserved.

2. *In re Compton*, 117 S.W.3d 548 (Tex.App.—Texarkana 2003, no pet.)

Vicki Compton obtained a protective order by a county court at law in Smith County. At the time, a divorce was pending in a district court in Hunt County. Vicki filed a pre-trial motion in which she argued that collateral estoppel prevented the district court from considering the matters addressed by the county court in its protective order. In other words, she did not want to re-litigate whether family violence had occurred. The trial court denied the motion. Vicki then filed a petition for writ of mandamus to prohibit the retrial of issues already established in a protective order.

The court of appeals first noted that both the divorce suit and the request for a protective order had been filed in proper venues, even though the courts could issue conflicting orders affecting the possession of and access to the child. But this potential for conflicting orders did not give the court the authority to deny the district court the right to adjudicate the issues. In the event a conflict occurred, that there was an adequate remedy by appeal.

VI. PROPERTY ISSUES

A. Characterization

1. *Stavinoha v. Stavinoha*, 126 S.W.3d 604 (Tex.App.—Houston [14th Dist.] 2004, no pet)

Paul Stavinoha began working as a Houston police officer in January 20, 1975. He became a member of the pension system on May 10 of that year. On June 9, 1979, he married Maureen. Paul became eligible for retirement on May 10, 1995, but he did not retire immediately. In November 1995, he elected to participate in a deferred retirement option plan (DROP), meaning that while he continued to work and draw a salary, the annuity he

would have received was deposited into an account in his name. Paul had worked for nearly 21 years when he opted into the DROP, 4.39 years of which were before marriage.

Under the DROP plan, when the member actually retires he is entitled to receive the amount in his account in a lump sum in addition to his monthly pension benefit. The retirement benefit was a service-related benefit based on the years of service with a twenty-year vesting period, and the member's interest in all of the benefits vested upon attaining twenty years of service. The plan was a defined benefit plan governed by article 6243g-4, sections 1-28 of the Texas Revised Civil Statutes; thus a member was not eligible to participate unless eligible to retire. In addition, once a member is vested and has made a DROP election, neither pay raises nor additional years of service are credited to the monthly pension. The pension is only increased by cost of living adjustments.

In 2000, the parties filed for divorce. The nine-day bench trial was dominated by whether Paul's retirement benefits were community or separate property. The trial court accepted Maureen's expert's calculation that the community interest was 80.11% and Paul's separate property interest was 19.89%. The final decree was entered on June 21, 2002 and provided that the deposits into the account from 1995 until the date of divorce were to be divided between the community and separate estates, deposits after the date of divorce were Paul's separate property, the monthly benefit after retirement was divided between the community and separate estates, and Maureen was awarded fifty percent of the apportioned benefits. The community was given no interest in annual cost of living adjustments or other benefits paid post-divorce. On appeal, Maureen claimed that the community had an interest in the monthly retirement pension credited to the DROP account post-divorce, the annual cost of living adjustments, and the one time \$5,000 lump sum payment.

The appellate court agreed in part. The fact that Paul was currently deferring receipt of his retirement benefits while the funds were credited to the DROP account did not alter the community property character of the benefits since most were earned during the marriage, vested during marriage, and

frozen in value when Paul "retired" in November 1995 before the divorce. Accordingly, the court held that Maureen was entitled to a percentage of the community interest in all of the disputed benefits credited to Paul's DROP account, including those credited post-divorce. But Maureen had no interest in Paul's contributions from his current salary to the pension plan post-divorce. In addition, the court found that the annual cost of living adjustments and the one time \$5,000 lump sum payment were community property since the increases were not due to raises, promotions, services rendered, or contributions. The trial court abused its discretion in finding that the disputed benefits were Paul's separate property.

After the court determined that the disputed benefits were community property to the extent that they were earned during the marriage, the court examined apportionment. The *Taggart* apportionment formula was applied since there was no danger that any post-divorce labors would increase the retirement benefits to implicate the use of the *Berry* formula. The court next looked at whether the trial court's mischaracterization caused it to abuse its discretion in making the property division. The court found that it did. The net value of the community estate as determined by the trial court was \$478,631; however, the community had lost post-divorce monthly credits to the account, cost of living adjustments, earned interest, and the one-time lump sum of \$5,000. Because the degree of harm increased every year that Paul continued to defer his retirement and monthly benefits were credited to the account, the loss of those benefits materially affected the equitable division made by the trial court and warranted remand.

2. *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex.App.—Fort Worth 2004, no pet)

Christina Teadora Varrasso married major league baseball player Esteban Antonio Loaiza in October 1998. Prior to the wedding, Esteban was traded to the Texas Rangers. Two weeks before the wedding, Esteban began an affair with Ashley, a nanny employed by one of his teammates. A few days before the wedding, Ashley began making harassing phone calls to Christina and Esteban denied the affair. In January, Esteban and Christina

began building a home in Pennsylvania and Esteban left for spring training. In July 2000, Christina attended a wedding in Mexico, and Esteban met Ashley at an Arizona resort. During the trip, Ashley told Esteban that she was pregnant. Shortly thereafter, Esteban was traded to the Toronto Blue Jays. Christina and Esteban moved to Toronto for the remainder of the 2000 season and Esteban made plans to divorce Christina. Esteban then bought Ashley a \$64,000 Lexus and his brother and sister new \$30,000 cars. On August 31, 2000, Esteban filed for divorce in Tarrant County without telling Christina. He and Ashley signed a lease on a house with an option to purchase and Esteban used \$75,000 in community funds as a down payment. In November and December 2000, Esteban bought Rolex watches for his teammates, a car for his mother, and two cars for himself, all of which totaled \$184,000. On February 27, 2001, Esteban signed a contract with the Blue Jays guaranteeing payments of \$4 million in 2001 and \$5.8 million in 2002. Esteban continued his affair with Ashley, who had the baby in March 2001, and paid all her medical bills. Esteban also paid Ashley's mother \$72,000 a year to care for the baby during the day.

At trial, Christina presented evidence of Esteban's expenditures: (1) \$64,732.32 on a Lexus for his girlfriend Ashley; (2) approximately \$30,000 in down payments on cars for his sister, mother, and brother; (3) \$145,809.33 to pay Ashley's medical bills; (4) \$78,436.56 to Ashley's mother, primarily for child care for his child, but also including \$6,548.68 in payments made before the child's birth; (5) \$75,000 for the option to buy a house he had leased for Ashley and himself; (6) \$82,550 in payments to his mother; (7) \$118,745.38 in gifts or loans to other members of his family; (8) approximately \$145,000 on hotels and airfare for trips with Ashley and her family; (9) \$38,800 on Rolex watches for teammates; and (9) approximately \$105,500 in checks and cash advances to himself that he could not account for.

With regard to the contract, an expert witness [the pre-eminent Kathy Kinser] testified that it was the most guaranteed contract that she had seen since payment was guaranteed whether the club allowed him to play or not. Esteban's agent testified that the contract was guaranteed only if the player were

willing to perform skilled services as a baseball player. The trial court ruled that Christina did not prove that Esteban wasted community assets, breached fiduciary duties owed to her, or committed an economic fraud against the community estate. The court also characterized the post-divorce payments under Esteban's contract as his separate property because he was required to complete his services as a baseball player before he was entitled to receive the money.

The appellate court disagreed, finding that Christina conclusively established a breach of fiduciary duty. And because she had established that the expenditures were made without her knowledge or consent, she successfully raised a presumption of constructive fraud requiring Esteban to demonstrate fairness in disposing of community assets. Since Esteban presented no evidence to show that the expenditures were fair to Christina or made with her consent, he failed to rebut the presumption. Thus, the evidence conclusively established constructive fraud. Recognizing that Christina had no independent cause of action for economic torts, the appellate court noted that the trial court could have, and evidently did, consider Esteban's actions in the division of the community estate.

David testified that during marriage, the couple obtained a \$350,000 mortgage to build a house. David reduced the debt by paying \$200,000 he had collected from the sale of his separate assets, including a number of cars and another residence. A recent appraisal of the house revealed a fair market value of \$450,000. The balance due on the mortgage as of the date of trial was \$135,000. Based on the proportion of payments made by his separate estate and the community estate, David estimated that his separate estate contributed \$294,456.52 of the net equity in the residence and he asked the court to grant his claim for economic contribution. The trial court granted the divorce and divided the community estate in accordance with David's exhibits.

The appellate court reversed. As the party claiming his separate estate was entitled to economic contribution, David had the initial burden to clearly trace and identify the separate nature of funds expended to reduce the community debt. The

As for characterization of the contract, the court concluded that Esteban was required to perform his services as a skilled baseball player before he was entitled to payment. Consequently, the remaining payments due under the contract were future earnings belonging to Esteban's separate estate.

B. Economic Contribution/Reimbursement

Boyd v. Boyd, 131 S.W.3d 605 (Tex.App.—Fort Worth 2004, no pet.)

Rarely does an appellate court reverse the division of property for factual insufficiency. To see it twice in one year is somewhat astonishing.

After her attorney withdrew, Linda Boyd showed up for trial and informed the court she was proceeding *pro se*. David Boyd proceeded on his counter-petition and introduced seven exhibits without objection from Linda which provided summaries regarding the nature and classification of the couple's property. The documents included a list of Linda's separate property, David's separate property, an inventory and appraisal of property, a proposed division of community property, and David's claim for economic contribution.

court found that David had presented no *documentary* evidence establishing the separate origin of the funds he used to pay down the mortgage including financial records, deed or title records, or closing statements. Nor did he offer any evidence establishing the dates of sale, the proceeds received, or that the mortgage was funded with proceeds from those sales. David also did not provide documentation of the fair market value, the principal debt, or equity of the community residence as of the date of marriage or divorce including mortgage documents, closing statements, or appraisal reports. He provided no corroboration or substantiation of the transactional trail leading to his claim for economic contribution. In short, all David provided was his own testimony. This was insufficient to discharge his burden to rebut the community presumption by clear and convincing evidence. Consequently, the evidence was factually insufficient to support David's claim that he

contributed separate property to the community residence.

In conducting a harm analysis, the court found that although the overall division of property was 53% to 47% in favor of Linda, the mischaracterized \$294,456.52 was not included in the community estate. Because this characterization error contributed to a gross undervaluation of the community estate, the division was so unjust and unfair as to constitute an abuse of discretion.

C. Valuation

In re Scott, 117 S.W.3d 580 (Tex.App.—Amarillo 2003, no pet.)

Here is the second example of a reversal for factual insufficiency arising from the trial court's valuation of real estate at \$35,610. Alta Scott listed this as the value in her sworn inventory and she acknowledged that the figure came from the county appraisal district tax rolls some three years prior to trial. While this constituted some evidence to support the trial court's valuation, the record also indicated that Alta introduced testimony from a real estate appraiser who concluded that the fair market value was \$80,000. A local real estate agent testified that the property could be listed at \$125,000. John Scott testified the property was worth between \$125,000 and \$150,000. Referencing case law holding that values reflected by the tax rolls do not reflect fair market value, the appellate court found that the trial court's valuation was so against the great weight and preponderance of the evidence as to be manifestly unjust. Because the valuation error skewed the property division, the error was harmful.

VII. ATTORNEY-CLIENT ISSUES

A. Interim Fees

In re Flores, No. 01-03-00641-CV, 2004 WL 306109 (Tex.App.—Houston [1st Dist.] Feb. 19, 2004, no pet.)

In this modification case, the trial court granted the mother's motion for interim fees and ordered Flores to deposit \$4000, which he refused to do. The mother then filed a motion to strike the trial setting since Flores refused to pay the fees. In

considering Flores' petition for writ of mandamus, the court of appeals determined that the trial court's refusal to set the case for trial was a denial of access to the courts under due course of law. The mandamus was conditionally granted.

B. Disqualification

In re Sanders, No. 05-03-01678-CV, 2004 WL 260568 (Tex.App.—Dallas Feb. 13, 2004, app. for mandamus filed)

Bill Sanders worked some evenings and weekends as a carpenter for his attorney in order to pay legal expenses. Joyce Sanders moved to have the attorney disqualified, alleging she was a material fact witness in the custody case since she was Bill's employer. The trial court denied the motion.

In granting mandamus relief, the appellate court found that the attorney's testimony relating to Bill's abilities to care for the children or pay child support and her possibly adverse testimony about when the employment began may confuse or mislead the jury. The attorney could continue to represent Bill in pretrial matters and if requirements under Texas Disciplinary Rule 3.08 were met, then members of her firm could act as advocates for Bill.

C. Disgorgement

In re Moore, No. 12-03-00290-CV, 2004 WL 583868 (Tex.App.—Tyler Mar. 24, 2004, no pet.)

Temporary orders entered in a divorce action provided:

It is FURTHER ORDERED, ADJUDGED AND DECREED that legal counsel for Lynwood T. Moore, Petitioner, (and any and all successor counsel or co-counsel) as agents of Petitioner and as officers of this Court, be and they are hereby ORDERED to refrain from accepting any sums of money or thing of value from or for Lynwood T. Moore or on Lynwood T. Moore's behalf or account, directly or indirectly, for attorneys' fees or costs of court in this cause in excess of such additional sums as may hereafter be approved in advance by the written order of this Court.

Celeste Moore filed a motion to disqualify Robert Foster, Lynwood's attorney, arguing that Foster was a fact witness and had accepted diverted community funds in payment for his services. She also sought disgorgement of any payment received in violation of the temporary orders.

At the hearing, Celeste's attorney called Foster to the stand and asked how much he had been paid to represent Lynwood. Foster invoked the attorney-client privilege. After an exchange between the court and Celeste's attorney, the judge overruled the privilege and Foster answered that he had been paid \$20,000, \$10,000 of which had been paid after entry of the orders. Foster further testified that Lynwood did not pay the additional \$10,000, that he did not know who had paid him, and that he was not sure in what form the other funds were paid. When asked to explain how he could not know who paid him, he again invoked the privilege. After a discussion, the judge again instructed Foster to answer, but he refused and invoked his Fifth Amendment right. The trial court ruled that Foster had disqualified himself by invoking the Fifth and ordered Foster to pay all funds received in excess of \$10,000 into the registry of the court.

In a mandamus proceeding, the appellate court ruled that whether Foster should be disqualified depended on whether the trial court could have reasonably concluded that he had participated in a conspiracy to defraud the community estate. The court found that the record was replete with references to Foster's participation in a conspiracy with Lynwood, but that those references were found only in Celeste's motion to disqualify and in her attorney's arguments. The record did not contain any evidence that Foster engaged in the alleged conduct. Consequently, disqualification of counsel was improper. However, based upon Foster's testimony that he had received money in violation of the temporary orders, disgorgement was appropriate.

D. Incompetency

Saldarriaga v. Saldarriaga, 121 S.W.3d 493 (Tex.App.Austin 2003, no pet.)

Alejandro Saldarriaga filed for divorce from his wife Debra in October 1999. Three years later, Debra's attorney, Lisa Zintsmaster Verhaeghe, filed a motion for the appointment of an attorney ad litem due to her concern that Debra was mentally incompetent to make decisions in the divorce. Two weeks later, Zintsmaster filed another motion entitled "Motion for Appointment of Attorney Ad Litem, and/or Guardian Ad Litem, and/or Next Friend". At the hearing on the motions, two witnesses testified – Debra's brother Lou Carter and attorney Jerry Jones. The deposition of Dr. David Flume was read into the record. Dr. Flume indicated that Debra had been diagnosed with major depression, dependent personality disorder, attention deficit disorder, obsessive compulsive disorder and could not take care of herself. Jones was appointed next friend at the end of the hearing.

After Jones was appointed next friend, he filed a guardianship proceeding on Debra's behalf. Peter Meeker was appointed attorney ad litem in the proceeding. While the guardianship was pending, Jones entered into a Rule 11 agreement with Alejandro settling financial and child related issues against Debra's wishes. Debra then hired Rick Kennon to set aside both the appointment of Jones as next friend and the Rule 11 agreement. He also filed a plea in abatement asking the divorce court to await the results of the pending guardianship proceeding before entering judgment. The court refused to abate the divorce and entered a final decree incorporating the Rule 11 agreement. Kennon filed a motion to discharge Debra's next friend, which was granted. The guardianship proceeding was dismissed, and Debra appealed. She complained that Jones was appointed as next friend without affording her procedural due process. She also complained that the court erred in entering judgment on the Rule 11 agreement.

The court of appeals found it was legal error for an attorney to step into the middle of a lawsuit as the next friend of an adult woman without a formal adjudication of her incapacity. In considering whether the appointment met basic due process requirements, the court found that Rule 44 gave a next friend the same rights as a guardian and that it was incongruous that a next friend would not be bound by the same procedure for appointment. If

there is no difference between the actions a next friend and a guardian could take, then there should correspondingly be no difference between the procedural safeguards that govern how, when, and under what circumstances a person may be appointed a next friend or a guardian based on the alleged incapacity of the proposed ward. Whatever title was bestowed upon Jones, the effect was that his appointment removed Debra's legal ability to make decisions for herself in the pending divorce action; Jones was effectively Debra's guardian for purposes of the divorce. If Zintsmaster believed that Debra was incompetent, then the proper procedure would have been to ask the probate court to find her incapacitated and to appoint a guardian. The procedure followed by the divorce court did not afford Debra any of the protections of the Probate Code, nor did it have jurisdiction to consider guardianship. The district judge could not accomplish an unlawful end by merely calling a guardian a "next friend". If someone were going to act for Debra against her wishes in settling the long-pending divorce, it needed to be a guardian properly appointed by the probate court after due process had been afforded to her. The court also noted that it seemed that Zintsmaster pursued guardianship only after Debra refused to consent to a Rule 11 agreement. Although the court, Zintsmaster, Jones, and Alejandro were well-intentioned in desiring to end the three-year-long divorce proceedings to avoid further depletion of the marital estate, such concerns cannot override procedural safeguards. The court found error in the appointment of a next friend who had virtually all the powers of a guardian, and in the approval of a Rule 11 agreement entered into by the next friend over Debra's objections.

VIII. EVIDENCE AND PROCEDURE

A. Expert Testimony

In re A.J.L., No. 2-03-040-CV, 2004 WL 912650 (Tex.App.--Fort Worth 2004, no pet.)

This case involves the reliability of expert testimony concerning play therapy. The trial court conducted a *Daubert* hearing and determined that it was reliable. During trial, the expert testified

regarding play therapy she had conducted with one of the children. She described his playacting with puppets to show what his mother did to his little sister and what his reactions were to the behavior. The child felt he needed to protect his younger sister and that he had been traumatized at home.

On appeal, the appellate court found that play therapy was a legitimate field of expertise. The expert testified that it was a highly regarded and generally accepted method of counseling children, that research showed it was a successful and effective way to work with children, that no studies challenged the reliability of play therapy, and that case law illustrated it was often used as a basis for expert testimony. Next, the court examined whether play therapy was within the scope of the expert's legitimate field of expertise and whether she properly utilized the principles of play therapy. The court looked at her education, experience and training, her interaction and observations of children using play therapy, and the absence of evidence to refute the therapy. It concluded that the testimony was sufficiently reliable.

B. Discovery

In re Kuntz, 124 S.W.3d 179 (Tex. 2003)

Hal and Vesta Kuntz were divorced in 1999 with the court approving an Agreement Incident to Divorce. The AID contained a section entitled "Future MOXY Royalty," which provided:

Husband by virtue of employment or as a partner of CLK may earn additional interests in oil and gas leases and properties which Husband may acquire by assignment from McMoRan Offshore Exploration Co. (MOXY) or its successors or predecessors in the future. All such interests which have not been assigned by MOXY shall be the property of Husband, except Wife will have the right to 25% of all overriding royalty interests, if any, from MOXY assigned to Husband after the date of divorce that results [sic] from projects on which CLK forwarded letters of recommendation to MOXY to drill during the marriage.

MOXY was an independent oil and gas company operating primarily offshore in the Gulf of Mexico. CLK was MOXY's primary geological and geophysical consultant. MOXY was CLK's only client. Hal was a minority owner and the general manager of CLK. CLK prepared property evaluations to which Hal and other CLK principals had access. The consulting agreement between the companies provided that compiled data was the property of MOXY and prohibited disclosure to third parties without MOXY's written consent. Further, CLK's operating agreement required Hal to maintain confidentiality of data acquired during his employment and prohibited disclosure to third parties without the board's approval.

In May 2001, Vesta filed a motion to compel discovery requesting that Hal be ordered to produce all positive evaluations made during marriage, i.e. between October 7, 1983 and June 30, 1999. Hal claimed that he did not have possession, custody, or control of the documents and that they were MOXY's privileged trade secrets. The trial court granted the motion and ordered Hal to produce the evaluations. Hal sought mandamus relief.

The court held that Hal's mere access to the relevant letters of recommendation did not constitute physical possession of the documents for purposes of Rule 192.7(b). Thus, the court concluded that the trial court abused its discretion in ordering Hal to produce them. Moreover, if Hal were required to produce the evaluations, he would be forced to violate the confidentiality provisions contained in both CLK's operating agreement and the consulting agreement between MOXY and CLK, potentially subjecting himself to a suit for significant damages.

A concurring opinion found that Vesta had not merely sought discovery from the wrong person but that she was not entitled to production of the evaluations because they were privileged trade secrets under Rule 507 of the Rules of Evidence and she did not establish that they were essential to the fair adjudication of her claims.

C. Default Judgments

Comanche Nation v. Fox, 128 S.W.3d 745 (Tex.App.--Austin 2004, no pet.)

Jennifer Perry and Gregory Alan Fox had a daughter born in 1992. Ten months after the child's birth, Perry moved out of the house she shared with Gregory and left the child in his care. Gregory became the primary care giver for the child, and she resided with him until 1995 when he was killed in an accident. After Gregory's death, the paternal grandparents, Joseph and Patricia Fox, filed a suit affecting the parent-child relationship asking to be appointed managing conservators of their granddaughter. The district court initially entered a temporary order in 1995 establishing a temporary joint managing conservatorship shared by Perry and the Foxes. Perry was required to undergo psychological evaluation and attend parenting classes. A final order was issued a year later establishing joint managing conservatorship shared by Perry and the Foxes. Perry had primary possession and had the exclusive right to establish the child's legal domicile. Perry and her daughter moved to Oklahoma where they became members of the Comanche Nation by ancestry of Perry's mother, Francetta Gentry.

In 2001, Gentry filed a petition for guardianship of the child in the Court of Indian Offenses for the Comanche Tribe. She alleged that Perry had abandoned and neglected the child and that the child had lived with her and her husband for three years. Gentry did not notify the Foxes of her petition. By chance, the Foxes found out about the petition and filed a motion to dismiss for lack of subject-matter jurisdiction, asserting that the district court was the court of original and exclusive jurisdiction under the UCCJEA. The Court of Indian Offenses construed Gentry's petition to be a motion to modify the terms of the 1996 order, dismissed for lack of subject-matter jurisdiction, and remanded custody of the child to the Foxes for their summer visitation. The Foxes then filed a motion to modify the 1996 order and sought to be named sole managing conservators, alleging that the child's safety and well being were at risk under Perry's care. In July 2001, the court heard the Foxes' motion, but Perry did not appear. The court issued a temporary order modifying the 1996 order by removing Perry as joint managing conservator and appointing her possessory conservator. Perry filed an answer in late July, and the Comanche Nation and Gentry filed motions to

intervene. The Comanche Nation also filed a motion under the Indian Child Welfare Act to transfer jurisdiction of the child to the Comanche Tribal Children's Court. In August 2002, the court placed the case on the dismissal docket and sent notice to the Foxes, Perry, Gentry, and the Comanche Nation. The Foxes filed a motion to retain the case and appeared with their attorney on September 26. Perry, Gentry, and the Comanche Nation did not appear. The court granted the Foxes' motion to retain and set a hearing on November 25, 2002. Notice of the hearing was sent to Perry and the Comanche Nation.

The Foxes were the only parties to appear at the hearing. Their attorney did not present additional evidence but directed the court's attention to the previous temporary restraining order hearing. The court granted the motion to modify whereby the Foxes became the child's managing conservators and Perry the possessory conservator with her access to the child subject to the Foxes supervision and arrangement. Perry and the Comanche Nation filed motions for new trial, and the court held a hearing with all parties present. The court denied the motions, and Perry and the Comanche Nation appealed.

The appellate court began by reasserting that a trial court's ruling on a motion for new trial directed against a default judgment must be guided by the widely known three-pronged *Craddock* test: (1) the defendant's failure to answer before judgment was not intentional or the result of conscious indifference on the defendant's part, but was due to a mistake or accident; (2) the motion for new trial sets up a meritorious defense; and (3) the motion is filed at a time when its granting would not result in a delay or otherwise injure the plaintiff. See *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939). The *Craddock* test also applies to a post-answer default judgment. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex.1987). While Texas courts have routinely applied *Craddock* to suits affecting the parent-child relationship, the analysis is complicated because of the difficulty of fitting the "best interest of the child" into the second prong of a meritorious defense. See *Lowe v. Lowe*, 971 S.W.2d 720 (Tex.App.-Houston [14th Dist.] 1998, pet. denied).

The Austin court agreed that *Craddock* does not fit well into a consideration of the best interests of the child, but until the Supreme Court outlines a more fitting test for SAPCR proceedings, the court applied *Craddock*, but did so liberally.

In so doing, the court overlooked the fact that Perry had failed to attend a series of hearings, finding that her absence from the final hearing was the relevant consideration. Perry asserted that she missed the modification hearing because she mistakenly relied on information given to her by a Comanche Nation employee that she did not need to appear since the case was going to be postponed. Perry's excuse was not controverted by the Foxes. The court concluded that Perry's failure to attend was the result of mistake, not conscious indifference. While her excuse was not a very good one, she was appearing *pro se* and was indigent. It then reversed the default judgment as to her.

The Comanche Nation also filed a motion for new trial, alleging that its failure to attend was the result of mistake, not conscious indifference. The Nation also asserted as a meritorious defense that the court did not have jurisdiction over the custody proceeding under the Indian Child Welfare Act. The court disagreed that the Indian Child Welfare Act applied to custody modification proceedings but nevertheless concluded that the Tribe presented a meritorious defense – that it was in the child's best interest to maintain a connection with her Comanche relatives and heritage. The default judgment against the Tribe was also reversed.

IX. CONCLUSION

Every case digest needs at least one humorous fact scenario and so I will close with this one. The case of *Curtis v. Anderson*, 106 S.W.3d 251 (Tex.App.-Austin 2003, pet. denied) involves the ancient question about ownership of the engagement ring when the love affair goes bust. After a brief engagement, Curtis sought the return of the engagement ring because Anderson had some sexual hang-ups and a bad temper. When she refused to return it, Curtis sued on a theory of an oral contract and conversion. The trial court granted summary judgment in Anderson's favor. The appellate court first rejected the contract theory. A promise or

agreement on consideration of marriage or nonmarital conjugal cohabitation is not enforceable unless the promise or agreement or a memorandum of the promise or agreement is in writing and signed by the person obliged by the promise or agreement.

In the absence of an enforceable agreement, the court turned to the conditional-gift rule. As applied by Texas courts, the rule contains an element of fault. The rule operates to require that the ring be returned to the donor if the donee is at fault in terminating the engagement. Here, Curtis as donor judicially admitted to terminating the engagement. In what the appellate court called a case of first impression, it concluded that the same rule should apply when the donor defaults. Absent a written agreement, a donor is not entitled to the return of an engagement ring if he terminates the engagement.

Curtis wasn't any more successful with his conversion claim. A fundamental element of a conversion cause of action is that the plaintiff be the owner of or legally entitled to immediate possession of the property allegedly converted. In order to prevail, Curtis had to establish his ownership or superior right to possession of the ring in question, which he could not do.

The opinion gives no insight into the size or sentimental value of the ring. But since the case was pursued all the way to the Supreme Court, it must have been a rock. Given Anderson's purported sexual hang-ups, I could think of an analogy to Tolkien . . . The Fellowship of the Ring, The Two Towers, etc., but I probably shouldn't go there. Sometimes hyperbole can be a bad Hobbit.